

IRAQ: THE CASE FOR LOSING

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*What follows is the lightly edited text of a lecture delivered at the Brooklyn Law School Symposium on War and Trade on September 22, 2005. I argued that, as of the date of the lecture, the United States had already been defeated in Iraq, predicted an exit strategy likely to be adopted by the Bush administration, and assessed the likely consequences of the defeat for the various participants in the conflict. I ended with a statement that we should embrace our defeat as good for the world at large, however terrible for the Iraqi people. Of course, by the time the text went to the printer, much had changed, and by the time it finds its way into the reader's hands, yet more will have changed. I am grateful to the Brooklyn Journal of International Law for its willingness to publish the lecture nonetheless, as a contribution to the debate on the war and also to the archive of anti-war speeches that may interest future historians of the domestic conflict over the conflict.***

I. INTRODUCTION

This is a talk about the Iraq War and its consequences in world politics. It is in the form of a prediction supported by an analysis. The prediction is that the Bush administration will choose as its exit strategy to misrepresent as a victory the defeat of the United States in Iraq, a defeat that has already happened and is irrevocable. I will argue that it is a good thing, on balance, taking into account different effects on different actors, that the United States has been defeated. It will be an even better thing if our exit strategy manages to avoid the absolute worst outcome for the Iraqis.

The Patriot Act¹ hovers overhead. I don't know if you know the Patriot Act, but it is a quite sinister document.

What do I know about Iraq? I read the newspaper religiously—several newspapers; I'm obsessed with Iraq. I am also a devoted follower of Juan Cole, who has a website called *Informed Comment* on Iraq.² It's a fantastic website; he's a fantastic reporter, partly because he uses a wide range of Arabic language sources and posts translations of lots of them on the site. I have also been influenced by Peter Galbraith, who writes in the *New York*

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** I am grateful to the *Brooklyn Journal of International Law* for their addition of footnotes to this piece.

1. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107-56, 115 Stat. 272.

2. Informed Comment, <http://www.juancole.com/>.

Review. Juan Cole is basically neutral. Peter Galbraith is a writer well worth reading whenever he writes about Iraq, but he's basically a crypto-Kurd, more sympathetic to their interests than to anyone else's in the story. The ideas I'm going to propose are based on these sources, randomly supplemented by magazine articles and the occasional perusal of websites giving things like casualty figures and reports on the economy. In short, I have no expert knowledge of my subject.

One basis of my prediction of events to come is the idea that the future of the Republican Party is at stake in Iraq. The administration rightly calculates, I imagine, that the United States has been defeated, and that they have to find a way to radically reduce our military presence in Iraq that doesn't make it look as though the Republicans are the authors of a national catastrophe. A catastrophe, that is, when looked at from the "rah! rah!" jingoistic point of view, the point of view of identification with American military power. Bush is not running for re-election, but the congressional elections are coming up in a year. After that, Republican presidential candidates will have to have a line about what happened.

My first prediction is that in order to be able to withdraw a lot of troops from Iraq without a domestic political disaster, the administration will set out to get Iraq out of the primetime television news and off the front pages of non-elite newspapers. This is more important than anything else for purposes of being able to minimize political damage; anticipated coverage (or non-coverage) will drive policy on the ground rather than vice versa. Once Iraq is out of sight and out of mind for the non-elite public, it will be possible to lie about the situation, claiming we are withdrawing having succeeded, rather than in defeat.

Getting Iraq out of primetime requires three things: First, getting the casualty figures way, way down. Second, to be able to say: "Well, I said, when they stand up, we'll stand down, and they're standing up." Third, to be able to claim progress towards democracy: "We're not there yet. Democracy hasn't arrived. But steps have been taken that have put Iraq on the road to a working, rudimentary but evolving democracy."

II. GETTING THE CASUALTIES DOWN

How to do it? The first thing to realize is that we sustain casualties only in a relatively small part of the country. The Kurds control Kurdistan, where the Iraqi army is actually their militia, the Pesh Merga. We have never had significant casualties there. In the south, the British have had strikingly few casualties, up until the last couple of weeks, because that part of the country is predominantly Shia. The Shia are politically and also militarily divided between the mainstream fundamentalist Iranian-supported parties, the Supreme Council of Islamic Revolution in Iraq

(SCIRI) and the Islamic Dawa Party, and the radical fundamentalist Iranian-supported party of Moktada al-Sadr. The party militias, the Badr Brigade and the Mahdi Army, are the de facto security forces of the region. After the initial battles with Saddam, we haven't had significant casualties there either.

The U.S. military fights in the Sunni triangle, north and west of Baghdad to the Jordanian and Syrian borders; in Baghdad, where there are millions of Sunni and millions of Shia; and south and east of Baghdad where the towns and countryside are mixed.

The Sunni insurgency appears to have two main components, one nationalist or post-Baathist, and the other jihadist, with some number of foreign fighters from all over the Arab world, and with Zarqawi's Al Qaeda in Iraq as the most prominent of a number of groups.

The single most important little admitted fact about the war is that the Sunni insurgency already controls the Sunni triangle. If you read the paper carefully, you'll find the U.S. military concedes that, and the press has begun to talk about "insurgent strongholds." It turns out that there are no towns in the Sunni triangle except Falluja that are not "insurgent strongholds." The second least recognized fact about the war is that the insurgency also controls the Baghdad neighborhoods that are overwhelmingly Sunni. Again, the military and the press have begun to hint that this is the case, sometimes referring to these neighborhoods as "hotbeds."

Another large part of Baghdad is Sadr City, a Shia slum area of two million people controlled by Moktada al-Sadr, the radical Shia cleric whose line is strongly anti-American and makes a class-based appeal to the masses of unemployed youth. After Moktada staged his uprisings to drive the Americans out of Iraq, we did two things. We crushed his forces in Najaf and suppressed them in Sadr City, and we offered him a deal: 25,000 jobs in Sadr City, mainly building infrastructure, and suspension of our patrols in the neighborhood, in exchange for peace.

The remaining areas where the U.S. military sustains casualties are the mixed Sunni/Shia neighborhoods of Baghdad, and the region of mixed towns and countryside south and east of Baghdad.

A civil war between Sunni and Shia is already under way. This was initiated by the jihadist insurgents (as opposed to the nationalists), who are mainly Wahabbi or Salafi or otherwise serious Sunni fundamentalists. They are a very small minority of the world's vast Muslim population, but they are important because they believe that the Shia are Islamic heretics, as well as cultural inferiors, and therefore actually "worse" than the Christian infidels. The jihadists use suicide-bomb attacks against the civilian Shia population, especially in mixed areas. The Shia militias have begun to retaliate. We know this because the Sunni representatives in the

constitutional process talked about it every day. They talked about the fact that men wearing the uniforms of the Iraqi army or police were dragging Sunni men out of their houses and executing them. For this reason, the mixed neighborhoods of Baghdad and the area to the south and east are separating out. Where the neighborhoods or towns are mainly Shia, the Sunni are leaving; where Sunni predominate, the Shia are leaving.

In this situation, it would be easy to reduce U.S. casualties to a bare minimum. We could stop trying to control the Sunni triangle and the Sunni-dominated neighborhoods of Baghdad. We could simply acquiesce in the gradual population shifts that are eliminating mixed areas. Instead, what we do now in the triangle is mount operations designed to root the insurgents out of particular towns. In order to avoid slaughtering the civilian population, we announce our arrival, the insurgents flee except for a rear guard, we destroy the town in the course of killing them, we leave, and the insurgents return. At the same time, we mount occasional aggressive patrols and set up roadblocks here and there outside Baghdad, in what is essentially enemy territory. We lose men to improvised explosive devices.

The U.S. military and the Iraqi armed forces do not attempt to control Sunni Baghdad in the sense of monopolizing force at the street level. They patrol constantly and set up checkpoints looking for random insurgents. But they don't do anything that is close to a full-scale military occupation. Every few months, they mount a big operation in which they say they're going to encircle them, root them out; then they claim to have killed them; the number of attacks goes down; the military claims the insurgents are no longer capable of doing anything; then they come back and start again.

Recalling that there are minimal casualties in Kurdistan, the Shia south, and Shia Sadr City in Baghdad, it seems likely that if the U.S. military stopped aggressive action in the triangle, in Sunni Baghdad and in the mixed areas, and just stayed put in its bases, there would be very few U.S. casualties. Of course, we could keep up the pretense by patrolling occasionally with embedded journalists and occasionally besieging and destroying a town in the triangle. It could be a very low casualty pretense. We seem to be moving in this direction. It is notable that there is no public plan at all as to how we could ever regain control either in the triangle or in Baghdad. The rhetoric assumes that we are doing a good job as occupiers and the only question is when "the Iraqis" will be able to take over from us.

III. STANDING UP AND STANDING DOWN

The *Wall Street Journal* recently editorialized that in the offensive in Tal Afar, in the Sunni triangle near the Syrian border, 5000 Iraqi troops took prime responsibility with the United States as backup.³ The *Journal* suggested this might be the turning point in the Iraq War because it shows that there are now battalions and battalions of Iraqi soldiers who are able to take on the insurgency.⁴ This great victory killed, in the military's own account, 145 insurgents, while destroying the town. The military estimates that there are 20,000 to 30,000 insurgents active in Iraq. This makes the claim of a turning point implausible, except as the beginning of an administration campaign to persuade us that "they are beginning to stand up so we can begin to stand down."

The anti-insurgent Iraqi military forces are not a single unified entity, or even two unified entities. In Kurdistan, which has been de facto independent since the first Gulf war, the Pesh Merga has already "stood up." In the south, the Iraqi military and the Iraqi police exist as entities formally supplied and commanded from the Defense and Justice ministries of the central government in Baghdad. But, they are not analytically distinct from the militias of the Islamist, pro-Iranian parties—the Badr brigade of the SCIRI and Muktada al-Sadr's Mahdi Army. On the ground, the militias have "infiltrated" the army and police; in Baghdad, the mainstream Islamist parties control the ministries in question.

In the Sunni triangle, in Baghdad and in the mixed areas, there are new nationally controlled military and police forces with ex-Baathist, mainly Sunni, officers and new recruits, who are predominantly Shia (with some Kurds and some new Sunni recruits). This is the force that attacked Tal Afar. No one thinks that it will be able to fight effectively in more than very small numbers for a long time to come. When operating in Sunni areas, it is regarded as a foreign army that is the tool of another foreign army. Elements within it are responsible for continuing death-squad and other abuses of the Sunni population in the fight against the insurgency. This force is the main target of the nationalist part of the Sunni insurgency.

In Baghdad and in the mixed areas to the south and east, there is yet another element: on the disputed borders of Kurdistan, the Pesh Merga operates against the Sunni insurgency but also against the Sunni population as a whole. In Baghdad and the south, both the Badr Brigade and the Mahdi Army operate independently, as well as within the Iraqi military. They are probably responsible for revenge killings and targeted operations against the Sunni population.

3. See Editorial, *Tal Afar Turning Point?*, WALL ST. J., Sept. 15, 2005, at A20.

4. See *id.*

What would it mean for the Iraqis to stand up so we can stand down? In the situation I've just described, it is no more conceivable that a U.S.-trained Iraqi national military will defeat the Sunni insurgency than it was that the South Vietnamese military would defeat the North Vietnamese and Viet Cong after the United States withdrew. The United States has been defeated in part because it has failed to anticipate this.

On the other hand, given the chaotic complexity that I've just described, it might be possible to misrepresent the situation as one in which there was at least a good chance that the Iraqi military could succeed without large numbers of American ground combat troops. There is even the argument that it would have worked in Vietnam had Congress not cut off aid after the U.S. withdrawal. The administration's best bet would seem to be a steady drum beat of false reports of progress, combined with a careful withholding of Iraqi forces from situations in which their weakness would be obvious.

IV. HOW WE BROUGHT DEMOCRACY TO IRAQ

A new constitution has been drafted and it's now overwhelmingly likely that it will be ratified in the October 15th referendum.⁵ Then there will be a democratic election of a new parliament in December.⁶ The Bush administration will claim these events are enormous victories for democracy. But, as even Noah Feldman conceded, the constitution is actually an obstacle to a stable democratic outcome in Iraq because it so overwhelmingly favors Shia and Kurdish interests.⁷ In other words, the end result of the

5. On October 25, 2005, Iraqi electoral officials announced that the constitution had been approved in the October 15 referendum. Edward Wong, *Iraqi Officials Declare Charter has been Passed*, N.Y. TIMES, Oct. 26, 2005, at A1.

6. The parliamentary election took place on December 15, 2005. Dexter Filkins, *The Struggle for Iraq: The Election; Iraqis Open Vote for Parliament; An Islamist-Secular Split is Seen*, N.Y. TIMES, Dec. 15, 2005, at A1.

7. After the completion of the Iraqi draft constitution, but before its ratification, Noah Feldman, a senior advisor for constitutional law to the Coalition Provisional Authority in Iraq, stated:

The flawed negotiations of recent weeks, driven at breakneck pace by American pressure to meet an unnecessary deadline, failed to produce an agreement satisfactory to the Sunni politicians in the talks. It appears that the draft will be put before the people with their strong disapproval. The paradoxical result is a looming disaster: a well-conceived constitution that, even if ratified, may well fail to move Iraq toward constitutional government [T]he text certainly reflects many of the Islamic preferences of those who elected the majority Shiite political coalition Shiites and Kurds can still reach out to Sunni voters and try to convince them that they would flourish under the constitution. This would require a few public concessions, including commitments not to form a southern

constitutional process has been to intensify the divisions in Iraqi society rather than to moderate them.

I argued above that the military situation has evolved into the de facto division of the country into zones controlled by autonomous sectarian forces. The constitution legitimizes and will probably perpetuate this set-up by promoting a radical federalization of the country. This will be so even if the provision that allows the formation of consolidated ethnic regions is removed or never used. There is no supremacy clause, but rather an anti-supremacy clause in the Iraqi constitution.⁸ Regional law trumps federal law rather than vice versa.⁹

The democracy we are bringing to Iraq will mean that Shia traditionalists, mainstream and radical, will rule in the south and impose a regime that will resemble Iran, but will probably be much harsher. It is unlikely that secular Shia will have the level of freedom to be publicly secular that they have in Iran, or that they will be allowed a fair shot to win control of the government, supposing that they were to gain a bit of popular support. The Kurds will have autonomy; it will be interesting to see if they ever have seriously contested elections. The Sunni triangle and the mixed areas will be war zones for the indefinite future.

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So my prediction is that the Bush administration will move to get Iraq out of the news by reducing U.S. casualties, and by continuing to misrepresent the state of the Iraqi security forces and the direction of Iraqi democratic politics. It will be time for us to radically reduce our military presence, but not to cut and run. I think it's inconceivable that the administration will simply bring the troops home.

mega-region that leaves the impoverished Sunnis trapped between de facto Shiite and Kurdish states If Iraq adopts a constitution that reflects a profound and unresolved national split, violence and eventual division of the nation will follow. Ordinary Iraqis and American soldiers will be the losers. So will the ideal of constitutional government.

Noah Feldman, Editorial, *Agreeing to Disagree in Iraq*, N.Y. TIMES, Aug. 30, 2005. See also Robin Wright, *Constitution Sparks Debate on Viability*, WASH. POST, Aug. 25, 2005, at A13 (quoting Noah Feldman as saying, "A constitution that is a deal between the Shiites and Kurds is not a deal.")

8. This "anti-supremacy" clause states, "All that is not written in the exclusive powers of the federal authorities is in the authority of the regions. In other powers shared between the federal government and the regions, the priority will be given to the region's law in case of dispute." IRAQI DRAFT CONSTITUTION art. 111, *translated in* http://www.un.int/iraq/TAL_Constitution/Draft_Iraqi_Constitution_english.pdf.

9. See *id.*

V. A PARTIAL EXIT STRATEGY: CIVIL WAR STABILIZED BY U.S. AIR POWER

Because we've lost, if we just bring the troops home, the consequence will be very hard to calculate. It's very hard to know what would happen if we simply pulled out completely. Everybody says there would be a civil war to which one answer is that there's already a civil war, to which they say, yes, but a really serious civil war with hundreds of thousands of casualties.

The insurgents are fighting the civil war by the guerrilla tactic of the improvised explosive devices used against the U.S. military and against the Iraqi Army and police; by suicide bombing against Iraqi military and police targets and often against Shia civilians in public places; and by death squads. The Shia and Kurds are pursuing the civil war through the national army and police, and through their militias (often, as we saw, indistinguishable from one another).

There would be no domestic U.S. political problem if that kind of a civil war went on indefinitely, no matter how horrific the consequences for the Iraqi population. But that kind of low level murderous equilibrium can't be secured without keeping some American troops there. If we pulled out completely, there would be a new military situation in which the insurgency would get organized in a different way. It wouldn't just be hitting and running. Baathists and the jihadists would quickly ratchet up from guerilla tactics to medium or large unit engagements designed to defeat the Iraqi militias and the Iraqi army. They would try to drive them out of the Sunni triangle altogether and might succeed. They would try militarily to take territory from the Shia and Kurds in the areas south of Baghdad (the large swath of territory that is composed of small towns and countryside where the Sunni and the Shia live together) and east of Baghdad (including Kirkuk). In Baghdad, they would set out to take, or at least endanger, the Green Zone, the enormous government compound on which the national government and the U.S. presence depend to be able to operate securely.

I don't think it's conceivable, given that we've lost, for us to withdraw completely. If any of the above were to happen, the loss would become obvious and undeniable and therefore politically unsustainable for the Republican Party. But there is a relatively simple solution. We could reduce our presence to a few garrison-type bases and provide air cover for the government forces and militias, called in by American special forces embedded with Iraqi units. The insurgency can't ratchet up to full-scale warfare against the Shia and the Kurds if every time they try to do it, they are attacked with helicopters and bombers and fighter jets.

This solution involves very few troops and, by the way, we could also make as many as possible private contractors. There are already probably

30,000 private security people in Iraq, on top of 185,000 U.S. troops, making it closer to 220,000 U.S. military combatants. We could have private military helicopter companies providing the air support to the Iraqis so they wouldn't be U.S. military. That's sort of a joke, but it's not inconceivable. It would have the advantage that private military contractor deaths wouldn't matter to the U.S. public and would anyway be proprietary data to which the press wouldn't have access. A lot of the air support that wasn't privately contracted could be done from outside Iraq, from our bases in Jordan or Kuwait.

We might withdraw 120,000 or 130,000 troops. There wouldn't be much official U.S. military in-country presence at all. It is extremely unlikely that the Shia and Kurds could defeat the insurgency with nothing more than U.S. air support. The low level civil war would go on indefinitely. But that isn't the issue. The issue is whether it could be sold by the administration to the public as a victory, as a success, or at least if not a success, not in any way a defeat, as something where we had plausibly done our job: getting their democracy going—they stood up and we stood down, and we've pacified the country so that the enemy can no longer inflict significant casualties. Air support would be expensive, but nothing like what we're spending now, and we could radically reduce non-military aid on the ground. We'd say that it's time for the Iraqis to stand up financially as well as militarily. No more nation building.

It seems to me that the recent and longer-term political history of the United States suggests that the President, in this kind of situation, could actually just lie his way out of it, so to speak. The story I've just told of relative success permitting withdrawal would have enormous appeal if it were true. It's not true, but might be plausible for people who aren't following closely, especially as spun by the conservative media that dominate most of the country.

That's my prediction of what's going to happen. I could be completely wrong. Predictions are intrinsically ridiculous¹⁰ in an incredibly complicated situation, and I'm not an expert. So take it for what it is worth: what you paid to get in.

10. See generally Duncan Kennedy, *Shock and Awe Meets Market Shock: The Dangerous Mix of Economic and Military Goals in Iraq*, BOSTON REVIEW, Oct./Nov., 2003, available at <http://bostonreview.net/BR28.5/kennedy.html>; Duncan Kennedy, *Rationalising War*, AL-AHRAM WEEKLY, May 8–14, 2003, available at <http://weekly.ahram.org.eg/2003/637/op13.htm#1>.

VI. IS IT GOOD OR BAD FOR THE AMERICANS TO BE DEFEATED IN IRAQ?

Is this good or bad? It will be really bad for some people and not so bad for others.

A. Winners and Losers in Iraq

Starting with the Iraqis, it will be bad for secular Shia because they are already living or will now be living in an Islamic fundamentalist state similar to Iran. But Iran is a very complex country with a highly differentiated social structure. Southern Iraq is a poorer, more provincial Islamist world.

It is already true that male and female students at the University of Basra get attacked and beaten up by the equivalent of the Iranian guards because they are picnicking together in public. The headscarf, though not yet the hijab, has already been imposed on a very large part of the Shia territory. The difference from Iran is that in a poorer less differentiated society, the opportunities for resistance, at least in enclaves, "reading *Lolita* in Teheran," will be more limited.

Another major loser group is the secular Sunni, who have already been the main losers from the downfall of Saddam. They will be living either in the land of the insurgency under at least partial jihadi control or in Baghdad under either insurgent or Shia control.

As between Moktada and the mainstream pro-Iranian Shia Islamist parties, it's impossible to tell what will happen. They might fight to the death or divide the spoils instead. In either case, they've already gotten their hands on a very large amount of money. Everyone agrees that the Iraqis in the Bremer government, and the Iraqis in the transitional Allawi government that succeeded it, and the mainly Shia Iraqis in the provisional government now in office, have stolen a great deal of money. The existence of the constant stream of oil money, no matter what the level of production, means that this will likely continue.

There is already substantial emigration from Iraq. A lot of the professional/managerial classes of all regions are already leaving, along with the intelligentsia. They mainly go to Jordan, which up to now has open borders. Jordan has no natural resources at all and little manufacturing, but the Jordanian currency is going through the roof. Real estate values in Amman have doubled and tripled over the last fifteen months, as Iraqi oil money and Iraqis flow in. The estimate is that there are now 500,000 Iraqis in Jordan. A low estimate is 100,000. They're there because it's unbearable for them to live in Iraq as members of the professional/managerial class, or because they're getting their money out, or both.

The Sunni populace as a whole will suffer the most. The civil war in the mixed areas will produce a continuing stream of horrible civilian casualties, and if the process of separation of mixed areas accelerates, there will be major dislocation. The Shia will suffer just as much or more in this process, but they can go to areas under stable Shia religious control in Baghdad or to the south. The Sunni have only the alternatives of Baghdad and the Sunni triangle. In the triangle, even if the Americans stop pretending to fight for control, there will be incursions and air strikes, and likely violence between the insurgent groups struggling for control, and jihadi terror tactics against civilians—all below the radar of the American public.

The Iraqi masses, both Sunni and Shia, will suffer for another reason. The economy is in ruins. The insurgents in the Sunni triangle are going to inherit an area somewhat like Afghanistan, or New Orleans after Katrina. The rest of the country will be better, but only in degree. The reason for this is that we have imposed a catastrophic economic policy on Iraq, and we will continue to be the dominant influence on economic policy in the regions under government control. It is a neo-conservative, neo-liberal, privatization, de-regulation, free markets, open borders policy. The overwhelmingly likely outcome is that all pre-existing Iraqi industry, everything except the oil industry, has already been or will be destroyed by cheap foreign imports that the Iraqi government wouldn't be allowed to stop even if it wanted to.

In its most recent report on the Iraqi economy, the World Bank stated that: "Many of the state-owned enterprises in the tradable sector have the potential to regain profitability, even in a very open economy with substantial foreign direct investment inflows and low import duties."¹¹ This is an amazing statement. If "many" will survive, then "most" will not. In short, the Bank's own favored open economy policy would, at least in the short run, destroy industry and increase unemployment.

The *New York Times* reported in July that Iraqi electrical capacity and production had finally exceeded the pre-war level—by a small amount, but it seemed exciting.¹² Yet blackouts had increased. Although there had been an increase in capacity, the frequency of shortages had increased in Baghdad and everywhere else in the country. Why was that? Well, apparently there had been an increase in demand that was larger than the

11. World Bank, Middle East and North Africa Region Social and Economic Development Group, *Rebuilding Iraq: Economic Reform and Transition*, at 5, Report No. 35141-IQ (Feb. 2006).

12. See James Glanz, *Iraqis Simmer as Demand Outstrips Electricity Supply*, N.Y. TIMES, July 23, 2005, at A5 (reporting that Iraq's power grid was producing "a marginal increase that the Americans say is proof that their approach is paying off.").

increase in capacity. What was the source of the increase? Air conditioners!¹³

We directly support something like three or four hundred thousand Iraqis, and we pay them on average something like three hundred dollars a month, which is about ten times more than Saddam paid them. We also have a free trade policy, with a flat 5 percent tariff on all imports. Iraq doesn't produce air-conditioners. A significant part of the money that we shovel into Iraq to pacify laid off civil servants and soldiers and pay the new army is going into buying air conditioners, increasing their energy-hungry number by a couple of hundred thousand in the last few years.

In short, our economic policy is destroying our military policy. There are no jobs for the masses; those needed to build the economic future are leaving, taking the oil revenues with them, and those we are paying off can't understand how it is that the Americans are the richest people in the world and in three years can't restore power supplies to where they were under Saddam.

B. Saudi Arabia, Israel, Iran

Saudi Arabia is a big loser because lots of the jihadis coming in through Syria are Saudi. The Wahabbi and Salafi extremist tendencies are more hostile to the Saudi regime than to anyone else except the Shia. They see the Saudi regime as traitors and call for the destruction of the royal family. A lot of the jihadis will die in Iraq, as a lot of them died in Afghanistan, but a lot of the smartest and most competent will survive, trained in a new Afghanistan to fight their home government, which happens to be next door. There's nothing the Saudi regime can do about this except to keep on ramping up their internal security.

The governing Israeli right thought the Iraq War was a great idea because Saddam was an incredible problem (twenty-five thousand dollars for families of Palestinian suicide bombers, etc.). He was a symbol, along with Assad and the Iranian mullahs, of everything that was most threatening to Israeli security, and the beauty part was that the Americans were paying and dying to get rid of him for them.

It's hard to avoid the conclusion that the outcome has been a disaster for Israel and may even have influenced Sharon's decision to get out of Gaza (at least in form). An Islamist and nationalist Arab guerilla movement has defeated the Americans, in the process innovating on the resistance tech-

13. *See id.* ("The rapid increase in demand is attributed to runaway sales of air-conditioners, refrigerators and other appliances after the fall of Saddam Hussein . . .").

niques of the Palestinians. The Americans are bogged down, and who knows how they will see the Middle East when they absorb their defeat.

The war is over and Iran has won. The Iranians have won on two fronts. Inside Iraq, they have pretty certainly deeply penetrated all the Shia parties and militias, supporting all of them even though they hate each other. They may even be supporting the Sunni nationalist insurgency. Their regional influence has obviously increased as well because of the emergence of Shia militancy in neighboring countries. (They do have to worry about the encouragement of their Kurdish minority.) On the international level, the war has eliminated the danger that the United States would try to change the Iranian regime by large scale military force.

C. The United States as a Military/Political World Power

We have lost political power because our military power turns out to be less than it appeared to be before and during the early phases of the war. One reason for this is that the enemy developed military techniques that will be useful for at least some time into the future to all those waging ideologically intense asymmetrical warfare, or plain old fashioned guerilla war, against the United States. The innovations are the improvised explosive device and suicide bombers deployed in numbers. Obviously neither tactic is unprecedented. It's just that this is a new deployment. These suicide bombers are like Japanese kamikazes, as well as like the Palestinians. In *Saving Private Ryan*, the paratroopers storm the cliffs of Normandy with a 95 percent chance of death. It's just that the technological and social organization of it has been totally transformed.

The great majority of U.S. casualties are inflicted by improvised explosive devices (IEDs). The first explosive devices were buried or hidden in the road, made of artillery shells from the Saddam regime, and detonated by a switch attached to a wire covered with sand running into the road. Very quickly the Americans trained their troops to spot the wires, and then equipped some vehicles with prongs to sweep ahead and pick them up.

The insurgents turned to electronic garage-door openers, dispensing with the wire. The United States began to jam the frequency on which automatic garage-door openers operated. The insurgents moved to cell phones, with many frequencies. U.S. patrols began to jam all the cell phones in their vicinity. Now the insurgents are using lasers. The beam goes from a box to the device, which detonates when the vehicle interrupts the beam. Not the end of the story, of course. We'll think of something. But this is what the military means when they say things like "the enemy is resourceful" or "the enemy has a lot of flexibility." The British claim that they are losing men in Basra because the Iranians have helped the Mahdi

Army master the Hezbollah technique of the shaped-charge IED, which can penetrate light British armor. Et cetera.

In a general way, it has become clear that our military capabilities are dramatically less than everyone believed they were after the Afghan War and up to the capture of Baghdad. After the Afghan invasion, it seemed as though we could peer into everyone's bedroom and figure out if they were breathing deeply or shallowly, and from some place in Arizona track every human being in Afghanistan and pick them off with drones one by one. We seemed to have achieved a kind of military supremacy that was almost beyond imagination.

We can speculate that the governments of Iran, Syria and North Korea, for starters, but many other regimes hostile to, or in competition with, the United States, from the Sudan to Venezuela to the Soviet Union, were seriously intimidated by this development. The United States still has the same technological capacities, but it has become clear that, while enormously impressive, the U.S. victories did not have the meaning for the global balance of power that at first appeared. True, the United States effortlessly changed the regime in Baghdad, but then it was defeated by the combination of nationalist and religious sectarian resistance with the hidden weaknesses of the American war machine. All this in a very poor country, devastated by the combination of Saddam's folly and a decade of sanctions.

The first weakness was the small size of the U.S. military, given the high ratio of non-combatants to combatants. Perhaps the United States should have sent more troops to Iraq at the beginning, but now the problem is that it doesn't have enough troops to pacify the country, supposing that that's what the Americans want to do. The force depended on the National Guard, which is collapsing. True, regular military recruitment is stable, but that is because bonuses have increased dramatically and the Army has informally reduced the qualifications for joining. So the United States is officially "over-stretched," and this means that it is inconceivable that the United States could invade Iran or Syria or North Korea. Of course, the United States could bomb them—all of them simultaneously—and do unlimited damage to their populations and their economies. Regimes might change under the air assault. But that is a very different kind of power than that of even short-term occupation.

The second weakness was organizational: it took years for the Americans to adjust to the unexpected situation they found in Iraq, if, indeed, they have in fact now adjusted. There is no reason to believe that another adventure in regime change would be Iraq all over again, or that it would take fewer years for the military to adjust anew.

The revelation that American military power is far less than it appeared amounts to the gift of security and enhanced freedom of action not just for Iran, Syria and North Korea, but for all states that are in a hostile or competitive relationship with the United States. The defeat is political on a global scale, as well as military, in Iraq.

D. The Internal Security of the United States

According to Bush, Iraq is the principal front of the war on terror, so that if we've lost in Iraq, there should now be occurring a disastrous increase in American vulnerability to terrorism. The loss, I'm arguing, will involve the de facto division of the country, and a low level civil war, with the insurgents in control of the Sunni triangle and a large part of Baghdad.

Will this mean more terrorism inside the United States? It's an important question, and it's hard to answer one way or the other with any confidence at all. A first point is that the capacity of Islamist terrorist groups to carry out attacks on civilians in the United States is, from a technical point of view, complete. All they have to do is go after soft targets with widely available technology, as in Madrid and London. The United States has no defense against these kinds of attacks other than intelligence and police work. There's no city in the United States where it would be hard for terrorists with minimal organization and determination to blow up a few hundred Americans and produce political, economic and emotional chaos. It doesn't have to be the World Trade Center all over again, and it's not the fault of the Bush administration; it's just the way things are. The United States will be no more and no less vulnerable as a result of what happens in Iraq.

The question is whether there are or will be small groups, loosely linked or not to Al Qaeda, with the will and competence to attack here. That depends on the motivations of Al Qaeda and its potential allies in the United States. In the last month or so, various liberals have begun to speculate about that, questioning the administration's idiocy about how Al Qaeda and its allies are motivated by hatred of the whole American way of life and determined to "destroy it."

These speculations implicitly acknowledge our defeat. If they want to destroy the American way of life, then their victory in Iraq will simply motivate them to bring the war to American territory. But if their goal is to kick the United States out of the Arab-Muslim world, destroy the U.S.-allied secular or insufficiently Islamic regimes and establish theocratic rule wherever they can, then it is harder to predict how they will react to their astounding victory. It's not obvious that they will say "onward to New York" or "onward to Washington," "onward to any place in the United States."

It's not even slightly obvious that that's what will happen. It's very possible that their victory will destroy them, for several reasons. The techniques by which they've achieved it are alienating more and more of the powerful Muslim world, the part of the Muslim world that has money, influence and resources, not to speak of the Shia everywhere.

Second, when they are no longer fighting the crusaders in the Sunni triangle, they will have to fight it out among themselves. It seems unlikely that nationalists and jihadists can rule together. And then there is the fact that they will not have Afghanistan under the Taliban, but rather the Sunni triangle, physically and economically devastated, and subject to continual harassment by American air power, not to speak of Shia/Kurd military incursions.

It seems clear that the war has made attack in the United States far, far more likely than it was after 9/11 by making the United States the principal world enemy of Islam. Once the United States has been defeated, it occupies a different status—to some extent humiliated, ridiculed, reduced to a paper tiger, with who knows what results. I think the consequences of the U.S. defeat for American internal security are impossible to figure.

E. Good Consequences of a Reduction of U.S. Political Power

I think it is good for the United States to lose power politically and militarily. I think our defeat is a blessing for the world because we don't use our power better than the people to whom it will be distributed, and our possession of it blocks openings to better uses by others. The main current use of American political power in the world since 1980, including during the Clinton administration, has been to impose one version or another of neo-liberal economic policies that are disastrous for the great majority of the population outside the developed North and West. A reduction in our military and political power would be a good thing because it would reduce our ability to impose that policy.

We have this free-market, free-trade template; we use a combination of military, economic and diplomatic power to impose it. We don't usually invade, just sometimes. It is a condition of getting loans from the World Bank; we negotiate treaties; we arm the contras. The consequences were hard to figure for a long time, but little by little it's become clear. Some people thrive and some people starve. Inside particular countries, the difference in wealth between the rich and the poor goes through the roof. We get rid of all the subsidies and state enterprises that are sustaining the people at the bottom in a moderately redistributive way; we help the rich to get twice as rich all over the world.

Between countries, there are winners and losers from trade. The closer we push the developing world toward free trade, the more the relationships

between those countries come to look like Manhattan in relation to Newark in the 1970s. Israel is to the Occupied Territories as Manhattan is to Newark. If you start out with even a quite small advantage in the game and win the first rounds, the disparities just get greater and greater. There is a circular causation in which the drain of money and talent across the border feeds on itself, and feeds corruption in the weak state, which accelerates the drain, which feeds the corruption. That's the likely future of Iraq as well.

I am arguing that the defeat of the United States makes the creation of these insane winner/loser set-ups, with downward spiral for three quarters of the people and wild upward spiral Reagan-style plutocracy for a minority, somewhat less likely. We are the authors of policies that contribute to radical economic oppression all over the world. The less power we have to do that, the better.

What about democracy? We don't stand for democracy in any way that is backed by any form of action. We just don't. We have no pro-democratic track record for the whole period since World War II. We have been anti-communist, and that has been good for democracy some of the time, in some places. But in the Cold War, and since the Cold War, our policy has been to support our allies, whether they are democratic or not. When it is good for us, we are for free elections. When it's bad for us, no free elections or rigged elections. We are not in Iraq to promote democracy, and what we are doing is not going to produce democracy. It's going to produce Islamic republics that are indigenous, genuinely indigenous: Iranian-style in Shia Iraq, Kurdish-style in Kuridistan, and no one knows exactly what in the Sunni triangle.

VII. CONCLUSION

So I am saying we should rejoice in our defeat. We should hope that the Bush administration persuades the American public to swallow a completely false picture of what's going on—the fantasy of military success (no more serious casualties), they can stand up, and democracy. I worry that the Democrats will denounce this and accuse Bush of cutting and running. I hope they will say, "George Bush is acting like a statesmen," and support his lies.

I am also worried about the neo-cons in the State Department, and now the World Bank and the United Nations, who passionately favor the Israeli right wing and love the U.S. military's big stick. They designed the war. They may well try to stop Bush from bailing out by mobilizing the part of the Christian right that favors Israel and loathes Islam. The pro-Israel neo-con/born-again Christian alliance has a lot of power in the administration.

I would say that what we can hope for is that a coalition of spinmeisters, worried about the election, manages to package the defeat as a victory and stiffens the Christian right and the neo-cons when they say, "No, George, you're betraying the program; you are cutting and running." This is a very, very dark view of the situation, but, except for the suffering of the Iraqis, I am arguing that there is a silver lining in the cloud.

Thank you.

**WAR AND TRADE SYMPOSIUM
OPENING REMARKS:
WAR, TRADE, AND THE CONSTRUCTION OF
THE INTERNATIONAL**

*Nathaniel Berman**

Welcome to the first panel of this symposium on “War and Trade.” Our panel, entitled, “The Use of Force and International Trade: Complementary or Competing Legal Regimes,” follows in the wake of Duncan Kennedy’s timely and provocative keynote address yesterday evening on Iraq. As one of the co-organizers of this symposium, I would like very briefly to lay out some of the background ideas that guided us in putting it together.

This symposium originated in our desire to deploy critical thinking on some of the conventional wisdom about the international situation since 1989. Almost all observers seem to agree with the proposition that “international-law-has-been-fundamentally-changed-by-post-Cold-War-developments.” However, not everyone agrees on precisely which developments have so thoroughly challenged the traditional structure of international law. And, above all, far too little thought has been given to the relationship between the various sources of the putative challenge to international law.

In conventional debate, there are two leading candidates for the source of this challenge. The first is the dramatic transformation in the military and security arenas—in short, the changing nature of war; the second is economic globalization and the dominance of the neo-liberal economic model—in short, the changing nature of trade.

Let us first consider the war side. A number of rather heterogeneous phenomena are often cited as provoking the destabilization of the traditional conceptualizations of war by political actors, as well as by scholars of international law and international relations. For example, the past sixteen years have seen the proliferation of civil wars and ethnic conflicts rather than traditional armed conflicts between states. They have also been a time of the emergence of vast American military predominance (a phenomenon perhaps now rendered uncertain by events in Iraq). Finally, it has been a period of a medley of other challenges to traditional images of war, such as military privatization, transnational terror networks, and the specter of the proliferation of weapons of mass destruction. On the economic side, we have neo-liberal economic globalization, powerful

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transnational economic networks, and trade liberalization, coordinated to some extent by the WTO and other international financial institutions.

Both sets of phenomena, those on the war side and those on the trade side, have been said to weaken sovereignty, to render obsolete a number of hoary doctrines of international law, and to make international governance both indispensable and incredibly difficult. The proliferation of "new kinds of war" and the globalization of the economy are both said to destabilize the way in which the international system was anchored in sovereign states and to diminish the autonomy of states to set their own policies. This untethering of the world from its traditional moorings seems to create power-vacuums on a number of levels, vacuums filled by a variety of new actors: powerful state militaries and economies, international organizations like the UN and WTO, and non-state actors like multinational corporations and transnational military groups. As at all times when it has seemed that "all that is solid melts into air," powerful new actors seem once again to be emerging with a variety of projects for restructuring the world in their image.

Nevertheless, I believe that no persuasive account has emerged of the relationship between changes in the military and economic arenas, or even a rigorous accounting of the many possible similarities and dissimilarities between them. And, therefore, over the course of today's symposium, I expect that many of the speakers are going to be proceeding on the basis of a different set of assumptions about such questions than in more conventional discussions. While not all speakers will agree with what follows, I would like to sketch some of the key disagreements that many of us have with more familiar accounts.

First of all, I think many of us are going to challenge the supposed novelty of these allegedly "unprecedented challenges to international law." For example, was it always true that sovereignty played the stabilizing role that the conventional account attributes to it? Or has sovereignty itself always been a contested political instrument, sometimes reinforcing disparities in both military and economic arenas, sometimes serving as a basis for challenging those disparities, sometimes producing stability, sometimes producing instability? And above all, to the extent that it has provided stability, has the legal concept of sovereignty not often ended up reinforcing Western power in relationship to the rest of the world whether in the form of overt, classical colonialism, or in other, more subtle, contemporary forms of domination? And, finally, when compared with the forcible wrenching of non-Western economies and resources into the service of Western economic expansion in the sixteenth through nineteenth centuries, might not today's supposed "un-

precedented economic globalization” appear as something of a historical epiphenomenon?

Secondly, I think many of us proceed from different starting points in understanding the relationship between war and trade than those that inform conventional discussions of the topic. In classical discussions of the topic, we would expect to find questions like the following: do trade links have a generally peacemaking effect, or do they tend to bring economic competitors into conflict, including military conflict? The first view, the one that proclaims the peaceful and even peacemaking nature of trade, is often associated both with the classical liberalism of the nineteenth century and with the contemporary “liberal peace” school. The second position, focusing on the dark, dangerous, bellicose nature of trade, is often associated with classical Marxism, especially in the form that it took in the early twentieth century in diagnoses of the causes of World War I. By contrast, I would expect that for many of the symposium participants, these kinds of broad debates have been displaced in varying degrees by situating the war-trade conundrum in relationship to specific patterns of the distribution of power and wealth among states, regions, and populations.

From this alternative optic, before asking about the generally pacifying or militarizing effects of trade, one would first ask the question, “war and trade among whom?” In particular, one would pay close attention to the differences in relations among different Western states, differences between intra-Western relations and relations between Western states and others, and differences in the way Western economic and military dominance has been exercised in different parts of the world. I also expect that many of the speakers in this symposium would view the traditional positions in these debates as often having radically underestimated the complexity of the historical phenomena. On the liberal side, this underestimation often takes the form of a tendentious, biased, or, alternatively, overly uniform, definition of fundamental terms like “state” or “liberal state” —or even “peace.” The “liberal peace” school, for example, seems ill-equipped to come to terms with concepts like that of “structural violence” or “permanent aggression” familiar to theorists of colonialism and neo-colonialism. Conversely, Marxist and other leftist frameworks often exaggerate the coherence or unity of the self-interest of states and economic actors, often failing to consider the tensions among those interests, their ambivalence, and the shifting and inconsistent ways in which those interests affect policy positions.

I now wish to sketch some background hypotheses about how things might look if one approached these questions from a more critical perspective. In particular, I want to use the optic of looking at the way in

which the relationship between war and trade has been handled in the policy-making circles of Western centers of power both recently and in the historical past. This sketch is necessarily going to be reductionist and tendentious, for I will analyze Western policies on these issues over the past couple of centuries as divisible into two broad impulses—the “drive to incorporate” and the “desire to quarantine.” In this analysis, I draw heavily on the work of Mark Duffield,¹ though I depart from him in a variety of ways and absolve him entirely from the reductionist quality of the following analysis.

The “drive to incorporate” refers to the urge to incorporate the non-Western world into the Western military and economic system. This drive may take the form of using military power to drive the non-West into the Western economic system. Conversely, it may take the form of using economic power to drive the non-West into the Western military system. By contrast, the “desire to quarantine” refers to the aspiration to cordon off, as far as possible, the non-incorporated world so as not to disrupt military and economic relationships in the West. The drive to incorporate and the desire to quarantine are thus opposite policy impulses—though actual policy in any given period may reflect an ambivalence about the non-West and hence may oscillate between the two impulses. I caution to add that these positions are not necessarily associated with predictable political positions. Each one has been identified at various times with the political left and the political right.

The drive to incorporate was, of course, most starkly embodied in classical colonialism. As one of our symposium participants, Antony Anghie, has written, “Trade and civilization have been the principal justifications for the colonial project through the centuries.”² Anghie has demonstrated in great detail³ the ways that modern international law from its inception, as well as colonialist practice, made war and peace dependent on submission by non-Europeans to certain kinds of European economic activity.

As I have mentioned, this kind of thinking was not always associated with the political affiliations that one might expect. For example, classi-

1. See generally MARK DUFFIELD, *GLOBAL GOVERNANCE AND THE NEW WARS: THE MERGING OF DEVELOPMENT AND SECURITY* (2001). Certain aspects of Duffield’s analytical framework dovetail with my work on the relationship between the early and later parts of the interwar period. See Nathaniel Berman, *Between “Alliance” and “Localization”*: *Nationalism and the New Oscillationism*, 26 N.Y.U. J. INT’L L. & POL. 901 (1994).

2. Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 VILL. L. REV. 887, 896 (2000).

3. See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

cal European colonialism was, at times, the project of the left—at least the center left, often called the “socialist left” in the late nineteenth and early twentieth centuries. Perhaps even more surprising to non-specialists, colonialism was, at times, opposed by the traditionalist right wing, concerned with colonialism’s negative effect on social and economic hierarchy in Europe as well as in the places that the Europeans were trying to colonize, such as India. Thus, at some moments, incorporationism was a European center-left project and quarantine a right-wing project. At other times, of course, colonialism was the project of the right wing and opposed by those on the social democratic left who were concerned by its negative effect on the resources available to build the welfare state at home.

I now shift from classical colonialism to rather more recent times. During the Cold War, the drive to incorporation characterized policy on both the military and economic planes. Such policies took a number of different forms. At times, incorporation into the Western economic trading system was a reward given to countries in exchange for military alliance, or in exchange for other kinds of military actions, such as the adoption by target countries of repressive measures in relationship to their own population. Conversely, at other times military alliance was a reward given in exchange for economic and trading benefits. Here too we find unpredictable political associations and ambiguities. For example, a tight link between trade ties and military alliance was often a liberal Democratic project in the United States. Thus, in the John F. Kennedy administration, there was a close link between the “Alliance for Progress,” a trade and development economic project, and military alliances against the left in Latin America. The rejection of incorporationism and a move towards a desire to quarantine became a populist and left project in the wake of Vietnam, and re-emerged later in the Naderite left.

The first phase of the post-Cold War period, from 1989–2001, saw both continuities and discontinuities with the Cold War. On the one hand, Cold War-style drives to incorporate the rest of the world both militarily and economically continued in relationship to certain countries and at certain times. On the other hand, the desire to quarantine prevailed in relationship to other countries and at other times. The vicissitudes of foreign policy debates in the Democratic Party can be viewed as an oscillation between these drives. Some Democrats were incorporationists in both the trade and military arenas, favoring both economic globalization coordinated by institutions like the WTO and military interventions like those in Haiti and Kosovo. Others only favored incorporationism in the economic arena, preferring policies of quarantine in military matters. The change in policy toward the Balkans between 1992 and 1995 may be

viewed as a gradual move from quarantine to incorporation. Still a third sector of the Democratic Party sought quarantine in both economic and military matters, in the form of economic protectionism and hostility to military intervention abroad.

Despite these complexities, one may draw a rough contrast between the Cold War and post-Cold War periods. The Cold War protagonists operated on the basis of a drive to incorporate as much of the globe into their respective camps as possible. By contrast, post-Cold War Western policy often seemed based much more on a willingness to measure interests in peripheral areas on a case-by-case basis, particularly from a security-based optic. When peripheral regions were perceived as presenting security threats, the drive to incorporate often prevailed on both military and economic fronts. When peripheral regions were perceived as not presenting security challenges, and this was often the case in relation to Africa, Western powers sought to wall off those areas from disturbing the military and economic relationships in the center. The security focus of much of this case-by-case evaluation, and the disagreements on what conclusions to draw from such a focus, go far to explain the oscillation between interventionism and non-interventionism during the 1989–2001 period.

After 9/11, one might have predicted that the new conditions of global fracturing and competition would unambiguously revive the predominance of the “drive for incorporation” characteristic of much of the Cold War. Indeed, some very influential opinion-makers of the “liberal peace school,” such as the journalist Tom Friedman and his academic homologues, urged that post-9/11 policy be structured by a tight link between security and trade—a very similar approach to that which prevailed during the Cold War. Others, for example those in the extremist Buchananite right wing, urged that 9/11 indicated that the United States should seek to quarantine itself from the rest of the world. Such observers argued that the United States should continue the stance proclaimed by the 2000 Bush campaign in rejecting incorporationism either on the security or economic planes, or both.

The militarization of U.S. policy after 9/11 reshuffled many of the expectations inherited from the policies and practices of the late 1990s. For example—a very striking and central example—the move from imposing sanctions on Iraq to invading Iraq was clearly a move from quarantine to incorporation. The Bush sector of the American right wing converted from neo-isolationism to a kind of grotesque transmogrification of Wilsonian internationalism. In this light, it is not surprising that many of the prominent initial actions taken by the U.S.-occupation administration in Iraq, the Coalition Provisional Authority, focused on making Iraq into an extreme example of economic neo-liberalism. These measures entailed

abolition of barriers to foreign investment and to foreign trade, and making Iraq generally available for incorporation into the Western economic system—for example, facilitating its eventual entry into the WTO.

And with these reflections, I conclude this extremely schematic sketch of an alternative framework for thinking about the relationship between war and trade in Western policy circles over the past couple of centuries. I think that something like this framework will inform many of the talks that you will hear today. Of course, since this is a meeting of international *law* scholars, I expect that most of the actual talks will not be at this broad level of historical speculation, but rather at the level of the detail of legal regimes. For example, I would expect the speakers to address the similarities and dissimilarities between the international legal regimes for trade and war at the level of doctrinal and institutional detail. Similarly, I would expect them to address, at a micro-level of historical and regional specificity, the question of whether the international legal regimes for trade and war facilitate each other, or compete with each other. And, finally, I would expect them to address the question of whether the international legal regimes for trade and war have similar or dissimilar impacts on the unequal global distribution of power and wealth.

In general, I expect that these analyses will examine the way particular legal regimes operate, and the way particular legal rules provide background norms against which both military and economic activity takes place. Moreover, I expect today's speakers to address the ways legal discourse plays an ideological role in society at large, legitimating the deployment of economic and military power, making unjust distributions of power and wealth seem natural or inevitable, and foreclosing the imagination of alternative ways of making the world.

The need for more complex analyses of the relationship between war and trade should be particularly compelling for specialists in international *law*. Both trade and war have often been viewed as quasi-natural, pre-legal phenomena, or, alternatively, as extra-legal phenomena in relationship to which law can only play an ineffective or counterproductive role. Yet the events of our era have demonstrated powerfully that law is thoroughly implicated in structuring both economic and military activity. Indeed, they have shown that trade and war as we understand and practice them are inconceivable without the background framework provided by law. Law is deeply involved in the construction of the difference between trade and war, both at the level of general conceptions of the two spheres, and at the level of the changing policies designed to manage their inter-relationship.

At the broadest level, the hypothesis guiding my own participation in this project is that the notion of “the international” as we know it might be an artifact of legal constructions of the relationship between war and trade. These constructions are historically contingent, politically contestable, and often incoherent or internally contradictory. And yet, it is precisely by identifying their malleability that we might regain hope of imagining new ways of organizing the world even in the deepening gloom of the times in which we live.

On a final note, whether or not all the participants in the symposium will recognize the assumptions I’ve outlined here as guiding their own work, I can confidently say one thing: the talks you will hear today will not be lacking in challenges to the conventional wisdom on these topics, in intellectual and historical depth, and, above all, in legal, political, moral, and even aesthetic imagination.

MONTESQUIEU ON COMMERCE, CONQUEST, WAR, AND PEACE

Robert Howse*

I. INTRODUCTION: COMMERCE AS THE AGENT OF PEACE: MONTESQUIEU AND THE IDEOLOGY OF LIBERALISM

In the history of liberalism, Montesquieu, who died two hundred and fifty years ago, is an iconic figure. Montesquieu is cited as the source of the idea of checks and balances, or separation of powers, and thus as an intellectual inspiration of the American founding.¹ Among liberal internationalists, Montesquieu is known above all for the notion that international trade leads to peace among nation-states. When liberal international relations theorists such as Michael Doyle attribute this position to Montesquieu,² they cite Book XX of the *Spirit of the Laws*,³ in which Montesquieu claims: “The natural effect of commerce is to bring peace. Two nations that negotiate between themselves become reciprocally dependent, if one has an interest in buying and the other in selling. And all unions are based on mutual needs.”⁴

On its own, Montesquieu’s claim raises many issues. Montesquieu’s point is that trade based on mutual dependency discourages war. Here, Montesquieu abstracts entirely from the relative power of the states in question, a concern that is pervasive in his concrete analyses of relationships among political communities. For example, later on in the same section of the *Spirit of the Laws* he mentions that trade relations between Carthage and Marseille led to jealousy and a security conflict:

There were, in the early times, great wars between Carthage and Marseille concerning the fishery. After the peace, they competed in economic commerce. Marseille was all the more jealous, that, while equal to its rival in industry, it was becoming inferior in power. Thus the reason for its great loyalty to the Romans. The war the Romans fought against the Carthaginians in Spain was a source of riches for Marseille,

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1. See THE FEDERALIST No. 47 (James Madison). See also HARVEY C. MANSFIELD, JR., TAMING THE PRINCE: THE AMBIVALENCE OF THE MODERN EXECUTIVE POWER 214 (1989).

2. Michael W. Doyle, *Liberal Internationalism: Peace, War and Democracy*, <http://nobelprize.org/peace/articles/doyle/index.html> (last visited Mar. 27, 2006).

3. All citations to the *Spirit of the Laws* are by book and chapter number. The translations are my own, based on the French text in BARON DE MONTESQUIEU, 2 OEUVRES COMPLETES: DE L’ESPRIT DES LOIS [2 COMPLETE WORKS: SPIRIT OF THE LAWS] (Roger Caillois ed., Gallimard 1951) (1748).

4. *Id.* bk. XX, ch. 2.

which served as a supply port. The ruin of Carthage and Corinth increased still more the glory of Marseille. And, but for the civil wars, where it was necessary to close one's eyes and choose a side, it would have been happy under the protection of Romans, who were not jealous of its commerce.⁵

Montesquieu claims that commerce can cure "destructive prejudices" and render manners (*moeurs*) gentle.⁶ But he also, and equally emphatically, suggests that prejudices and ferocious manners impede or prevent commerce: "[In the case of the Romans and the Parthians] far from there being commerce, there wasn't even communication: ambition, jealousy, religion, hatred, manners kept everything apart."⁷ Does not then the disease itself prevent the proposed cure?

In the opening of the *Spirit of the Laws*, Book I, which sets out the view of human nature on which the work is premised, Montesquieu presents human beings as naturally timid and non-conflictual, while it is social dependency and interdependency that lead to aggression, distrust and conflict.⁸ Why then should conflict not be engendered by *trade* dependency or interdependency? For Judith Shklar, Montesquieu's meaning is that commerce and conquest are alternative means of satisfying the needs of a state: "Commerce is the object of free states, while conquest is the aim of despotic ones and, as [Montesquieu] knew, all continental monarchies as well."⁹ Yet, Montesquieu himself seems at least as much impressed with the extent to which conquest and colonialism (and indeed even genocide and mass exile) went hand in hand with the development of commerce, at least historically. He goes so far as to suggest: "The history of commerce is that of the communication of peoples. Their various destructions, and the displacement and devastation of population groups, are its greatest events."¹⁰ Elsewhere, Montesquieu states that the conquests of Egypt and India by Alexander the Great were among the events that made a great revolution in commerce, and he asks whether "it [is] necessary to conquer a country in order to have commerce with it."¹¹

For those who are inclined to reduce philosophy to a set of slogans, Montesquieu is a dangerous thinker to cite and an impossible one to understand. There is hardly a generalization in his *Spirit of the Laws* that is not qualified or contradicted by another generalization, or put in question

5. *Id.* bk. XXI, ch.11.

6. *Id.* bk. XX, ch. 1.

7. *Id.* bk. XXI, ch. 16.

8. *Id.* bk. I, chs. 2-3.

9. JUDITH N. SHKLAR, MONTESQUIEU 107 (1987).

10. MONTESQUIEU, *supra* note 3, bk. XXI, ch. 5.

11. *Id.* bk. XXI, ch. 8.

by Montesquieu's own examples. Despite Montesquieu's own insistence in the preface that the work has a plan or design, Montesquieu's manner of proceeding through self-correction (or, less charitably, self-contradiction) has led some illustrious readers to complain of its disorganization.¹²

While, as already noted, liberals consider Montesquieu a "liberal," his liberalism is seductive and subversive rather than moralistic and revolutionary. Montesquieu does not recommend the replacement of an illegitimate order, the *ancien regime*, by a legitimate regime. He is not a precursor of the (bourgeois) French Revolution, and a strain in French scholarship and political theory thus regards him as a reactionary, an aristocrat defending class interests.¹³ Montesquieu is critical of every kind of political regime, however liberal, and on the other hand, is fatalistic about power and constraint as endemic in the human condition. For Montesquieu, liberty is not seized in a single stroke that replaces the regime of Throne and Altar with the regime of rights, but is to be found in the margins of the actual power relations and, above all, in the subtle transformation of those relations from dangerous and illiberal forms of dependency into more benign and gentle forms of mutual dependency. While leading, in some circles, to the view of Montesquieu as a reactionary, this way of thinking led Louis Althusser to view Montesquieu, in some respects, as a (defective or inconsistent) precursor of a certain kind of Marxist social theory.¹⁴

II. WAR AND CONQUEST: BOOKS IX AND X OF THE *SPIRIT OF THE LAWS*

Montesquieu elaborates his views on war and peace prior to his systematic consideration of commerce in Books XX and XXI of the *Spirit of the Laws*. He begins his discussion of defensive force in Book IX with the proposition that all regimes, whether republican, aristocratic or monarchic, are subject to the same dilemma: if they are small, they will be destroyed by external force, whereas if they are large they will be destroyed by "internal vice."¹⁵ While carefully prepared by Montesquieu's dissections in Part I of the *Spirit of the Laws* of the internal contradic-

12. For a review of the different readings of Montesquieu's *Spirit of the Laws*, see RAYMOND ARON, *LES ÉTAPES DE LA PENSÉE SOCIOLOGIQUE* [STAGES OF SOCIOLOGICAL THOUGHT] 61–66 (1967).

13. *See id.* 62–63.

14. *See* LOUIS ALTHUSSER, *POLITICS AND HISTORY: MONTESQUIEU, ROUSSEAU, HEGEL AND MARX* (Ben Brewster trans., 1972).

15. MONTESQUIEU, *supra* note 3, bk. IX, ch. 1.

tions that plague both ancient republics and modern monarchies,¹⁶ Montesquieu's bold statement at the outset of Book IX that *no* regime can combine internal health and effective external defense represents an arresting indictment of the entire tradition of political philosophy. The search for the best regime, meaning the best "city" or the best "state," the best "closed" political community,¹⁷ is utterly futile. The achievement of sound internal governance merely leads to vulnerability and ultimate destruction by external force. Only a despot can act fully consistently in internal and external affairs.

While most commentators assume that, for Montesquieu, England is the model of the ideal constitution or regime,¹⁸ Montesquieu in no way exempts England from his verdict. Montesquieu understands political liberty not in terms of citizenship and formal rights of political participation, but in terms of each individual's sense of personal security and the "tranquility of spirit" that flows from it: "the government must be such that a citizen cannot fear another citizen."¹⁹ But, if liberty is really this "tranquility of spirit," then no single political regime can guarantee liberty, even if it creates an order where one does not fear one's fellow citizens, because no single political regime can guarantee against external aggression. There are external threats to this "tranquility of spirit" that are as menacing as internal threats; as Montesquieu demonstrates in the many examples he presents in the *Spirit of the Laws*, throughout history, the lives and property of individuals have been destroyed as much through external conflict as internal oppression.

But, in Book IX, Montesquieu does suggest that there *is* a form of political association that can combine internal good governance with effective external defense: a republican federation.²⁰ This is a "society of societies" that results from the merging of previously sovereign political

16. Ancient republics are maintained by "virtue"—an almost fanatical overcoming of private interest for the sake of the common good, of which military virtue is the peak—but even this virtue is not enough to guarantee that a small republic will be able to defend itself against a larger power, especially one with the latest military technology. Once a republic becomes large, however, private ambition and interest declare themselves: "interests become particular; a man feels first of all that he can be happy, great, glorious, without his homeland; and soon he can be great alone, on the ruins of his homeland." *Id.* bk. VIII, ch. 16. On the other hand, when a monarchy covers a large territory, it is difficult to assure the obedience of the officials, lords, etc., that are required to administer the parts of this large territory, since they operate far from the capital. Because of this problem, a large monarchy tends to degenerate into a despotism. *Id.* bk. VIII, ch. 17.

17. *Id.* bk. I, ch. 3.

18. See, e.g., MANSFIELD, *supra* note 1, at 230.

19. MONTESQUIEU, *supra* note 3, bk. XI, ch. 6.

20. *Id.* bk. IX, ch. 1.

bodies (*corps politiques*).²¹ Montesquieu credits the form of republican federation with the fact that in Europe, Holland, Germany and Switzerland have been able to become “eternal republics.”²² At first, Montesquieu suggests that the model of a republican federation can only work if the entities that form the federation are themselves republics: “The spirit of monarchy is war and aggrandizement; the spirit of the republic is peace and moderation. These two types of governments cannot co-exist in a republican federation, except in a forced manner.”²³ But, Montesquieu then mentions an institutional innovation that can solve this difficulty: Germany is in fact composed of both former principalities and free cities.²⁴ This is possible because Germany has given itself a “chief,” a leader of the federation as a whole.²⁵

The existence of an independent level of governance at the federal level demarcates the republican federation from confederations such as the ancient Greek leagues, which proved unstable and ultimately not “eternal.”²⁶ Removing the obstacle created by the mixed nature of the regimes of the different members of a republican federation, the possibility of this federal level of governance eliminates the only constraint explicitly mentioned by Montesquieu on the capacity of a republican federation “to expand through new associates united with it.”²⁷ Montesquieu, who emphasizes throughout the *Spirit of the Laws* the relationship between domestic laws and factors such as climate and culture, does not apparently consider these factors as fatal to the merging of societies into a republican federation. Far from his ultimate teaching being one of relativism or determinism, Montesquieu’s detailed examination of the particularities of domestic laws in their relation to the local, by giving the local its due, allows one to believe that the local and the particular can co-exist with a (potentially) universal legal system. The differences in laws produced by the effects of climate, local culture, geography, etc., can be handled through a federal union, either through complete devolution of regulation in areas where these factors are naturally determinative, or through subsidiarity (room to deviate from, or adjust federal law to reflect local contingencies).

By attributing differences in the laws to fixed particularities such as climate, Montesquieu is usually regarded as taking the side of difference

21. *Id.*

22. *Id.*

23. *Id.* bk. IX, ch. 2.

24. *Id.*

25. *Id.*

26. *See id.* bk. IX, ch. 1.

27. *Id.*

against that of universality, and thus as the precursor of historicism.²⁸ On the contrary, he is preparing the ground for a certain kind of universalism by attributing the particularities of domestic or local laws to factors *other* than unbridgeable divides of belief and value, conflicting gods and demons—to use Max Weber’s turn of phrase—which would make it *impossible* for different peoples to live together in peace. Montesquieu is perhaps the original thinker of “path dependency”: within each political community the laws reflect a dynamic relation between the form of government and other factors that, historically, would naturally have influenced lawmaking in that particular setting (climate, etc.).²⁹ There is a diversity of laws, both over time and among different political communities at a given time, which would at face value make any project depending on legal harmonization or integration seem utterly unrealistic. However, differences in laws that are attributable to “path dependency” of individual societies may well be tractable to degrees of harmonization. Once one understands legal differences as the consequence of the different “paths” that particular societies have taken, rather than as expressions of conflicting *ideals* of government, they ought to be negotiable in the service of the project of federation.

Thus, in looking at the laws as they have developed historically in the different ideal types of regime—monarchy, republicanism/democracy, aristocracy—Montesquieu shows that the actual differences in laws are not so much a product of the ideal type of government as of the interaction of that ideal type with many accidental and contingent factors. Understood as legal integration, the merging of a monarchy with a republic, for example, is something very different than the attempt to wed together two conflicting ideal forms of government. We must face diversity and understand it, in order to overcome it as an obstacle to *universal* legality, and further understand that *universal* legality can entail something less than full homogenization of positive law, i.e., accommodating differences that are non-threatening to the “spirit” of the laws.

Admittedly, Montesquieu attributes *some* particularities of laws to differences in religious convictions in different societies, but these differences, for Montesquieu, usually amount to “prejudices” or “superstition,” which are susceptible to being removed as interaction between peoples and individuals increases, whether through commerce, immigration or

28. Shklar, for instance, finds it difficult to reconcile Montesquieu’s apparent “universalism” in the condemnation of oppression with his apparently deterministic view of law. SHKLAR, *supra* note 9, at 96–98.

29. For an overview of the concept of “path dependency,” see Paul A. David, *Path Dependence, Its Critics, and the Quest for ‘Historical Economics’* (2000), <http://129.3.20.41/eps/eh/papers/0502/0502003.pdf>.

intermarriage. It is notable that the distinctive domestic laws criticized by Montesquieu as fanatical or against nature tend to be attributed by him to prejudice, not to the kinds of local factors that might explain “reasonable” differences between laws. These are laws that deserve to be removed even by imperial conquest. Such laws are presented by Montesquieu as even less “reasonable” than despotism.

Montesquieu’s remarks about war and conquest in Books IX and X must be understood in light of his dramatic presentation of a continuously expanding republican federation as the only adequate solution to the problem of politics. He begins with the proposition that between “nations” the use of offensive force is “regulated” by the *ius gentium*.³⁰ Under the *ius gentium*, the legitimate use of offensive force is based on the natural right of self-preservation. However, the right of self-preservation in the case of peoples results in a broader scope for the use of force than in the case of individuals. An individual can only exercise the right of self-defense on those “immediate occasions where he would be lost if he waited for the assistance of the laws.”³¹ In the case of societies, the effectiveness of the right of self-defense depends largely upon the possibility of pre-emption. Even in time of peace, where another society has acquired the power to destroy it, a society must be able to attack preemptively; the law, including the police, cannot be counted on to intervene to prevent the destruction of the weaker power by the (now) stronger one.³² Following Thucydides here, Montesquieu suggests that any peace among nations is intrinsically unstable; the temptation of states to exploit peace to increase their (relative) power is in the nature of things, and irresistible for certain regimes.³³ This leads to insecurity on the part of other states and a (justifiable) collapse of the peace. Only if international law were able to equalize power between states could this insecurity be avoided, and the right to preemption legitimately narrowed or limited to situations of immediate attack. In a world of sovereign states, significant differences in relative power appear to Montesquieu as inevitable. By contrast, a republican federation is well suited to integrating both small and large states and mediating the implications of differences in size peacefully, through federal institutions.³⁴

30. MONTESQUIEU, *supra* note 3, bk. X, ch. 1.

31. *Id.* bk. 10, ch. 2.

32. *Id.*

33. According to Thucydides, the truest cause of the Peloponnesian War was the growth of Athenian power, which made other cities, and eventually Sparta itself, insecure. THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR 15 (Richard Crawley trans., 1874).

34. See MONTESQUIEU, *supra* note 3, bk. IX, ch. 3.

In a remarkable single stroke, Montesquieu endorses the right to conquest as a necessary implication of the right to self-preservation. He bluntly accepts the possibility that the only way of countering the security threat that led to the use of force in the first place is to conquer and colonize the enemy. However, through grounding the right to conquest in the natural right of self-preservation, Montesquieu places a set of derivative legal constraints on the manner in which the right to conquest may be exercised. Strategies such as the destruction or enslavement of the conquered people are contrary to the natural right of self-preservation; they are *only* justifiable if there is no other means of eliminating the security threat posed by the conquered people. At the same time, the exercise of the right to conquest, which at the end of the chapter Montesquieu qualifies as a “necessary, legitimate and unfortunate (*malheureux*)” right, “always leaves an immense debt to be paid, to vindicate oneself before human nature.”³⁵ The ideal way of paying this debt, in the case of a republic, is to provide the conquered state with good administration and good civil laws.³⁶

Moreover, conquest can “destroy harmful prejudices” that may be an obstacle to different peoples being integrated or living together in a single political community.³⁷ Here, Montesquieu gives two examples: the peace treaty that Gelon made with the Carthaginians, which prohibited the practice of burning children, and Alexander the Great’s prohibition on the Bactrians sending their elderly parents to be eaten alive by big dogs. Alexander’s interdiction, Montesquieu tells us, was a “triumph that he won over prejudice.”³⁸

Alexander provides Montesquieu’s model for benign or beneficial conquest and empire:³⁹

He resisted those who wanted him to treat the Greeks like masters, and the Persians like slaves; he thought only of uniting the two nations, and making the distinction between conquering and conquered people disappear. He abandoned, after the conquest, all the prejudices that had served him in conquering. He adopted the manners (*moeurs*) of the Per-

35. *Id.* bk. X, ch. 4.

36. *Cf. id.* bk. X, ch. 9.

37. *Id.* bk. X, ch. 4.

38. *Id.* bk. X, ch. 5.

39. Alexander the Great’s significance for Montesquieu is noted by Catherine Larrère, who comments that “Alexander thus becomes the image of modernity found in the midst of ancient ages” Catherine Larrère, *Montesquieu on Economics and Commerce*, in *MONTESQUIEU’S SCIENCE OF POLITICS: ESSAYS ON THE SPIRIT OF LAWS* 335, 354 (David W. Carrithers et al. eds., 2001).

sians, in order not to make them discontent with taking the manners of the Greeks⁴⁰

Alexander encouraged mixed marriages, a practice of which Montesquieu approves in other contexts as well. “After a certain passage of time, all of the constituent elements of the conquering state are connected to those of the conquered state, by customs, intermarriage, law, associations and a certain conformity of spirit.”⁴¹ This renders trust and peace possible based on *equality* between the peoples and the individuals who constitute them, and servitude of the conquered people definitively unnecessary to ensure the security of the conquering society. By degrees, empire is transformed into republican federation; the obstacle to republican federation that Montesquieu flagged in Book IX:III—namely, that sovereign states of equal power, jealous of their sovereignty, are unlikely to be inclined to surrender it to federative power—does not prevent an *empire* from becoming a republican federation.⁴²

40. MONTESQUIEU, *supra* note 3, bk. X, ch. 14.

41. *Id.* bk. X, ch. 3.

42. Here, I have been influenced in my interpretation by Alexandre Kojève. Kojève cites the very same practice of Alexander the Great emphasized here by Montesquieu as the original model for the creation of the Universal and Homogenous State, a federal juridical order capable, in principle, of encompassing the entire world. According to Kojève:

What characterizes the political action of Alexander in contrast to the political action of all of his Greek predecessors and contemporaries, is that it was guided by the idea of *empire*, that is to say of a *universal* State, at least in the sense that this State had no *a priori given* limits (geographical, ethnic, or otherwise), no *pre-established* “capital,” not even a geographically and ethnically fixed center destined to exercise political dominion over its periphery. To be sure there have at all times been conquerors ready to extend the realm of their conquests indefinitely. But as a rule they sought to establish the same type of relation between conquerors and conquered as that between Master and slave. Alexander, by contrast, was clearly read to dissolve the whole of Macedonia and of Greece in the new political unit created by his conquest, and to govern this unit from a geographical point he would have *freely* (rationally) chosen in terms of the new *whole*. Moreover, by requiring Macedonians and Greeks to enter into mixed marriages with “Barbarians,” he was surely intending to create a new ruling stratum that would be independent of all rigid and given *ethnic* support.

Alexandre Kojève, *Tyranny and Wisdom*, in LEO STRAUSS, ON TYRANNY 135, 170 (Victor Gourevitch & Michael S. Roth eds., rev. and expanded ed. 2000) (emphasis added).

III. LUXURY COMMERCE AND ECONOMIC COMMERCE

Montesquieu's view of commerce and its relation to war and conquest depends on a crucial distinction that he draws between the commerce of luxury and economic commerce. The commerce of luxury serves the needs of the few and, above all, the political elite.⁴³ Unlike economic commerce, it is not so much based on reciprocity and competitive advantage as on the fantastic consumption demands of a small ruling class, which cannot be satisfied within the boundaries of the community that they rule. The commerce of luxury is entirely consistent with the spirit of the conquerors—and indeed of despotism—as Montesquieu shows in his discussion of Portugal and China.⁴⁴ The commerce of luxury that is based on conquest and empire is exploitative; it is not economically rational in the sense of being conducive to the general economic welfare either in the conquering or the conquered state. Montesquieu uses the example of the colonial commerce of Spain:

It is a bad kind of wealth . . . which does not depend on the industry of the nation, the number of inhabitants, nor the cultivation of the earth. The king of Spain, who receives great sums from his customs house in Cadiz, is in this respect but a very rich individual in a very poor state. Everything passes directly from the foreigners to himself without his subjects having any part; this commerce is independent of the good or bad fortune of his kingdom.⁴⁵

Montesquieu explains the difference between the commerce of luxury and economic commerce in the following way:

Commerce is related to the constitution. In an autocracy, it is usually based on luxury, and whatever it may do to serve real needs, its principal object is to procure for the nation engaged in it everything that can serve the vanity, whims and fantasies of the ruler. In a mixed regime, it is more often based on economy. Merchants, who keep an eye on all the nations of the earth, bring to one what they take from another.⁴⁶

Economic commerce is, in its origin, the commerce of the impoverished, the powerless, and the oppressed. People who either lack a fertile territory or have been deprived of their territory (Montesquieu mentions Jews and other displaced peoples) manage through work to create something of value to others, which can then be traded to meet the basic needs

43. MONTESQUIEU, *supra* note 3, bk. XX, ch. 4.

44. *Id.* bk. VII, ch. 6 (discussion of China); *id.* bk. XX, ch. 20 (discussion of Portugal).

45. *Id.* bk. XXI, ch. 22.

46. *Id.* bk. XX, ch. 4.

of self-preservation.⁴⁷ Whereas the logic of the commerce of luxury is *taking* something of value from others in order not to have to make it oneself, economic commerce is based on helping oneself through industry that *gives* something of value to others. Montesquieu says of Marseille:

The barrenness of the terrain led its citizens to economic commerce. They had no choice but to be hardworking, to provide what nature had denied; they had to be just in order to live among barbarian nations that were the key to their prosperity, and to be moderate so that their government was always calm. . . . One has seen everywhere that violence and conflict give birth to economic commerce, when human beings are constrained to be refugees, in marshes, on islands, in the far reaches of the ocean, and even its limits.⁴⁸

Economic commerce is natural in the sense that it is based on actual needs that human beings have as human beings, or closely rooted in those needs (contributing to self-preservation, basic comfort and security). The commerce of luxury, by contrast, reflects the capacity of certain human beings to acquire material needs that are detached from nature, based on fantasies and prejudices.

This allows us to understand better Montesquieu's remark that "[t]he natural effect of commerce is to lead to peace."⁴⁹ This remark applies to *economic* commerce: the reciprocity of natural human needs is served through peaceful mutual dependency. In this kind of commerce the buying and the selling nation both receive something of which they are naturally needful. But commerce driven by luxury seeks to take what will serve its fantastical needs from wherever that thing can be found, regardless of reciprocity. Where necessary, such taking may well be by force—hence, conquest and exploitation.

As well, the commerce of luxury has quite different internal effects than economic commerce. As Montesquieu suggests, the commerce of luxury may leave the general population of a state worse off; if the commerce of luxury is not based on exploitation of *other* peoples through conquest and colonialism, it may well be based on exploitation of one's own people. Montesquieu gives the example of Poland:

A few lords possess entire provinces; they press the workers so they can have a greater quantity of wheat that they can send abroad and obtain the things that their luxury demands. If Poland had no trade with any nation, these peoples would be happier. The powerful, who would

47. *Id.* bk. XX, ch. 5.

48. *Id.*

49. *Id.* bk. XX, ch. 2.

having nothing but their wheat, would give it to the peasants in order to live; too large domains being in their charge, they would share them with their peasants; everyone would find leather and wool in their flocks, there would no longer be an immense cost in the making of clothing; the powerful, who always love luxury, and who could not find it other than in their own country, would encourage the poor to work.⁵⁰

It is the harshness of political rule and the lack of familiarity with the “commodities of life”—and not climate or culture—that, for Montesquieu, best explains poverty in the South:

There are two types of poor peoples: those that the harshness of the government has rendered such; and these are incapable of hardly any virtue, because their poverty is part of their servitude; the others are only poor for having disdained, or not having known the commodities of life; and these can do great things, for their poverty is part of their liberty.⁵¹

Poverty should not be associated with laziness or indolence as a hard-wired cultural characteristic. Under exploitative political rule, people are poor and idle not because such necessities as they require are available without toil, but because their labor benefits not themselves but the luxurious tastes of their masters. In a “free” subsistence society, people are poor and appear idle, not knowing or caring much about the “commodities of life”; they focus their energies elsewhere.

Montesquieu’s distinction between the commerce of luxury and economic commerce plays a major role in his analysis of the political morality of commerce and its legal regulation. In free societies, which are characterized by economic commerce rather than the commerce of luxury, there is more, not less regulation of commerce than in societies characterized by political servitude. “Freedom of commerce is not a capacity given to merchants to do what they want; that would more likely be servitude. That which disadvantages the trader does not, for that, disadvantage trade.”⁵² Commerce can serve the interests of building national wealth and creating employment, but it may well not do so without government regulation. An example that Montesquieu gives is that England prohibits the export of its wool.⁵³ By such a prohibition, we can surmise, England assures itself of a trade in cloth and clothing made from English wool, which benefits the public interest more than a trade in wool itself, because in addition to those employed in the production of

50. *Id.* bk. XX, ch. 23.

51. *Id.* bk. XX, ch. 3.

52. *Id.* bk. XX, ch. 12.

53. *Id.*

wool, England now has many who are employed in the production of cloth and clothing for global markets.

The commerce of luxury, as opposed to economic commerce, tends toward monopolies of trade in certain products or with certain countries. Montesquieu is very critical of these kinds of restrictions, as well as the granting of exclusive privileges to particular merchants or trading companies on certain routes of commerce: “The true maxim is to not exclude any nation from one’s commerce without great reasons.”⁵⁴ In fact, contestation of control or monopoly rights over commerce with a particular country or region turns commerce into a zero-sum game, leading to jealousy, concern with relative gains, and possible military conflict.⁵⁵ The attempt of Spain and Portugal to stabilize this competition by dividing the world into two commercial empires failed: “[T]he other nations of Europe did not leave them in peace to enjoy their division: the Dutch chased the Portuguese out of almost all of East Asia and various nations made settlements in the Americas.”⁵⁶ Montesquieu describes a world where economic commerce is always susceptible to being frustrated both by the ambition of political elites to co-opt it for their own needs—to make it or remake it into the commerce of luxury⁵⁷—and by the susceptibility of governments to give traders special privileges and monopolies that limit the ability of commerce to spread wealth and employment widely, both within states and globally.

IV. WAR, CONQUEST AND ECONOMIC COMMERCE

Although war and conquest often result in the disruption of economic commerce⁵⁸ and the expansion of luxury commerce through colonialism, according to Montesquieu, war has also contributed positively to the development of economic commerce. First of all, as we have already discussed, war has resulted in peoples being displaced and put in a situation of necessity that spurred their commercial spirit. Secondly, as Montesquieu emphasizes in his discussion of Alexander the Great—a central figure in both the chapters of the *Spirit of the Laws* on war and conquest, and those on commerce—conquest can lead to the discovery of routes of navigation that open up new possibilities for economic commerce.⁵⁹ Conquest can increase the knowledge of the world that is essential to economic commerce, but often inhibited by religion and prejudice. And,

54. *Id.* bk. XX, ch. 9.

55. *Id.* bk. XXI, ch. 21.

56. *Id.*

57. *Id.* bk. XX, ch. 8.

58. *Id.* bk. XXI, ch. 5.

59. *Id.* bk. XXI, ch. 8.

finally, as Montesquieu had indicated in his discussion of Alexander the Great in the chapters of the *Spirit of the Laws* on war and conquest, conquest can lead to intermixing of peoples and customs and the actual *removal* of prejudices that limit or inhibit communication between peoples, including commerce.

The fact that war and conquest have actually spurred, or contributed to the development of, economic commerce—even if they have also destroyed it in certain places and for certain periods of time—does not really provide much support for the hope Montesquieu appears to hold out, that commerce will lead to a stable peace. The pacific aims and manners of people who engage in commerce may have the effect of making states dominated by such people less bellicose, but if other states regard commerce as a means of taking wealth to satisfy the needs of their political and social elites, or as a zero-sum game for the world's resources, why should economic commerce with its pacific aims and manners triumph? As Pierre Manent suggests, “After all, the benefits of commerce exemplified by [commercial peoples] only have a place in the interstices of general violence sustained by traditional war-like politics, politics *as usual*, and appear then to depend for their very existence on this violence.”⁶⁰

To appreciate Montesquieu's answer to this objection, one should begin with his observation that trading peoples have responded to violence by ingeniously protecting themselves against rapacious and bellicose powers. Montesquieu's example is that of “letters of exchange,” whose invention Montesquieu attributes to the Jews.⁶¹ Through the storing of wealth in intangible form, commerce “can elude violence.”⁶² The ability of any individual state to suppress this transnational activity becomes limited, and thus “[w]e have begun to cure ourselves of Machiavellianism, and we continue to cure ourselves day by day.”⁶³ Absolute sovereignty shows itself as a myth, and the attempt by the sovereign to use instruments of coercion to control that which exceeds the limits of his territory shows itself as mere imprudence. Moreover, whereas in the past commerce may have been dependent on the bellicose state and its conquests to chart previously unknown territory and open up routes of trade and navigation, the means of doing so are now in the hands of the traders themselves, thanks to the compass: “Today one discovers lands by sea voyages; in early times, one discovered seas by the conquest of lands.”⁶⁴

60. PIERRE MANENT, *LA CITÉ DE L'HOMME* [THE CITY OF MAN] 62 (1994).

61. MONTESQUIEU, *supra* note 3, bk. XXI, ch. 20.

62. *Id.*

63. *Id.*

64. *Id.* bk. XXI, ch. 9.

But “letters of exchange” surely depend upon trust, probity and perhaps legality (at least a *lex mercatoria*) for their effectiveness. They suggest the possibility of a legal order beyond a state or closed political community, just as Alexander the Great’s model of “empire,” mixing different peoples and their customs, suggests the possibility of a social order beyond the state or closed political community.

By making sovereignty less effective, Montesquieu appears to suggest, a transnational commercial order will also make it less attractive, at least in the long run. And, just as the sovereign has been rendered less capable of depriving the transnational commercial class of its property and profits, the sovereign cannot easily destroy their knowledge of different lands and their customs. Knowledge of this kind allows a certain liberation from national or religious prejudice (which ultimately occurs, according to Montesquieu, due to ignorance of ourselves, i.e., our common humanity, and can only be cured by knowing others). Commerce depends on knowing *and* trusting the other. The grounds for keeping peoples apart become questionable if such trust is possible. The practice of commerce through trust and reciprocity implies a common language of human needs and, minimally at least, of cooperation to meet those needs.

This is a different beginning point for understanding the problem of social coordination than that adopted by the older political philosophers, who sought to establish the legitimate or the best political order, or closed political community. It is a beginning point closer to Montesquieu’s own in the *Spirit of the Laws*, which is a state of nature where human beings are essentially oriented toward the satisfaction of basic needs and where their sense of timidity or vulnerability precludes them from imagining the idea of dominating others, even in order to satisfy those basic needs. In the state of nature, vulnerability has the consequence of keeping human beings apart, not just of keeping them from fighting. It thus precludes the arts of peace as well as of war. Commerce represents the idea of human society based not upon rule or domination but mutual neediness. Any closed society (*chaque societe particuliere*) has the effect of making human beings forget their timidity or vulnerability, giving them the feeling of “force”⁶⁵; they thus become war-like towards other closed societies and try to dominate one another on the inside. Commerce, by contrast (that is to say, commerce that is not itself the product of the ambition and avarice of closed societies and their leaders), means the dependency on others for meeting one’s natural human needs—the needs based in comfortable and secure self-preservation—or, in short, the ground of social interaction. It does not lead to a sense that

65. *Id.* bk. I, ch. 3.

one has the power to take from the other what one wants, but rather that one must win it freely. This is illustrated by Montesquieu in identifying the commercial spirit with the spirit of peoples who have not had a territorial state, or whose territorial state has been taken away from them.⁶⁶ These peoples have been cured of—or are free of—the illusion of “force” that comes from being in a closed, “sovereign” political community on a defined territory.

V. CONCLUSION

Commerce does not guarantee or secure peace in a world of sovereign states; rather, commerce represents for Montesquieu an alternative to a world of sovereign states, of closed political communities—a model of peaceful social cooperation that requires laws and conventions, certainly, but of a transnational, transpolitical kind. We now understand the meaning of Montesquieu’s notion that the model for law is not *nomos* (the custom or way of a particular society or community) but something more universal, a concept of order or structure that is prior to and more fundamental than *nomos*.⁶⁷ However, while implicit in the idea of law, the transnational, transpolitical order must be built out of the diverse *nomoi* of existing political communities. Commerce, by illustrating how stateless merchants have maintained an order among themselves to sustain exchange across the most diverse societies, helps point the way.

The first stage is indicated by the idea of a republican federation suggested in Book IX of the *Spirit of the Laws*. Montesquieu’s deepest practical intent is the federalization of closed political societies through legal integration, with the laws chosen being those most favorable to freedom; this is what informs his obsessive concern about the differences of positive laws and the sources of those differences. Perhaps we should not project onto his sober spirit the actual project of world government or a universal liberal society. But, without some such conception, his contentions about the relationship of commerce, war and peace collapse into a set of contradictions, paradoxes and tautologies.

66. *Id.* bk. XX, ch. 5.

67. *Id.* bk. I, ch. 1.

COMMERCE, CONQUEST, AND WARTIME CONFISCATION

*James Thuo Gathii**

All the Advantage procured by Conquest is to secure what we possess ourselves, or to gain the Possessions of others, that is, the produce of their Country, and the Acquisitions of their Labor and Industry; and if these can be obtained by fair Means, and by their own Consent, sure it must be more eligible than to exhort them by Force.

This is certainly more easily and effectually done by a well regulated Commerce, than by Arms.¹

I. INTRODUCTION

In this short paper, I explore the complex relationship between commerce, conquest, and the confiscation of private property in the context of war. I do this by examining illustrative case law and other materials. In doing so, I make two primary arguments. My first argument is that the relationship between conquest and confiscation, on the one hand, and commerce, on the other, is not fixed or even stable but rather occupies a continuum between at least two extremes: the absolute power of a sovereign belligerent to confiscate enemy private property upon conquest on the one hand, and the policy of allowing commerce safe passage during war on the other hand. Given this relationship, my second argument is that it is inaccurate to portray the eighteenth and nineteenth centuries as periods during which the absolute power of confiscation prevailed and the twentieth century as a period in which a rule prohibiting confiscation of private property during wartime held sway.²

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1. 3 CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS 179 (John Trenchard & Thomas Gordon eds., Da Capo Press 1971) (1755).

2. This narrative of progress from the dark nineteenth century as a time of confiscation to today's more acceptable rules proscribing confiscation during wartime is recently exemplified by the Eritrean Ethiopian Claims Commission. In this dispute between the State of Eritrea and the Federal Democratic Republic of Ethiopia, the Commission noted in part that:

[u]ntil the nineteenth century, no distinction was drawn between the private and public property of the enemy, and both were subject to expropriation by a belligerent. However, attitudes changed; as early as 1794, the Jay Treaty bound the United States and the United Kingdom not to confiscate the other's nationals' property even in wartime. This attitude came to prevail; the 1907 Hague

I proceed by discussing the four manifestations of the relationship between confiscation and commerce. These manifestations include the following: confiscation trumps commerce; commerce trumps confiscation; balancing between commerce and confiscation where neither trumps the other; and finally, the doctrine of exceptional circumstances under which warfare between lawful belligerents and actors thought of as existing outside the law are regarded as beyond legal regulation. In addressing the exceptional circumstances doctrine, I show how the broad ranging measures to confiscate the property of Baathists following the U.S.-led conquest of Iraq in 2003 is related to the exceptional circumstances doctrine that is being used to justify the massive transformation of the Iraqi economy without fully consulting with the Iraqi people. The paper ends with some concluding reflections.

II. THE RELATIONSHIP BETWEEN CONFISCATION AND COMMERCE

A. Confiscation Trumps Commerce

The inherent power of confiscation during wartime is traceable to absolutist notions of sovereignty.³ Proceeding from such views of the power of the State, courts have affirmed confiscations as an exercise of a war power as opposed to a municipal power⁴ suggesting that war powers

Regulations reflect a determination to have war affect private citizens and their property as little as possible.

Eritrean Ethiopia Claims Commission, Partial Claims Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27–32, para. 125 (Dec. 17, 2004), <http://pca-cpa.org/ENGLISH/RPC/EECC/ER%20Partial%20Award%20Dec%202004.pdf>. To be fair, the Commission does acknowledge in a later paragraph that these prohibitions are accompanied by a “competing body of belligerent rights to freeze or otherwise control or restrict the resources of enemy nationals so as to deny them to the enemy State.” *Id.* para. 127.

3. Thus in *Ware v. Hylton*, 3 U.S. (2 Dall.) 199, 226 (1796), Justice Chase, quoting *Bynkershoek Q. I.P. de rebus bellicis*, states that “[s]ince it is a condition of war, that enemies, by every right, may be plundered, and seized upon, it is reasonable that whatever effects of the enemy are found with us who are his enemy, should change their master, and be confiscated, or go into the treasury.” To further illustrate the absoluteness of the claims of confiscation, the Confederate government passed retaliatory legislation permitting it to confiscate the property of northerners when Congress passed legislation permitting the confiscation of enemy property during the Civil War. *See* JOHN SYRETT, *THE CIVIL WAR CONFISCATION ACTS—FAILING TO RECONSTRUCT THE SOUTH* 6 (2005).

4. *Miller v. United States*, 78 U.S. (11 Wall.) 268, 304–05 (1870). Here, the court held that the restrictions of the Fifth (prohibiting deprivation of private property without due process of law) or Sixth (presentment or indictment by jury) Amendments did not preclude the confiscations since Congress has the power to declare war which includes “the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.” *Id.*

are more expansive than the more limited municipal powers. Other justifications for the authority to confiscate private property during wartime include the military necessity doctrine,⁵ executive orders claiming expansive authority in the conduct of war,⁶ as well as the kind of broad powers the International Economic Emergency Powers Act⁷ confers on the Office of Foreign Assets Control.⁸

Several American Civil War cases demonstrate the far-reaching claims of the absoluteness of the rights of belligerents to confiscate private property. In *American Insurance Co. v. 356 Bales of Cotton*, the Court reaffirmed the absolute power granted to the government to confiscate property without compensation.⁹ In some Civil War cases, Congress' power to pass legislation authorizing the confiscation of private property, even in cases where it was held by non-combatants, was justified as arising under the power of Congress to "make regulations [sic] concerning captures on land and water."¹⁰

Courts generally upheld broad powers of the Union government and army to confiscate cotton owned by southerners even though the Confiscation Acts were vague and unclear.¹¹ One case affirms the legitimacy of wartime confiscation of cotton as being "not for booty of war, but to

5. See Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL. L. REV. 69, 75–79 (2005) (discussing military necessity as a justification for property seizure and destruction).

6. In *Paradissiotis v. United States*, 304 F.3d 1271 (Fed. Cir. 2002), the Federal Circuit held that the United States did not affect an unlawful taking of property when it refused to permit a person determined to be an agent of the Libyan government to exercise stock options included among assets that were frozen by executive order.

7. In *Dames & Moore v. Regan*, 453 U.S. 654, 671 (1981) (quoting Chas. T. Main Int'l v. Khuzestan Water & Power Auth., 651 F.2d 800, 806–07 (1st Cir. 1981)), Justice Rehnquist noted that "[t]he language of IEEPA [referring to 50 U.S.C. § 1702(a)(1)(B) in particular] is sweeping and unqualified. It provides broadly that the President may void or nullify the 'exercising [by any person of] any right, power or privilege with respect to . . . any property in which any foreign country has any interest . . .'" (emphasis in original).

8. On the role of the Office of Foreign Assets Control, see Jill M. Troxel, *Office of Foreign Assets Control Regulations: Making Attorneys Choose Between Compliance and the Attorney-Client Privilege*, 24 REV. LITIG. 637, 652–54 (2005).

9. *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 542 (1828).

10. *Haycraft v. United States*, 89 U.S. (22 Wall.) 11, 94 (1874) (quoting U.S. CONST. art. I, § 8, cl. 11).

11. SYRETT, *supra* note 3, at 155. Some scholars have suggested that civil war confiscation cases had a direct bearing on the emergence of laissez faire constitutionalism and the emergence of a particularly strong right to private property right. Daniel Hamilton, *A New Right to Property: Civil War Confiscation in the Reconstruction Supreme Court*, 29 J. SUP. CT. HISTORY 254, 255 (2004).

cripple the enemy.”¹² Thus in *Miller v. United States*, Justice Strong noted:

The whole doctrine of confiscation is built upon the foundation that [*property*] is an instrument of coercion, which, by depriving an enemy of property within reach of his power . . . impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war.¹³

Although the courts affirmed confiscation in broad terms, the Lincoln administration only grudgingly supported confiscation.¹⁴ Some Union army officers, by contrast, argued that the Confiscation Acts empowered them to confiscate slaves as they continued to be described as property.¹⁵ The Second Confiscation Act¹⁶ referred to slaves as property,¹⁷ consistent with the racist *Dred Scott* view that blacks could never attain citizenship in the United States.¹⁸

The enhanced authority of belligerents in cases like *Miller v. United States* was invoked in the post-Second World War case, *United States v. Caltex* in which the court held that military necessity justified the U.S. army's destruction of terminal facilities after the attack on Pearl Harbor and that such destruction was necessary to prevent the use of the facilities by the enemy.¹⁹ In 2003, the Court of Federal Claims in *El Shifa v. United States* affirmed such broad powers when it held that the President's designation of “war-making property” was judicially unreviewable and as such the mistaken bombing of private property abroad was not subject to compensation under the Fifth Amendment.²⁰

12. *Haycraft*, 89 U.S. (22 Wall.) at 94.

13. *Miller*, 78 U.S. (11 Wall.) at 306 (emphasis added). In *American Manufacturers Mutual Insurance Co.*, the court held that there was no compensation available for property destroyed as part of the fortunes of war. *Am. Mfrs. Ins. Co. v. United States*, 197 Ct. Cl. 99 (1972).

14. SYRETT, *supra* note 3, at 186.

15. *Id.* at 22 (“Slaves remained property in descriptions of confiscation but became people in reference to their rights after the fighting, however.”).

16. An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes. 37 Cong. Ch. 195, 12 Stat. 589 (July 17, 1862).

17. SYRETT, *supra* note 3, at 24.

18. PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* 4 (1997).

19. *United States v. Caltex*, 344 U.S. 149, 154–55 (1952).

20. *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 771–72 (2003). The Court in *El-Shifa* considered a claim resulting from destruction of Sudanese property by the United States in retaliation for terrorist attacks on the American embassies in Kenya and Tanzania. *Id.* at 753–54. For a further analysis, see Nathaniel Segal, Note, *After El-*

This strong rule of confiscation also manifests itself under contemporary international law. United Nations Security Council Resolution 1373 of 2001, passed only a few days after the terrorist attacks on the United States on September 11, 2001, authorized states to freeze and therefore confiscate private property without due process and outside the UN's international human rights standards.²¹ The Security Council established the Counter-Terrorism Committee to monitor the implementation of this resolution.²² In 2002, the UN agreed to potentially consider appeals of over two hundred individuals whose assets had been frozen and who had been listed by the Counter-Terrorism Committee as having suspected links to terrorism.²³ At the September 2005 UN World Summit, a resolution was adopted expanding the work of the Counter-Terrorism Committee to include incitement to commit acts of terrorism.²⁴ The resolution, however, called upon states to comply with rules of international human rights in complying with their enhanced obligations to combat terrorism.²⁵ The expansive authority the Security Council has assumed in combating terrorism has fundamentally shifted its role from dealing with

Shifa: The Extraterritorial Availability of the Takings Clause, 13 CARDOZO J. INT'L & COMP. L. 293 (2005).

21. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). Paragraph 1(c) of Resolution 1373 obliges States to:

Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.

S.C. Res. 1373, para. 1(c), U.N. Doc. S/RES/1373 (Sept. 28, 2001). *See also* Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 874–76 (2003) (discussing the implications of the Counter-Terrorism Committee's ability to impose financial sanctions).

22. The Security Council describes the Counter-Terrorism Committee as follows:

The 15-member Counter-Terrorism Committee (CTC) was established at the same time [as the adoption of resolution 1373] to monitor implementation of the resolution. While the ultimate aim of the Committee is to increase the ability of States to fight terrorism, it is not a sanctions body nor does it maintain a list of terrorist organizations or individuals.

Security Council: Counter-Terrorism Committee, <http://www.un.org/sc/ctc/> (last visited Mar. 1, 2006).

23. *UN Eases Tough Stance Frozen Assets*, MX (Austl.), Aug. 16, 2002, at 15, available at 2002 WLNR 6240311.

24. S.C. Res. 1624, para. 1, U.N. Doc. S/RES/1624 (Sept. 14, 2005).

25. *Id.* para. 4.

crises on a case-by-case basis to legislating entirely new rules of international law.²⁶ Given the unrepresentative nature of the Security Council, where no African, Arab, or Latin American country is represented, these new rules may very well represent the will of a tiny minority of the States in the world today.²⁷

Even more troubling is that the work of the Security Council's 1267 Sanctions Committee, initially established in 1999 to monitor sanctions against the Taliban regime, in 2002 was extended to cover individuals linked to the Al-Qaeda organization.²⁸ The Sanctions Committee is authorized under the Security Council's compulsory authority under Chapter VII of the UN Charter and is therefore susceptible to application against an individual's private property without review or appeal. Unsurprisingly, the United States has used this authority in conjunction with its Office of Foreign Assets Control without regard to due process or transparency.²⁹

Another instance illustrating the absolute policy of confiscation arose following the 2003 U.S.-led war and subsequent occupation in Iraq. The de-Baathification of that country became one of the most important occupation objectives of the U.S.-led occupation.³⁰ It has involved the dissolution of not just the Baath Party, but a whole continuum of entities affiliated with Saddam Hussein, including defense, security, information, and intelligence organs of government and the entire structure of the

26. See Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 902–05 (2002) (discussing Security Council Resolution 1373 and the Security Council's increasing willingness to make demands on states).

27. I pursue this theme much more fully in James Thuo Gathii, *Assessing Claims of a New Doctrine of Pre-emptive War Under the Doctrine of Sources*, 43 OSGOODE HALL L.J. 67 (2005).

28. S.C. Res. 1267, para. 6, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1390, para. 2, U.N. Doc. S/Res/1390 (Jan. 16, 2002). For a description of post-September 11, 2001 international reaction to terrorist financing, see Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315 (2003).

29. See Alvarez, *supra* note 21, at 876–77.

30. The preamble to the first order of the Coalition Provisional Authority on de-Baathification notes in part,

[T]hat the Iraqi people have suffered large scale human rights abuses and deprivations over many years at the hands of the Ba'ath Party,

. . . . [And] the grave concern of Iraqi society regarding the threat posed by the continuation of Ba'ath Party networks and personnel in the administration of Iraq, and the intimidation of the people of Iraq by Ba'ath Party officials

Coalition Provisional Authority Order No. 1: Implementation of De-Ba'athification of Iraqi Society, pmbl. (May 16, 2003), available at <http://www.cpa-iraq.org/regulations> (on file with the *Brooklyn Journal of International Law* (BJIL)).

Iraqi military, including paramilitary units.³¹ All the property and assets of the Baath party were under order directed to be seized and transferred to the U.S. appointed and controlled Coalition Provisional Authority “for the benefit of the people of Iraq.”³² Individuals in possession or control of Baath party property were required to turn it in to the Coalition.³³ An Iraqi Property Claims Commission was authorized to return seized private property.³⁴ The Iraqi De-Baathification Council, now renamed Committee, is charged with the location of Baathist officials and the assets of the Party and its officials with a view to eliminating the party and its potential to intimidate the population.³⁵

A striking similarity in each of the instances discussed above, in which the absolute power of confiscation was advanced, is that there was a danger argued to justify confiscation as a means of defeating the enemy with whom the danger was associated. In the context of the U.S. Civil War, courts even justified the power of confiscation where those involved were not belligerents on the premise that there was a mere possibility that if their cotton fell into the hands of the Confederate army, it could be used to support the rebellion against the Union. In addition, the power to confiscate has been claimed in a variety of historical epochs. As noted above, in the contemporary international scene, new institutions, such as the Counter-Terrorism Committee, are facilitating the power of confiscation among States. This continuity undermines claims that a successful belligerent’s authority to confiscate enemy private property has receded into historical memory.

Finally, it is important to note that it is not always true that the absolute power to confiscate is always opposed to the ends of commerce. Rather,

31. Coalition Provisional Authority Order No. 2: Dissolution of Entities, Annex (May 23, 2003), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*).

32. Coalition Provisional Authority Order No. 4: Management of Property and Assets of the Iraqi Baath Party, § 3(1) (May 25, 2003), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*).

33. *Id.* § 3(3).

34. Coalition Provisional Authority Regulation No. 8: Delegation of Authority Regarding an Iraq Property Claims Commission (Jan. 14, 2004), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*). The Property Rights Commission (IPCC) and the Property Rights Reconciliation Facility (IPRF) were both developed, in part, to collect and resolve real property claims. However, the IPCC is a quasi-judicial agency under the direction of the Governing Council, while the IPRF acts more like an executive agency under the direction of the Administrator. Coalition Provisional Authority Regulation No. 4: Establishment of the Iraqi Property Reconciliation Facility (June 25, 2003), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*).

35. Coalition Provisional Authority Order No. 5: Establishment of the Iraqi De-Baathification Council, § 3 (May 25, 2003), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*).

the question might more appropriately be whose commerce is affected since confiscation may well only divert the gains of commerce from one party to another. For example, in *Young v. United States*, the Supreme Court upheld the confiscation of cotton found within confederate territory as well as the decision of the Union army to sell it and as such to divert the benefit of trade and commerce away from the Confederacy and in favor of the Union.³⁶ This example illustrates that it is possible to simultaneously weaken the enemy by confiscating private property in accordance with the absolutist rule, while simultaneously continuing in commerce and trade. In this scenario, rather than destroying private property, the absolutist rule seeks to divert the gains of trade and commerce from the enemy belligerent to the defeated belligerent.

B. Commerce Trumps Confiscation

A second relationship between commerce and confiscation during wartime is that commerce trumps confiscation. According to Justice Marshall in *United States v. Percheman*, property rights are not abolished with a change in sovereign power. According to Marshall:

The modern usage of nations, which has become law, would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world, would be outraged; if private property should generally be confiscated and private rights annulled, on a change in the sovereignty of the country. The people change their allegiance . . . but their relations to each other, and their rights of property remain undisturbed.³⁷

36. *Young v. United States*, 97 U.S. 39, 61 (1877) (noting “the national government acted with double power upon the strength of the enemy: first, by depriving them of the means of supplying the demand for their products; and, second, by lessening the demand.”).

37. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 51 (1833). The government’s position in the case is captured by the following quote:

What, indeed, can be more clearly entitled to rank among things favorable, than engagements between nations securing the private property of faithful subjects, honestly acquired under a government which is on the eve of relinquishing their allegiance, and confided to the pledged protection of that contry [sic] which is about to receive them as citizens?

Id. at 68.

This view is also reflected in British cases of the same period.³⁸ Perhaps in overstating the significance of commerce during war, Chief Justice Marshall in *Brown v. United States* noted that the “practice of forbearing to seize and confiscate debts and credits [is] universally received”³⁹ and that this “modern rule . . . appears to be totally incompatible with the idea, that war does of itself vest the property in the belligerent government.”⁴⁰ Attitudes about the positive role of commerce in society are strongly correlated with the rejection of any claims of restricting commerce such as through the public power of confiscation of private property without compensation.

Thus, French philosopher Montesquieu argued that the influence of commerce and industry “polishes and softens barbaric ways.”⁴¹ Alexander Hamilton also observed that some individuals believe that the “natural effect of commerce is to lead to peace.”⁴² One of the most important justifications accounting for the preeminence of commerce over a belliger-

38. See *In re Rush*, [1923] 1 Ch. 56, 70 (Eng.) (Younger, L.J., concurring) (“Lord Birkenhead, in *Fried Krupp Aktiengesellschaft v. Orconera Iron Ore Co.*, in 1919 observed: ‘It is a familiar principle of English law that the outbreak of war effects no confiscation or forfeiture of enemy property.’” (quoting (1919) 88 L.J.R. (Ch.) 304, 309)). Somewhat analogously, in *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238 (2d Cir. 1994), the Second Circuit held that a default occasioned by war, economic sanctions, and the freezing of its assets making it impossible to obtain foreign currency to repay its debts did not preclude it from finding that Iraq had willfully defaulted. *Id.* at 242–43.

39. *Brown v. United States*, 12 U.S. 110, 123 (1814).

40. *Id.* at 125. In a more forthright statement of the principle, Justice Marshall observed that the “proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt.” *Id.* at 127. However, Justice Marshall conceded that war gives a sovereign the “full right to take the persons and confiscate the property of the enemy,” but that this “rigid rule” had been moderated by “the humane and wise policy of modern times.” *Id.* at 122–23. By contrast, Justice Story dissented, arguing that while mere declaration of war did not ipso facto operate as a confiscation of the property of enemy aliens, such property is liable to confiscation “at the discretion of the sovereign power having the conduct and execution of the war” and that the law of nations “is resorted to merely as a limitation of this discretion, not as conferring the authority to exercise it.” *Id.* at 154. Although Justice Marshall appeared to have suggested that the modern rule prohibited confiscation under the law of nations and limited the sovereign power to confiscate enemy property, *id.*, in *United States v. Percheman*, 32 U.S. 51 (7 Pet.) (1833), he affirmed the rule against confiscation under the law of nations unambiguously.

41. See Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. ECON. LITERATURE 1463, 1464 (1982) (quoting CHARLES MONTESQUIEU, *DE L’ESPRIT DES LOIS* 81 (1961) (1748)).

42. However, Hamilton himself disagreed with this notion. See *THE FEDERALIST* NO. 6, at 33–36 (Alexander Hamilton) (E. H. Scott ed., 1898).

erent's right to confiscation is the salience of private property rights over competing claims of confiscation made by sovereigns. For example, Alexander Hamilton supported the prohibition against confiscation contained in the Jay Treaty in the strongest terms, stating in part:

No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation.⁴³

The rise of individualism associated with the Enlightenment that had influenced the American and French revolutions,⁴⁴ and the Spanish Constitution of 1812⁴⁵ are closely associated with the importance placed on protecting the inalienable rights to individual property from tyrannical governments.⁴⁶ The Lockean views of property ownership were argued to derive rights from the labor of the individual rather than from a grant from the sovereign.⁴⁷ As such, some of the framers of the U.S. Constitution argued that when individuals were deprived of certain inalienable rights, such as the right to property,⁴⁸ they were entitled to revolt against such deprivations of their inalienable rights.⁴⁹

43. Otto C. Sommerich, *A Brief Against Confiscation*, 11 LAW & CONTEMP. PROBS. 152, 156 (1946) (quoting 4 HAMILTON'S WORKS 343 (Lodge ed., 1885)).

44. See G. Richard Jansen, *The Provenance of Liberty and the Evolution of Political Thinking in the United States* (Feb. 1, 2003) (unpublished manuscript, on file with *BJIL*), available at <http://lamar.colostate.edu/~grjan/provenanceliberty.html?>. The merchant and bourgeoisie classes were strong driving forces behind the French Revolution in 1789. *Id.*

45. The Spanish Constitution of 1812 was based in large part on the Jacobian Constitution of 1793. Karl Marx, *Revolutionary Spain* (1854), in XII WORKS OF MARXISM-LLENINISM: REVOLUTION IN SPAIN 62–63 (1939).

46. Jansen, *supra* note 44. The French National Assembly, in its Declaration of the Rights of Man and the Citizen, written by the Marquis de Lafayette, assisted by Thomas Jefferson, included property as a natural and inalienable right of man. *Id.*

47. John Locke, *Second Treatise on Government*, in TWO TREATISES OF GOVERNMENT 285, 303–20 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

48. Jefferson, during the Revolution, wrote of the right of people to recognize a new government when the existing government fails to protect those rights. See Christian G. Fritz, *Recovering the Lost Worlds of America's Written Constitution*, 68 ALB. L. REV. 261, 264 (2005) ("In the Declaration of Independence, Thomas Jefferson considered the people 'endowed by their Creator with certain unalienable Rights,' including the right to alter or to abolish governments destructive of the legitimate ends of government. These words are often associated with Locke's justification for the right of revolution."). The Fifth Amendment provides that "no person shall be . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. See generally J. FRANKLIN JAMESON, *THE AMERICAN REVOLUTION CONSIDERED AS A SOCIAL MOVEMENT* 27–46 (Beacon Press

In international humanitarian law, this attitude is reflected in the prohibition of destruction or seizure of enemy property “unless . . . imperatively demanded by the necessities of war” found in Article 23(g) of the 1907 Hague Regulations,⁵⁰ as well as Article 33 of Geneva Convention Relative to the Protection of Civilians in Time of War (IV) which prohibits pillage and reprisals against protected persons’ property.⁵¹ With respect to occupied territory, Article 53 of the Geneva Convention Relative to the Protection of Civilians in Time of War (IV) prohibits destruction of private property except where “rendered absolutely necessary by military operations”⁵² while Article 46 of the Hague Regulations prohibits confiscation,⁵³ and Article 47 forbids pillaging by military authorities in occupied territory.⁵⁴ To supplement this broad range of prohibitions of interfering with private property during war is the customary international law rule that territory cannot be lawfully acquired through the use of force.⁵⁵

The strong support of private property rights against belligerent confiscation found similar expression in the post-Second World War period, when a jurist noted that the norm against confiscation of private property was an important precondition for the United Nations to build durable peace.⁵⁶ Perhaps building on this view, Article 8(2)(a)(iv) of the Statute of the International Criminal Court, which entered into force on July 1,

1964) (1926) (discussing how the ownership system of land influenced the American Revolution).

49. David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring With the People*, 81 CORNELL L. REV. 879, 886 (1996). The framers were highly skeptical of a powerful centralized government and favored an inherent right of the citizenry to revolt when deprived of certain inalienable rights. *Id.*

50. Convention Respecting the Laws and Customs of War on Land art. 23, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

51. Geneva Convention Relative to the Protection of Civilians in Time of War art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

52. *Id.* art. 53.

53. Hague Regulations, *supra* note 50, art. 46.

54. *Id.* art. 47. Notably, in the 1970s, the U.S. State Department took the position that Israel’s occupation of the Gulf of Suez did not authorize it to violate the concessionary rights granted by Egypt to an American corporation, as these rights were protected under the law of belligerent occupation. Memorandum of Law, Monroe Leigh, United States Department of State, Israel’s Right to Develop New Oil Fields in Sinai and the Gulf of Suez (Oct. 1, 1976), *reprinted in* 16 I.L.M. 733, 750–53 (1977).

55. See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Annex, G.A. Res. 2625, para. 1, U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (Oct. 24, 1970).

56. John Dickinson, *Enemy-Owned Property: Restitution or Confiscation?*, 22 FOREIGN AFF. 126, 141 (1943).

2002, makes it a war crime to engage in “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and unwantonly.”

In *Congo v. Uganda*, decided by the International Court of Justice (ICJ) in December 2005, the Court found against Uganda for violating rules proscribing the looting, plundering, and exploitation of the natural resources of the Democratic Republic of the Congo.⁵⁷ Similarly, in December 2005, the Eritrea Ethiopia Claims Commission found Ethiopia liable for failing to compensate Eritrean civilians whose trucks and buses it had requisitioned contrary to international law rules requiring full compensation for wartime confiscations.⁵⁸

The reinforcement of the primacy of private property over the rights of belligerents to confiscate it in the foregoing rules and cases is belied by other rules and cases that continue to justify the confiscation of private property without compensation. I outlined a variety of such rules in Part II.A above. Professor Joseph Singer has, for example, shown how, notwithstanding the extremely strong support for private property rights in the United States, courts have simultaneously justified the uncompensated taking of American Indian property.⁵⁹ On the international level, I have demonstrated how the deferential application of the rules prohibiting interference with the private property of Italians and Germans during the post-Second World War Allied occupation stands in sharp contrast with the widespread disregard of these rules in the non-Western societies of Japan after the Second World War and Iraq following the U.S.-led war.⁶⁰ In short, there is a tension between the right to private property and a sovereign's claim to broad ranging power. As Franz Neumann observed regarding the opposition between sovereignty and the rule of law—if we were to imagine the limitation of the sovereign right to con-

57. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 7, 75–79 (Dec. 19). The Court found that Uganda had failed to live up to its obligation of vigilance as an occupying power as required by Article 43 of the Hague Regulations of 1907 by failing to stop the “looting, plundering and exploitation” of the natural resources of the Congolese territory it occupied. *Id.* at 79.

58. Eritrea-Ethiopia Claims Commission, *Partial Award, Loss of Property in Ethiopia Owned by Non-Residents, Eritrea's Claim 24*, paras. 15–26 (Dec. 19, 2005), available at <http://pca-cpa.org/ENGLISH/RPC/EECC/FINAL%20ER%20CLAIM%2024.pdf>; see also *Partial Claims Award, Civilians Claims 15, 16, 23, 27–32*, *supra* note 2, paras. 123–52.

59. Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 1–5 (1991).

60. James Gathii, *Foreign and Other Economic Rights Upon Conquest and Occupation: Iraq in Comparative and Historical Context*, 25 U. PA. J. INT'L ECON. L. 491, 542–46 (2004).

fiscate as limited by the rule of law—whenever a reconciliation between the two is sought, “insoluble contradictions” arise.⁶¹

C. *Balancing Between Commerce and Confiscation*

Courts and jurists invented a number of doctrines between the two irreconcilable views of the absolute right of confiscation during wartime, on the one hand, and the freedom of commerce during wartime, on the other. Thus the third manifestation of the relationship between commerce and confiscation during wartime that I address here is a continuum between these two otherwise opposing ideas. In the United States, the balancing between the right to confiscate and to engage in commerce during war found its clearest expression when the United States was less powerful as an economic and military state relative to Britain and France and at a time when countries like the Netherlands had superior naval capabilities in safeguarding their commerce. To illustrate this balancing, I will also examine confiscation cases arising from the American Civil War, particularly those that arose in relation to congressional limitations on the Union government’s power to confiscate the assets of southerners.

The first doctrine I will examine is that of suspension and restoration. One of the best cases illustrating this doctrine is *Hanger v. Abbott*, a Civil War case in which the Court held that debts and executed contracts that existed prior to the Civil War and that played no part in undertaking the war, even though confiscated, remained suspended during the war

61. FRANZ NEUMANN, *THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY* 4 (1986). Justice Marshall recognized this dilemma in *Brown*, 12 U.S. at 122–23, where he noted:

[W]ar gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall chuse [sic] to bring it into operation, the judicial department must give effect to its will.

In this case, Justice Marshall, however, concluded that the modern rule was that in the absence of congressional authorization to confiscate enemy property upon the declaration of war, there was no automatic power of confiscation. *Id.* at 126–27. In *The Nereide*, 13 U.S. 388 (1815), Justice Marshall, speaking of two conflicting rules of neutrality of commerce, one allowing a neutral to carry enemy property without confiscation and another to the contrary, noted: “If reason can furnish no evidence of the indissolubility of the two maxims, the supporters of that proposition will certainly derive no aid from the history of their progress from the first attempts at their introduction to the present moment.” *Id.* at 420.

and revived with the restoration of peace.⁶² By contrast, under the rule in this case, executory contracts are dissolved on the premise that “all trading, negotiation, communication, and intercourse between the citizens of one of the belligerents with those of the other” ceased with the declaration of war.⁶³ The doctrine of suspension enunciated in *Hanger v. Abbott* is a sharp departure from cases like *Miller v. United States* in which the Supreme Court had held that the mere presence of property within the enemy territory made the property of those present therein subject to capture and confiscation.⁶⁴

Closely related to the doctrine of suspension is the view of the Supreme Court in *Haycraft v. United States*.⁶⁵ In this case an insurgent's cotton had been confiscated and sold by the Union government during the Civil War. The insurgent then sought amnesty and pardon as provided by statute in order to be entitled to recover the proceeds of the sale of his or her property.⁶⁶ Under the statute, pardon and amnesty therefore had the effect of restoring the property rights of the insurgent or enemy whose property had been confiscated. In *Klein v. United States*, the Supreme Court held that under the 1863 Captured and Abandoned Property Act, those who had not given aid or comfort to the rebellion and whose property had nonetheless been seized or confiscated were not divested of their ownership in the captured property.⁶⁷

62. *Hanger v. Abbott*, 73 U.S. 532, 536 (1867). The court also notes that this rule is justified by the fact that a creditor has no ability to sue for the debt during the war since the courts where the debtor is located are closed or inaccessible. Thus, the law of nations results in the suspension of the debt during the pendency of the war. The court also notes that the statute of limitations stops running with declaration of the war and with the return to peace, the statute of limitations starts to run. *Id.* at 539–40.

63. *Id.* at 535. By contrast, executed contracts such as a preexisting debt are not dissolved but suspended. *Id.* at 536.

64. *Miller v. United States*, 78 U.S. (11 Wall.) 268, 306 (1870); *see id.* at 317–18 (Field, J., dissenting).

65. *Haycraft v. United States*, 89 U.S. (22 Wall.) 11 (1874).

66. *Id.* at 95–96. *See also* *United States v. Klein*, 80 U.S. 128, 128–29 (1871).

67. *Klein*, 80 U.S. at 139 (holding in part: “(1.) That the cotton of the petitioner was, by the general policy of the government, exempt from capture after the National forces took possession of Savannah. (2.) That this policy was *subject to modification* by the government, or by the commanding general, in the exercise of his military discretion. (3.) That the right of possession in private property is not changed, in general, by capture of the place where it happens to be, except upon actual seizure in obedience to the orders of the commanding general.”) (emphasis added). Another doctrine demonstrating the absolute power of confiscation had moderating doctrines is the rule permitting transactions that are the result of necessity between an alien enemy and a citizen. *See Hallet v. Jenks*, 7 U.S. (3 Cranch) 210 (1805).

The United States was even more circumspect in exercising a right to confiscation in its international relations in the late eighteenth and early nineteenth century. Thomas Jefferson reflected this caution in 1793 when he summed up U.S. policy on confiscation of a belligerent's private property by saying that "the making of reprisal on a nation is a very serious thing. Remonstrance [and] refusal of satisfaction ought to precede; [and] when reprisal follows it is considered as an act of war."⁶⁸ Thus while the United States in its initial years as a nation recognized the right of a belligerent to confiscate the goods of its enemy, it wished to remain neutral in the ongoing conflicts between Britain and France, and took no position on either side in an attempt to "cultivate the arts of peace."⁶⁹ In *Findlay v. The William*, a Pennsylvania court therefore observed that it was "difficult for a *neutral nation*, with the best dispositions, so to conduct itself as not to displease one or the other of belligerent parties, heated with the rage of war, and jealous of even common acts of justice or friendship on its part."⁷⁰

The doctrine of neutrality and the caution expressed in establishing the legality of confiscations of foreign states announced in *Findlay* can best be understood against the background of the new government's desire to forge peaceful relations with foreign nations. There was a practical policy rationale for U.S. neutrality. As a relatively new nation, the United States lacked the military resources to wage war with superpowers of the period such as England and France as well as Spain and Holland.⁷¹ Fur-

68. Thomas Jefferson, *Opinion on "The Little Sarah,"* in 7 THE WORKS OF THOMAS JEFFERSON 332, 335 (Paul Leicester Ford ed., 1904).

69. *Findlay v. The William*, 9 F. Cas. 57, 61 (D. Pa. 1793). *Findlay* held, inter alia, that as a neutral nation, the United States does not have the right to affect the confiscation practices of another sovereign, but can forbid the sale of confiscated goods on American soil. *Id.* at 59.

70. *Id.* (emphasis added).

71. BENSON J. LOSSING, THE PICTORIAL FIELD-BOOK OF THE WAR OF 1812, at 154 (1869). Lossing notes that a French decree of December 17, 1807, promulgated in response to British decrees, in turn sparked similar decrees from Spain and Holland. As a result, the commerce of the United States was "swept from the ocean" within a few months, even though it had been conducted "in strict accordance with the acknowledged laws of civilized nations." *Id.* As a result, Lossing notes that the United States was

utterly unable, by any power it then possessed, to resist the robbers upon the great highway of nations [and] the independence of the republic had no actual record. It had been theoretically declared on parchment a quarter of a century before, but the nation and its interests were now as much subservient to British orders in council and French imperial decrees as when George the Third sent governors to the colonies of which it was composed

Id.

ther complicating political matters, the general population had a great distrust and contempt for the creation of a standing military, fearing that a permanent military would become little more than a resource for political patronage jobs, among other concerns.⁷² As a result, early lawmakers were both practically and politically estopped from adopting a policy of confiscation. Instead of fighting British and French confiscation of American cargo with force,⁷³ U.S. diplomats attempted to use access to American ports as leverage in their treaties with England.⁷⁴ This infuriated the French, who, feeling betrayed by the nation they had assisted in overthrowing the British, embarked upon a campaign of seizure of American goods on the high seas.⁷⁵

Following the defeat of Thomas Jefferson to John Adams in the 1797 presidential election, France commissioned its war vessels to seize certain U.S. ships.⁷⁶ In January of the following year, France's Executive Directory issued a proclamation whereby any ship containing any item of English manufacture was subject to seizure.⁷⁷ This led to the United States' first quasi-war. In retaliation to French privateering,⁷⁸ Congress authorized the capture of French military vessels,⁷⁹ and the seizure of

72. *Id.* at 167–69. Lossing also notes that “notwithstanding the many deprivations upon American commerce and the increasing menace of the belligerents of Europe, very little had been done to increase the efficiency of the navy of the United States since its reduction at the close of the war with the Barbary States.” *Id.*

73. 3 HISTORY OF NEW YORK STATE 1523–1927, at 1072 (James Sullivan et al. eds., 1927). By 1792, Northeastern merchants were already complaining of British confiscation of American cargo. *Id.*

74. Gregory E. Fehlings, *America's First Limited War*, NAVAL WAR C. REV. (Summer 2000), <http://www.nwc.navy.mil/press/Review/2000/summer/art4-Su0.htm> (last visited Mar. 23, 2006). In 1794, the United States and Britain entered into Jay's Treaty, which authorized British privateers' use of American ports in their conflicts against France. *Id.*

75. *Id.*

76. See Decree of the Executive Directory Concerning the Navigation of Neutral Vessels, Loaded With Merchandise Belonging to Enemies of the Republic, and the Judgments on the Trials Relative to the Validity of Maritime Prizes, 12 Ventose *an* 5 (Mar. 2, 1797), Duv. & Boc. 358 (1825). In reaction to Adams' defeat of Jefferson, the Directory (France) commissioned its war ships and privateers to seize all U.S. flagged vessels with insufficient cargo inventories or carrying contraband. See ALEXANDER DECONDE, THE QUASI-WAR 36–73 (1966).

77. See Law Which Determines the Character of Vessels From Their Cargo, Especially Those Loaded With English Merchandise, 29 Nivose *an* 6 (Jan. 18, 1798), Duv. & Boc. 214 (1825).

78. See *Talbot v. Seeman*, 5 U.S. 1, 6 (1801).

79. An Act to Authorize the Defence of the Merchant Vessels of the United States Against French Depredations, ch. 60, §§ 1–2, 5th Cong., 2d Sess., *in* 1 THE PUBLIC

French cargo.⁸⁰ While the congressional acts gave American vessels the right to seize French property, the laws were not unfettered,⁸¹ and contained a number of restrictions regarding the nature of property to be confiscated.⁸² One act provided that aliens of hostile nations could depart the United States with their property intact.⁸³

The United States' legislated seizure of its enemy's private property provided the Supreme Court with an opportunity to define early American judicial attitudes towards the law of nations. In the 1801 opinion in *Talbot v. Seeman*, Chief Justice Marshall, writing for the Court, upheld the constitutionality of the 1798 and 1799 congressional acts designed to safeguard U.S. commerce from armed foreign vessels,⁸⁴ but limited the scope of the acts' application, and provided some criticism of the doctrine of confiscation.⁸⁵ In *The Nereide*, Marshall articulated the principle that war does not confer the right to confiscate the goods of a friend,⁸⁶ and that property belonging to a neutral nation found on a belligerent ship was not belligerent in nature, and thus not subject to confiscation.⁸⁷ According to Marshall, it was "harsh indeed to condemn neutral property, in a case in which it was clearly proved to be neutral."⁸⁸

STATUTES AT LARGE OF THE UNITED STATES OF AMERICA 572–73 (Richard Peters ed., Little & Brown 1845) (1798) [hereinafter PUBLIC STATUTES].

80. An Act to Further Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof, ch. 2, § 6, 5th Cong., 3d Sess., in PUBLIC STATUTES, *supra* note 79, at 615–16.

81. See Fehlings, *supra* note 74. Congress specifically withheld the right to prey upon unarmed French vessels in fear of an all-out war between the French and the United States. The United States' reluctance to authorize seizure of unarmed French vessels was less a product of enlightened thinking and more the product of America's fear of an all-out war and possible French invasion. *Id.*

82. See An Act to Further Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof, ch. 2, § 6, 5th Cong., 3d Sess., in PUBLIC STATUTES, *supra* note 79, at 615–16.

83. *Id.* at 615; see 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 132 (O.W. Holmes, Jr. ed., Little, Brown & Co. 12th ed. 1873) (1826).

84. See *Talbot v. Seeman*, 5 U.S. 1, 9, 31 (1801).

85. *Id.* at 41. Marshall wrote that a violation of the law of nations by one belligerent did not justify a subsequent retributive violation by the other belligerent. Marshall added that remonstrance was the appropriate initial course of action for an aggrieved nation, but conceded that once all remonstrative options had been exhausted, use of hostilities was in conformity with the law of nations. *Id.*

86. *The Nereide*, 13 U.S. at 418–19. Marshall attributed recent variations of this principle to nations acting in their own self-interest, deeming a non-belligerent's right to avoid confiscation as a "simple and natural principle of public law." *Id.* at 419.

87. *Id.* at 419–20.

88. *Id.* at 417.

American efforts at retaliation showed little success, and by 1800, French military vessels and privateers had seized over two thousand American vessels.⁸⁹ Throughout the next decade, the French government continued to issue decrees and proclamations authorizing the seizure of American vessels and property.⁹⁰ This provided ample opportunity for Jefferson's political opponents to criticize his policy.⁹¹

A further complication to U.S. policy on confiscation and commerce was the increasing number of English confiscations of American vessels on the high seas.⁹² With congressional acts authorizing the United States to seize belligerent property having little to no effect on French and British privateering, President Jefferson offered a new policy approach whereby the United States would cut economic ties with countries confiscating the private property of its citizens.⁹³ The effects of this policy

89. See Fehlings, *supra* note 74. In 1797, Secretary of State Pickering reported to Congress that during the previous eleven months, the French had captured 316 merchant ships. *Id.*

90. The Berlin Decree of November 21, 1806 declared the British Isles closed to commerce and authorized the seizure of both packages sent to England and letters written in the English language. Nov. 21, 1806, Duv. & Boc. 66 (1826). The Milan Decree, issued by Napoleon on December 17, 1807, authorized seizure of any ship and all cargo traveling from or to an English port. Dec. 17, 1807, Duv. & Boc. 223 (1826). The Bayonne Decree, issued on April 23, 1808, authorized the immediate seizure of all American vessels found in France. LOSSING, *supra* note 71, at 170. The Rambouillet Decree, issued on March 23, 1810, Duv. & Boc. 69 (1826), in response to the Non-Intercourse Act, ch. 24, 2 Stat. 528 (1809), provided that any American ship traveling in French controlled territory or any ship carrying an American or American goods was subject to seizure.

91. LOSSING, *supra* note 71, at 168. Lossing quoted a Jefferson critic who noted that his policy was "wasteful imbecility." *Id.*

92. LOSSING, *supra* note 71, at 158. The attack on the American vessel, *The Chesapeake*, by the British was heavily criticized across the board within the United States. *Id.*

93. See generally L.M. SEARS, JEFFERSON AND THE EMBARGO (1927) (exploring Jefferson's perspective on the use of embargo and its role in the law of nations). The first attempt was the Nonimportation Act of 1806, ch. 29, 2 Stat. 379, forbidding the importation of specified British goods in order to force England to relax its rulings on cargoes and sailors. The act was suspended, and replaced by the Embargo Act of 1807, ch. 5, 2 Stat. 451, which forbade all international trade to and from American ports. Britain and France stood firm, and not enough pressure could be brought to bear. In March of 1809, the embargo was superseded by the Non-Intercourse Act, ch. 24, 2 Stat. 528. This allowed resumption of all commercial intercourse except with Britain and France, but failed to bring pressure on the belligerents. In 1810, it was replaced by Macon's Bill No. 2, ch. 39, 2 Stat. 605, which provided for trade with both Britain and France so long as they timely revoked their restrictions on American shipping; the President was empowered to forbid commerce with either Britain or France if they failed to revoke their offensive measures.

shift did little to thwart privateering.⁹⁴ In 1810, America's resumption of trade led France to repeal many of its decrees authorizing confiscation of American goods.⁹⁵ England's refusal to follow suit and the continued plundering of American goods led President Madison to ask Congress for a declaration of war, and the War of 1812 ensued.

Following the 1812 war, U.S. policy regarding a sovereign's confiscatory rights continued to shift from the absolute to the limited. Some scholars have attributed this shift to the expansion of voting rights during the 1820s and 1830s.⁹⁶ The argument in support of this shift is that with a larger populace able to express their preferences through the ballot box, politicians began paying more attention to the right of individual ownership of personal property. More importantly, the courts, and Marshall in particular, established that it was within the judicial power to chastise those sovereigns abusing the right to seize the property of belligerents. While many of the Court's decisions during this time period left the ultimate decision on matters of confiscation in the hands of the legislative branch, the Court was quick to limit acts of confiscation performed outside the realm of war.⁹⁷

In sum, doctrines balancing the right of confiscation and of private property, in part was a reflection that early U.S. leaders lacked the military strength and economic leverage required for the application of the sovereign's absolute power to seize private property during times of conflict. As a result, early American exercise of its confiscatory power was used as a retributive last resort when all other methods of diplomacy had been exhausted. However, even as American military strength grew

94. SEARS, *supra* note 93, at 124–42. Jefferson's acts had little impact on the seizure of American cargo, but irritated northeast merchants who expressed their concern in the ballot box and in the press. However, Sears suggests that ultimately northeast merchants adapted to the embargo as it spurred the development of domestic manufacturing in the north. While southerners tended to support the embargo, it actually harmed them as the embargo did not encourage the development of manufacturing in the south. *See id.* at 125–28, 145–51.

95. In a letter dated August 5, 1810, the Duke of Cadore, speaking on behalf of Napoleon, declared the Berlin and Milan decrees repealed, effective November 1, 1810. LOSSING, *supra* note 71, at 178–79.

96. *See* Jansen, *supra* note 44 (“During the 1820's and 1830's suffrage became wider and property and freehold requirements for voting gradually were abandoned. More offices at state and local levels [also] became elective rather than appointive in nature.”).

97. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 86–87 (1833). In *Percheman*, private landowners used the United States for enforcement of the 1819 Treaty regarding Spanish cessation of Florida. Specifically, the treaty guaranteed landowners continued possession of all property owned prior to the change in sovereignty. Justice Marshall, writing for the court, held that a change in sovereignty does not affect the right of private individuals to possess and enjoy their property. *Id.*

throughout the early nineteenth century, the Supreme Court, and specifically, Justice Marshall, sought to limit the sovereign's confiscatory power, and consistently held that the decision to confiscate lay in the hands of elected officials rather than with the courts.⁹⁸ The foregoing cases and analysis demonstrate judicial creativity in managing the tension between the absolute powers of confiscation, on the one hand, and giving commerce a definite freedom during wartime, on the other. By inventing a variety of doctrines, courts deemphasized sharp distinctions between power to confiscate and the right to engage in commerce during wartime.

D. The Exceptional Circumstances Doctrine

The exceptional circumstances doctrine is the fourth and final doctrine on the relationship between commerce and conquest during war that I will explore. Unlike any of the foregoing doctrines, it is founded on extremely broad and troublesome claims of authority. For example, while Justice Marshall strongly argued in favor of limiting the power of confiscation without congressional grants of approval, he nevertheless argued that conquest⁹⁹ and discovery¹⁰⁰ give conquerors a legitimate title to the territory of Native Americans. Hence, in exactly the same time period he was urging limitations on the power of confiscation, he was endorsing acquisition of title to territory by conquest and discovery. He also fa-

98. *Id.* at 89–90. In fact, Marshall labelled the practice of confiscation unjust and morally outrageous. *Id.* at 86–87.

99. In *Johnson v. M'Intosh*, 21 U.S. 543, 587 (1823), Marshall held that “[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”

100. According to Marshall:

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

Id. at 591. In affirming this further, Marshall notes:

This opinion conforms precisely to the principle which has been supposed to be recognised by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectionment.

Id. at 592. *See also id.* at 595.

vored the incorporation of conquered peoples into American society.¹⁰¹ However, he specially singled out what he referred to as Indian “tribes” for non-incorporation since in his view they were “fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.”¹⁰² Marshall argued that it was impossible to “govern them as a distinct people” and because of their fierceness, it was necessary to enforce European claims to the land occupied by these Indians “by the sword.”¹⁰³ War then, rather than incorporation, was the solution for the subjugation of the Indian peoples. Marshall endorsed this subjugation by arguing that “European policy, numbers, and skill, prevailed” over Indian aggression.¹⁰⁴

As Marshall’s holding in *Johnson v. M’Intosh* illustrates, under this exceptional circumstances doctrine, the power of confiscating or assuming title over Indian territory arises not simply out of a belligerent’s absolute power, but rather out of the presumed backwardness of those whose territory or property has been seized as well as by virtue of the proclaimed superiority of Europeans over these peoples. Similar to Marshall’s unqualified support of the effect of conquest on Indian territory and the arrogance of European conquest, a British court in the early twentieth century upheld the refusal of the British government to compensate a South African company whose gold had been seized. The court, recalling an earlier case, observed that “where the King of England conquers a country . . . by saving the lives of the people conquered [he] gains a right and property in such people, in consequence of which he may impose upon them what laws he pleases.”¹⁰⁵

This basis of this doctrine in the common law finds expression in the landmark 1602 *Calvin’s Case* where Lord Coke noted:

And upon this ground there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath *vitæ et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King

101. *Id.* at 589.

102. *Id.* at 590.

103. *Id.* Marshall claimed that the Indians were incapable of legally owning the land and that they merely possessed it and as such could not pass on valid title to the white population. Marshall claimed that the Indians were merely the ancient inhabitants of the land. *Id.* at 591.

104. *Id.* at 590.

105. *W. Rand Cent. Gold Mining Co. v. R.*, [1905] 2 K.B. 391, 406 (U.K.) (emphasis added).

should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue¹⁰⁶

Similarly, Alexander the Great extolled the idea that conquerors dictate the law to the conquered, and the conquered are expected to abide by that law.¹⁰⁷ Even during the Roman Empire, it was “an indubitable right of war, for the conqueror to impose whatever terms he pleased upon the conquered.”¹⁰⁸ There is clearly a lineage of Western thought exemplified in *Calvin’s Case* designating non-Christian and non-European peoples not only as infidels, but as perpetual enemies with whom their conquerors could have no peace.¹⁰⁹ Some scholars have argued that the prejudice against non-believers in *Calvin’s Case* was a throwback to a very medieval time and that this dictum was also quite contrary to the “commercial interests of a country which was beginning to conduct a prosperous trade with infidels.”¹¹⁰

It is certainly true that the prejudice against non-believers is medieval.¹¹¹ It is also important to note that this prejudice was sometimes expressed in subtle, though still Eurocentric, ways in the process of justifying European conquest and acquisition of non-European territory and resources.¹¹² For example, in a groundbreaking analysis of the writings of

106. *Calvin v. Smith*, (1608) 7 Coke Rep. 1a, 77 Eng. Rep. 377, 397–98 (K.B.).

107. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 348 (A. C. Campbell trans., M. Walter Dunne Publisher 1901) (1625), available at http://oll.libertyfund.org:81/Texts/Grotius0110/LawOfWarPeace/0138_Bk.pdf.

108. *Id.*

109. *Calvin*, 77 Eng. Rep. at 397; see 8 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 409 (2nd ed., Little, Brown, & Company 1937) (1903).

110. 8 HOLDSWORTH, *supra* note 109, at 409. The writ *de haeretico comburendo*, an English writ dating back to 1401, permitted the execution of a heretic. BLACK’S LAW DICTIONARY 435–36 (7th ed. 1999).

111. Today, international law recognizes freedom of religion. International Covenant on Civil and Political Rights, art. 18, *adopted and opened for signature* Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171.

112. See, e.g., Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 244–45 (1986). Williams notes:

Eurocentrically-defined reason’s mediating function, represented conceptually in the law of God and nature, was used to determine the status and rights of all individuals according to universal normative criteria. Those who could presumptively comport their conduct according to these universalized norms, such as European Christians at peace with the King, were granted rights consistent with their status. Those who presumptively could not, such as infidels, were not

Vitoria, the sixteenth century international legal jurist credited with being one of the founders of international law, Antony Anghie shows that while Vitoria exhibited a progressive approach to dealing with the Indians by arguing in favor of incorporating them within the universal law of *jus gentium*, their incorporation into this universal law in turn served as the basis for justifying the imposition of Spanish discipline on them.¹¹³ Vitoria argued that since Indians were resisting the right of the Spanish to sojourn on their territory, the Spanish were entitled to use forcible means to enforce this right.¹¹⁴ In addition, Vitoria argued that the ordinary prohibitions of waging war do not apply to Indians. In Vitoria's words:

And so when a war is at that pass that the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods are justifiable, then it is also justifiable to carry all enemy-subjects off into captivity, whether they be guilty or guiltless. And inasmuch as war with pagans is of this type, seeing that it is perpetual and that they can never make amends for the wrongs and damages they have wrought, it is indubitably lawful to carry off both the children and women of the Saracens into captivity and slavery.¹¹⁵

Vitoria's writings here sound eerily similar to Lord Coke's dictum in *Calvin's Case*.¹¹⁶ Like Lord Coke, Vitoria justified as lawful the killing of the Indians in the course of the war noting that this is "especially the case against the unbeliever, from whom it is useless ever to hope for a just peace on any terms."¹¹⁷ Thus, according to Vitoria, war and the destruction of all the Indians who bore arms against the invading Spanish conquerors were the only remedies available to the Spaniards.¹¹⁸

What is remarkable about Justice Marshall, Vitoria, and Lord Coke's dictum in *Calvin's Case* is the genealogical similarity in their racially charged jurisprudence with respect to non-Christian and non-European

even entitled to inclusion within the hierarchy of statuses accorded to individuals in Coke's English common law jurisprudence.

Id.

113. Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321, 327-31 (1996).

114. *Id.* at 328.

115. *Id.* at 330.

116. *Calvin*, 77 Eng. Rep. at 398.

117. Anghie, *supra* note 113, at 330.

118. *Id.* at 328. Under Eurocentric jurisprudence, conquest was thought necessary to "bring the Infidels and Savages' . . . to human Civility, and to a settled and quiet Government." Williams, *supra* note 112, at 246 (quoting S. COMMANGER, DOCUMENTS OF AMERICAN HISTORY 8 (1968)).

peoples. One could surmise that such similar jurisprudential moves arise in the encounter between metropolitan policy and local colonial conflict.¹¹⁹ As Laura Benton has argued, the extraterritorial expansion of metropolitan authority in the periphery produced predictable “routines for incorporating groups with separate legal identities in production and trade and for accommodating (or changing) culturally diverse ways of viewing the regulation and exchange of property.”¹²⁰ Thus widely repeated conflicts between people from vastly different cultural and racial backgrounds reproduce similar solutions and rules for ordering relations between them.¹²¹ The solution under English law for ordering these relations was “Christian subjugation and remediation.”¹²² Ordering these relations then is ultimately a question of power.¹²³

In my view, the ongoing haphazard¹²⁴ and massive transformation of the Iraqi economy by the U.S.-led occupation parallels the expansive and extraordinary powers of subjugating non-European peoples as claimed by Vitoria, Lord Coke, and Justice Marshall.¹²⁵ The 2003 Anglo-American war against Iraq was primarily premised on finding weapons of mass destruction to preempt their use in future terrorist attacks.¹²⁶ However, the goal of finding weapons of mass destruction came to

119. For further discussion, see LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900*, at 4–5 (2002), which has heavily influenced my work.

120. *Id.* at 5.

121. See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005) (arguing that sovereignty doctrine emerged through the encounter with cultural difference).

122. Williams, *supra* note 112, at 247.

123. See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 675 (1989) (arguing that the issues of power and sovereignty “dominate the scholarship of ‘federal courts’ jurisprudence”).

124. For an acknowledgement of the haphazard nature of this transformation by a senior U.S. administrator in Iraq, see L. PAUL BREMER III & MALCOLM MCCONNELL, *MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE* (2006). See also GEORGE PACKER, *THE ASSASSINS’ GATE: AMERICA IN IRAQ* (2005).

125. See Ash U. Bali, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT’L L. 431, 440–45 (2005) (criticizing the United States’ desire to establish a market economy in post-Saddam Iraq as in conflict with its obligations as an occupying power). See generally Henry H. Perritt, Jr., *Iraq and the Future of United States Foreign Policy: Failures of Legitimacy*, 31 SYRACUSE J. INT’L L. & COM. 149 (2004) (evaluating and critiquing the United States’ political trusteeship of Iraq). See also Gathii, *supra* note 60, at 534–43 (discussing the international rules governing an occupying power).

126. Robert F. Turner, *Operation Iraqi Freedom: Legal and Policy Considerations*, 27 HARV. J.L. & PUB. POL’Y 765, 778 (2004).

naught.¹²⁷ For this reason, other justifications given by the Bush and Blair administrations for going to Iraq need to be taken seriously. According to Colin Powell, then Secretary of State, the U.S.-led coalition was waging war to “liberate the Iraqi people”¹²⁸ from Saddam Hussein’s tyrannical dictatorship, including his torture chambers. Fully aware that the war against Saddam Hussein would be widely regarded as the conquest of a militarily weaker and oil-rich country, President Bush argued that the United States exercises its “power without conquest” and that it sacrifices “for the liberty of strangers.”¹²⁹ Thus, according to President Bush:

America is a nation with a mission, and that mission comes from our most basic beliefs. We have no desire to dominate, no ambitions of empire. Our aim is a democratic peace—a peace founded upon the dignity and rights of every man and woman. America acts in this cause with friends and allies at our side, yet we understand our special calling: This great republic will lead the cause of freedom.¹³⁰

Clearly then, spreading freedom and other humanitarian goals clothe the geopolitical ambitions of conquering states today as did the mission to spread the benefits of civilization during the times of Spanish conquest of the New World as seen by jurists like Vitoria. Similar to the jurisprudence of Justice Marshall with regard to American Indians or of Lord Coke with regard to the Irish in *Calvin’s Case*, the cause of freedom that justified the 2003 war against Iraq is an expression of military power laced with the desire to subjugate so-called “primitive” peoples.¹³¹

The mission of bringing freedom to Iraq and to the Middle East is no less informed by a view that presupposes the superiority and inevitability

127. Robert Cryer & A. P. Simester, *Iraq and the Use of Force: Do the Side-Effects Justify the Means?*, 7 THEORETICAL INQUIRIES IN L. 9, 10 (2006) (“In post-Saddam Iraq, after more than a year of searching, the coalition failed to find any evidence of WMD in Iraq.”).

128. Colin L. Powell, U.S. Secretary of State, Remarks at Briefing on the State Department’s 2002 Country Reports on Human Rights Practices (Mar. 31, 2003), available at <http://www.state.gov/secretary/former/powell/remarks/2003/19218.htm> (last visited Mar. 23, 2006).

129. George W. Bush, State of the Union Address (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-23.html> (last visited Mar. 23, 2006).

130. George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last visited Mar. 23, 2006).

131. For an excellent exposition of this theme in the context of human rights, see Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201 (2001).

of the values of liberty and freedom as Western norms to be spread around the globe with forcible means if need be.¹³² This then parallels Vitoria's sixteenth century views that the Spanish were free to wage war against the Indians if they resisted the right of the Spanish to sojourn in the New World.¹³³ Like Vitoria recognizing the humanity of the Indians, the Bush administration similarly acknowledges the humanity of the Iraqis and the peoples of the Middle East,¹³⁴ but it nevertheless justifies the use of force to spread the benefits of freedom to them.¹³⁵

Lurking¹³⁶ behind these humanitarian justifications is the fact that the United States and the United Kingdom were unable to procure Security Council consent to use force against Iraq or even to build a broad based coalition in the war effort.¹³⁷ Thus, it is legitimate to ask whether the reasons given for the invasion were pretexts for seeking control of one of the richest oil sources in the world today or whether it was to demonstrate the unparalleled military might of the United States to other rogue states.

The U.S.-led coalition also assumed broad powers in government-occupied Iraq. After the coalition single-handedly appointed Civilian Governor Paul Bremer without any apparent consultation with the then

132. Jacinta O'Hagan, *Conflict, Convergence or Co-existence? The Relevance of Culture in Reframing World Order*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 537, 565 (1999) (describing a "clash of civilizations" analysis where Western universalism "projects Western evolved norms and values" including the use of force as a means to achieve that end).

133. *See supra* notes 117–18.

134. Thus, according to President Bush, "Our desire is to help Iraqi citizens find the blessings of liberty within their own culture and their own traditions." *See* Press Release, White House, President Signs Iraq Resolution (Oct. 16, 2002), <http://www.whitehouse.gov/news/releases/2002/10/20021016-1.html> (last visited Mar. 23, 2006).

135. According to President Bush, "Part of the war on terror is to promote freedom in the Middle East." *See* Press Release, White House, President Discusses Energy, Iraq and Middle East (Aug. 19, 2003), <http://www.whitehouse.gov/news/releases/2003/08/20030819.html> (last visited Mar. 23, 2006).

136. The remainder of this section is largely based on and is a further exploration of a section of my previous article, James Thuo Gathii, *Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context*, 25 *U. PA. J. INT'L ECON. L.* 491, 536–43 (2004).

137. *See France Warns of "Illegitimate" War*, CNN, Feb. 26, 2003, <http://www.cnn.com/2003/WORLD/meast/02/26/sprj.irq.france.warn/index.html> (last visited Mar. 1, 2006). Countries argued that a U.S.-led force to overthrow Saddam Hussein without UN approval was an illegitimate use of force. They urged the United States to refrain from launching a unilateral invasion against Iraq, believing that international approval in the form of a Security Council Resolution should be obtained before any military attack was made. *See id.*

U.S.-appointed Iraqi Governing Council,¹³⁸ Bremer issued a series of wide-ranging orders authorizing, among other things, foreign investors to own up to one hundred percent interests in Iraqi companies (without profit repatriation conditions) in virtually all sectors of the economy¹³⁹ while leaving the oil industry in the hands of a professional management team who would be independent from political control;¹⁴⁰ the appointment of a former Shell Oil Company CEO to be chair of an advisory committee to oversee the rehabilitation of Iraq's oil industry;¹⁴¹ a flat tax;¹⁴² a U.S.-Middle East free trade area;¹⁴³ the privatization of the police force;¹⁴⁴ formation of a stock market with electronic trading;¹⁴⁵ and the establishment of modern income tax, banking, and commercial law systems under the direction of U.S. contractors.¹⁴⁶

A secret plan dubbed "Moving the Iraqi Economy From Recovery to Sustainable Growth," drafted in part by U.S. Treasury Department officials, is widely regarded as a blueprint for reorganizing the Iraqi econ-

138. See Dmitry Kirsanov, *Paul Bremer Appointed Chief of Civilian Authorities in Iraq*, ITAR-TASS NEWS AGENCY, May 2, 2003.

139. Coalition Provisional Authority Order No. 39: Foreign Investment (Sept. 19, 2003), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*). Some commentators have suggested that this order is highly troublesome since it conflicts with the Iraqi Constitution. See Thomas Catan, *Iraq Business Deals May Be Invalid*, *Law Experts Warn*, FIN. TIMES, Oct. 29, 2003, at 14. An article published by the conservative Heritage Foundation has called for widespread privatization of publicly held Iraqi assets. Ariel Cohen & Gerald P. O'Driscoll, Jr., *The Road to Economic Prosperity for a Post-Saddam Iraq*, HERITAGE FOUND., Mar. 5, 2003, <http://www.heritage.org/Research/MiddleEast/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=37452>.

140. See Chip Cummins, *State-Run Oil Company is Being Weighed for Iraq*, WALL ST. J., Jan. 7, 2004, at A1 (noting the opinion of the occupation advisors that the oil industry should be state-owned).

141. See Neela Banerjee, *A Retired Shell Executive Seen as Likely Head of Production*, N.Y. TIMES, Apr. 2, 2003, at B12 (noting that the former chief executive of Shell Oil is expected to be the leading candidate to oversee Iraqi oil production).

142. Coalition Provisional Authority Order No. 37: Tax Strategy for 2003 (Sept. 19, 2003), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*). The flat rate tax is apparently down from 45 percent under Saddam Hussein. Dana Milbank & Walter Pincus, *U.S. Administrator Imposes Flat Tax System on Iraq*, WASH. POST, Nov. 2, 2003, at A09.

143. See Jess Bravin & Chip Cummins, *U.S. Offers Concessions to U.N. in Bid to Lift Sanctions on Iraq*, WALL ST. J., May 9, 2003, at A1.

144. See Andrew Higgins, *As it Wields Power, U.S. Outsources Law and Order Work*, WALL ST. J., Feb. 2, 2004, at A1.

145. See Neil King, Jr., *Bush Officials Draft Broad Plan for Free-Market Economy in Iraq*, WALL ST. J., May 1, 2003, at A1. Private American contractors will be primarily responsible for establishing the proposed Iraqi electronic stock market. *Id.*

146. See *id.* at A8; see also Bob Sherwood, *Legal Reconstruction: Investors Want Reassurance Over Iraq's Framework of Commercial Law*, FIN. TIMES, Nov. 3, 2003, at 14.

omy along a free market model.¹⁴⁷ Two primary premises of the privatization effort underpinning this effort were that Western-based firms are capable of making Iraq's assets and resources more productive and that private ownership at a time when there is no stable government in the country is preferable to public ownership of assets.¹⁴⁸ In addition, these reforms are predicated on the view that a future Iraqi government organized around a model of free market democracy would be unlikely to become dictatorial or inclined to develop weapons of mass destruction as the Saddam Hussein regime.¹⁴⁹ These reforms have been widely criticized for being thinly veiled plans to give multinational corporations access to Iraqi assets.¹⁵⁰

The exercise of these expansive powers to transform Iraq into a free market economy incorporating controversial elements such as a flat tax have been justified as falling within the scope of the Coalition Provisional Authority's (CPA) mandate of promoting "the welfare of the Iraqi people through the effective administration of the territory"¹⁵¹ and assisting in the "economic reconstruction and the conditions for sustainable development"¹⁵² While this Security Council Resolution is at best a controversial source of such expansive authority, it is scarcely arguable that the powers exercised by the CPA in signing privatization contracts lacked legitimacy among a broad range of Iraqis¹⁵³ and potentially may be subject to reversal by a post-occupation Iraqi regime exercising its internationally recognized sovereignty over its natural and other re-

147. King, *supra* note 145, at A1, A8.

148. For similar views justifying a role for the private sector in post-war reconstruction, see Allan Gerson, *Peace Building: The Private Sector's Role*, 95 AM. J. INT'L. L. 102 (2001).

149. *See generally id.* (discussing the international community's recognition of the importance of private-sector involvement in unstable areas).

150. *E.g.*, Sara Flounders, *Why Best-Laid Plans Can Go Astray: The Corporate Looting of Iraq*, WORKERS WORLD, July 24, 2003, at 6-7, available at <http://workers.org/pdf/2003/ww072403.pdf>; *The Rape of Iraq*, WORLD SOCIALIST WEB SITE, May 9, 2003, http://www.wsws.org/articles/2003/may2003/iraq-m09_prn.shtml (last visited Feb. 23, 2006).

151. S.C. Res. 1483, para. 4, U.N. Doc. S/RES/1483 (May 22, 2003).

152. *Id.* para. 8(e).

153. *See* Cummins, *supra* note 140, at A1. *See also* ANDREW NEWTON & MALAIKA CULVERWELL, ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, SUSTAINABLE DEVELOPMENT PROGRAMME, LEGITIMACY RISKS AND PEACE-BUILDING OPPORTUNITIES: SCOPING THE ISSUES FOR BUSINESSES IN POST-WAR IRAQ 1, available at <http://www.chathamhouse.org.uk/viewdocument.php?documented=3953> (stating that "business must earn legitimacy if it is to approach successfully the opportunities arising from the need to reconstruct Iraq").

sources.¹⁵⁴ Further, justifying a broad mandate on the premise that it is consistent with the welfare of the Iraqi people is very reminiscent of the “sacred trust of civilization” under which European countries justified their mission of colonial rule and administration.¹⁵⁵

Thus, in addition to the broad ranging measures confiscating the property of Baathists discussed earlier in this paper and the massive transformation of the Iraqi economy without the consent of the Iraqi people based on the presumed superiority of the free market model of economic governance and constitutional democracy, the occupation forces have exercised extremely broad powers to transform the Iraqi economy into something of an idyllic bastion of the free markets.¹⁵⁶ Even the U.S. economy is not governed by market norms as extensively as U.S. reforms in Iraq suggest. For example, the conservative economic idea of a free tax imposed in Iraq has found little attraction in the United States. Further, it is ironic that the Bush administration, claiming the unassailable superiority of its conception of both human and economic freedom, has itself been responsible for torturing Iraqis¹⁵⁷ as well as massive economic corruption.¹⁵⁸

154. Paragraph 7 of General Assembly Resolution 1803 provides that the “[v]iolation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace.” G.A. Res. 1803, para. 7, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (Dec. 14, 1962). Paragraph 1 of General Assembly Resolution 1803 provides that “[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.” *Id.* para. 1. The preamble of Security Council Resolution 1483, in addition, provides that Iraqis have the right “freely to determine their own political future and control their own natural resources” S.C. Res. 1483, para. 4, U.N. Doc. S/RES/1483 (May 22, 2003). Note that U.N. Security Council Resolution 1511, adopted on October 16, 2003, underscored “that the sovereignty of Iraq resides in the State of Iraq,” and reaffirmed “the right of the Iraqi people freely to determine their own political future and control their own natural resources.” S.C. Res. 1511, pmbl., para. 2, U.N. Doc. S/RES/1511 (Oct. 16, 2003).

155. See generally James Thuo Gathii, *Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, 15 LEIDEN J. INT’L L. 581 (2002) (discussing the role of racism in the European colonization of African nations).

156. See Duncan Kennedy, *Shock and Awe Meets Market Shock: The Dangerous Mix of Economic and Military Goals in Iraq*, BOSTON REV., Oct.–Nov. 2003, available at <http://www.bostonreview.net/BR28.5/kennedy.html>.

157. See generally REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (2004), available at <http://download.repubblica.it/>

III. CONCLUSIONS

Since the end of the nineteenth century, commerce has often been thought of as an antidote to war and wartime confiscation. In this Article, I have demonstrated that the relationship between war and the confiscation of private property is more complicated. The view that either commerce or wartime confiscation supersede each other has to be seen against a series of legal doctrines such as neutrality and suspension. In addition, the continued vitality of the exceptional circumstances doctrine under which belligerents have claimed inherent authority to override commerce undermines the view that commerce has prevailed over wartime confiscations. The massive transformations of the Iraqi economy and society have been justified on the basis of such exceptional powers. It is therefore plausible to argue that it is not so much that commerce has prevailed over the barbarity of wartime confiscations, but that at various historical moments, powerful countries employ the ascendant ideas of liberty and freedom as a means of prevailing over culturally and politically different but militarily weaker societies.¹⁵⁹ My argument then has been that these projects of liberty and freedom as promoted and supported by the most powerful countries contain and sometimes conceal the

pdf/rapporto_crocerossa.pdf (discussing incidents of torture of Iraqi detainees by U.S. forces in Iraq prior to the revelations of the Abu Ghraib torture scandal). HUMAN RIGHTS WATCH, THE NEW IRAQ? TORTURE AND ILL TREATMENT OF DETAINEES IN IRAQI CUSTODY 2 (2005), available at <http://www.hrw.org/reports/2005/iraq0105/iraq0105.pdf> (demonstrating that human rights violations continue at the hands of Iraqi police and an inability to confirm that U.S. torture violations are not continuing). It is also noteworthy that the President has resisted congressional legislation to prohibit torture of overseas detainees. See *Bush Urged to Specify U.S. Policy on Torture*, L.A. TIMES, Jan. 20, 2006, at A18; Editorial, *Vice President for Torture*, WASH. POST, Oct. 26, 2005, at A18.

158. Michael Hirsh, *Follow the Money*, NEWSWEEK, Apr. 4, 2005, at 34 (discussing the fraudulent actions of Custer Battles, a military contractor in Iraq contracted by the U.S. government). Custer Battles overcharged occupation authorities and therefore increased its profits by claiming inflated costs. When the fraud was exposed by whistle-blowers who brought an action against the contractor, the Bush administration refused to participate and attempted to retrieve the money that the government was essentially defrauded of. The Justice Department has never responded to requests by the presiding judge of the case to join the lawsuit. In response, the government says that the CPA is not an arm of the U.S. government. *Id.* See also CHRISTIAN AID, BRIEFING PAPER FOR THE MADRID CONFERENCE ON IRAQ, IRAQ: THE MISSING BILLIONS: TRANSITION AND TRANSPARENCY IN POST-WAR IRAQ 5 (2003), available at <http://www.christianaid.org.uk/indepth/310iraqoil/iraqoil.pdf>; Adam Davidson & Mark Schapiro, *Spoils of War*, NPR Marketplace radio broadcast, Apr. 20–23, 2004, available at <http://marketplace.publicradio.org/features/iraq/index.html> (last visited Mar. 23, 2006).

159. See Obiora Okafor, *Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective*, 43 OSGOODE HALL L.J. 171 (2005).

raw power of wartime confiscation. Wartime confiscation is therefore not an aberration of the contemporary international legal order, but rather a constitutive component of it—albeit one which no country wants to claim adherence.

A major upshot of the analysis in this paper is that conquest ultimately involves the domination of a militarily weaker society by a militarily stronger society. The power of confiscation in early U.S. history in relation to more economically and militarily powerful States of the period was therefore carefully hedged by the Marshall court. By contrast, in the contemporary period of unchallenged military superiority, the federal judiciary has acquiesced to the expansive claims of Executive authority to conduct the war and its military policy abroad with little if any checks. Similarly, the United Nations Security Council has through the Counter-Terrorism Committee expanded its authority to legislate and in particular to empower States to freeze, block, and confiscate assets of individuals or groups with ties to terrorism. However, the expansion of the power to confiscate in the context of conquest has not been unambiguous. There continue to be efforts to check the unbridled exercise of these powers through the human rights guarantees of the United Nations system as well as through limiting the power of belligerents to use force inconsistently with international legal prohibitions. Curbing the excesses of war, not to mention wartime confiscations, as well as the accompanying racial and cultural arrogance of powerful northern states, continues to be an important imperative in the twenty-first century as it was in prior periods.

**CONSTRUCTING INTERNATIONAL LAW
IN THE EAST INDIAN SEAS:
PROPERTY, SOVEREIGNTY, COMMERCE
AND WAR IN HUGO GROTIUS' *DE IURE
PRAEDAE*—THE LAW OF PRIZE AND
BOOTY, OR “ON HOW TO DISTINGUISH
MERCHANTS FROM PIRATES”**

Ileana M. Porras^{*}

I. INTRODUCTION

Throughout history, and across the globe, peoples and nations have encountered and entered into relationship with one another. While keeping in mind the dangers of oversimplification, it could nevertheless be argued that despite their variety, international relations fall mostly into either of two familiar types: The first takes the form of war or conquest, while the second pertains to commerce or international trade.¹ It is evident that these two categories are not mutually exclusive; war and trade have often gone hand in hand. War has more often than not served the needs of commerce, while commerce has fueled the capacity for war. Nevertheless, war and trade have traditionally been treated as distinct and even antithetical realms of international relations. War, typically associated with state-on-state violence, destruction and subjugation, is understood as international relations pursued by public authorities under the register of coercion—war is antagonistic and creates enmity. Trade, on the other hand, imagined as involving private commercial transactions and associated with reciprocity and mutual advantage, is

^{*} Visiting Professor, Arizona State University College of Law. I would like to thank the organizers and participants of the War and Trade Symposium for a rich and enjoyable experience. The work and friendship of many of the participants have over the years served as a great inspiration and support. I would also like to thank the remarkable group of Grotius scholars who welcomed me in their midst and, in the course of the workshop on Piracy, Property, Punishment—Hugo Grotius and *De Iure Praedae*, held at the Netherlands Institute of Advanced Studies (NIAS) in June 2005, introduced me to a new multidisciplinary Grotius. Special thanks, however, go to Dan Danielsen for his careful and generous reading of an early draft of this article, but above all for his unflinching encouragement and friendship on the journey.

1. Another form of international relations that intersects with the first two in a number of complicated ways and is perhaps equally pervasive is that of religious or spiritual propagation. The exploration of this third leg of the international relations stool however, is beyond the scope of this article.

understood as international relations pursued by private actors under the register of consent—trade is friendly and produces amity.

Recent scholarship has raised serious challenges to each of these categories, terms and associations, yet our modern legal and international relations regimes still reflect a fundamental division between war (public and coercive) and trade (private and consensual). Because war has come to be considered an evil that interferes with human flourishing, the official project of public international law has been to limit and constrain war, if not to prohibit it altogether. The project of international trade law, on the other hand, has been to encourage and facilitate international commercial transactions on the assumption that international trade is consensual and welfare enhancing. One striking outcome of the contrast so readily drawn between war and trade is that today it is proclaimed that an end to the scourge of war and global insecurity will arrive in the wake of a commitment to worldwide trade liberalization.

This article sets out to challenge some of the tradition's conventional assumptions about the distinct roles of war and trade in the history of international law. Through a reading of an early seventeenth century text, *De Iure Praedae* (The Law of Prize and Booty)² written by a young Hugo Grotius (1583–1645) sometime between 1604 and 1608,³ I explore the surprisingly crucial role played by concepts and views of commerce and commercial competition at the origins of international law, including the law of war. It is in this early work, a text whose professed intent was to justify the seizure and prize-taking of a Portuguese merchant vessel by a corporate-owned Dutch merchant vessel in the East Indies, that Grotius, still revered by many as the father of international law,⁴ first

2. 1 HUGO GROTIUS, *DE IURE PRAEDAE COMMENTARIUS* [COMMENTARY ON THE LAW OF PRIZE AND BOOTY] (Gwladys L. Williams & Walter H. Zeydel trans., Clarendon Press 1950) (1604), in *THE CLASSICS OF INTERNATIONAL LAW* (James Brown Scott ed., 1950). This Carnegie translation is being reissued by the Liberty Press as HUGO GROTIUS, *COMMENTARY ON THE LAW OF PRIZE AND BOOTY* (Martine Julia van Ittersum ed., Liberty Fund, forthcoming May 2006), in *NATURAL LAW AND ENLIGHTENMENT CLASSICS* (Knud Haakonssen ed., 2006).

3. For a brief biography of Hugo Grotius, see C.G. Roelofsen, *Grotius and the Development of International Relations Theory: "The Long Seventeenth Century" and the Elaboration of a European States System*, 17 *QUINNIPIAC L. REV.* 35 (1997).

4. Recent scholarship has challenged the characterization of Hugo Grotius as the father of modern international law. See, e.g., David Kennedy, *Primitive Legal Scholarship*, 27 *HARV. INT'L L.J.* 1, 76–95 (1986). See also PETER HAGGENMACHER, *GROTIUS ET LA DOCTRINE DE LA GUERRE JUSTE* [GROTIUS AND THE DOCTRINE OF JUST WAR] (1983); Benedict Kingsbury, *A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 *QUINNIPIAC L. REV.* 3, 8–14 (1997). See also JAMES BROWN SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW* (1934) (dis-

elaborated a comprehensive theory of justice, a doctrine of the freedom of the seas, and a law of war. While his thoughts on the subject of the rights of war and peace in particular continued to evolve throughout his career, their fundamental character was formed in *De Iure Praedae*, in the context of what we might call a commercial dispute between Europeans in the East Indies.

European ideas about the law of nations and the law of war had, until the sixteenth century, been used primarily to address questions of diplomacy and war arising within a familiar European context. The doctrines of just war were useful for regulating or prohibiting armed conflict among Christian sovereigns in Europe (wars framed as dynastic disputes or arising out of sovereign ambition for territory) and to justify war against pagans and heathens on the borders of Europe (wars waged in defense of Christianity or her holy places). The European period of “discovery” and the encounter with the unknown peoples of the New World broke the familiar frame and required a re-tooling of European doctrines to address the new exigencies generated by the unprecedented European conquest. In his magisterial work on the colonial origin of international law, Antony Anghie argued that many of the basic doctrines of international law “were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation.”⁵ According to Anghie, the set of structures created by international law out of the moment of New World-European encounter, structures that he convincingly demonstrates are repeated throughout the history of modern international law, constructed the “difference” of the native subject in such a way as to disable him vis-à-vis normal international law, even as it turned him into a prime object of concern and reform. By the sixteenth century then, the Christian European law of nations and the law of war had begun its radical transformation into a secular (or natural) and universally applicable international law.

At the beginning of the seventeenth century, a new and violent encounter took place in the East Indies, one which further challenged the assumptions of international law. As European nations other than Spain and Portugal, the powers which for over a century had dominated the seas, began to build and expand their maritime capacity, their merchants turned their sights on promising new commercial ventures in the East

cussing the proposition that the Spanish jurists rather than Grotius should be considered the founders of international law).

5. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 3 (2005).

Indies. In the face of Iberian claims of exclusivity in the Indies trade, the merchants of Protestant Britain and those of the United Provinces⁶ (also known as the Dutch) pooled their resources, investing their capital in corporations chartered to undertake trading missions to the Indies. The stage was set for the encounter of European traders with one another in the distant seas of the Indies, and it proved a violent affair. Fueled by an endemic state of war in Europe, the conflictual predisposition of the European vessels' commanders, crew and traders, was in the Indies apparently exacerbated by commercial competition.

Building on the work of Antony Anghie, I would like to propose that the violent encounter of Europeans with one another over competition for trade in the Indies was as generative of international law as the direct encounter of Europe with Native America. This article does not seek to contest Anghie's important and original insight concerning the foundational role of the colonial encounter for international law. Rather, by turning to the theater of the East Indies in the early seventeenth century instead of that of the New World in the sixteenth century, it seeks to complicate the story in two significant respects: by noticing the triangulated character of the colonial encounter and, in tandem, by stressing the vital role played by commercial competition in that encounter.

A. Hugo Grotius' De Iure Praedae and its Seventeenth Century Context

Hugo Grotius' *De Iure Praedae* is a lengthy and complex work which was never published in his lifetime.⁷ Indeed, it lay all but forgotten until the 1860's when a manuscript of the text in Grotius' handwriting was

6. In this article the term "United Provinces" has been retained to designate the entity that is sometimes referred to as the "United Provinces of the Netherlands" or the "United Netherlands." This entity is sometimes in the literature somewhat misleadingly referred to as the "Dutch Republic." In the early years of the seventeenth century, however, the United Provinces had not yet achieved uncontested recognition as an independent nation or state, nor had its leaders unambiguously settled on the political form of a republic. Full recognition as an independent republic was achieved only in 1648 when the Dutch Republic signed a comprehensive peace treaty with Spain, one of the agreements that came to be known as the Peace of Westphalia.

7. Structurally, the work is comprised of fifteen chapters that can be broken down into five distinct sections: (1) The introduction and *Prolegomena*, in which Grotius sets forth a comprehensive theory of justice (chapters I & II); (2) A theoretical analysis of just war (chapters III–X); (3) An historical account of the events (the facts) that led to the taking of the *Santa Catarina* (chapter XI); (4) An application of the law of war to the facts, first as a case of just private war (chapter XII) and then as a case of just public war (chapter XIII); and (5) A discussion of whether the taking of the *Santa Catarina* was honorable and beneficial in addition to being legitimate (chapters XIV & XV).

discovered.⁸ In this extensive tract, part history, part politico-philosophical dissertation, part advocacy brief, Grotius vigorously sought to demonstrate the unimpeachable legitimacy of an act of violent acquisition in the East Indies. At stake were not native lands taken by Europeans, but a richly laden Portuguese-flagged carrack, the *Santa Catarina*, captured off the coast of Sumatra by a fleet of merchant vessels belonging to the recently chartered Dutch East India Company (VOC) in 1603.⁹ The legal question addressed by Grotius in *De Iure Praedae* was whether under the particular facts of the case, the taking of the *Santa Catarina*, could legitimately be considered a “seizure of prize,” “the acquisition of enemy property through war.”¹⁰

The immediate economic stakes were fabulous. The *Santa Catarina*, a fourteen hundred ton carrack, which at the time of its capture had been porting from the Portuguese settlement at Macao in China to Goa in India, held merchandise that when sold at public auction yielded about three and a half million florins.¹¹ The legal and moral stakes were equally

8. The text, which bears no title in the manuscript, was named *De Iure Praedae Commentarius* [Commentary on the Law of Prize and Booty] by its first editor. It is interesting to note, however, that in his correspondence, Grotius always referred to this early work as *De rebus Indicis* [On Indian Matters], which tends to hint at its close connection to Francisco de Vitoria’s earlier work *De Indis Noviter Inventis* [On the Indians Lately Discovered], commonly referred to as *De Indis*. FRANCISCUS DE VITORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* (Ernest Nys ed., John Pawley Bate trans., William S. Hein & Co. 1995) (1557), in *THE CLASSICS OF INTERNATIONAL LAW* (James Brown Scott ed., 1995). The edition relied upon spells the author’s last name as “Victoria,” however, because he is commonly referred to as “Vitoria,” all citations will be to Vitoria.

9. The Dutch East India Company, known by its Dutch acronym “VOC,” was incorporated on March 20, 1602 by the States-General of the United Provinces. The *Verenigde Oost-Indische Compagnie* was created by the union of six small companies, usually referred to as the pre-companies. Between them, these pre-companies—of which the Amsterdam and Zeeland-based companies were by far the most significant—had commissioned a total of sixty-five merchant vessels to sail to the East Indies between 1595 and 1602. For a concise summary of the history of the foundation and complex structure of the VOC, see F.S. Gaastra, *Foundation of the VOC—The Charter*, http://www.tanap.net/content/voc/organization/organization_found.htm. The fleet involved in the taking of the *Santa Catarina* was owned and managed by the Amsterdam-based pre-company, the *Gede Amsterdamse Oostindische Compagnie* when it set sail from the United Provinces. By the time of the capture, however, which took place on February 25, 1603, the *Gede Amsterdamse Oostindische Compagnie* had been subsumed under the VOC. *Id.*

10. 1 GROTIUS, *supra* note 2, at 30.

11. “At the time, this was equivalent to one half of the paid-in capital of the Netherlands’ United East India Company (VOC), established in 1602, and more than double that of its English counterpart, the Honorable East India Company (EIC), founded in 1600.” Peter Borschberg, *The Santa Catarina Incident of 1603: Dutch Freebooting, the*

high. In theory, either the *Santa Catarina* was a lawfully and, as Grotius would argue, a gloriously taken “prize,” and the vessel and her goods could be kept, or Jacob van Heemskerck, commander of the Dutch merchant fleet, had perpetrated an ignominious act of “piracy,” and the vessel and her goods would have to be returned to their legitimate owners.

There is good evidence that Grotius was commissioned to prepare a defense of the taking by some of the directors of the VOC, but no evidence that Grotius' unpublished text was ever put to practical use in the legal dispute. Indeed, by the time Grotius completed work on *De Iure Praedae*, the *Santa Catarina* had been duly confiscated, and the prize adjudicated by the Admiralty Board of Amsterdam.¹² The Board's predictable verdict in favor of Van Heemskerck and the VOC was based on a jumble of “loosely related arguments” in which self-defense, just war doctrine, natural law and the law of nations were all brought to bear. According to Van Ittersum, who has undertaken careful and detailed research of the documentary evidence available, Hugo Grotius' *De Iure Praedae* should be understood as a response to the Board's written verdict, an attempt at putting some order into the unsatisfying tangle of legal principles.¹³ According to Van Ittersum, while the directors of the VOC may have turned to Grotius to produce a convincing historico-political tract denouncing Portuguese depredations in the East Indies, peppered liberally with gestures to familiar and high-sounding legal doctrines and unimpeachable principles, they were not commissioning a work of legal theory.¹⁴ What they sought was a work of *apologia* or propaganda. What Grotius produced was rather more complex and multifaceted. Justification of the taking of the *Santa Catarina* remained the work's central concern and functioned as an organizing principle. It could also be argued, however, that the events surrounding the seizure and the legal, political, economic, and moral questions it gave rise to, served as a vehicle for Grotius to study and then expand upon recent scholarship on sovereignty and just war theory, to reflect on the subject of property and natural rights, and to develop some original ideas concerning the role of commerce in interna-

Portuguese Estado da Índia and Intra-Asian Trade at the Dawn of the 17th Century, 11 REV. OF CULTURE 13, 13 (2004).

12. Martine Julia van Ittersum, *Hugo Grotius in Context: Van Heemskerck's Capture of the Santa Catarina and its Justification in De Iure Praedae (1604–1606)*, 31 ASIAN J. SOC. SCI. 511, 521 (2003).

13. *Id.* at 524.

14. *Id.* at 525–26. Though a fairly young man at the time, Grotius, a protégée of the powerful Pensionary Oldenbarnevelt, had been appointed Historiographer of Holland in 1601, a post he held until 1604. In 1607, his political career was significantly advanced when he was promoted to Advocaat Fiscaal. Roelofsen, *supra* note 3, at 43–44.

tional relations. The result of Grotius' application to the subject yielded a rich intellectual harvest: *De Iure Praedae* is the original context of *De Mare Liberum*, the important Grotian tract on the freedom of the seas, published anonymously in 1609,¹⁵ and it contains the prototype of the most important Grotian contribution to international law, the influential *de Iure Belli ac Pacis*, first published in 1625.¹⁶

Any foray into the reading of a seventeenth century text such as *De Iure Praedae* is fraught with peril. It is not just a matter of the ever-present danger of falling into anachronism. The past is indeed a foreign country and we do not speak the language. It is thus almost impossible to read a seventeenth century text in its own terms. We can only guess at the motivations of the actors, and at the association of ideas which colored their understanding of what they were "up to."¹⁷ Over three hundred years separate us from these precursors; three centuries over the course of which the nature and practice of commerce and war have changed dramatically, while the international law that under-girds them has gone through many currents and countless iterations. Yet our tendency is to read the past as somehow coherent in itself and congruent with the present. Thus, it is almost impossible not to look back into history without having the past be colored by the prism of the as yet undetermined future. Inescapably, given the future role of the Dutch (and the British) as colonial powers in the East Indies, and the part played in this development by the rival East India Companies, it is difficult not to read the story of *De Iure Praedae* as deeply implicated in the story of empire and colonialism. And, since imperial ideologies are discredited in the minds of most modern readers, we are equally tempted to impute disingenuous-

15. *The Freedom of the Seas (a.k.a. The Free Sea)* is in substantial part a reworking of chapter XII of *De Iure Praedae*. 1 GROTIUS, *supra* note 2, at 216–82. Its publication in Leiden in 1609 coincided with Spanish-Dutch truce negotiations. All references to the particular case of the taking of the *Santa Catarina* were eliminated and the tract focused more generally on the legal basis for the Dutch claim to a general right of access to the seas. Beginning in 1610 Anglo-Dutch disputes over fisheries erupted and a number of British scholars attacked *Mare Liberum*, having concluded that its real purpose was to open up British coastal waters to Dutch fishing. HUGO GROTIUS, *THE FREEDOM OF THE SEAS, OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE* (Ralph Van Deman Magoffin trans., Oxford University Press 1916) (1608), *available at* http://oll.libertyfund.org/Texts/Grotius0110/FreedomOfSeas/HTMLs/0049_Pt03_English.html.

16. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW OF NATURE AND OF NATIONS* (A.C. Campbell trans., M. Walter Dunne 1901) (1625), *available at* http://oll.libertyfund.org/Texts/Grotius0110/LawOfWarPeace/0138_Bk.html.

17. *See generally* 1 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* (1978).

ness and devious purpose to those who in any way participated in or contributed to the production of the colonial enterprise. We can resist this temptation to some extent, but are always at risk of faltering back into the fallacy of retrojection because of the demands of a coherent narrative arc. The challenge is made all the more difficult when, as in this case, the seventeenth century author has come to hold a prominent place in the canon and is considered by many a significant contributor in the history of ideas of multiple modern academic fields.¹⁸

The past may be a foreign country. Yet, for all that, we are entangled with it in a complex and often obscure web. For better or worse, we cannot escape it. Despite the inevitable pitfalls and our own limitations, we strive to make sense of the present through a past that is inherently opaque. While we cannot hope to render the past transparent or fully intelligible nor, for that matter, completely avoid making anachronistic or culturally incoherent associations, we can at least attempt to avoid some of the most palpable incongruities. A brief sketch of the historical context¹⁹ within which Grotius prepared his tract justifying the taking of the *Santa Catarina* will, despite being inevitably partial and contestable, serve to sharpen our understanding of the multiplicity of thorny issues that Grotius had to address in his text and help us to identify his unique contribution.

B. The Context of the United Provinces

At the turn of the seventeenth century, despite being embroiled in continuous conflict and war against Spain, the United Provinces had already entered a period of economic expansion and cultural and social renewal that has come to be known as the Dutch Golden Age.²⁰ Though it would take almost another half century for the newly forged union to be formally recognized as independent by its erstwhile sovereign, the King of Spain, it was a prosperous time.²¹ The traditional maritime trades were

18. Grotius was actively involved in the religious, political and philosophical controversies of his age. He was a renowned and prolific author. In today's overly segmented disciplinary terms, we could say that his main contributions were in the fields of theology and Christian apologetics, legal and political theory, philosophy, international relations, and history. See Roelofsen, *supra* note 3, at 44.

19. For a much richer description of some of this historical context, see JONATHAN ISRAEL, *DUTCH PRIMACY IN WORLD TRADE, 1585–1740* (1989).

20. See generally SIMON SCHAMA, *THE EMBARRASSMENT OF RICHES: AN INTERPRETATION OF DUTCH CULTURE IN THE GOLDEN AGE* (1987).

21. The Dutch rebellion may be said to have begun around 1568. Philip II, King of Spain and sovereign over an impressive number of nations, cities, principalities and other territories dispersed over all four known continents, was officially deposed as Count of Holland by the promulgation of the Act of Deposition on July 26, 1581, an act whereby

flourishing, as was the shipbuilding industry. The war with Spain had brought political and religious refugees from the southern provinces of the Low Countries²² still under Habsburg rule, and the émigrés brought with them commercial and technological know-how, already established pan-European trading networks, as well as large quantities of capital now seeking investment opportunities.²³

Beginning in 1595, enterprising Dutch merchants had sent vessels to explore new commercial opportunities in what was considered to be one of the most potentially profitable trades of the time: the spice trade from the East Indies, a trade until then monopolized almost exclusively by the Portuguese who claimed and controlled the sea routes from Europe. Though Grotius in *De Iure Praedae* intimates that the Dutch were driven to make this incursion into waters claimed by the Portuguese because of “necessity,”²⁴ it seems fairly clear that the ventures were prompted first and foremost by the fortuitous 1595 publication of Jan Huygen van Linschoten’s *Reysgheschrift*, which made the zealously guarded navigational instructions of the Portuguese to the East Indies finally available.²⁵ King Philip II of Spain’s ill-considered decision to cut off his rebellious Dutch subjects from their profitable role as Europe’s middlemen for the Iberian trade served to justify the Dutch ventures,²⁶ while the relative calm in the Spanish-Dutch conflict following the king’s death in 1598, further en-

the States-General of the United Provinces sought to declare “independence” and transfer sovereignty to the Duke of Anjou. It was only in 1648, however, eighty years after the beginning of the conflict that Philip IV formally recognized Dutch independence. For a concise account of the Dutch rebellion and its causes, see Roelofsen, *supra* note 3, at 40–43. For a more detailed account of the Dutch revolt, see JONATHAN ISRAEL, *THE DUTCH REPUBLIC: ITS RISE, GREATNESS, AND FALL, 1477–1806* (R.J.W. Evans ed., 1995).

22. The southern provinces of the Spanish Netherlands, also known as the Southern Netherlands, eventually gained independence in 1831 and is today known as Belgium.

23. BENJAMIN SCHMIDT, *INNOCENCE ABROAD: THE DUTCH IMAGINATION AND THE NEW WORLD, 1570–1670*, at 140–42 (1st paperback ed. 2006). Émigrés from the south, for instance, provided 40 percent of the VOC’s start-up capital. *Id.* at 140. For an in-depth account of the transformation of the Dutch economy in this period, see JAN DE VRIES & ADRIAAN VAN DER WOUDE, *THE FIRST MODERN ECONOMY: SUCCESS, FAILURE, AND PERSEVERANCE OF THE DUTCH ECONOMY, 1500–1815* (1997).

24. 1 GROTIIUS, *supra* note 2, at 178.

25. SCHMIDT, *supra* note 23, at 153–54. According to Schmidt, the publication of the *Reysgheschrift* in 1595 and of the accompanying *Itinerario* in 1596, instantly launched Dutch trade to the East. Indeed the first major Dutch fleet to set sail to the Indies under Cornelis de Houtman in 1595 is said to have carried a copy of the *Reysgheschrift* on board. *Id.* at 154.

26. Halfway between the Iberian Peninsula and the Baltic region, and a natural entryway into northern and central Europe, during the sixteenth century the ports of the Low Countries had become major warehousing and distribution centers for Portuguese spices and Baltic grain. See DE VRIES & VAN DER WOUDE, *supra* note 23, at 356.

couraged Dutch boldness.²⁷ The initial forays to the East Indies by Dutch merchants were profitable enough to inspire further ventures and, by 1601, the English had followed the Dutch example.²⁸

Already by the time Admiral Van Heemskerck's fleet, which was to take the *Santa Catarina*, left Holland in April 1601, the Dutch had sent at least sixty-five merchant ships to the East Indies and established a series of "factories," including one at the Japanese port of Bantam. This Dutch toe-hold in the vicinity of the Spice Islands may well have caused serious concern among the Portuguese, who considered the East Indies-European trade as their exclusive domain, but the establishment of a factory in the East Indies should not be confused for an attempt at establishing a settlement, much less a colony. "Factories" were pragmatic responses to the price inflation that inevitably attended the sudden arrival of large European vessels in search of East Indian trading goods. A kind of guarded warehouse, the factory served primarily to stockpile wares. In theory, East Indian products could be acquired by company factors when prices were favorably low, while European trade goods could be disposed of over a longer period of time, thus avoiding a market glut.

It is important to remember that in the early seventeenth century commercial exchange with Europeans constituted no more than a small proportion of the overall commercial activity in the East Indies. The bulk of commercial exchange in Asia was regional. The great domestic markets of China, India and Java were served by Chinese, Japanese, Arab, Malay and other local merchant vessels.²⁹ Furthermore, while it is not impossi-

27. In the historical narrative, Grotius describes the Dutch decision to brave the perils of the East Indies as a direct result of having been cut off from the intermediary role:

After that period, indeed, when it became apparent that the enemy had entered upon a systematic attempt to subjugate through hunger and want the nation which it had been unable to subjugate by armed force—that is to say, when the Iberian trade that had hitherto constituted our people's principal means of subsistence was cut off—we ourselves gradually began to turn our attention to lengthy voyages, and to distant nations which were known to the Portuguese but not subject to them.

1 GROTIUS, *supra* note 2, at 178.

28. The British East India Company (EIC) chartered in 1600 sent its first small fleet to the East Indies in February 1601.

29. Recent research suggests "that until 1800 an integrated world economy was dominated by India and China." Robert Markley, *Riches, Power, Trade and Religion: The Far East and the English Imagination, 1600–1720*, 17 *RENAISSANCE STUD.* 494, 494 (2003). The need to reassess the Eurocentric assumptions of early modern history has also been stressed by Linda Colley, who provides a lively and sobering reminder of the distance between the rhetoric and the reality of Britain's early claims to rule the waves. LINDA COLLEY, *CAPTIVES: BRITAIN, EMPIRE, AND THE WORLD, 1600–1850* (2002).

ble that some Dutch merchants and other adventurers were interested in the possibility of overseas territorial acquisition, there was little sense that large scale colonization was either feasible or desirable.³⁰ Unlike New World natives, the peoples of the East Indies could not easily be dismissed as naked, uncivilized savages with no sense of property relations. On the contrary, Europeans were impressed by what they saw of the Chinese and Japanese civilizations, and by the manners, rituals and obvious wealth of the multitude of Muslim princelings that they encountered on their commercial adventures. Furthermore, while the image of limitless riches “there for the taking” still beckoned, by the early seventeenth century it was becoming evident to the Dutch that the Spanish (and to a lesser extent the Portuguese) territorial conquest of the New World was not the unequivocal glorious or profitable enterprise that it had seemed to be at first blush. While the gold and silver extracted from the mines seemed inexhaustible, the prohibitive cost of maintaining military and administrative control over the source of these riches was beginning to show. A common assessment was that the Iberians’ New World conquests had led to tyranny abroad and had brought depopulation and impoverishment at home.³¹ For those investing their capital in the inherently risky long distance East Indies trade, the goal was to secure maximum profits and a quick return. Sinking capital into colonies, settlements and fortresses was not part of the plan. Even the building and maintaining of fortifications to protect the factories were viewed as unfortunate if unavoidable expenditures.³² Within a remarkably short time,

30. It is perhaps worth noting that at the turn of the seventeenth century, neither the Dutch nor the English had any experience in overseas settlement or colonization. While the Spanish and Portuguese had extended their rule over lands in the Caribbean, Central and South America and obtained some territorial concessions in Asia, European presence in North America had only barely begun. The earliest British settlement attempt at Roanoke (1584–1590), Sir Walter Raleigh’s plantation, had been abandoned; whereas the first hundred settlers destined for its successor, the Virginia settlement, did not arrive in North America until April 1607. The Pilgrims (or Leiden Separatists), for their part, made landfall in Massachusetts only in 1620, while the Dutch settlement of New Amsterdam (later New York) was not undertaken until 1625.

31. See DAVID ARMITAGE, *THE IDEOLOGICAL ORIGINS OF THE BRITISH EMPIRE 166–67* (2000); ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C. 1500–C. 1800*, at 66–73 (1995).

32. When after many years of promotion by interested parties the Dutch West Indies Company (WIC) was finally chartered in 1621, it failed at first to generate the necessary capital investment. Investors, it appears, were suspicious of the overt double purpose of the WIC. The terms of the charter foresaw that the WIC would be involved not only in trade as such, but in the settlement of colonies, while taking an active military role against Spanish interests in the West Indies. See *Charter of the Dutch West India Company: 1621, June 3, 1621*, available at <http://www.yale.edu/lawweb/avalon/westind.htm>.

the picture would take on different character, one in which the Dutch by force of arms subjugated and seized control of the spice islands, brutalized the local populations and dealt ruthlessly with European competitors. Even then, however, the VOC was not wholeheartedly committed to a project of settlement or colonization and, consequently, the shareholders and many of its directors resisted and protested territorial expansion and its attendant costs.

When Van Heemskerck's small fleet set sail for the East Indies in 1601, there is no question that it was engaged upon a commercial, rather than a colonial or military, adventure. Like all merchant vessels engaged in the long distance seaborne trade, however, it was armed. At a time when armed conflict in Europe was a constant, it could not have been otherwise. The Spaniards, with whom the Dutch had by 1601 been at war for about forty years, had a massive naval presence and economic interests to defend around the world. Furthermore, they controlled the adjacent ports of the southern provinces of the Spanish Netherlands.³³ Skirmishes were common. Keeping their major ports open and Dutch shipping safe were significant concerns of the two great Dutch maritime provinces, Holland and Zeeland, whose economies were largely dependent on the fishing industry and seaborne trade. Furthermore, journeys to the East Indies were long (a return trip averaging twenty-two months) and the vessels faced many perils along the route, both natural and human. Pirates and hostile local populations were ever-present dangers, but of equal concern was that of running into a Portuguese vessel, as it was assumed that they would greet Dutch vessels trespassing on their turf with certain violence. All Dutch merchant vessels were therefore armed and ready for self-defense. But Dutch merchant vessels, like the English East India Company ships that followed their lead into the East Indies seas, were also primed for privateering.

Indeed, by the turn of the century Dutch merchantmen already had a long experience of privateering. The so-called Dutch "Sea Beggars," a fleet of privateers commissioned by William, Prince of Orange, had played a key role in the beginning of the Dutch rebellion (and had subsequently been transformed into the first Dutch navy), while Zeeland-based privateers continued to choke off all commerce with the port of Antwerp, occupied by Spain in 1585.³⁴ Privateers functioned as a kind of merce-

33. Defeated by the English (and the weather) in 1588, the Spanish Armada had rapidly been rebuilt and improved.

34. Oscar Gelderblom, *The Political Economy of Foreign Trade in England and the Dutch Republic (1550–1650)*, at 5 (June 2004) (unpublished working paper, *available at* http://www.lowcountries.nl/2004-8_gelderblom.pdf).

nary navy at a time when war ships were few and far between.³⁵ During times of war, a sovereign could commission a private vessel by means of an official document known as a Letter of Marque. The private vessel would thereby receive official sanction to arm herself and harass or attack enemy shipping. It was a lucrative trade and privateering commissions could often be sold by the sovereign. Ships taken by privateers, like enemy ships taken by war ships, would be considered “prize” to be adjudicated by the relevant admiralty court. Once adjudicated, the “prize” would be sold at auction and the profits distributed to the prize taker, her crew and the government in accordance with some predetermined arrangement.

In theory, privateering was an officially regulated activity, but as the events surrounding the taking of the *Santa Catarina* (and other Portuguese vessels) would show, commanders of merchant vessels were ready and willing to take matters into their own hands. The temptation to shortcut the long, economically uncertain trading missions by seizing and appropriating the cargo of well-laden Portuguese vessels was almost irresistible. Taking of prize was attractive to the commander and crew of a vessel because in addition to their formal share of the prize, it was a source of unofficial private booty. Equally important, the captured vessel and its cargo, once officially confiscated and adjudicated by an admiralty court, constituted a substantial windfall for the directors and shareholders of the VOC, as well as for the relevant ruling elite. Not surprisingly perhaps, plunder, along with more traditional commercial exchange and war, became one head of the “incontestable and indivisible trinity upon which the company built a good chunk of its early fortunes.”³⁶ However profitable (and relatively effortless), privateering was nevertheless morally and politically risky. Only a fine line served to distinguish the unlawful (and much condemned) piratical seizure of merchant vessels

35. Privateering was until well into the nineteenth century an accepted practice. The United States Constitution, for example, specifically authorizes Congress to issue Letters of Marque and Reprisal. U.S. CONST. art. 1, § 8. Privateers played a significant role on all sides of the U.S. War of Independence and the follow-up Anglo-American War of 1812. Officially sanctioned privateering was mostly outlawed by the Declaration of Paris of 1856, which prohibited the issuance of Letters of Marque and Reprisal. Declaration of Paris, April 16, 1856, available at <http://elsinore.cis.yale.edu/lawweb/avalon/lawofwar/decparis.htm>. The United States, however, was not a signatory.

36. Peter Borschberg, *Luso-Johor-Dutch Relations in the Straits of Malacca and Singapore, c. 1600–1623*, 28 *ITINERARIO* 15, 21 (2004). What was true of the VOC would also be true of the EIC. Indeed, absent James Lancaster’s enthusiastic involvement in privateering, it is unlikely that the first venture of the EIC in 1601 would have broken even financially, much less proven a success. See JOHN KEAY, *THE HONOURABLE COMPANY: A HISTORY OF THE ENGLISH EAST INDIA COMPANY 14–18* (1991).

from the capture of prize by privateers. Indeed, from the point of view of the seized vessel, her crew and the owners of the cargo, the two events were nearly indistinguishable.³⁷

It was in this context that Grotius prepared his defense of the taking of the *Santa Catarina*. Many factors made the case a difficult one to argue: Commander Van Heemskerck, in charge of a private merchant fleet, did not carry a written sovereign commission in the form of a Letter of Marque which would have given him official sanction to engage in an offensive war against “enemy” shipping. The taking of the *Santa Catarina* had been effected at a distance and in a world far removed from any European theatre of war. While the Dutch fleet might have been able to rely on a claim of self-defense, the Portuguese merchant vessel was not known to have initiated an attack, but instead Van Heemskerck had lain in wait for her. The case for a standing Portuguese “enmity” against the Dutch was weak as what enmity existed was merely the result of a forced union under the King of Spain.³⁸ Finally, even if Portugal was to be considered the enemy of the Dutch because of this union, there remained the problem of the status of the United Provinces: Were the Dutch true sovereigns or were they merely rebels?

It was Grotius’ genius to have taken these difficulties and resolved them in the original and multilayered *De Iure Praedae*, a work whose significance went well beyond the dispute in question. In his hands, the violent encounter of European merchants in the distant seas of the East Indies and the conundrums it posed served as a catalyst for a re-interpretation of international law. To explore the impact this new intra-European merchant encounter had on the development of international law, in this article I identify an undercurrent and a line of reasoning that run through the Grotian enterprise in *De Iure Praedae* and which I have broken down into three movements: first, the centrality of the theme

37. A fascinating near contemporaneous account of a prize capture by Dutch merchant vessels has been left by Francesco Carletti, a Florentine merchant who was in 1601 heading back to Europe with his goods aboard a Portuguese vessel when she was seized just off St. Helena. From Carletti’s perspective, the Dutch vessels were lying in wait and took the *Santiago* under the flimsiest of pretexts, occasioning the death of many crew and passengers. See FRANCESCO CARLETTI, *VOYAGE AUTOUR DU MONDE DE FRANCESCO CARLETTI (1594–1606)*, at 267–84 (Paolo Carile ed., Frédérique Verrier trans., 1999).

38. Following a dynastic crisis caused by the untimely death without issue of King Sebastian, the crown of the Kingdom of Portugal had passed to Philip II, King of Spain, in 1580, a right Philip made good through conquest. Though they shared a sovereign from 1580 to 1640, relations between Spain and Portugal were far from amicable. The personal union of the two kingdoms under Philip, however, had a serious impact on the character of Portuguese-Dutch relations. 9 THE NEW ENCYCLOPÆDIA BRITANNICA 376–77 (15th ed. 2005); 25 THE NEW ENCYCLOPÆDIA BRITANNICA 1056–57 (15th ed. 2005).

of commerce and Grotius' elaboration of a right to engage in trade; second, his expansion of just war doctrine to encompass just "private" war; and third, Grotius' novel characterization of prize law as a mechanism whereby title to coercively acquired enemy "goods" is permanently transferred. In brief, my analysis of Grotius' argument proceeds as follows: Responsive to the importance of international commerce, Grotius anchored Dutch national identity and sovereignty to the rock of seaborne long-distance trade and discovered a far reaching right to engage in trade founded on Divine Providence, natural reason and the consent of nations. Interference with this right, Grotius proclaimed, was not only a personal injury, but constituted a universal offense, comparable to piracy. On behalf of the private (corporate) merchants sailing on the distant seas, Grotius reworked just war doctrine to encompass the possibility of just "private" war. According to Grotius, in places such as the sea that were by nature free of jurisdiction, the private actor returned to his original sovereignty and could engage in just war in self-defense or in retaliation for injury, including an interference with the right to trade. In the course of a just war (whether public or private) the injured belligerent was entitled to seize any enemy goods in reparation for the injury. A merchant vessel injured by interference with its right to engage in trade was thus privileged to seize an enemy vessel as prize. But seizure of property was not in itself sufficient to effect transfer of true title. Something more was needed. In Grotius' analysis, this was the function of prize law. Prize law was the mechanism whereby title to property was transferred without the consent of the prior owner. Indeed, in a contemporaneous unpublished work, *Commentarius Theses XI*,³⁹ Grotius had even gone so far as to argue that sovereignty itself could be lawfully transferred in the course of a just war through the mechanism of prize law. From the perspective of the merchants, however, the significance of prize law was that seized goods were freed to enter the market without taint, having become indistinguishable from trade goods acquired through commercial transactions in the Indies.

39. PETER BORSCHBERG, HUGO GROTIUS "COMMENTARIUS IN THESES XI": AN EARLY TREATISE ON SOVEREIGNTY, THE JUST WAR, AND THE LEGITIMACY OF THE DUTCH REVOLT 269-83 (1994).

II. THE ROLE AND POWER OF "COMMERCE" AND THE RIGHT TO ENGAGE IN TRADE

"Commerce" is at the heart of the Grotian enterprise in *De Iure Prae-dae*; it is the cement that binds the work together. In this section I will focus on the manifold functions that commerce plays throughout Grotius' oeuvre, and underline the originality of Grotius' discovery of a right to engage in commerce. For Grotius, as we will see, international commerce is the life blood of the fledgling nation. He sees in it the natural character and destiny of the Dutch. It is also, and here Grotius taps into an already centuries' long tradition, desired by God, as it brings peoples together, begetting peace and harmony in its wake. Some eighty years prior, Francisco de Vitoria had justified the New World's conquest as a just response to the barbarians' refusal to offer hospitality to the Spanish.⁴⁰ Vitoria had evoked a right to hospitality (which included a right to engage in trade) to justify European violence against supposedly intractable New World barbarians.⁴¹ Despite his reliance on Vitoria, Grotius, as I will show, bypasses the issue of hospitality and discovers a natural right to engage in trade per se. Mutually beneficial, necessary for the vitality and integrity of the nation, and desired by God, commerce could, according to Grotius, only be secured by the assertion of such a right. Interference with the right could be considered tantamount to an injury, sufficient to give good cause for "just war." In this way, Grotius expanded on a right that, in Vitoria, was no more than a consequence or effect of the right to hospitality. By finding a right to engage in trade outside of the context of a right to hospitality, I argue, Grotius opened up the category of those against whom a just war in defense of the right to trade could be fought to include other Europeans, perhaps for the first time explicitly justifying European violence against other Europeans on behalf of trade.

As he introduces his project, Grotius opens with a declaration warning of the perils that will ensue if Dutch merchantmen are not allowed to engage in prize taking: The Iberians will retain exclusive access to the East Indies and the Dutch economy will collapse. Grotius declares that the merchants must be encouraged to engage in prize taking through economic incentives (a share in the profits) for otherwise they would quite reasonably not take the risk. Moreover, Grotius proclaims, prize taking is

40. VITORIA, *supra* note 8, at 119. See also Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996).

41. For a more detailed discussion of Vitoria's version of the right to engage in commerce, see *infra* text accompanying notes 95–100.

a most effective weapon granted by God to the Dutch for use against their Iberian enemies. Dutch liberty depended upon it:

[I]f the Dutch cease to harass the Spanish [and Portuguese] blockaders of the sea (which will certainly be the outcome if their efforts result only in profitless peril), the savage insolence of the Iberian peoples will swell to immeasurable proportions, the shores of the whole world will soon be blocked off, and *all commerce with Asia will collapse—that commerce by which (as the Dutch know, nor is the enemy ignorant of the fact) the wealth of our state is chiefly if not entirely sustained*. On the other hand, if the Dutch choose to avail themselves of their good fortune, God has provided a weapon against the inmost heart of the enemy's power, nor is there any weapon that offers a surer hope of liberty.⁴²

Despite its rather strident tone, Grotius' opening salvo perfectly conveys a series of connections he will develop throughout the work between Dutch prize taking, freedom of the seas, commerce, profit, wealth, the nation, and the prosecution of war. In Grotius' account, defending the right of the Dutch to engage in the Indies commerce in the face of Iberian claims to exclusivity is of vital importance because the "wealth of our state is chiefly *if not entirely* sustained [by it]."⁴³ Later, he will reiterate the claim in even stronger terms:

[W]ho is so ignorant of the affairs of the Dutch as to be unaware of the fact that the sole source of support, renown, and protection for those affairs lies in navigation and trade? Among all of the Dutch enterprises in the field of trade, moreover, our business in the East Indies easily occupies first place in worth, extent, and resultant benefits.⁴⁴

Empirically, the claim that the economy of the United Provinces was dependent on the Indies commerce was not only wrong, but quite misguided.⁴⁵ Yet Grotius can be excused for this rhetorical exaggeration, for, as evidenced in contemporary tracts, the promise of immense profits to be reaped from the Indies trade, occupied a place in the collective imagination quite incommensurate with its actual (or comparative) value.⁴⁶ The promise of almost inexhaustible riches available in the Indies had been fed not so much by the moderately successful trading ventures of

42. 1 GROTIUS, *supra* note 2, at 1–2 (emphasis added).

43. *Id.* at 1 (emphasis added).

44. *Id.* at 340.

45. See generally DE VRIES & VAN DER WOUDE, *supra* note 23.

46. See generally SCHMIDT, *supra* note 23; DE VRIES & VAN DER WOUDE, *supra* note 23.

the Dutch, but by the immense riches discovered in the holds of the captured Portuguese prizes.⁴⁷

To be fair to Grotius, however, even if the direct Asian trade was not in the early seventeenth century a significant factor in the overall economic growth of the United Provinces, the carrying trade, along with the equally important fishing industry, was the backbone of the economy of the maritime provinces, and the merchants of Holland and Zeeland had certainly taken a big hit in the 1580s when they had been suddenly excluded from their role as Europe's intermediaries for the Indies trade. That the future well-being of the United Provinces lay in continuing expansion in search of new trading opportunities was generally accepted. When, in early 1602, the States-General of the United Provinces labored to consolidate the small competing trading companies into a single United Dutch East India Company and granted it a twenty-one year monopoly, they were expressing a collective assessment that the success of the East India trade was important enough to the whole nation that it should be regulated and supported by that governing body of the new union, which had been given special responsibility for foreign affairs and naval and military matters.⁴⁸

Returning to Grotius' opening statement, we can now trace the line of his reasoning. Because the Indies commerce is of vital importance not just to the prosperity, but to the very existence of the United Provinces, the Iberian blockade of the seas is a direct attack on the homeland itself. It is, he will later suggest, tantamount to an act of war. The "insolent" Iberians must thus be resisted at all costs. Dutch prize-taking is a form of harassment that disrupts the Iberians' "insolent" ambition. Grotius takes

47. Grotius says of the prize aboard the *Santa Catarina*:

Indeed, when the prize from the *Catherine* [*Santa Catarina*] was recently put up for sale, who did not marvel at the wealth revealed? Who was not struck with amazement? Who did not feel that the auction in progress was practically the sale of royal property, rather than of a fortune privately owned?

1 Grotius, *supra* note 2, at 342.

48. The exact nature of the United Provinces as a political entity has always been difficult to describe. Neither unified state, nor federation as such, the Union, formed by seven "independent" Provinces, boasted in this period a complex, decentralized structure of authority. The States-General of the United Provinces shared sovereignty with the Provinces (each in turn enjoying its own unique form of decentralized power), a Council of State, an elected hereditary Stadholder (traditionally a member of the House of Orange), and a Land's Advocate or Council-Pensionary. Not surprisingly, the decisions of the States-General were often ignored by the provincial governments, and the mystery for contemporary observers was that the Union, despite its evident structural incoherence, somehow managed to be successful on a military front and to thrive economically.

for granted that Dutch merchantmen, rather than, for instance, a Dutch navy or a dedicated fleet of officially commissioned privateers, should be at the front line of the struggle over the freedom of the sea. Moreover, they should be entitled to reap the benefit of their seizure for if, warns Grotius, “the outcome of their efforts result only in profitless peril,” the Dutch merchantmen will “cease to harass the Spanish [and Portuguese] blockaders of the sea.” Grotius recognized that the Dutch vessels venturing into the seas of the East Indies were not bent on reckless adventure or heroic exploits; rather they were backed by serious capital investment in search of a good return. They were, in other words, commercial ventures limited by the willingness of the merchants to take a calculated financial risk. He also recognized, however, that from a commercial point of view it made little difference if the profits were achieved from goods acquired through regular trade or from plunder acquired through prize-taking—the only important issue was the rate of return on a particular investment.

That Dutch merchants should be motivated by a healthy regard for the bottom line was, for Grotius, not only quite natural but a form of virtue. Indeed, Grotius proudly ascribes a mercantile character to the whole Dutch nation. According to Grotius, the Dutch are “a people surpassed by none in their eagerness for honorable gain.”⁴⁹ There was, it is evident, nothing either shameful or sinful about the pursuit of profit by the Dutch. On the other hand, profit-seeking, if taken to excess, could become a vice and Grotius, in *De Iure Praedae*, drew a sharp contrast between the virtuous pursuit of profit and a “consuming greed for gain,” which he qualified as “a vile disease of the spirit.”⁵⁰ As we might expect, throughout the text Grotius emphasizes that the Portuguese are driven by avarice and greed while he lauds the Dutch for their moderation. The Portuguese are, he insists, more like pirates than merchants.⁵¹ Nonetheless, concerned that some Dutch merchants might view prize-taking as tainted by its similarity to piracy, Grotius also warns that the Dutch should be mindful not to fall into the contrary vice of an excess of prudence, which might cause them to neglect opportunities to promote their own interest.⁵²

49. 1 GROTIUS, *supra* note 2, at 1.

50. *Id.* at 2.

51. “[T]he Portuguese, though they assume the guise of merchants, are not very different from pirates.” *Id.* at 327.

52. “[In abstention from greed], we should guard against excess,” as it is equally a sin to “neglect[] opportunities to promote one’s own interests.” *Id.* at 2. In chapter II, titled *Prolegomena*, the contrast is recast as that between self-interest, which is the right object of (divinely inspired self-love), “the first principle of the whole natural order,” and “immoderate self-interest,” a vice which results from an excess of such love. *Id.* at 9.

Grotius understands that the quest for profit is one of the primary motors of commerce. According to Grotius, however, the commercial activity of a merchant should be viewed as conferring a public benefit. Yet because he is also investing his labor and bearing a risk, a merchant should be justly rewarded. “[Commerce] was established in order that one person’s lack might be compensated by recourse to the abundance enjoyed by another, *though not without a just profit for all individuals taking upon themselves the labour and peril involved in the process of transfer.*”⁵³ The merchant and his quest for profit are treated as eminently rational. In explaining why the prize (the *Santa Catarina*) “should” be granted to the merchants who had financed the company’s venture, Grotius does not mince words: “[T]he wise man does not incur expense unless the attendant risk is cancelled by the prospect of a fair profit.”⁵⁴ The quest for profits, the practice of commerce and even the acquisition of riches are all positive values for Grotius. In the closing chapter of *De Iure Praedae*, a chapter dedicated to demonstrating that the taking of the *Santa Catarina* was “beneficial,” as well as legal and honorable, he argues that spoils, so long as they are justly and honorably acquired are not to be spurned: “[S]poils are beneficial primarily because the individuals honourably enriched thereby *are able to benefit many other persons, and because it is to the interest of the state that there should be a large number of wealthy citizens.*”⁵⁵ Riches, it would seem, circulate and bring benefit to many persons, while having rich citizens is an advantage to the state. Moreover, according to Grotius, even God’s eschatological plan is furthered by Dutch commercial success:

Another aspect of the benefits to be received by the public lies in the fact that great numbers of the vast multitude comprising the common people are engaged in commerce or navigation and derive support from no other source. *Thus it will come to pass, as Isaiah prophesied, that all merchandise and all profit shall be consecrated to the Lord: it shall not be treasured nor laid up, but shall be for them that dwell before the Lord, that they may eat unto fullness and be clothed sufficiently.*⁵⁶

Whether he imagines it as held in the hands of wealthy citizens or serving the needs of the common people, riches from the East become virtuous by association when owned by the Dutch. Unlike the Iberians, whose unhealthy and insatiable greed for riches led them to “spread terror throughout the world,” the riches obtained by the honorable and moder-

53. *Id.* at 261 (emphasis added).

54. *Id.* at 356.

55. *Id.* at 339 (emphasis added).

56. *Id.* at 342–43 (emphasis added).

ate Dutch will serve “as a means of protecting life and liberty.”⁵⁷ Indeed, so virtuous is the Dutch pursuit of wealth that God himself, according to Grotius, has intervened on behalf of the Dutch in their East Indies enterprise. In the face of the Spanish “savagery” that had interrupted Dutch commercial activities (in other regions), in response to the “ferocity of the foe,” who sought to keep them out from the Indies, God had resolved to point the Dutch in the right direction and brought their East Indies venture to fruition.⁵⁸ In its vivid imagery which evokes tempests and snares and a journey into the unknown, the conflict between the Iberians and the Dutch takes on biblical proportions. There is no doubt about the identity of God’s elect. God’s care saves the Dutch from certain ruin and keeps them from the “dejection of spirit” that would have resulted from failure. Indeed, so attentive was God to the usefulness of Dutch success in the Indies that he had even inspired the States-General of the United Provinces to establish the VOC!⁵⁹

In fact, “commerce,” especially that characterized by long distance seaborne travel, had not always been applauded in the European, Christian tradition. Over the centuries, commerce was routinely decried for its propensity to encourage fraud, greed and avarice. Denounced for being excessively speculative, censured for presenting too great a hazard to life and property in the service of procuring unnecessary foreign luxuries, international commerce was also periodically deplored because it encouraged dependence rather than self-sufficiency.⁶⁰ Grotius and many of his contemporaries, however, were drawn by an alternative, equally ancient, but radically different view of seaborne commerce. This view, dubbed the “doctrine of the providential function of commerce” by the economist Jacob Viner, holds that far from being a vicious and sinful practice, commerce is the handiwork of God himself, the result of God’s grand design—a human activity made necessary by God’s careful planning.⁶¹ The classic formulation of this doctrine, which Viner traced back to the fourth century, combined two related sets of assumptions concerning God’s purpose and the function of trade.

God did not bestow all products upon all parts of the earth, but distributed His gifts over different regions, to the end that men might cultivate a social relationship because one would have need of the help of another. *And so he called commerce into being*, that all men might be able

57. *Id.* at 342.

58. *Id.* at 341.

59. *Id.*

60. See, e.g., JACOB VINER, THE ROLE OF DIVINE PROVIDENCE IN THE SOCIAL ORDER: AN ESSAY IN INTELLECTUAL HISTORY 32–36 (1972).

61. *Id.* at 37.

to have common enjoyment of the fruits of earth, no matter where produced.⁶²

On this view, God's ultimate purpose was that human beings should be sociable—"cultivate a social relationship"—with one another. Unfortunately, left to his own devices, Man (in his fallen state) had a tendency to isolation. In order to remedy this problem, God had designed the world in such a way that no people or nation could ever hope to be self-sufficient. God's gifts were therefore judiciously dispersed across the world. Every nation lacked for something, while having an abundance of some other necessary good. By Divine design the problem of lack (or need) could be overcome only by means of exchange. Each nation could acquire what it lacked by supplying another nation with those gifts of which it had been given an abundance. Lack, the need for each others' goods, generated a state of interdependence. To thrive, peoples could not remain in isolation but would have to enter into relationship with one another. And in this relationship lay harmony, friendship and even love. This is why God had brought commerce into being, that men might come to friendship.

As Viner has shown, while the set of ideas which comprise this "doctrine of the providential function of commerce" resurfaced periodically over the centuries, it was never properly theorized. Rather, each statement of the "doctrine" merely repeated the classic formulation within its own particular context. Moreover, even its proponents failed to recognize it as a distinctive philosophic or economic theory with a long pedigree. In *De Iure Praedae*, we find Grotius articulating his own elaborate version of the doctrine, which he uses to support his contention that there is a natural right to engage in commerce:

For God has not willed that nature shall supply every region with all the necessities of life; and furthermore, He has granted pre-eminence in different arts to different nations. *Why are these things so, if not because it was His Will that human friendships should be fostered by mutual needs and resources*, lest individuals, in deeming themselves *self-sufficient*, might thereby be *rendered unsociable*? In the existing state of affairs, *it has come to pass, in accordance with the design of Divine Justice, that one nation supplies the needs of another*, so that in this way (as Pliny observes) whatever has been produced in any region is regarded as a product native to all regions

Consequently, anyone who abolishes the system of exchange abolishes also the highly prized fellowship in which humanity is united. He destroys the opportunities for mutual benefactions. In short, he does vio-

62. *Id.* at 36–37 (quoting Libanius, *Orationes*, fourth century A.D.) (emphasis added).

lence to nature herself. Consider the ocean, with which God has encircled the different lands, and which is navigable from boundary to boundary; consider the breath of the winds in their regular courses and in their special deviations, blowing not always from one and the same region but from every region at one time or another: are these things not sufficient indications that nature has granted every nation access to every other nation? In Seneca's opinion, the supreme blessing conferred by nature resides in these facts: *that by means of the winds she brings together peoples who are scattered in different localities, and that she distributes the sum of her gifts throughout various regions in such a way as to make a reciprocal commerce a necessity of the members of the human race.*⁶³

The conventional elements of the doctrine are all here, along with a number of additional flourishes. God desires human sociability. To achieve his purpose in the face of mankind's predilection for isolationism and self-sufficiency, God has deliberately granted different gifts to diverse peoples while permitting that each nation suffer lack in some respect, thus fostering a condition of mutual need and interdependence. Commerce abolishes lack by supplying the needed resources in the course of mutual exchange, thereby bringing peoples together in friendship. Reciprocity is the quality of commercial exchange most highlighted by Grotius. According to Grotius, commerce brought about mutual advantage. Since by definition friendship was a relationship that produced mutual advantage, commerce could be said to engender friendship.⁶⁴ Those who traded with another across the oceans would become friends.⁶⁵ Friendship brought humanity together in love, producing a harmony pleasing to God. Universalizing in its sweep, the "doctrine" recast differences across the world as providential and non-essential. East Indian peoples, despite their distance and strangeness, could be depicted by Grotius as reaching out to the Dutch, desiring to be embraced in the circle of mutual exchange.⁶⁶ Nonetheless, while all peoples could reach out in desire, only the merchants in their vessels held the key; only they could put an end to geographical separation by traversing the oceans:

63. 1 GROTIUS, *supra* note 2, at 218 (emphasis added).

64. "[F]riendships rest on mutual benefits . . ." *Id.* at 158.

65. An echo of this association of terms can be heard in the name of the ubiquitous "Treaties of Friendship, Navigation and Trade."

66. Grotius makes repeated reference to the East Indians' desire to enter into commercial relationships with the Dutch. Despite Portuguese calumny, once the native peoples encounter the virtuous Dutch merchants, who, in Grotius' account, desire nothing better than to enter into fair commercial transactions, they cannot help but be impressed. Their rulers encourage the Dutch merchants and seek alliances of friendship with the Dutch sovereigns. 1 GROTIUS, *supra* note 2, at 213–14.

they were the midwives of the brave new world community. In this role the Dutch held a place of honor, for Dutch geography and character had, it seemed, combined to produce a nation turned in a special way to this philanthropic maritime enterprise:

[E]veryone knows that the situation of the Dutch coast and the assiduity of the natives are such that merchandise is very conveniently transported from all parts of the said coast to all other localities whatsoever, since a natural bent (so to speak) for maritime enterprise characterizes our people, *who regard it as the most agreeable of all occupations to aid humanity, while finding a ready means for self-support, through an international exchange of benefits from which no one suffers loss.*⁶⁷

Here again are the familiar themes. Commerce is a peaceable activity, everyone stands to benefit and so it follows that those who engage in commerce are serving humanity.⁶⁸

The corollary of this line of reasoning (or “doctrine”), as Grotius makes explicit in the earlier quote, is that interference with commerce is interference with an activity that serves mutual advantage. It interferes with the forging of friendship, and fosters disharmony: It is, in other words, an interference with God’s work. “Consequently, anyone who abolishes the system of exchange abolishes also the highly prized fellowship in which humanity is united. He destroys the opportunities for mutual benefactions. In short, he does violence to nature herself.”⁶⁹ By means of the “doctrine of the providential function of commerce,” Grotius elevates the offense of the Portuguese to a crime against nature, an affront to God’s design. The Iberian blockade of the oceans, the Portuguese refusal to allow Dutch merchants to engage in trade with the East Indies, is no longer condemned merely as an attack on the economic well-being (and existence) of the United Provinces, it is rather an affront to all of humanity, a humanity in search of a means to overcome lack

67. 1 GROTIUS, *supra* note 2, at 171 (emphasis added).

68. The notion of commerce as an activity that tends to world peace was picked up by Kant who in 1795 wrote an essay arguing for a cosmopolitan right to engage in commerce. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in KANT: POLITICAL WRITINGS 93, 114 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991) (1970). While Kant’s ultimate (or ideal) goal was world peace, in practice, the cosmopolitan right to engage in commerce served to justify European-led colonial expansion. In an eighteenth century context, in which commerce had come to be understood as an agent and product of “manners” and civilization, commercial relations could be imposed even upon the unwilling as civilization was the basis of peace. *See id.*; *see also* J.G.A. POCOCK, VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY (1985).

69. 1 GROTIUS, *supra* note 2, at 218.

while finding a corresponding outlet for its resources, a humanity eager in its desire for fellowship and sociability. All of humanity is implicated, and the depraved Iberians worthy of universal abhorrence, for, says Grotius: “[T]here is no stronger reason underlying our abhorrence of robbers and pirates than the fact that they besiege and render unsafe the thoroughfares of human intercourse.”⁷⁰ Toward the end of his treatise Grotius takes the analogy one step further, alleging that the Portuguese are pirates and should be treated as such:

For if the name of ‘pirate’ is appropriately bestowed upon men who blockade the seas and impede the progress of international commerce, shall we not include under the same head those who forcibly bar all European nations (even nations that have given them no cause for war) from the ocean and from access to India . . . ? Therefore, since it was invariably held in ancient times that persons of this kind were worthy objects of universal hatred in that they were harmful to all mankind, and since even now there is no one, or at the most a very few individuals who would absolve the Portuguese from the charge of belonging to this class, why should anyone fear that he might incur ill will by inflicting punishment on them?⁷¹

The “doctrine of the providential function of commerce” was peculiarly well adapted to a commercial people, one newly attractive in an age seeking to ennoble and justify commercial expansion. Over time, it would come to enjoy the dubious privilege of a tenet of faith, a belief stated and firmly held, but rarely examined.⁷² As we have seen, in

70. *Id.* at 220.

71. *Id.* at 327. While Grotius has Portuguese vessels in mind, it is evident that from another point of view, he is essentially claiming that Portugal itself is a piratical nation, worthy of universal abhorrence and subject to punishment by all. The reasoning, it is interesting to note, is not unlike that marshaled today by certain sectors against so-called “rogue states.”

72. A near contemporary deployment of the “doctrine” is clearly discernible in a letter entrusted by Queen Elizabeth to Sir James Lancaster, commander of the first fleet to sail from England on behalf of the newly chartered East India Company (1600):

ELIZABETH by the Grace of God, Queene of England, France, and Ireland, defendresse of the Christian Faith and Religion. To his great and mightie King of Achem, &c. in the Iland of Sumatra, our loving Brother, greeting. The Eternall God, of his divine knowledge and providence, hath so disposed his blessings, and good things of his Creation, for the use and nourishment of Mankind, in such sort: that notwithstanding they growe in divers Kingdomes and Regions of the World: yet, by the Industrie of Man (stirred up by the inspiration of the said omnipotent Creator) they are dispersed into the most remote places of the universall World. To the end, that even therein may appeare unto all Nations, his marvellous workes, hee having so ordained, *that the one land may have*

Grotius' hands, the "doctrine" acquired a significant new element, for Grotius makes an explicit association between the "doctrine" and a right to engage in commerce. Grotius, however, fails to spell out the nature of the connection. Rather, he appears to find the "right" inherent in the "doctrine," as absent the right; God's plan, expressed in the "doctrine," would be frustrated. In order to understand why he finds it unnecessary to explain the relationship between the "doctrine of the providential function of commerce" and a right to engage in commerce, we must turn back to the theory of justice that Grotius develops in the *Prolegomena* of *De Iure Praedae*, which frames the subsequent legal arguments, for Grotius is too much of a modern to be satisfied with affirming the existence of a right based on nothing more than divine authority. Yet, in the end, as we will see, Grotius' elegant analysis fails to produce any basis for a right to engage in commerce more substantive than that of Divine design.

In the *Prolegomena*, by methods he describes as mathematical and proper to natural reason, Grotius perfects a comprehensive theory of justice comprised of two related legal systems. Grotius begins by describing and deriving the sources and content of natural law and then proceeds to elaborate the sources and content of positive law. Altogether, Grotius posits nine general "rules" (principles) from which he derives thirteen "laws" (precepts).⁷³ Of these, the first three principles and the first six precepts concern natural law proper and serve as a source for positive law, whereas the final six principles and five precepts are within the exclusive domain of positive law. Together, the nine general principles and thirteen precepts, combining natural and positive law, function as the "preliminary assumptions" or "premises" that Grotius claims as the foundation for his legal arguments in *De Iure Praedae*.

The first principle with which Grotius launches his analysis in the *Prolegomena*, the principle to which he ascribes "pre-eminent authority" is that: "*What God has shown to be his Will, that is law.*"⁷⁴ Law, as used here by Grotius, is that which is commanded. "In any case," he adds,

need of the other. And thereby, not only breed intercourse and exchange of their Merchandise and Fruits, which doe superabound in some Countries, and want in others: but also ingender love and friendship betwixt all men, a thing naturally diuine.

Markley, *supra* note 29, at 497–98 (emphasis added).

73. Grotius' terminology of "rules" and "laws" in the *Prolegomena* is confusing and somewhat misleading. What he means by these terms is better conveyed by the alternative terms he also sometimes employs: "principle" for "rule" and "precept" for "law." In an attempt to minimize confusion I have chosen to substitute the terms "principle" and "precept" throughout the remainder of my discussion of Grotius' theory of justice.

74. 1 GROTIUS, *supra* note 2, at 8.

“the act of commanding is a function of power, and primary power over all things pertains to God”⁷⁵ “The Will of God,” pursues Grotius, “is revealed, not only through oracles and supernatural portents, but above all in the very design of the Creator; for it is from this last source that the law of nature is derived.”⁷⁶ In other words, the first principle is nothing other than the instauration of the “design of the Creator” as the ultimate source of natural law. From here it is an easy step for Grotius to ascertain that “since God fashioned creation and willed its existence, every individual part thereof has received from Him certain natural properties whereby that existence may be preserved”⁷⁷ What Grotius discovers in God’s design is that God wills the self-preservation of his creation. From this he makes a case for self-interest, characterizing it as the first object of love: “[L]ove, whose primary force and action are directed to self-interest, is the first principle of the whole natural order.”⁷⁸ From the beginning, Grotius seems to have the virtuous profit-seeking merchant in mind: The prototypical Dutchman motivated by the right kind of self-interest. As if to ensure that the point is not lost, Grotius reiterates that “the first principle of a man’s duty relates to himself.”⁷⁹ He then proceeds to distinguish the right kind of moderate self-interest from immoderate self-interest, which he describes as “an excess of self love.”

Consequently, from the first principle—God’s will—Grotius, applying the methods of logical proof, derives what he terms the two most important “precepts” of the law of nature, which are both concerned with self-preservation: “It shall be permissible to defend one’s own life and to shun that which proves injurious” [Precept 1]; and “It shall be permissible to acquire for oneself, and to retain, those things which are useful for life” [Precept 2].⁸⁰ Grotius then uses the first principle, “*What God has shown to be His Will, that is law,*”⁸¹ along with the two derivative precepts—the right to self-defense and the right to acquisition and use—to elaborate what we may call a theory of proto-property in the state of nature⁸²—a theory which assumes a “common grant” but a right of seizure

75. *Id.*

76. *Id.*

77. *Id.* at 9.

78. *Id.*

79. *Id.*

80. *Id.* at 10.

81. *Id.* at 8.

82. Grotius never makes use of the term “state of nature,” but both here and elsewhere he makes reference to a historical time before the emergence of separate political communities and the advent of civil law. It is important, however, to recognize that Grotius’ image of “the state of nature” is radically different from that subsequently imagined by Hobbes in *The Leviathan* in at least one important respect. For Grotius, in the

for individual use.⁸³ Only after a duty of self-interest and a protean form of property rights in the state of nature has been established does Grotius turn to the duty to care for the “welfare of our fellow beings”—Grotius also seems to discover this duty from God’s design. In Grotius’ words:

God judged that there would be insufficient provision for the preservation of His works, if He commended to each individual’s care only the safety of that particular individual, without also willing that one created being should have regard for the welfare of his fellow beings, in such a way that all might be linked in mutual harmony as if by an everlasting covenant.⁸⁴

As with the contrast Grotius draws between self-love and excessive self-love, these images have a familiar ring. They are after all a form of the claim about God’s divine interest and purpose in commerce. God’s will is that men care for each other’s welfare (love one another) so that there might be sufficient provision for the preservation of all, and that they might be linked in mutual harmony.

In Grotius’ system of law, the first principle and its two derivative precepts hold a place of honor, for they are derived directly from the design or will of God. Next in line is what Grotius terms the “primary law of nations.” In Grotius’ rendering, the primary law of nations, though it arises out of the mutual accord of human beings, is (indirectly) received from God, for it is born of man’s rational faculty, which is the imprint of God’s image in man. Grotius articulates it as the Second Principle: “*What the common consent of mankind has shown to be the will of all, that is law.*”⁸⁵ It is important to note that in Grotius’ system of law we are still in a period prior to civil society and prior to the division of the world into separate polities. What Grotius seems to have in mind here is a minimalist but universal ethic, which has the force of law (or command). According to Grotius, what mankind agrees on is “that it behoves us to have a care for the welfare of others,”⁸⁶ which he understands to be

state of nature, man lives in a world community subject to the first three principles and the first six precepts of his theory of justice. *Id.* at 8–30. This primary natural and universal community is not destroyed by the subsequent division into polities.

83. Grotius expands on his theory of property in chapter XII, as part of his proof concerning freedom of the seas. *Id.* at 228–55. Since Richard Tuck’s intervention on the subject in *The Rights of War and Peace*, there has been some interesting debate as to what exactly Grotius had in mind here. See RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE* 78–108 (1999). However, we do not have to solve the puzzle at this point.

84. 1 GROTIUS, *supra* note 2, at 11.

85. *Id.* at 12.

86. *Id.*

the basis of a kind of universal society and at the origin of justice.⁸⁷ Bringing together his first two principles, the force of command arising out of divine will and from the common consent of mankind, two forces which according to Grotius can never be in opposition, Grotius derives two further precepts that should guide human beings' relationship with others. These take the form of prohibitions: the precept of inoffensiveness (in other words, don't injure others) [Precept 3], and the precept of abstinence (that is, don't seize another's possession) [Precept 4].⁸⁸ In a certain respect, these two prohibitions could be understood as the negative limits of the first two precepts concerning self-interest: the right to self-defense and the right to acquisition and use. Grotius then rounds out these four precepts with two further precepts, which he qualifies as being precepts of justice: evil deeds must be corrected (retaliation or punishment) [Precept 5]; and good deeds must be recompensed (restitution or reward) [Precept 6].⁸⁹ Finally, Grotius enunciates a third principle—the principle of good faith—which stands at the origin of pacts (and contracts).⁹⁰ Up to this point in the analysis, Grotius' objective has been to establish a system of natural law, the set of principles and precepts that govern human beings even before the advent of civil society. Natural law, for Grotius, is the law of the universal human society, a superior law that precedes civil law and can never be abolished. Indeed, when Grotius at last turns to the subject of civil society and positive law, these are presented as necessary evils in a post-lapsarian world.

When it came to pass, after these principles had been established, that many persons (such is the evil growing out of the nature of some men!) either failed to meet their obligations or even assailed the fortunes and the very lives of others, for the most part without suffering punishment . . . there arose the need for a new remedy, lest the laws of human society be cast aside as invalid.⁹¹

The need was urgent, there were more human beings, they were scattered about “with vast distances separating them and were being deprived of opportunities for mutual benefaction.”⁹² According to Grotius, these conditions lead men to gather into social units, and this movement in turn gives birth to the commonwealth—“not with the intention of abolishing the society which links all men as a whole, but rather in order to fortify

87. *Id.* at 13.

88. *Id.*

89. *Id.* at 15–18.

90. *Id.* at 18–19.

91. *Id.* at 19.

92. *Id.*

that universal society by a more dependable means of protection”⁹³ Again we find in Grotius’ depiction an emphasis on vast distances separating men and the claim that they were being deprived of opportunities for mutual benefaction. The remedy here, however, is not commerce but the political community, which is a replica in miniature of the world society. The commonwealth is not, in its essence, part of the problem of fracture and estrangement but part of the solution. Civil or municipal law, according to Grotius, exists to support and strengthen natural law, which is why it can never contradict it. The closer bonds of friendship that unite a commonwealth do not extinguish the natural bonds of universal human society; rather they should serve to strengthen them. Following the discussion of municipal law, Grotius turns to what he terms “the secondary law of nations.” This he considers “a species of mixed law, compounded of the [primary] law of nations and municipal law”⁹⁴

Fortunately it is not necessary for us to follow Grotius in his lengthy analysis of civil law or the secondary law of nations, for the right to engage in commerce is never mentioned explicitly by Grotius in these sections of the *Prolegomena*. While a right to engage in commerce is not specifically identified in the section on natural law either, I have tried to demonstrate that each line of Grotius’ analysis seems to imply its necessity. As we have seen, in Chapter XII, Grotius appears to imply the right from the need to give effect to God’s beneficent will as described in the “doctrine of the providential function of commerce.” In the *Prolegomena*, Grotius presents God’s will as the first and most authoritative principle in the systematic analysis of law. God’s will is presented as the source of authority and command, yet it must be ascertained from God’s design. As Grotius deciphers God’s plan in the section on natural law, elements from the “doctrine” make their appearance. God’s particular plan concerning the distribution of scarcity and abundance, needs and resources, and God’s desire that mankind enter into fellowship through the process of exchange, is played out in a variety of registers. At length, the “doctrine” appears to inhabit both the structure and the substance of the natural law. Commerce becomes a necessity to protect self-interest and to serve the welfare of others. The right to engage in trade must be asserted to give effect to God’s will.

Grotius, it should be noted, was not the first to make reference to a right to engage in commerce; rather, he was able to rely on the earlier work of the Spanish Dominican theologian and legal theorist Francisco

93. *Id.*

94. *Id.* at 26.

de Vitoria. Yet as my analysis will show, Grotius' right to engage in commerce was a radical revision of the right first identified by Vitoria. In 1539, three quarters of a century before Grotius, in a lecture later published as *De Indis*, Vitoria had argued that the refusal of Native Americans to allow the Spaniards to carry on trade with them was a wrong that provided sufficient justification for the Spaniards to initiate a "just war" against them.⁹⁵ According to Vitoria, the native lands that had fallen into Spanish possession in the course of such a just war, could be lawfully seized and might be legitimately kept. Unlike Grotius, however, Vitoria had not based his claim on a strong version of the doctrine of the providential function of commerce. Indeed, it is not clear that he had intended to assert an autonomous and distinctive "right to engage in trade," as Grotius proceeded to do. Vitoria's overall objective in *De Indis* is to clarify the legal relationship that exists between the Spaniards and the New World natives whose lands they have conquered. The specific legal question that motivates the work is whether the Spanish conquest of native lands in the New World in the early sixteenth century was justly undertaken. In *De Indis*, Vitoria begins by critiquing the arguments or "titles" by which the Spaniards had until then conventionally justified their conquest. According to Vitoria, neither discovery, the Pope's or the Emperor's authority, nor the natives' unbelief or sinfulness, could in themselves justify dispossessing the natives of their lands. Having dismissed the traditional claims, Vitoria turned his attention to possible "just titles" that might nonetheless justify the conquest. The first "just title" that Vitoria proposes is "*that of natural society and fellowship.*"⁹⁶ Vitoria's first conclusion under this title is that:

The Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them.

Proof of this may in the first place be derived from the law of nations (*jus gentium*), which either is natural law or is derived from natural law (*Inst.*, I, 2, I): "What natural reason has established among all nations is called the *jus gentium*." For, congruently herewith, it is reckoned among all nations inhumane to treat visitors and foreigners badly without some special cause, while, on the other hand, it is humane and correct to treat visitors well; but the case would be different, if the foreigners were to misbehave when visiting other nations.

Secondly, it was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel

95. VITORIA, *supra* note 8, at 154–55.

96. *Id.* at 151.

wheresoever he would. Now this was not taken away by the division of property, for it was never the intention of peoples to destroy by that division the reciprocity and common uses which prevailed among men, and indeed in the days of Noah it would have been inhumane to do so.⁹⁷

While the reference to “reciprocity” and the mention of “division” hint at some connection with the “doctrine of the providential function of commerce,” the accent is clearly on showing hospitality to strangers and on sociability. The story Vitoria is telling is that of a world before property or political boundaries. At that time everyone was free to wander about, to travel and visit without limitation. The “division of property” was not intended to abolish this original (and universal) privilege, because such an abolition would have been considered “inhumane.” Humanity itself imposes a duty of hospitality and sociability on the natives. Twelve additional proofs are then mustered by Vitoria to support the proposition that the Spaniards have the right to travel and sojourn in native lands.

The second proposition that Vitoria develops under the “just title” of “*natural society and fellowship*” is that:

The Spaniards may lawfully carry on trade among the native Indians, so long as they do no harm to their country, as, for instance, by importing thither wares which the natives lack and by exporting thence either gold or silver or other wares of which the natives have abundance. Neither may the native princes hinder their subjects from carrying on trade with the Spanish; nor, on the other hand, may the princes of Spain prevent commerce with the natives. This is proved by means of my first proposition. [That concerning the “right” to travel and sojourn.]⁹⁸

Vitoria bases this second proposition on the law of nations and divine law (which he says is not opposed to it) and then adds that in any case, “the sovereign of the Indians *is bound by the law of nature to love the Spaniards*. Therefore, the Indians may not causelessly prevent the Spaniards from making their profit where this can be done without injury to themselves.”⁹⁹ This curious addition reminds us that for the Spanish theologian, the ultimate optic through which law, whether natural, divine, international, or human, is examined, is that of “love”—which is what the duty of hospitality to strangers and sociability is all about. When the Indians of the New World refuse to enter into commercial relationship with the visiting Spaniards, their offense is an offense against

97. *Id.*

98. *Id.* at 152.

99. *Id.* (emphasis added).

love. That the offense against love has a potential economic dimension is noted, but not given center stage.¹⁰⁰

Unlike Vitoria, in *De Iure Praedae*, Grotius places commerce squarely at the heart of his analysis. When he refers to Vitoria's earlier work, he quotes him approvingly, but he reverses the order of things. Vitoria had started with the duty of hospitality to strangers and sociability. Love of neighbor was the guiding principle. The privileges of the Spaniards to travel or sojourn, to trade, to share in the common goods, to dwell in native lands and to acquire nationality were all derivative from the duty of hospitality. Grotius, on the other hand, begins by claiming that the "doctrine of the providential function of commerce," as he has elaborated it "is the source of the sacrosanct law of hospitality."¹⁰¹ Vitoria, says Grotius, holds that:

[I]f the Spaniards should be prohibited by the American Indians from traveling or residing among the latter, or if they should be prevented from sharing in those things which are common property under the law of nations or by custom—if, in short, they should be debarred from the practice of commerce—these causes might serve them as just grounds for war against the Indians; and indeed as grounds more plausible than others.¹⁰²

Hospitality, the right to travel or reside, the right to share in the common ownership—all these are for Grotius merely expressions of the practice of commerce.

The distinction between the two men may seem minor, yet Grotius' reversal of terms had an important consequence. In Vitoria's scheme, the Indians, if they prevented the Spaniards from enjoying any of the "rights" to which they were entitled under the head of duties of "hospitality and sociability," including the "right" to trade, would be causing an offense to the Spaniards, and the Spaniards would have sufficient cause to initiate a "just war." The fundamental offense of the Indians was a refusal to engage in a loving relationship with the Spaniards. The only "injured" party, under this system, was the party with whom the Indians refused to engage. Such an injury was limited in range because it was a personal injury. No third party could claim to be injured by the Indians' refusal to offer hospitality to the Spaniards. Furthermore, while in theory the right and the potential injury were universal, in practice, it was evident that it could only be used to justify a European "just war" against barbarians. Its claims, based on a universal duty of hospitality and socia-

100. *Id.* at 152–53.

101. 1 GROTIUS, *supra* note 2, at 219.

102. *Id.* (emphasis added).

bility, assumed both no prior (commercial) relationship and non-Christian peoples, as a common Christianity was considered a bond of love. No European nation would be able to assert it against another. By placing the accent on commerce and on a right to engage in commerce, Grotius' reversal partly eliminated this limitation.

The offense of the Portuguese against the Dutch in the East Indies was clearly not an offense against hospitality. Instead, the Portuguese injury was the interference with a trading relationship between third parties. The injury based on a right to engage in trade had become, in Grotius' hands, good cause to justify a European nation's initiating "just war" against another European nation. Furthermore, the Portuguese blockade of the seas could now be viewed as not only an injury against the Dutch, but as an offense against the East Indian peoples who sought to enter into a mutually advantageous commercial relationship with the Dutch. It could even be viewed as a universal injury, for the blockade affected all of humanity in its pursuit of greater harmony and sociability. Europeans defending their right against other Europeans could thus perceive themselves as triply virtuous.

III. JUST WAR—SOVEREIGN ANXIETY, PRIVATE WAR AND THE FREEDOM OF THE SEAS

The framework within which Grotius explored and developed his ideas on commerce, the right to engage in commerce, war and prize law in *De Iure Praedae* was the doctrine of just war. The just war doctrine, traceable in its Christian form back to Augustine, had received its classic formulation in Thomas Aquinas' *Summa Theologica*,¹⁰³ written in the fourteenth century. In the course of this important and immensely influential theological treatise, Aquinas raised the question that had plagued thoughtful Christians since their beginning: Was waging war against God's law? Was it, in other words, a sin? Though he discusses "war" under the heading of "vices" that offend against "charity (love)," Aquinas nonetheless sides with the pragmatic and fiery Augustine in holding that under the right conditions some wars are just, and therefore not sinful:

In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior. . . . Secondly, a just cause is required, namely that those who are attacked,

103. 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. 2, question 40 (Fathers of the English Dominican Province trans., Benziger Bros. 1947).

should be attacked because they deserve it on account of some fault Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil.¹⁰⁴

By the beginning of the sixteenth century, Aquinas' formulation and his three conditions for "just war:" sovereign authority, just cause and right intention, had become the standard. Moreover, Aquinas' theological doctrine had quickly been transposed into the kindred realm of law. Vitoria, for instance, expounded on Aquinas' doctrine of just war in his *Second Relectio, Sive De Ivre Bellis Hispanorum in Barbaros* (On the Law of War Made by the Spaniards on the Barbarians),¹⁰⁵ the companion piece to *De Indis*. Familiar as it was, the young Grotius considered the "law of war" to be in certain respects, "exceedingly confused,"¹⁰⁶ and one of his stated purposes in *De Iure Praedae* was to clarify it once and for all.

The specific legal controversy that Grotius sought to address in *De Iure Praedae* was whether the taking of the *Santa Catarina* was legitimate.¹⁰⁷ For Grotius, the answer to this question was bound up with a proper understanding of the doctrine of "just war." The *Santa Catarina*, a Portuguese merchant ship, had been violently attacked and seized by a Dutch merchant vessel on the high seas. From a legal perspective, the only way to render this violent act legitimate, rather than a reprehensible act of piracy, was to show that the *Santa Catarina* had been taken in the course of just war and had accordingly become a lawful prize—enemy property taken in the course of a just war. Such a demonstration required that Grotius apply just war doctrine to the facts of the case. From a certain perspective, we might have expected the application to be quite straightforward. After all, the *Santa Catarina* was a Portuguese vessel and the Dutch were at war with the King of Spain, who was now also the King of Portugal. This much seemed easily ascertainable. Thus, all that Grotius would have to show was that the ongoing Dutch war against Spain (and Portugal) was a just war. The rest would follow. The case, however, did not prove so easy to resolve for the facts were somewhat contentious and made application of the traditional doctrine awkward. In brief, Grotius was laboring under three disabilities: First, the sovereignty of the United Provinces was in question; second, it was not certain that the Portuguese were at war with the Dutch; and third, the Dutch merchant fleet was privately owned and not officially commissioned as a privateer. In order to

104. *Id.* question 40, art. 1.

105. VITORIA, *supra* note 8, at 269–97.

106. 1 GROTIUS, *supra* note 2, at 7.

107. *See id.* at 216–317.

arrive at a satisfying resolution in face of these messy facts, Grotius could not simply apply the doctrine of just war as he found it in Aquinas and Vitoria; instead he found it necessary to modify and round it out. In a masterly fashion Grotius was then able to apply a revised doctrine to the facts in a series of variations that all confirmed the existence of a just war and thus established the legitimacy of the taking.

In seeking to elaborate his own theory of just war in *De Iure Praedae*, however, Grotius had to work within the constraints of the already well-established formulation of just war doctrine. He had to contend with Aquinas' three conditions: sovereign authority, just cause, and right intention.¹⁰⁸ Aquinas' first condition, that there be a sovereign by whose authority the war was to be waged, had two constraining functions: First, it sought to restrict the scope of just war to public war, thus delegitimizing the concept of private war, for: "If an individual had a quarrel, he could seek redress of his rights from the tribunal of his superior."¹⁰⁹ In Aquinas' view, "strife" or private war was always a sin "because it takes place between private persons, being declared not by public authority, but rather by an inordinate will."¹¹⁰ The only partial concession he made was in the case of self-defense. Even then, Aquinas imposed two additional conditions, requiring that the defender not be motivated by hatred or vengeance and that he not exceed moderation in defending himself. Under those circumstances, according to Aquinas, private war or strife might be considered no more than a venial sin. The second constraining function of Aquinas' condition of "sovereign" authority was to limit as much as possible the circle of those wielding public authority who might legitimately undertake a war. In theory at least, the smaller the circle, the less war was likely. Consequently, only those fighting a war authorized by the sovereign himself might be entitled to the immunity from sin conferred by just war doctrine.

For Grotius, each dimension of Aquinas' condition of "sovereign authority" posed a difficulty. He had to address two obvious problems: The first concerned the validity of the claim to sovereignty of the United Provinces. Under this head, there were two issues with which Grotius had to contend: the Spanish counterclaim that the United Provinces should be considered a rebellious province, and the fact that sovereignty in the United Provinces, even if it could be claimed, was a dispersed and

108. This third condition does not cause Grotius much concern. In those few instances when he mentions the problem of "right intention," he dismisses it as a matter of conscience not susceptible to proof which, most significantly, does not interfere with the retention of spoils as it has no legal effect. *Id.* at 129.

109. 2 AQUINAS, *supra* note 103, pt. 2, question 40, art. 1.

110. *Id.* question 41, art. 1.

disaggregated affair little resembling the conventional notion of the sovereign prince. The second problem that Grotius had to address remained the ticklish matter of the private character of the Dutch vessels that had seized the *Santa Catarina*. Indeed, buried within the folds of *De Iure Praedae* we can detect two related and powerful anxieties over distinctions that Grotius' analysis seeks to dispel: First is the anxiety over how to distinguish rebels from sovereigns, and second is an anxiety over the boundary between the inherently unstable categories of piracy and freebootery. In both cases, as we will see, the boundary would be determined in Grotius' work by a proper understanding of just war and sovereignty.

In the early seventeenth century, when Grotius worked on the text of *De Iure Praedae*, Philip III, King of Spain, still deemed the citizens of the United Provinces as little more than rebellious subjects. Until his death in 1598, King Philip II, who had never recognized the authority of the States-General to depose him, had waged an unrelenting war against them. After his death, due to a financial crisis, the conflict entered a cooler phase, but it is evident that his son, Philip III, had not renounced, and despite the escalating costs of the war, did not intend to renounce, his historical claim to sovereignty over all of the erstwhile Burgundian lands in the Low Countries. For the Spanish Habsburgs, the Low Countries were no peripheral outpost; they were a strategic political and economic pivot of the massive empire, entranceway to the heart of Europe as well as center of their own family identity.¹¹¹ Moreover, in 1581, at the time of the deposition of Philip II, the States-General had not immediately declared themselves a Republic. Instead, they searched for a substitute prince to exercise sovereignty over them. Both Henry IV, King of France, and Elizabeth I, Queen of England, had their own quarrels with Philip II; both welcomed the disturbance in the Low Countries as a distraction and an expense for their enemy, yet neither was eager to do

111. Charles V, father of Philip II, was born in Ghent, brought up in the Low Countries, and lived there during much of his reign.

Dynastic accident had brought together in [his person] four separate inheritances, each of them a major political entity. From his father's father, Charles received the ancestral estates of the Habsburg's in southeastern Germany and (after 1519) the title of Holy Roman Emperor; from his father's mother he inherited the Burgundian lands in the Netherlands. From his mother's mother Charles received Castile and the Castilian conquests in North Africa, the Caribbean and Central America; from his mother's father he inherited Aragon and the Aragonese overseas dominion of Naples, Sicily and Sardinia.

GEOFFREY PARKER, *PHILIP II* 4 (1978). In the course of his reign, Charles V added significant new territories to his already impressive patrimony, including, most importantly, a vast swathe of South America. *Id.*

much more than assist the rebels financially and, in the case of England, strategically. Not only did neither sovereign relish a new cause of war with Spain, but neither could approve subjects who rose in rebellion against their legitimate sovereign. Having failed to convince any prince to take on the job of sovereign, in 1585, the States-General of the United Provinces came to a compromise and voted to accept a governor-general appointed by a reluctant Queen Elizabeth. This politically delicate and controversial arrangement, much disapproved by the powerful Province of Holland, had in any case fallen through within two years. Only following this fiasco did the United Provinces decide at last to proceed without a “foreign” sovereign. Even then, however, the provinces did not draw up anything resembling a federal constitution. Instead their political system remained *ad hoc* and pragmatic.¹¹² The United Provinces was at base a defensive union of self-governing provinces, each jealous of its historic rights and privileges. The self-governing provincial authorities did not consider themselves bound by the dictates of the central authority of the States-General. Even Maurice of Nassau, Prince of Orange, Commander of the Army and Admiral of the Navy, was not really a “prince,” but the appointed “Stadtholder” or “governor” over five of the provinces, (while his cousin was recognized as Stadtholder over the remaining two). Sovereignty, such as it was, was dispersed across a bewildering array of public authorities in the United Provinces.

Under the circumstances, it is hardly surprising that Grotius at the turn of the century should evidence some anxiety over the question of whether there was a sovereign in the United Provinces, with authority to engage in “just war,” under the Aquinan formulation. Given that civil war under Aquinas’ definition could never be just, Grotius’ first task was to show the United Provinces were not engaged, as the King of Spain would have it, in a civil war of rebellion against their legitimate sovereign.¹¹³ The argument Grotius makes in *De Iure Praedae* to counter the charge of rebellion closely tracks the analysis he develops at greater length in the near contemporaneous *Commentarius in Theses XI*.¹¹⁴ In

112. Hans W. Blom, *The Republican Mirror: The Dutch Idea of Europe*, in *THE IDEA OF EUROPE: FROM ANTIQUITY TO THE EUROPEAN UNION* 91, 97 (Anthony Pagden ed., 2002) (“It thus seems inadequate to label the Republic a federal state, if only because it possessed no detailed regulation of the respective rights and duties of its different parts.”).

113. Grotius’ response to the unspoken challenge to the legitimacy of Dutch sovereignty is carried primarily in the historical narrative (chapter XI). 1 GROTIIUS, *supra* note 2, at 168–71. In chapter XIII, he makes the case for the taking as an act of just “public” war. *Id.* at 283–317.

114. See generally BORSCHBERG, *supra* note 39.

short, the accusation of rebellion is answered by recourse to a theory of sovereignty which relies on a non-unified concept of sovereignty, as against the dominant Bodinian model,¹¹⁵ and which places the nation before sovereignty, rather than having the sovereign define the nation.

In Grotius' historical account of the events that led to the Dutch revolt, the spark was lit when the Duke of Alba, appointed by Philip II to govern the Low Countries, exceeded his legitimate sovereign powers by attempting to alter some laws and judicial procedures and impose additional taxes on the citizens of the Province of Holland without seeking the approval of the local authority, an injustice which led to a popular uprising. At length, the States-Assembly of Holland, which, according to Grotius, had been "a true commonwealth for all of seven centuries" and was "a guardian of the rights of the people,"¹¹⁶ gathered in assembly and under its own authority declared war against Alba. This war was then joined by other peoples in the Low Countries. The resulting conflict was by all accounts exceedingly cruel and expensive:

It would be too long a story, if we attempted to tell what quantities of blood have been shed from that time on; what plundering on the part of the Spaniards and what expenditures on the opposite side have drained the resources of the Low Countries (expenses so heavy, in fact, that an accurate reckoning would show them to be in excess of those borne by any other people in any age)¹¹⁷

Philip II, rather than punish the excesses of the Duke of Alba, had encouraged them and, says Grotius, "sought to obtain by force of arms a power greater than was legitimate" until, having no other recourse, the States-General had deposed him: "This was the beginning of the movement in which oaths were taken in support of the sovereignty of the States-General as against Philip."¹¹⁸

Augustine in the fourth century had proclaimed that the end of just war was peace, and that "the natural order, the order adapted to the maintenance of peace among mortals, demands that authority and discretion for the undertaking of wars should reside in princes."¹¹⁹ As we have seen, Aquinas too had sought to constrain the scope of just war to sovereigns. Vitoria, concurring with Augustine and Aquinas, had nonetheless stated

115. Julian H. Franklin, *Introduction*, in JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH xii–xiii (Julian H. Franklin ed. & trans., Cambridge University Press 1992) (1583).

116. 1 GROTIUS, *supra* note 2, at 169.

117. *Id.* at 170.

118. *Id.*

119. VITORIA, *supra* note 8, at 168–69, citing Augustine, *Contra Faustum*.

the proposition in a slightly different form. Vitoria had emphasized that the authority to wage war resided in the state, rather than in the sovereign. He had, however, also insisted that, "where there are already lawful princes in a State, all authority is in their hands and without them nothing of a public nature can be done either in war or in peace."¹²⁰ In addressing the further question of what was to count as a state, Vitoria had offered the definition that: "A perfect State or community . . . is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates . . ." ¹²¹ Then, taking account of the reality of sixteenth century Europe and perhaps especially of the manner in which the Spanish King, Holy Roman Emperor Charles V, held personal sovereignty over a vast but disparate array of states and lands, he added, that: "[T]here is no obstacle to many principalities and perfect States being under one prince. Such a [perfect] State, then, or the prince thereof, has authority to declare war, and no one else."¹²²

Grotius, while starting from the same Augustinian proposition, and without explicitly rejecting Aquinas' formulation of just war, proceeded to take a yet a different turn by making an additional distinction for those circumstances in which the prince is absent or negligent:

In my opinion, however, when the prince is absent or negligent, and when no law exists expressly prohibiting this alternative course, the magistrate next in rank will undoubtedly have power not only to defend the state, but also to make war, to punish enemies, and even to put malefactors to death.¹²³

According to Grotius, the term "public war" is applicable in such cases, "[f]or such wars are supported by the will of the state; and the state's will, whether expressly or tacitly indicated, ought assuredly to be regarded as authority for the waging of war . . ." ¹²⁴ Applying theory to

120. *Id.* at 169.

121. *Id.*

122. *Id.*

123. 1 GROTIUS, *supra* note 2, at 64.

124. *Id.* It is important to remember, however, as Kingsbury has pointed out in reference to Peter Haggemacher's work, that:

Grotius does not have a closely defined concept of "the state" in the senses subsequently developed in western legal theory. *Civitas*, *respublica*, *populus*, *regnum*, and *imperium* are all used in *JBP* in ways that touch on the modern concept of "state," but only "civitas" is defined, and Grotius does not employ a taxonomy that feeds into later analytic usages.

Kingsbury, *supra* note 4, at 14.

facts, Grotius then concludes that “the state of Holland, even if it was subject to a prince, did not lack authority to undertake a public war independently of that ruler”¹²⁵ The State-Assembly of Holland, which according to Grotius, had since ancient times been the guardian of the people, had justly sought to defend the citizens of Holland against usurpation of their rights by the Duke of Alba and the Spanish King. When the deposed King had sought to regain his lost sovereign status by force of arms, he had given the Dutch just cause for war.¹²⁶ Grotius’ argument was not intended as a theory of a right of rebellion held by the people against a legitimate sovereign. On the contrary, in Grotius’ view there had been no rebellion. According to Grotius, the “prince,” Philip II, Count of Holland and King of Spain, was not in Holland an absolute monarch holding all the “marks” or “powers” of sovereignty.¹²⁷ The power to tax, for instance, was concurrently held by the prince and the state assembly. When the prince had attempted to bypass the state assembly and authorize new taxes without seeking that body’s approval, it was an attempted usurpation of the “mark” of sovereignty retained in this body, whose duty it then was to defend itself against the prince. “*He who holds some mark of sovereignty has the right to wage war in defence of that mark [of sovereignty], even [if this be conducted] against a party which holds another mark.*”¹²⁸ Grotius’ view of disaggregated sovereignty was thus composed of a double assertion: First, the “marks” or “powers” of sovereignty were not necessarily always held in a single “prince,”¹²⁹ and second, every holder of a “mark” of sovereignty was privileged to engage in public war in defense of its own mark. Furthermore, as we have seen, Grotius maintained that in the absence of the sovereign, or when the sovereign was negligent, the magistrates could wield sovereign powers and, if necessary, declare public war. The net result was to significantly open up the category of those whose authority was sufficient to wage just war.¹³⁰

While these technical arguments were perhaps sufficient to counter the charge that the conflict with Spain was a war of rebellion, the question remained, whether the United Provinces could be considered a state at all. It was not just that the United Provinces boasted a bewildering array

125. 1 GROTIUS, *supra* note 2, at 284.

126. *Id.* at 289.

127. For a discussion of this line of argument in the *Commentarius*, see *infra* text accompanying notes 192–97.

128. BORSCHBERG, *supra* note 39, at 237 (alterations in original).

129. *Contra* BODIN, *supra* note 115.

130. For discussion of the relationship between prize law and the acquisition of marks of sovereignty in war, see *infra* text accompanying notes 198–200.

of competing or concurrent sovereignties which co-existed in uneasy harmony held together only by a common external threat. The United Provinces also suffered from border indeterminacy. The Dutch had sought to push back the sea, and in that arena they had enjoyed significant successes; yet, their political boundaries shifted daily with the vagaries of the successes and failures of war. Many of the provinces and cities, which had signed the treaty of the Union of Utrecht in 1579 and those that had abjured the sovereignty of Philip II in 1581, were in the early seventeenth century back under Spanish control. Furthermore, the Dutch did not share a strong sense of national identity. The population was far from being homogeneous: Their numbers since the break with Spain had swollen through immigration, mostly from the southern Hapsburg controlled provinces, but also from England, France, Spain and Portugal. The Dutch army reflected and magnified this diversity as it was composed of large numbers of foreigners, including whole battalions under foreign command. The people of the United Provinces spoke different languages and worshipped in different sects. Their economic interests split along the cleavage that separated the maritime from the interior provinces. The Province of Holland, a behemoth among equals, dominated the union economically and politically and was not trusted by the other provinces. Moreover, if it was unclear what or who the United Provinces were, there was even less consensus about what or who they should become. At the most basic level, for instance, at the beginning of the seventeenth century, there was no accord on whether the future of the United Provinces should encompass the southern provinces still under Spanish rule.

At the time of the taking of the *Santa Catarina*, the United Provinces was a polity in search of a national identity. In response to anxiety about its character as a true nation, the people of the United Provinces adopted a variety of strategies. Among these, the Batavian myth, the claim that the Dutch were descended from a noble Germanic tribe that had valiantly resisted the Roman conquerors and been much admired by them, gave the new polity an ancient pedigree;¹³¹ self-identification as the new Israel gave it a spiritual ideology and divine recognition;¹³² and the tales of Spanish cruelty and enmity, depicted in art, performed on stage, and recounted in the popular literature and pamphlet press, served to unite them

131. SCHAMA, *supra* note 20, at 75. Indeed, Grotius contributed to the elaboration of the myth in his history of the ancient Batavians, *Liber de Antiquitate Republicae Batavorum* (1610).

132. *Id.* at 93.

against a common oppressor.¹³³ All three of these strategies are brought to bear by Grotius in *De Iure Praedae*.¹³⁴ In building the implicit case for a Dutch nation at the front of the state, however, Grotius incorporates a number of additional elements which all work toward the goal of giving the fact of the nation an incontrovertible feel of reality. First of these is the association Grotius makes between Dutch geography, Dutch character, and Dutch destiny.¹³⁵ When Grotius refers to the character of the people and its connection to the geographic reality of the nation, its resources and physical character, he is building the image of a natural entity; the people of Holland have become the maritime nation of the United Provinces. The United Provinces, in this telling, is bounded by water, its character is set by water, and its relationship to the rest of the world is determined by this characteristic. Its productiveness and industry are the result of geography. Thus, nature herself had compelled the Dutch to their maritime destiny; commerce was not simply a chosen activity but their vocation. It is thus possible for Grotius to approach this entity (bounded by the sea, inhabited by merchants) as an economic unit, with its own unique interior economic reality (needs, resources, skills), and this economic character sets it apart from and separates it out from other “natural” groups.

If Dutch geography, character and destiny had made merchants of them, then the state could be properly imagined as a political community of merchants, and the merchants’ interests became the state’s interests. As we have seen, Grotius describes the survival of the United Provinces as bound up with Dutch commercial expansion into the East Indies. Commerce in the United Provinces was a matter of nationwide concern, for, according to Grotius, even the mass of the common people had an economic stake in it. In Grotius’ account, commerce had become a major

133. See generally SCHMIDT, *supra* note 23.

134. See, e.g., 1 GROTIUS, *supra* note 2, at 1, 168, 338.

135. 1 GROTIUS, *supra* note 2, at 171. In the seventeenth century, similar claims concerning English geography, character, and destiny would begin to be made. In the case of England (Britain) the insular nature of the nation gave it its character and led to its destiny as a seaborne empire. As Armitage argues in *The Ideological Origins of the British Empire*, one significant advantage of the distinctive seaborne quality of the destiny of the English (then British) was that a seaborne empire could be associated with liberty and commerce, and distinguished from the conquest and tyranny of the land-based empires of antiquity and of Spain. ARMITAGE, *supra* note 31, at 100–01. Obviously this distinction also served the Dutch, who prided themselves on being purveyors of liberty along with commerce. *Id.* at 166.

matter of public concern, a national concern, as important, if not more important, than war. Consequently, one of the protean state's core functions had become to take responsibility for securing commerce and for facilitating the expansion of trading opportunities on behalf of the "nation."¹³⁶

A further indication of the degree to which Dutch character, Dutch commercial interest, the nature of the Dutch polity, and her future had become intertwined can be found in Grotius' remarks in *De Iure Prae- dae*, approving the States-General of the United Provinces for their prescience and solicitude in first seeking to consolidate and then granting a "federal" charter (and a twenty-one year monopoly) to the VOC, a corporate conglomerate that united under one umbrella the many disparate and previously locally chartered East India Companies.¹³⁷ The ostensible purpose of the federal incorporation of the VOC had been to avoid duplication and reduce wasteful, self-defeating internal competition. The Dutch nation as a whole would suffer if the privately owned companies of each province vied with each other for the same pepper crop, inflating the price of pepper in the East Indies, or if they glutted the Asian market with European goods. In response to this inefficient competition fraught with the dangers of inter-company and inter-provincial conflict, the States-General had recognized the need for "federal" regulation of commerce.¹³⁸ Under the aegis of the VOC, the companies would now be required to coordinate their activities, and while they might sail on behalf of one of the local companies, at least in the East Indies they could present themselves as Dutch merchants, members of a distinctive national community and citizens of a sovereign state. Paradoxically, the idea of a Dutch nation was being forged in the open seas, in regions far distant

136. The idea that commerce was a central or crucial matter of state interest became prevalent in the late seventeenth century, but it was not so in the early part of the century. While merchants may very well have made such claims in an earlier period, it was not generally so understood until much later.

137. 1 GROTIUS, *supra* note 2, at 341. For the text of the VOC Charter, see *The Licence Granted by the States General to the Dutch East India Company on March 20, 1602*, in *VOC 1602–2002: 400 YEARS OF COMPANY LAW* 29, 29–38 (Ella Gepken-Jager et al. eds., 2005).

138. The VOC Charter stated:

We, the States General, have made due reflection after thoroughly considering the importance to the United Netherlands and its good inhabitants that this same shipping trade and commerce [to the East Indies] be maintained and allowed to expand by means of an appropriate general regulation of its policy, mutual relations and its administration.

Id. at 29.

from any claim to territory, borders, population or self-government, by traders who were employees of a corporation.

Moreover, with “federal” incorporation of the VOC came nationwide ownership of shares. The ambition that the company be truly representative of the nation and its interests and that all citizens become stakeholders (or, from our perspective, the goal that the VOC help give shape to a nation), was incorporated into the very design of the VOC. A striking term of the charter provided that: “*All of the inhabitants of these United Netherlands shall be allowed to be shareholders in this Company and to do so with as small or as great an amount as they see fit.*”¹³⁹ Nor were these merely empty words, for its purpose was given effect by a further proviso that if too much capital was offered, then those who had invested an amount greater than 30,000 guilders would be required to “decrease this capital pro rata in order to make place for others.”¹⁴⁰ Furthermore, the charter made provision for adequate publicity: “In the months that follow, the inhabitants of this land shall be kept informed of developments by means of public posters pasted in those places where they are usually pasted.”¹⁴¹ Following its incorporation, the VOC was immensely successful in raising the necessary start-up capital. Initial shares were acquired by all sectors of society, including villages, charitable associations and relatively humble tradespeople, although soon enough, those least able to afford to hold risky and long-term investments sold-up and left corporation ownership in the hands of a narrower set of more traditional and wealthier owners.¹⁴² Nonetheless, stakeholders in the VOC included not only individual private investors, but the whole range of public authorities who shared sovereignty across the United Provinces: City governments, provincial governments, the States-General, and the Statholder all held shares in the company. Along with economic stake came a voice in corporate governance, for, the VOC’s corporate structure, as described in the charter of 1602, mirrored and gave concrete form to the complex, weighted, multi-sovereign, decentralized political system that had developed ad hoc in the United Provinces.¹⁴³ Moreover, in its insistence on a nationwide unity of interest, in its attention to the joint commercial and political interests of the company that now represented a nation, the charter of the VOC also reflected the centralizing aspirations of the States-General of the United Provinces.

139. *Id.* at 31 (emphasis added).

140. *Id.*

141. *Id.*

142. Claudia Schurmann, *The VOC, the WIC, and Dutch Methods of Globalization in the Seventeenth Century*, 17 *RENAISSANCE STUD.* 474, 478 (2003).

143. *See id.* at 29–38.

The fact that a private commercial corporation such as the VOC could serve as template for and representative of the Dutch “nation in formation” in 1602, may help explain Grotius’ second departure from Aquinas’ formulation of just war theory—the significant introduction of the category of just “private” war. As we have seen, Aquinas did not recognize the possibility of just “private war.” For Aquinas, war was by definition a matter of public authority—commanded by a sovereign and waged in pursuance of a just cause which Aquinas had specified meant that “those who are attacked, should be attacked because they deserve it on account of some fault.”¹⁴⁴ Conceptually, such wars concerned the public function of correction or punishment. For Aquinas, private strife was always sinful, for private persons always had recourse to public authorities in case of injury. Vitoria had restated Aquinas’ principle as: “There is a single and only just cause for commencing a war, namely, a wrong received.”¹⁴⁵ Unlike Aquinas, however, Vitoria had recognized a limited role for “private war.” According to Vitoria, anyone could wage a private war in defense of his person, property or goods. A private person, however, had no right to avenge wrongs done him. Furthermore, self-defense could only be resorted to in a moment of danger. Once the necessity had passed, the legitimacy of private war was at an end.¹⁴⁶

Grotius went much further in legitimizing private war. As we saw earlier, in *De Iure Praedae*, Grotius had gone back to first principles and mapped out a comprehensive theory of justice in order to produce a systematic law of war.¹⁴⁷ At the conclusion of the *Prolegomena*, summariz-

144. 2 AQUINAS, *supra* note 34, pt. 2, question 40, art. 1.

145. VITORIA, *supra* note 8, at 170.

146. According to Vitoria:

Any one, even a private person, can accept and wage a defensive war. This is shown by the fact that force may be repelled by force Hence any one can make this kind of war, without authority from any one else, for the defense not only of his person, but also of his property and goods.

Id. at 167. Furthermore,

[B]e it noted that the difference herein between a private person and a State is that a private person is entitled, as said above, to defend himself and what belongs to him, *but has no right to avenge a wrong done to him, nay, not even to recapt property that has been seized from him if time has been allowed to go by since the seizure.* But defense can only be resorted to at the very moment of the danger, or, as the jurists say, *in continenti*, and so when the necessity of defense has passed there is an end to the lawfulness of war.

Id. at 168 (emphasis added).

147. See *supra* text accompanying notes 71–87.

ing his position on just war, Grotius makes it clear that in his view just war might be public or private:

A war is said to be 'just' *if it consists in the execution of a right*, and 'unjust' if it consists in the execution of an injury. It is called 'public' when waged by the will of the state, and in the latter concept the will of magistrates (e.g. princes) is included. . . . *Those which are waged otherwise . . . are 'private' wars*, although some authorities have preferred to describe such conflicts as 'quarrels' rather than 'wars'. . . . In the present work, the terms 'seizure of prize', 'seizure of booty', are used to refer to the acquisition of enemy property through war [whether public or private].¹⁴⁸

In Grotius' system, the natural rights of states are derived by analogy from the natural rights of private individuals living in a world society, a sort of "state of nature" that existed historically prior to the creation of civil society. The state is an artificial creation that cannot, in Grotius' view, receive any right that did not first belong to the individual. And this, as we will see, includes the right to punish and correct, and even to avenge injuries—that is, to wage just war—under the right circumstances.

Much of *De Iure Praedae* is taken up with Grotius' revision and application of just war theory.¹⁴⁹ As his analysis unfolds, Grotius covers all the bases. First, he examines the facts from the perspective of "private war" and poses the question of whether the VOC, viewed strictly as a private person, would have been justified in waging private war. Then, he looks at the facts and considers the case from the perspective of "public" war, arguing that the VOC ship was engaged in a "public war" on behalf of the sovereign. These two series of arguments, one from the perspective of private war and the other from the perspective of public war are presented by Grotius as arguments in the alternative. In each context, he maps out a series of competing and overlapping claims about the Portuguese injury or offense that could have been sufficient to supply cause

148. 1 Grotius, *supra* note 2, at 30 (emphasis added).

149. About a quarter of the text of *De Iure Praedae* (chapters III–X) is devoted to further theoretical analysis of the many questions underlying just war: Whether war can ever be just; whether just war can be waged against Christians; who can wage it; for what cause(s); whether the nature of the cause(s) is different in the case of public or private war; who can take prize; what (and how much) may be taken as prize; who may be legitimately despoiled; and who gets to keep the spoils. *Id.* at 31–167. These issues are taken up again and given further nuance in chapters XII–XIII, in which Grotius applies his theory of just war to the facts. *Id.* at 216–317. Their contours are again revisited in chapters XIV and XV in the course of a discussion of whether the taking of the *Santa Catarina* was honorable and beneficial in addition to being legitimate. *Id.* at 318–66.

for just war. Each approach, each formulation of the facts, leads him to the same conclusion. Whether he approaches it from the perspective of the Dutch commander Van Heemskerck, the VOC, the United Provinces, the East Asian “allies” or the world community, the conditions of just war doctrine are met and the taking of the *Santa Catarina* is determined to have been a legitimate action taken in the course of “just” war.

I do not propose to review the twists and turns of Grotius’ analysis in detail. Rather, I wish to focus on some consequences arising out of his categorical embrace of just “private” war. The intuition that underlies my analysis is that Grotius’ decision to provide theoretical sanction to just “private” war in the face of the tradition’s disfavor can be traced back to his central preoccupation with commerce (including his awareness that Dutch national identity had come to be conjoined with commerce) and to the sovereign anxiety that he labored under.

One of the most interesting consequences of Grotius’ decision to endorse the possibility of just private war is that it inspired him to defend a doctrine of the freedom of the seas. In *De Iure Praedae* we can observe this doctrine serving two distinct functions: First, it served to support the claim that in blockading the sea the Portuguese were inflicting an injury, an injury that could in turn serve to justify either “private” or “public” just war in defense of the right to trade. Second, it provided the grounds for the exceptional case of necessity that justified van Heemskerck’s prosecution of a private war against the Portuguese. For, while Grotius was willing to entertain the possibility of just private war, he was not ready to make the benefits of just war doctrine available indiscriminately to all private persons seeking to avenge an injury. His solution was to circumscribe the doctrine by limiting its availability to those situations where private individuals were in effect returned to the pre-civil law natural state.

According to Grotius, “[i]n the natural order . . . every individual is charged with the execution of his own rights.”¹⁵⁰ Since “just war consists in the execution of a right,”¹⁵¹ it would seem that individuals in the natural order were privileged to engage in just private war. Nonetheless, Grotius recognized that when individuals had entered into civil society, the state became the arbiter of disputes that concerned them. The fear was that an excess of self-love might corrupt the ability of the individual to be judge and executor in his own cause. Thus, private individuals were required under civil law to submit their causes to civil tribunals. The civil law, created to support and help enforce the natural order had, however,

150. *Id.* at 60.

151. *Id.* at 66.

merely displaced but not extinguished the natural rights of individuals. Thus, in the exceptional case of “necessity,” when judicial means for the attainment of his rights proved defective, the individual was in Grotius’ view still privileged to execute his own rights. “[I]n so far as a defect exists, to that extent recourse to force—or, in other words, private execution in accordance with the natural order—is just.”¹⁵² According to Grotius, two kinds of necessity could be recognized: *temporary necessity*, as in the case where a person is being attacked and must defend his person or his property because his rights are about to be violated—in which case, necessity and therefore the justice of private war cease the moment when recourse to an adjudicator becomes possible; and *continuous necessity*, which may be due to a defect in law or fact.¹⁵³ A continuous “defect in fact” occurs “whenever the person to whom jurisdiction properly pertains, is disregarded by those subject to him.”¹⁵⁴ For our purposes, however, the “defect in law” is the more interesting category. “It is a defect in law,” says Grotius, “when in a given place *there is no one possessing jurisdiction, a state of affairs which may exist in desert lands, on islands, on the ocean* or in any region where the people have no government.”¹⁵⁵ Grotius reiterates:

In such cases . . . the situation becomes very much what it was before states and courts of justice were established. But in those days human beings were governed in their mutual relations solely by the six laws which we laid down first of all. Those six precepts were the source of all law, and also of the principle that each individual was the executor of his own right . . .¹⁵⁶

Thus, we find that in Grotius’ opinion, the ocean is a space outside of civil jurisdiction; a space where a “defect in law” and so “necessity” exists in a permanent form. In such a space, individuals are returned to their original state before civil law and are freed to become judges and executors in their own case, or, in other words, to engage in just private war in response to an injury.

That the ocean is a place empty of jurisdiction (and so permanently available for private war), is a conclusion that Grotius arrives at in the context of reviewing the legitimacy of possible Portuguese claims justifying their “demand . . . that noone save themselves shall approach the

152. *Id.* at 87.

153. *Id.* at 88.

154. *Id.*

155. *Id.* (emphasis added).

156. *Id.*

East Indies for purposes of trade.”¹⁵⁷ Grotius proceeds step by step. He begins by demonstrating that the Portuguese can have no claim to ownership of the regions visited by the Dutch in the East Indies. These lands, argues Grotius, were clearly the property of the East Indian peoples and their sovereigns before the advent of the Portuguese. Grotius then reviews possible Portuguese claims to ownership from actual possession or title to possession (from discovery, papal donation, or just war) and dismisses each in turn. Having satisfactorily demonstrated that the Portuguese had “not acquired any legal right over the East Indian peoples, lands or governments,” Grotius turns his attention to the question of whether they had nonetheless brought “the sea and matters of navigation, or the conduct of trade, under their own jurisdiction.”¹⁵⁸ It is at this point in his analysis that Grotius develops his doctrine of the “freedom of the seas,” a doctrine that is at root a theory of property.

The basic argument runs as follows: In the beginning there was no private ownership but all things were held in common.¹⁵⁹ Through a gradual process, moveable goods that could be consumed (or whose usefulness was reduced by prior use) and those immoveable goods which were not sufficient for indiscriminate use by all persons came to be apportioned through the physical act of attachment. So was born the institution of private property (and the law to govern it). Since the origin of private property lay in the removal of goods from “common property” for exclusive use through an act of physical attachment, “occupation” came to be recognized as the root of title for private property. It was, according to Grotius, in this same period of time that the establishment of states was first undertaken. “Accordingly . . . those things which were wrested from the original domain of common ownership have been divided into . . . public property . . . owned by the people . . . [and] strictly private property . . . belong[ing] to individuals.”¹⁶⁰ The sea cannot, by its nature, be occupied—it cannot be bounded or enclosed. Furthermore, adds Grotius, even if it could be enclosed, there is no reason to seek to apportion the sea, for it can be used by all equally without diminishing its usefulness. Those things which are “capable of serving the convenience of a given person without detriment to the interests of any other person . . .” should remain free to all, for “they proceeded originally from nature and have not yet been placed under the ownership of anyone . . . [and] it is evident

157. *Id.* at 217.

158. *Id.* at 226.

159. By “common ownership,” Grotius does not mean to imply joint ownership or community ownership which is a kind of private property. Rather, he means to denote a form of ownership that existed prior to the creation of private property.

160. 1 GROTIUS, *supra* note 2, at 230.

. . . that nature produced them for our common use.”¹⁶¹ The sea, argues Grotius, “is an element common to all, since it is so vast that no one could possibly take possession of it, and since it is fitted for use by all, ‘with reference to purposes of navigation and to purposes of fishing, as well.’”¹⁶² Thus, he concludes: “[T]he sea is included among those things which are not articles of commerce, that is to say, the things that cannot become part of anyone’s private domain.”¹⁶³ In other words, according to Grotius, the sea had remained in the original state of nature in which all things had been held in common. Nothing that the Portuguese could do would change that. The oceans remained under common ownership and thus could never come under any state’s jurisdiction, save in the limited case of an agreement between states, but such an agreement would, as positive law, be binding only on the contracting states.

As mentioned above, for Grotius one of the implications of finding that the ocean was a space by its very nature free of private ownership and thus not subject to any state jurisdiction, was that it became a space where “private” war could be legitimate. For when they were on the sea, private individuals were by definition in a situation where judicial recourse was lacking in a continuous manner, and so, in a state of permanent “necessity” if they suffered an injury. On the sea, in a sense, private individuals reverted back to the state of nature and, as Grotius had said, “In the natural order . . . every individual is charged with the execution of his own rights.”¹⁶⁴ As private “individuals” engaged in private war, the Dutch merchant vessels could now rely on a double line of reasoning to justify their “just war” taking of the *Santa Catarina*. First, they could make the claim of just defense against an unjust war begun by the Portuguese, for as Grotius had pointed out: “[T]hose same causes which render war just for the aggressor when they themselves are just, transfer this quality to the party defending itself if that justice is wrongfully claimed for them.”¹⁶⁵ Since Grotius had demonstrated that the Portuguese had no lawful basis for a claim to ownership or jurisdiction over the sea, one could take the view that the Portuguese blockade was itself an act of war, and conclude that the Dutch vessel’s defensive action was by the operation of reversal, automatically just. Second, either the Dutch vessel or the VOC could claim that in attacking the Portuguese carrack, they had merely been engaged in the execution of their own rights, for the Portuguese had (at a minimum) interfered with their right to free navigation

161. *Id.* at 231.

162. *Id.*

163. *Id.* at 236.

164. *Id.* at 60.

165. *Id.* at 217.

and with their right to engage in trade, both of which were universal and natural rights. The four recognized just causes of war, which originated in the most fundamental natural law principles, were self-defense, defense of one's property, recovery of debts arising out of contracts, and the punishment of wrongdoing or injury.¹⁶⁶ In attacking the carrack, the Dutch merchants had sought to defend their property, for in Grotius' view, property included the right to trade.

The defence or recovery of possessions, and the exaction of a debt or of penalties due, all constitute just causes of war. *Under the head of 'possessions', even rights should be included. . . . But the concept of 'rights' embraces both that which is due us in our capacity as private individuals, and that which is our due by the law of human fellowship . . . that is to say, the use of whatever is common—e.g. the sea and commercial opportunities—forms a part of the said concept. Therefore, if any person has quasi-possession of such a right, it will be proper for him to defend that claim.*¹⁶⁷

Furthermore, private individuals, at least in a situation where there was “no judicial recourse” (as was the case on the sea) were clearly endowed with the power to punish.¹⁶⁸ The Portuguese attempt to blockade the sea and prevent all other nations from engaging in mutually beneficial commerce was an offense not only against the Dutch merchants but against all of humanity. Thus, in attacking the carrack, the Dutch vessel had acted within its legitimate right to punish the offender on behalf of all of humanity.¹⁶⁹

166. Thus, states Grotius, “*insofar as concerns the persons who wage war . . . that war has a just cause, wherein the said persons defend their lives or their property, or seek to recover the latter, or attempt to exact either payment of that which is due or punishment for wrongdoing.*” *Id.* at 70 (emphasis in original).

167. *Id.* at 262 (emphasis added).

168. According to Grotius:

[J]ust as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals; and similarly, the power of the state is the result of collective agreement, as we demonstrated in our discussion of the Third Rule. Therefore, since no one is able to transfer a thing that he never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state.

Id. at 92.

169. What just end can be served by the private avenger? “[T]he private avenger has in view the good of the whole human race, just as he has when he slays a serpent” *Id.* at 93.

IV. PRIZE LAW—WAR AND EXCHANGE: ACQUIRING TITLE TO ENEMY PROPERTY

The coercive seizing of enemy property in the course of war was a ubiquitous practice in the early seventeenth century. As with war itself, however, not all such seizures could be considered legitimate. The line of discrimination was that of “just war.” “[A]ll seizures of prize or booty are just, which result from a just war,”¹⁷⁰ asserts Grotius, but “just war” did not simply provide a cleansing context within which coercive seizure became legitimate; rather the “cause” or “injury” that justified the war also turned seizure of enemy goods into a practical necessity. In Grotius’ terms:

[I]n warfare—whether public or private—everything necessary for the execution of one’s right is permissible. *It is indeed necessary, if we wish to obtain that which is our due, that we should acquire enemy property [rem hostilem]; and the acquisition of such property is nothing more nor less than that very practice which we call ‘acquisition of prize or booty’*¹⁷¹

In Grotius’ rendition of just war doctrine, since an injury is a taking away of something that belongs to us, our seizure of prize is a response through which we are doing nothing other than attaining what is rightfully ours. So intimate is the connection between just war and prize-taking that Grotius can agree with those authorities who hold that “*the essential characteristic of just wars consists above all in the fact that the things captured in such wars become the property of the captors.*”¹⁷²

As might be expected given this line of reasoning, in *De Iure Praedae*, Grotius had little difficulty demonstrating that prize-taking in just war was a legitimate activity.¹⁷³ Grotius’ central concern, however, was not with seizure per se, but with its operation within the ambit of property relations. Grotius acknowledged that war, like commerce, functioned as a means of exchange: goods in war clearly changed hands. Ever attentive to important distinctions, however, Grotius recognized that there was a difference between possession and ownership. While the act of possession might be sufficient to create title in goods that had no prior owner,

170. *Id.* at 58.

171. *Id.* at 132–33 (emphasis added).

172. *Id.* at 43 (emphasis added).

173. In chapter IV of *De Iure Praedae*, titled *Is Seizure of Prize or Booty Just?*, Grotius undertakes a rigorous demonstration to prove that prize-taking in just war is in accordance with the Divine Will and with every type of law, be it natural law, the law of nations or civil law, and in conformity with holy writ, the example of holy men and supported by authoritative opinion. *Id.* at 43–57.

the mere act of taking possession could not suffice to extinguish title in a previous owner. In the case of a voluntary exchange, the prior owner agreed to divest himself of title. When the act of exchange was involuntary however, something more was needed. For Grotius, this something more was “never lacking” in the case of just war, for the law of prize operated to transfer title from the dispossessed enemy to the new owner.¹⁷⁴ Prize law, in other words, served to “quiet title” and to return a good momentarily tainted by coercive dispossession into the stream of legitimate commerce. Indeed, so powerful is the urge to normalize the function of war as an exchange mechanism that Grotius will go so far as to claim that it is consensual, for, “wars carry with them a *tacit agreement of exchange*, so to speak, an agreement to the effect that each belligerent, acquiescing in the turn of the die as the contest proceeds, shall take the other’s property or lose his own”¹⁷⁵ War, in this image, is a game of chance, a game which participants enter willingly in full knowledge that they are engaged in a process of exchange in the course of which they might gain property or lose it.

That Grotius should approach prize law as a subset of property law makes perfect sense once we remember the starting point of *De Iure Praedae*. The specific legal controversy that Grotius sets out to address is whether the taking of the *Santa Catarina* was legitimate. But the anxiety behind this question is not about legitimate or illegitimate violence. Indeed, throughout the text the question of violence recedes into the background. The incident at the heart of the story, the taking of the *Santa Catarina*, is passed over without description. The reader is given no details of the confrontation between the “enemy” vessels. We are told nothing of the excitement of battle, there is no mention of the firing of cannon, no mention of casualties, indeed no mention of the violence necessary to subdue and board a large Portuguese carrack, nor of the violence inherent in the coercive seizure of the personal property of passengers, men, women and children, along with the trade goods carried in the hold of the vessel. Rather, the anxiety that Grotius sets out to assuage is that of the “legitimacy” of the goods themselves. As is clear from the introductory chapter of *De Iure Praedae*, there was some concern among Dutch merchants that the goods seized from the *Santa Catarina* might be tainted.¹⁷⁶ The more serious concern, however, was that the prior owners might still have some claim of title over the goods of which they had been dispossessed and such doubts could reduce the value of the goods in the market

174. *Id.* at 45–49.

175. *Id.* at 48 (emphasis added).

176. *Id.* at 5.

place. Consequently Grotius' task was to overcome such hesitations by demonstrating that, whatever view one took of the incident, whether it was a case of private war or public war, title to the goods had passed. The previous owners had been well and truly dispossessed by the operation of the laws of war and prize, and the goods were now indistinguishable from any other goods in the market.

It is this same concern with "quieting title" that accounts for another notable characteristic of Grotius' approach to prize law: the expansive view he adopts of what and how much can be taken as prize and from whom it can be seized. In theory, Grotius respects the idea of what we today would call the principle of proportionality. In pursuit of just war, a belligerent should seek only to recover his due. Thus, at least in theory, the limiting factor is the nature or quantum of the injury. By definition an injured party is entitled to seize booty or prize from the enemy up to the full amount of the debt owed. As it is applied by Grotius, however, the doctrine could be interpreted as imposing no limit whatsoever. Whether he approached the question from the perspective of just war or from that of public war, Grotius deemed injuries offenses against rights, making it hard to quantify the harm, especially when the right has a universal, as well as a personal dimension. For instance, as we have seen in the case of commander Van Heemskerck and the VOC, Portuguese interference with the Dutch right to engage in commerce could be viewed as an offense not only against Dutch merchants, but against the East Indian peoples or against the whole world. Thus, the size of the Portuguese "debt" was not solely determined by the loss in profits that the Portuguese blockade had caused the VOC, though that was, according to Grotius, already "truly enormous." The Portuguese liability extended to the debt incurred for the illicit seizure of a right pertaining to all of humanity in the natural order. Furthermore, if this argument should prove insufficient, there was, in Grotius' assessment of the facts, no end to the number and variety of Portuguese offenses against the Dutch nation, which could be attributed to individual Portuguese or to the Portuguese nation, making a careful accounting of the "debt" superfluous—nothing could ever suffice.¹⁷⁷

177. Grotius frames his argument in this way:

[L]et us put aside every claim to vengeance Let us turn our attention rather to the following contention [T]he Portuguese have prevented the Dutch from trading freely with whatsoever East Indian nations the latter might choose for their trade, and are therefore under an obligation to make reparation for all of the profits lost to the Dutch by reason of that interference. The losses so caused amount to a truly enormous sum, since the first voyages were rendered practically futile and fruitless in consequence of the snares set by the Portuguese.

As to the matter of the parties from whom prize might legitimately be seized in just war, Grotius' theory proved equally expansive—all enemy property was subject to seizure: “Therefore, we conclude that all [enemy] subjects, at all times, are liable to despoliation, but not necessarily to forfeiture of their lives.”¹⁷⁸ No one is excepted, not innocent subjects, not women and children and not merchants or farmers unless, of course, prior security against despoliation had been given.¹⁷⁹ In *De Iure Praedae* Grotius develops a number of theories to support the view that all subjects are liable for the “debts” of the state. First, he argues that individual citizens are bound by the act of the state and therefore liable for them. “Indeed,” he asserts, “it is in keeping with natural equity, since we derive advantages from civil society, that we should likewise suffer its disadvantages.”¹⁸⁰ Second, drawing an analogy from the law of partnership, Grotius argues that individual subjects should be considered as severally liable for the debts of their state:

The law of nations . . . does not recognize such distinctions [between groups and individuals]; it places public bodies and private companies in the same category. Now, it is generally agreed that private societies are subject to the rule that whatever is owed by the companies themselves may be exacted from their individual partners. . . . [T]he state is constituted by individuals . . . [and so] individuals are liable in the same fashion as the state in so far as concerns reparation for losses, even when the claim in question is founded on wrongdoing. . . . [P]ecuniary penalties owed by the state may be exacted from the subject, since there would be no state if there were no subjects.¹⁸¹

Finally, Grotius challenges the notion that there might be such a creature as a truly innocent enemy subject. In Grotius' view, even if the subjects themselves could be considered as innocent of wrongdoing, their property was always necessarily implicated in the injury, for all enemy wealth served as a means of supporting the war effort:

[Enemy] subjects, even when innocent, are liable to attack in war in so far as they impede the attainment of our rights; now, all subjects, even those who do not themselves serve as soldiers, impede our efforts by means of their resources, when they supply the revenue used in the

Id. at 275. This passage is followed by a careful accounting of the rest of the Portuguese crimes. On the question of “how much” can be taken, see *id.* at 48–49, 133–34.

178. *Id.* at 113.

179. In the narrative account of the events that precede the taking of the *Santa Catarina*, Grotius makes mention of the security that had been granted after 1580 to Portuguese merchants residing in the United Provinces. *Id.* at 173–74.

180. *Id.* at 107.

181. *Id.* at 107–08 (emphasis added).

procurement of those things which imperil our lives and which do not only hinder the recovery of our possessions but also compel us to submit to fresh losses; and therefore, subjects must be deprived of such resources Hence it is permissible to infer, not only that possessions may be forcibly taken from the said subjects, but also that these possessions may be added to our own.¹⁸²

Enemy property has lost its innocence and become a weapon of war. “[A]ll enemy possessions are so many instruments prepared for our destruction; that is to say, through them weapons are provided, armies are maintained, the innocent are stricken down.”¹⁸³ In a sense, Grotius’ argument amounts to the claim that in war, property loses its purely private character as it serves a public end. If the war is unjust then the property is subject to forfeiture automatically to pay the debt incurred by the state. From the just defendant’s perspective, all prize taken from enemy subjects is legitimate since the debtor could never fully discharge his debt. No careful keeping of accounts was therefore required. In conformity with this expansive view of prize, a buyer seeking to purchase prize goods in the marketplace would be free to disregard any scruples concerning the origin of the good. Prize goods that entered the marketplace were simply goods indistinguishable from other goods. But of course all this depended on the underlying assumption that the war in which the prize was taken was “just.”

It is evident that a corollary to the claim that just war rendered prize goods legitimate is that an unjust war would render them illegitimate. Logical though this conclusion might be, it was not satisfying from a practical perspective. That the legitimacy of a good acquired through the seizure of prize should depend on the validity of a just war claim left goods in the marketplace vulnerable to an indeterminacy that could reduce their value. Whose responsibility would it be to determine whether the war was just? Could a buyer rely on a public pronouncement or was he responsible for considering the question for himself? Who after all could verify that a prize was taken with the right intention? Could it turn out after the fact that the claim of justice for the war was misplaced? Would the goods then have to be returned to the previous owner who had been wrongly despoiled? Grotius’ analysis of the law of prize sought to eliminate all such quandaries.

182. *Id.* at 112 (emphasis added).

183. *Id.* at 44. In a similar move, Grotius argues that even if the Kingdom of Portugal was unwillingly joined to Spain in 1580, Spanish offenses (and enmity) could be attributed to Portugal as Portuguese taxes helped defray the Spanish war effort against the United Provinces.

Grotius' solution to the problem involved drawing a clear distinction between the sovereigns and their subjects. From the point of view of the sovereign (or the state), it was a logical impossibility that the war be just on both sides. In the case of belligerent states, only one could be engaged in a just war at any given moment. But, from the point of view of subjects, the case was, according to Grotius, radically different. Subjects were not required to make a determination of the justice of the cause for themselves. Justice in subjects consisted in following the command of the sovereign. The only qualification was in those instances where reason rebelled against the command "after the probabilities have been weighed," in which case the subject was freed from obedience to the sovereign.¹⁸⁴ From the perspective of the subjects then, public war could be just on both sides, and if war was just on both sides, then "spoils are justly taken and retained by subjects on both sides."¹⁸⁵ Subjects who seize spoils from enemy subjects in public war are analogized by Grotius to "good faith possessors," who cannot subsequently be dispossessed of their property. Troubled by the fact that at least insofar as irrevocable acquisition was concerned, his argument flew in the face of the natural law prohibition against the taking of private property, expressed within his theory of justice as the fourth precept,¹⁸⁶ Grotius turned for assistance to the "secondary law of nations" which, as we have seen, in his scheme is mixed in origin.¹⁸⁷ According to Grotius, all nations have agreed that things captured in war become the property of the captors of either belligerent party, regardless of the justice of their cause. The reason, adds Grotius, is pragmatic, for nations recognize that "citizens defend their state more zealously and bear the burdens of war more willingly under the influence of personal interest . . ."¹⁸⁸ Thus, invoking the secondary law of nations, Grotius concludes there is no duty to return spoils even if it turns out the public war was unjust; "For what I have once rightfully acquired cannot possibly cease to be mine, save by my own act."¹⁸⁹

This line of reasoning, relying as it does on the secondary law of nations, could not by definition apply to private war waged on the high

184. *Id.* at 84.

185. *Id.* at 119.

186. "Let no one seize possession of that which has been taken into the possession of another." *Id.* at 13.

187. *Id.* at 121. In the *Prolegomena*, the secondary law of nations is set forth in Principle (Rule) VIII: "Whatever all states have indicated to be their will, that is law in regard to all of them." *Id.* at 26.

188. *Id.* This could serve as a further example of Grotius' approval of the human beings' quest for profit.

189. *Id.* at 122.

seas. On the high seas, as Grotius had earlier pointed out, private individuals found themselves outside the jurisdiction of any state, and were thereby returned to something like the state of nature, which existed prior to the formation of states, and so prior to the secondary law of nations, which was grounded in state agreement. On the high seas, private war was governed only by the law of nature including the prohibition against taking property already in the possession of another. What then of private war belligerents? Could their seizure of prize be subject to subsequent challenge? In the case of private war says Grotius, "war does not in itself suffice to [transfer title] . . . without the additional factor of a truly just cause."¹⁹⁰ It would thus appear that at least in the case of private war, the question of indeterminacy would re-emerge. Grotius' response to this final quandary is eminently logical. He begins by returning to the distinction between temporary and continuous necessity. As we have seen, Grotius' argument is that private war is legitimate only in the case of necessity when no recourse to judicial adjudication is available. In cases of temporary necessity, civil law is only in temporary abeyance, and since civil adjudication quickly becomes available, there is no automatic transfer of title. In the case of continuous necessity, on the other hand, the situation is markedly different. In such cases, individuals, as if removed from civil society, revert back to their natural rights and are entitled to become judge and executor in their own cause. In other words, they are the sole judge of the justice of their cause and their decision is non-reviewable. In such an instance, says Grotius, "one belligerent, acting for himself in the capacity of judge, acquires forthwith the goods seized as a pledge from the other belligerent. Nor will the former incur, at some later date when recourse to a judge becomes possible, any obligation to make restitution."¹⁹¹ For, according to Grotius, that would be tantamount to reopening a case because of a change of facts after adjudication. Since the oceans are places outside civil jurisdiction, prize seized by private individuals pursuant to a claim of just private war, are permanently lost to their previous owners.

One final concern, raised by Aquinas' third condition defining just war, was quickly resolved. If just war required not only "just" cause but a "right intention," what would happen when (as one might suspect was not infrequently the case) the primary motive for a given seizure of prize was the acquisition of enemy goods rather than the execution of one's rights? Could such a distortion at the level of right intention affect the character of the goods seized? For Grotius the answer was unambiguous.

190. *Id.* at 135.

191. *Id.* at 136.

While “it is a vicious practice to aim at gain through spoils as one’s principal goal . . .”¹⁹² says Grotius, it is nonetheless a matter of conscience not susceptible to proof and must therefore be disregarded. “Furthermore,” adds Grotius, “even in the court of conscience, he who wages war for an unjust purpose is indeed convicted of sin, but he rightfully retains the spoils.”¹⁹³ The buyer of goods seized as prize in the seas of the East Indies could rest secure.

Grotius’ interest in prize law as a mechanism of exchange had one further ramification, which, while not immediately apparent in *De Iure Praedae*, is of central importance in the contemporaneous *Commentarius in Theses XI*. In this short treatise Grotius’ stated purpose is to provide a legal justification for the Dutch rebellion.¹⁹⁴ As we might have expected, the topic naturally brings Grotius back to the subject of just war and the nature of sovereignty. As we saw him doing in *De Iure Praedae*, Grotius here rehearses the idea that sovereignty is not necessarily unified in a single absolute prince, but that to the contrary, “[t]he marks of sovereignty may be divided among several parties”¹⁹⁵ as of course he contends they were in the case of the province of Holland. In the *Commentarius*, Grotius develops the theme of the marks of sovereignty in greater detail. Since each mark of sovereignty is self-contained, all marks of sovereignty are inherently equal. There can be no superior mark of sovereignty that trumps the others, for the definition of a mark requires that no one may rescind it by virtue of a higher right.¹⁹⁶ Moreover, a mark of sovereignty is presented by Grotius as equivalent to a right; defensible within the framework of the just war doctrine. And each mark of sovereignty carries with it a natural right for its execution:

Hence, there exists some natural right to exercise this mark And, since the mark [of sovereignty] is naturally linked to the means that tend towards the end of that mark, there is no natural reason why the right to apply these means should rest with another person than the one who has the mark [of sovereignty], just as each person has the natural right to defend himself.¹⁹⁷

From this proposition Grotius is able to conclude that: “He who holds some mark of sovereignty has the right to wage war in defence of that

192. *Id.* at 128.

193. *Id.* at 129.

194. BORSCHBERG, *supra* note 39, at 169–91. Borschberg dates the writing of the *Commentarius in Theses XI* to 1603–1608 and finds that there is insufficient evidence to show whether it was a precursor or a spin-off of *De Iure Praedae*. *Id.* at 193–99.

195. *Id.* at 225.

196. *Id.*

197. *Id.* at 237 (alterations in original).

mark [of sovereignty], even [if this be conducted] against a party which holds another mark.”¹⁹⁸

In line with this reasoning, the Dutch revolt could be characterized as a just war whereby the Dutch nation merely rose in defense of its mark of sovereignty seeking thereby to execute its right against the Spanish usurper. But the Dutch had not only defended their right, the United Provinces had sought to dispossess Philip II of his concurrent marks of sovereignty, to dispossess Philip and to acquire and retain those marks of sovereignty in themselves. In other words, Grotius still needed to identify a mechanism by which to justify the Dutch appropriation of Philip II’s marks of sovereignty, for the Dutch were not fighting an ongoing war against Spain to retain their ancient privileges, they were seeking to oust their prince. By what right could Philip be divested of his legitimate marks of sovereignty and by what mechanism could these rights be permanently acquired by the United Provinces? Once again, prize law came to the rescue. Grotius’ line of reasoning had placed the conflict waged between entities holding marks of sovereignty within the framework of just war. The Dutch, engaged in a just war to defend their mark of sovereignty against the usurper, were in the same posture as an individual waging private war on the seas or as a state engaged in public war against an enemy nation.¹⁹⁹ The marks of sovereignty, treated conceptually as rights or property belonging to the usurping enemy, are simply seized by the defending party in the execution of their rights. By the operation of prize law, “title” to the goods is then transferred automatically and is no longer subject to divestiture. Basing his argument on prize law, Grotius can then assert: “*Whoever undertakes a just war in defence of a mark of sovereignty which lies within his competence also acquires the other marks.*”²⁰⁰

Despite the dramatic application of prize law that Grotius deploys in the *Commentarius*, his analysis of its function as a mechanism of exchange lacks some of the nuances it acquires in *De Iure Praedae*. For instance, in the *Commentarius*, Grotius appears to claim that the legal

198. *Id.* (alterations in original).

199.

“[T]he state has the power within itself, if wronged by another state, to pass judgment concerning the wrong suffered.” This according to Vitoria, *De Iure Belli*, number 19, the origin of just war. The state, however, does not possess this right by superiority, since the two states are equal; hence, it possesses this right by necessity which holds sway in all cases where neither party is superior.

Id. at 247.

200. *Id.* at 259 (emphasis in original).

“permanent acquisition” of goods in war is purely the result of the secondary law of nations,²⁰¹ whereas in *De Iure Praedae*, Grotius turns to the secondary law of nations only to address the particular problem of goods taken in the course of a war that later turns out to be unjust.²⁰² Be that as it may, the significance of Grotius’ use of prize law to justify Dutch “seizure” of sovereignty in the *Commentarius* is that it highlights its vital function in *De Iure Praedae*. That sovereignty itself might be one of the “goods” exchanged in war gives a different complex to Grotius’ otherwise somewhat puzzling insistence on presenting just war as a mechanism of exchange. That “title” to goods seized from the enemy should transfer in a permanent form was of greater consequence than might have first appeared. On the legitimacy of prize law hung not only the wealth of the United Provinces but her future as a sovereign nation. The legitimacy of “property” rather than the legitimacy of violence had become the concern of the nascent international law of war.

V. CONCLUSION

Conventional views of international law have traditionally approached war and trade as categorically distinct forms of international relations. Consequently, it is assumed that public international law (including the law of war) and international trade law are distinct fields, each with its own separate history and trajectory. Furthermore, while war has come to be considered a great evil, trade is most commonly viewed as a good. Indeed, a broad range of theories from liberal internationalism to neo-conservatism share the belief that the end of war will be achieved in part through the full liberalization of international trade, while international institutions such as the European Union are founded on the conviction that the scourge of war can be put to rest only through an institutionalization of the liberal values of democracy and free markets. In any case, it is generally agreed that the goal of public international law should be to constrain war, while the goal of international trade law should be to enable international commerce.

In this article, I have sought to challenge some conventional assumptions about the distinct trajectories of war and trade in the history of international law by exposing the pervasive function played by commerce in Hugo Grotius’ early legal treatise *De Iure Praedae* (The Law of Prize and Booty). In this important work, written by a major figure at the ori-

201. *Id.* at 261. Grotius refers to the law of permanent acquisition as “a recent innovation in the law of nations.” *Id.*

202. *See supra* text accompanying notes 175–77. This difference suggests that the *Commentarius* was written prior to the chapters of *De Iure Praedae* devoted to prize law.

gin of international law, war and international commerce have become indissolubly entwined. *De Iure Praedae* is an ambitious work in which Grotius maps out an original theory of justice, improvises a new doctrine of the freedom of the sea, and composes a first version of his influential theory of the law of war. Grotius' innovations in each of these areas, my analysis suggests, can be understood as driven by the objective of producing a new international law that recognizes international commerce as a critical concern of the European nations and is receptive and attentive to the private character of commercial activity overseas. The result is a theory of justice in which natural law seems particularly well-attuned to the character of virtuous commercial man, who serves the welfare of mankind as a corollary of pursuing his rightful profit. It is a doctrine of the freedom of the seas that supports a defensible right to engage in commerce (already implicit in the theory of justice) and, by claiming the seas as a space outside of state jurisdiction, provides the grounds for private just war between merchants. And finally, the result is a more expansive and permissive law of war, one which embraces the concept that interference with the right to engage in trade is an injury sufficient to justify just war; introduces the category of private war, a category for all intents and purposes specifically tailored to supply legitimacy to prize-taking by merchant vessels; justifies treating all enemy goods as just prize; and redefines prize law as a mechanism of quieting title of enemy goods seized in war regardless of whether these were seized in the course of just or unjust war.

The context of Grotius' *De Iure Praedae* was the violent encounter of European merchants vying with one another for trading opportunities in the East Indies early in the seventeenth century. It was an encounter which, I argue, was generative of international law because it confronted legal theorists with a new form of conflict, one explicitly concerning commercial competition among members of "civilized" nations rather than the domination of "uncivilized" peoples, and one which manifested itself in the form of a violent confrontation between private merchants pursuing private economic interests in regions far distant from Europe. Nonetheless, the point is not simply to argue that international law's trajectory served the interests of trade from its earliest inception, though this is made abundantly clear in my reading of Grotius' *De Iure Praedae*. Instead, what I have hoped to show through the detailed reading of Grotius' text is that commerce inhabits every inflection of the text and that, in the end, commerce serves the interest of war as much as war serves the interests of commerce. The function of commerce in Grotius' text is not only economic. Commerce is a way of thinking about the human being and God's creation. It is inherent in the design of nature.

Commerce is the activity of private individuals, yet also a corporate practice. It becomes an expression of national identity and is presented as the nation's vocation. The national interest, the nation's well-being and even the nation's liberty are imagined as dependent on the success of commerce as much as they are on war. To defend the right of commerce is not only to defend the interest of private capital, but to defend the nation and to be on the side of nature and God's plan. It becomes reasonable to argue that the sovereign should go to war in defense of commercial interests. Yet, the introduction of commerce as a valid justification for war requires a new way of thinking about the relationship between the sovereign and war, and between the sovereign and commerce, for commerce that must be defended is the domain of private individuals and corporations. Both commerce and war were transformed by the encounter of European merchants in the East Indies in the seventeenth century; commerce became more like war while war became more like commerce. Commerce served as a justification for war and was used as a weapon in war. War became a means of acquiring goods in the pursuit of commerce.

Beyond showing that one cannot easily separate the history of international law from the history of international trade, my reading of Grotius' work offers a caution to those who have become convinced that the end to war can be achieved through trade liberalization. Grotius did not simply hold a positive view of commerce and do his utmost to transform international law to further the interests of commercial actors. The view of commerce that informs the whole work is a version of the "doctrine of the providential function of commerce." According to this "doctrine," international commerce is not merely divinely endorsed, but is actually brought into being by God's will as part of God's beneficent design to bring mankind back to harmony and friendship. In other words, Grotius adopted a view which is consistent with the popular idea that trade brings peace in its wake. Yet, despite his conviction, Grotius produced a series of legal doctrines that gave greater scope to war on behalf of trade. Furthermore, he crafted legal arguments that made it possible to view war itself as a commercial activity. As the seventeenth century unfolded, conflict between European merchants in the East Indies escalated. Prize-taking became a significant economic activity in the region. Eventually, of course, the East Indies also came under the scourge of colonization. Rather than harmony and friendship, commerce proved a vehicle of war and enmity.

***EMPAGRAN*, THE FTAIA AND EXTRATERRITORIAL EFFECTS: GUIDANCE TO COURTS FACING QUESTIONS OF ANTITRUST JURISDICTION STILL LACKING**

“As a moth is drawn to the light, so is a litigant drawn to the United States.”—Lord Denning¹

“In the globalization system, *where* you are doesn’t matter much anymore.”—Thomas Friedman²

I. INTRODUCTION

The United States has the most developed and aggressive antitrust regime in the world, so it is not surprising that parties injured by worldwide price-fixing conspiracies would prefer to litigate their claims here than anywhere else.³ Our case law is filled with examples of domestic plaintiffs litigating antitrust claims against foreign defendants, and foreign plaintiffs litigating antitrust claims against domestic defendants.⁴ But recently a new twist has appeared: foreign plaintiffs bringing their antitrust claims against foreign defendants, in U.S. courts for injuries that took place outside the United States.⁵

At issue is the extraterritorial reach of the U.S. antitrust laws. The question is this: Can victims injured abroad by a worldwide price-fixing conspiracy bring suit in U.S. federal courts under U.S. antitrust law when the antitrust conduct also has an effect on domestic business? After three different Courts of Appeal answered the question in three different

1. *Smith Kline & French Lab. Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 733 (Eng.), quoted in Spencer Weber Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 LOY. CONSUMER L. REV. 523, 523 (2002) [hereinafter Waller, *Courtroom*].

2. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 246 (Anchor Books 2000) (1999).

3. Waller, *Courtroom*, *supra* note 1, at 532 (explaining that there is a strong incentive for plaintiffs to bring price-fixing claims under the Sherman Act in the United States, rather than elsewhere, due in large part to the treble-damages provision of the Clayton Act and the United States’ more liberal discovery procedures, as well as class actions, contingent fees, punitive damages and jury trials.)

4. See Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159 (1999).

5. 1 VED P. NANDA & DAVID K. PANSIUS, *LITIGATION OF INT’L DISPUTES IN U.S. COURTS* § 8:13 (2005) [hereinafter 1 NANDA & PANSIUS].

ways,⁶ the U.S. Supreme Court granted certiorari to settle the issue, and held that U.S. courts do *not* have jurisdiction under U.S. antitrust laws to try a case in which foreign buyers allege they have been injured by the price-fixing actions of foreign sellers—but only where the foreign injury is *independent* of any effect on U.S. commerce.⁷ The decision left open the question of whether foreign plaintiffs could bring actions in the United States if the foreign injury is *dependent* on the effect of the injury on U.S. business⁸ and, further, what is the standard for dependence?⁹

The case, *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*,¹⁰ was the penultimate action in a years-long string of litigation that was set in motion¹¹ in 1997 when the U.S. government began to prosecute ten companies and their corporate executives for conspiring to fix the prices and allocate sales of bulk vitamins.¹²

That prosecution, known as the *Vitamins Case*, resulted in the largest fines in U.S. history and spawned a host of civil class action lawsuits in the United States that led to record settlements.¹³ Hoffman-La Roche, a Swiss manufacturer, agreed to pay \$500 million, and BASF Aktiengesellschaft, a German manufacturer, paid \$225 million.¹⁴ More than ten corporate officials went to jail.¹⁵ Subsequently, three Japanese corporations, two more German companies, and two U.S. companies pleaded

6. See generally *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001); *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002); *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 2001 WL 761360 (D.D.C. 2001).

7. *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 175 (2004).

8. *Id.*

9. See *infra* Part V.

10. *Empagran I*, 542 U.S. 155.

11. Bernard Persky, *Empagran and the International Reach of U.S. Antitrust Laws*, 21 NYSBA ANTITRUST LAW SECTION SYMPOSIUM 21 (2005).

12. See Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 712-17 (2001) [hereinafter First, *Vitamins*], for a comprehensive overview of the *Vitamins* litigation. See also Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 222 (2003) [hereinafter Waller, *Incoherence*].

13. First, *Vitamins*, *supra* note 12, 712-17.

14. Roxanne C. Busey & Patrick J. Kelleher, *A Short History of Civil and Criminal Antitrust Remedies and Penalties*, chart at 1, <http://gcd.com/newsevents/publications> (follow "Publications Archive" hyperlink, choose "Litigation" under dropdown search) (last visited Mar. 26, 2006).

15. Jane Whittaker & Elliot Thomas, *Three Meanings of the Indefinite Article, Three Judgments and the Global Reach of U.S. Anti-Trust Laws*, 25 BUS. L. REV. 112, 112-14 (2004) (U.K.).

guilty and paid large fines,¹⁶ with U.S. criminal fines totaling over \$1 billion.¹⁷

Concurrent with the criminal enforcement, direct purchasers of the vitamins and vitamin premixes¹⁸ brought class action suits in federal courts,¹⁹ settling with six of the companies for \$1.05 billion, “the largest private antitrust price-fixing settlement in history.”²⁰ Twenty-two states’ attorneys general shared an additional \$340 million on behalf of the states and their citizens.²¹

Finally, five non-U.S. vitamin distributors, all of whom had conducted their transactions entirely outside the United States, attempted to recover damages in a class action in U.S. district court under U.S. antitrust law.²² These plaintiffs had purchased vitamins abroad from cartel members (or their alleged co-conspirators) between January 1, 1988, and February 1999, and had taken delivery outside the United States.²³ This was the action that came to be known as *Empagran*.

The defendants moved for dismissal, arguing that the court did not have power to adjudicate the case under the Foreign Trade Antitrust Improvement Act (FTAIA), a statute that limits the extraterritorial reach of

16. First, *Vitamins*, *supra* note 12, at 716–17.

17. Waller, *Incoherence*, *supra* note 12.

18. First, *Vitamins*, *supra* note 12, at 718. As First explains, vitamin manufacturers blend their products into combinations of vitamins. The components of each blend are determined by the use to which the blend will be put (for example, to be added to a type of animal feed, or a breakfast cereal supplement). The vitamins manufacturers also sell their vitamins “straight” to independent blenders who mix them themselves. The independent blenders’ suspicions that collusion was occurring among the vitamins manufacturers led to the class action lawsuits. *Id.* at 712–13.

19. *Id.* at 713. A final judgment in a suit by the government that a person has violated the antitrust laws is prima facie evidence against the defendant in a subsequent private damage action, under § 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1914).

20. *Id.* at 718.

21. Waller, *Incoherence*, *supra* note 12, at 223–24.

22. *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 2001 WL 761360, at *1 (D.D.C. 2001).

23. *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 342 (D.C. Cir. 2003). Two domestic plaintiffs, Procter & Gamble Manufacturing Co. and Procter & Gamble Co., were initially part of the class but subsequently transferred their claims to another case that involved substantially the same claims and the same defendants. *Id.* at 343. The five plaintiffs remaining were companies in Ukraine, Australia, Ecuador, and Panama, all of whom had suffered their injuries outside the U.S. market. *F. Hoffman-La Roche Ltd. v. Empagran S.A., The Supreme Court Restricts the Applicability of U.S. Antitrust Laws with Regard to Injuries Suffered Abroad Independently from Effects on the U.S. Market*, Duke Law, <http://www.law.duke.edu/publiclaw/supremecourtonline/commentary/fhovemp.html> (last visited Mar. 26, 2006) [hereinafter Duke Law].

the Sherman Antitrust Act.²⁴ The district court dismissed the case,²⁵ and plaintiffs appealed, arguing that the court had misinterpreted the FTAIA.²⁶

The FTAIA exempts from the reach of the Sherman Act both U.S. export-only activity and other commercial activities that take place totally abroad, unless such activities negatively affect U.S. domestic commerce.²⁷ Courts had split over a key phrase in the statute regarding whether that activity must be the basis for the plaintiff's own claim, or whether it was merely necessary that *someone* had a claim.²⁸

In deciding the issue, the Supreme Court gave short shrift to the semantic inquiry and deterrence arguments that had split the circuits and instead looked to principles of international law and comity to define the scope of the FTAIA²⁹—a somewhat surprising approach considering that the Court had ruled out comity in a leading case only twelve years before.³⁰

Key to the Court's decision was the distinction between dependent and independent effects.³¹ The Court held that when the foreign plaintiff's injury is *independent* of the effect of defendant's conduct on U.S. commerce, U.S. courts have no jurisdiction.³² Some believe the Court was implying it *would* have had jurisdiction if the foreign plaintiff's injury would not have occurred "but-for" the effect of the conduct on the U.S. market.³³ Others believe the Court could not have meant that but-for linkage would be enough, because such a loose standard would be enough to support jurisdiction in virtually every such case.³⁴ In fact, it has been said that the Court decided only a hypothetical situation.³⁵

24. Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6(a) (1982). *See infra* Part III.

25. *Empagran*, 2001 WL 761360 at *9.

26. *Empagran*, 315 F.3d at 340.

27. *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 161 (2004).

28. Salil K. Mehra, "A" is for Anachronism: The FTAlA Meets the World Trading System, 107 DICK. L. REV. 763, 769 (2003) [hereinafter Mehra, *Anachronism*].

29. *Empagran I*, 542 U.S. at 164–73.

30. *See infra* Part IV.

31. *Empagran I*, 542 U.S. at 164.

32. *Id.* at 175.

33. *Perspectives on Empagran*, ANTITRUST SOURCE, Sept. 2004, at 1, 5, <http://www.abanet.org/antitrust/source/sept04/Sep04Empagran.pdf> (presenting remarks by Thomas C. Goldstein) [hereinafter Goldstein, *Perspectives*].

34. John H. Shenefield, *Empagran and the International Reach of U.S. Antitrust Laws*, 21 NYSBA ANTITRUST L. SEC. SYMP. 30 (2005) [hereinafter Shenefield, SYMPOSIUM].

35. *See infra* Part V.

With rampant globalization, instantaneous communication, and multinationals building products with components from all over the world and selling them far from where they are produced, it may be argued that there no longer are independent, national markets. The globalization of world trade and instantaneous communication have had a profound effect on the world.³⁶ The Internet has certainly complicated the issue further.³⁷ In today's globalized economy, businesses are not constrained by political or physical borders—"increasingly products have their origins in one country, are assembled in a second country, with parts from a third country, and are sold through fabricators in a fourth country ultimately to consumers in a fifth country."³⁸ When IBM stunned the business world in December 2004, by announcing it was in talks to sell its personal computer business to a Chinese PC maker, a *New York Times* article featured a picture of an IBM laptop with each component identified by its source—memory and display screen, South Korea; case, keyboard and hard drive, Thailand; wireless card, Malaysia; battery, Asia; graphics controller chip, Canada and Taiwan; microprocessor, United States; assembly, Mexico.³⁹ Clearly, these changes in how business operates have had an impact on antitrust regulation. While regulation still occurs at the national level, increasingly business is done globally.⁴⁰

36. See generally FRIEDMAN, *supra* note 2 (describing the new electronic global economy).

37. Salil K. Mehra, *Foreign-Injured Antitrust Plaintiffs in U.S. Courts: Ends and Means*, 16 LOY. CONSUMER L. REV. 347, 350 (2004) [hereinafter Mehra, *Ends and Means*].

38. John H. Shenefield, *Coherence or Confusion: The Future of the Global Antitrust Conversation*, 49 ANTITRUST BULL. 385, 386 (2004) [hereinafter Shenefield, *Coherence*]. He points out:

The last 25 years have seen two great trends—globalization and economic liberalization—which together have had a profound and transforming effect on most national economies, and concomitantly on efforts to safeguard competition in those economies by operation of law

Even apparently very localized companies cannot remain impervious to the combined impact of fluid capital markets, instantaneous international communication and the economic necessity of producers to buy from and sell into global markets. These facts of economic life directly affect regulatory policies: trade barriers have been forced down, and restrictions on foreign investments have likewise declined.

Id.

39. David Barboza, *An Unknown Giant Flexes its Muscles*, N.Y. TIMES, Dec. 4, 2004, at C1.

40. Alexander Layton & Angharad M. Parry, *Extraterritorial Jurisdiction—European Responses*, 26 HOUSTON J. INT'L L. 309, 310 (2004) (“[A]lthough trade is global, there is

Amid predictions that the exception would swallow the rule, the District of Columbia Circuit Court, on remand in *Empagran*, limited its jurisdiction to situations in which the domestic effect was the proximate cause of the plaintiffs' injuries.⁴¹ But the Supreme Court did not set out any standards for determining what the lower courts should consider in applying the FTAIA, and since its *Empagran* decision, cases interpreting the FTAIA in other courts have been decided inconsistently.⁴² The result of the Supreme Court's narrow ruling and lack of clear standard is continued uncertainty. Prospective plaintiffs still have little guidance on whether their claims will ultimately be heard by U.S. courts,⁴³ defendants are exposed to risks of unquantifiable later civil claims if they choose to settle government suits,⁴⁴ and foreign governments remain concerned about the reach of U.S. laws at a time when many are trying to develop their own antitrust regimes.⁴⁵

This Note argues that the question of the extraterritorial reach of the Sherman Act is still very much open, that the Supreme Court's decision gives limited guidance to the lower courts, and that the answer lies not in debating the interdependence of local effects and international injury, but in looking beyond the FTAIA for a solution. Part II provides a brief history of the extraterritorial effect of U.S. antitrust laws; Part III explains the split over construction of the FTAIA; Part IV sets out the Supreme

no single global regulator."); see also Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277, 280 (1992) (arguing that "effective regulation of the competitive process must somehow take place at the same level where the business activity itself is pursued, that is, the international level."). See also David J. Gerber, *Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 26 HOUSTON J. INT'L L. 287, 300 (2004) ("[G]lobal markets represent a source of opportunity, but governments can impede competitors' capacity to take advantage of those opportunities. Firms seek to minimize costs of operation, but each state border that is crossed may create additional compliance costs. Firms also seek to reduce uncertainty and increase planning predictability, but encounters with numerous legal systems reduce predictability.").

41. *Empagran v. F. Hoffman-La Roche (Empagran II)*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

42. See *infra* Part V.

43. See *infra* Part VI.

44. Defendants, in particular, may be much less likely to agree to settlements when facing criminal charges, because their subsequent civil liabilities could be much greater (and more difficult to estimate in advance). In fact, the Department of Justice and many foreign governments filed *amici curiae* briefs in the suit because of the potential harm such a result could have on antitrust enforcement. See Brief for the United States as Amicus Curiae Supporting Petitioners at 20–21, *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155 (2004) (No. 03-724).

45. See generally Layton & Parry, *supra* note 40.

Court's *Empagran* decision; Part V analyzes the aftermath of *Empagran* and recent court decisions construing its rule; Part VI offers a critique of the Supreme Court's decision; and Part VII looks at alternative approaches for deciding the question of when foreign plaintiffs' antitrust claims should be heard in U.S. courts, including the application of antitrust standing and an extension of the doctrine of forum non conveniens.

II. EXTRATERRITORIALITY

The extraterritorial application of the U.S. antitrust laws has evolved through the years in parallel with the extraordinary growth of transnational business. From the 1920s, when globalization began to develop,⁴⁶ through today, when the Internet and instantaneous communication make it possible for everyone to be everywhere,⁴⁷ the principles by which U.S. antitrust laws have been applied to foreign entities have shifted.⁴⁸

Conflicts were easily resolved when the basis for jurisdiction was pure territoriality, since territory has "well-defined and easily identifiable boundaries."⁴⁹ The territorial approach was exemplified in *American Banana v. United Fruit Co.*, where American Banana argued that United Fruit had seized one of its plantations in Costa Rica in collusion with local authorities in violation of the Sherman Act.⁵⁰ The Supreme Court held that the acts were done outside the jurisdiction of the United States.⁵¹ This approach was the rule on the extraterritorial application of U.S. law for the next several decades.⁵²

Pressures on the doctrine began to mount by the 1920s; by that time the international cartel movement was complicating business relationships

46. Jeremy C. Bates, Comment, *Home is Where the Hurt is: Forum Non Conveniens and Antitrust*, 2000 U. CHI. LEGAL F. 281, 317 (2000) (pointing out that antitrust law began its development in an era of rampant globalization resembling today's world more than is recognized).

47. Deanell Reece Tacha, *The Federal Courts in the 21st Century*, 2 CHAP. L. REV. 7, 25 (1999) ("The Internet knows no national boundaries and renders everyone with net access a speaker and a publisher.").

48. See James E. Ward, Comments, "Is That Your Final Answer?" *The Patchwork Jurisprudence Surrounding the Presumption Against Extraterritoriality*, 70 U. CIN. L. REV. 715, 717-21 (2002).

49. Gerber, *supra* note 40, at 293. "Where conduct occurs within a state's territory . . . the nexus is close, obvious and uncontested." *Id.* at 290.

50. See generally *American Banana v. United Fruit Co.*, 213 U.S. 347 (1909).

51. Ward, *supra* note 48, at 718 (explaining that the methodology in *American Banana* is "pure conflict of laws analysis based on vested rights and territoriality," and in accordance with its philosophy that "every nation possesses an exclusive sovereignty and jurisdiction within its own country . . . the legality of acts are to be determined wholly by the law of the country where the act is done.").

52. *Id.* at 719.

across national borders.⁵³ Business practices that spanned borders began to raise questions about which national laws applied.⁵⁴ The result was increased international acceptance of the “objective territorial principle,” which establishes the state’s jurisdiction over crimes begun outside the state’s territory but which cause injury within it.⁵⁵

As the volume of transnational trading grew, the “effects principle” developed to deal with the issue of antitrust’s extraterritorial application.⁵⁶ The leading case on the issue was *United States v. Aluminum Co. of America (Alcoa)*.⁵⁷ A Canadian subsidiary of Alcoa transacted all of Alcoa’s international business; it entered into an international cartel arrangement to fix aluminum prices worldwide, but none of the antitrust acts occurred within U.S. territorial boundaries.⁵⁸ The U.S. Justice Department alleged antitrust violations in the form of effects experienced within the United States.⁵⁹ Judge Learned Hand’s opinion stated “it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders that the state reprehends”⁶⁰ The court found the Sherman Act applicable to foreign conduct when it was “intended to affect imports and did affect them.”⁶¹ This principle came to be highly resented by other nations, although resistance has weakened as more of them have adopted the concept of applying their own laws beyond their borders.⁶²

This exercise of extraterritoriality has been constrained over the years (to a greater or lesser extent) by the principle of comity⁶³ or “reasonable-

53. Gerber, *supra* note 40, at 293.

54. *Id.*

55. *Id.* (“This concept appeared as a logical and appropriate extension of the territoriality idea, and it created few difficulties, because as originally conceived, its scope was narrow: it applied only when the consequences of conduct could be ‘localized.’”).

56. *Id.* at 290–91 (“It is now generally accepted that a state may prescribe norms where conduct has particular kinds of effects within its territory, regardless of where the conduct takes place.”).

57. *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

58. Ward, *supra* note 48, at 719.

59. *Alcoa*, 148 F.2d at 422–23.

60. *Id.* at 443. The decision has nearly the stature of a Supreme Court case because the Supreme Court had certified it to be heard by the Second Circuit. Marina Lao, *Reclaiming a Role for Intent Evidence in Monopolization Analysis*, 54 AM. U. L. REV. 151, 160 n.42 (2004).

61. *Alcoa*, 148 F.2d at 444.

62. Gerber, *supra* note 40, at 294–95.

63. Comity is “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to interna-

ness.”⁶⁴ While the government does consider comity before bringing cases against foreign nationals under federal antitrust laws, the majority of litigated cases involving foreign nationals, and therefore the development of the case law applying the principle of comity and its “rise and fall” since the 1970s, have been centered in private antitrust litigation.⁶⁵

The high point for comity was *Timberlane Lumber Co. v. Bank of America*.⁶⁶ The effects test had a number of shortcomings, such as ignoring the concerns of foreign governments.⁶⁷ In *Timberlane*, the Ninth Circuit set out a balancing test that took those interests into consideration.⁶⁸ The plaintiff, a U.S. company, alleged that the bank had conspired with officials in Honduras to monopolize the timber industry.⁶⁹ What made it different from *American Banana* and *Alcoa* was that the alleged antitrust activity took place entirely abroad (in Honduras), it involved only foreign citizens, and the economic impact was felt primarily in Honduras.⁷⁰ The court said that an effect on U.S. commerce was necessary but not

tional duty and convenience, and to the rights of its own citizens.” *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

64. Gerber, *supra* note 40, at 291. Gerber points out that the principle has been constrained in two ways: “One is to define more narrowly the kinds of effects required for the assertion of jurisdiction,” as done by the FTAIA, and, two, by using “balancing” or “reasonableness” factors in determining “whether there is prescriptive authority over foreign conduct or whether such authority should be exercised.” *Id.* at 295.

65. Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT’L L. 563, 566, 568 (2000) [hereinafter Waller, *Twilight*] (explaining that the need to apply comity arose because private litigants otherwise lacked incentive to consider the national interest in deciding whether to bring suits against foreign defendants). *See also* Wood, *supra* note 40, at 299 (noting that, notwithstanding substantive convergence on the law, “objections to extraterritorial enforcement, based on procedural grounds, continued,” and observing that “the remaining problems in this area tended to arise from private litigation in the United States, rather than government litigation.”).

66. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); Eleanor Fox, Testimony before the Antitrust Modernization Commission, Hearings on International Issues, § III (Feb. 15, 2006), http://www.amc.gov/commission_hearings/international_antitrust.htm [hereinafter Fox, Testimony] (referring to *Timberlane* as “the parent of U.S. antitrust comity ‘doctrine’”).

67. 3 VED P. NANDA, TRANSNATIONAL BUSINESS TRANSACTIONS § 13:3 (2005).

68. *Id.* The *Timberlane* test weighs (1) “the degree of conflict with foreign law or policy,” (2) the nationality or allegiance of the parties and the locations or principal places of businesses or corporations,” (3) “the extent to which enforcement by either state can be expected to achieve compliance,” (4) “the relative significance of effects on the United States as compared with those elsewhere,” (5) “the extent to which there is explicit purpose to harm or affect American commerce,” (6) “the foreseeability of such effect,” and (7) “the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.” *Timberlane*, 549 F.2d at 614.

69. *Timberlane*, 549 F.2d at 601.

70. Ward, *supra* note 48, at 721.

sufficient to determine whether the United States should assert jurisdiction.⁷¹ Instead, courts should look to whether the “interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.”⁷² This test ultimately found its way into the *Restatement (Third) of Foreign Relations Law*,⁷³ and was seen as a middle-of-the-road approach between *American Banana* and *Alcoa*,⁷⁴ but it came to be criticized as leaving too much discretion over political decisions to judges, rather than to the executive and legislative branches where such decisions arguably belong.⁷⁵

The Supreme Court’s 1993 decision in *Hartford Fire Insurance Co. v. California*⁷⁶ signaled a major shift in application of the balancing doctrine.⁷⁷ There, the Court established a new principle of prescriptive jurisdiction, holding that balancing issues are relevant, if at all, only where there is a “true conflict” between U.S. and foreign law.⁷⁸ Plaintiffs had brought Sherman Act claims against domestic insurers and foreign reinsurers, alleging that they cut back the scope of insurance coverage for U.S. buyers through illegal agreements.⁷⁹ The U.K.-based defendants asserted their conduct was lawful under British law, and they moved to dismiss the complaint for lack of jurisdiction and for reasons of comity.⁸⁰ But the Supreme Court held that there was jurisdiction, because the foreign conduct produced substantial effects in the United States.⁸¹ The Court avoided comity balancing, holding that comity should be considered only where there is a true conflict between U.S. and U.K. law.⁸² A “true conflict” would be one in which compliance with one nation’s law would require one to violate the law of another,⁸³ but no conflict exists

71. *Timberlane*, 549 F.2d at 613.

72. *Id.*

73. William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 130 (1998).

74. Ward, *supra* note 48, at 721.

75. John Byron Sandage, Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L.J. 1693, 1699–1701 (1985).

76. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).

77. Gerber, *supra* note 40, at 296.

78. *Id.* at 296.

79. See Eleanor M. Fox, *National Law, Global Markets, and Hartford: Eyes Wide Shut*, 68 ANTITRUST L.J. 73, 74 (2000).

80. *Id.* at 75.

81. *Hartford Fire*, 509 U.S. at 796.

82. Harry First, *Empagran and the International Reach of U.S. Antitrust Laws*, 21 NYSBA ANTITRUST L. SEC. SYMP. 26 (2005) [hereinafter First, SYMPOSIUM].

83. Gerber, *supra* note 40, at 296.

when the laws of both countries can be complied with at the same time.⁸⁴ Comity was “virtually eliminated” in such cases⁸⁵—until *Empagran I*. Justice Scalia wrote the dissenting opinion in *Hartford Fire*, and we will see echoes of that dissent in the Court’s *Empagran* opinion.⁸⁶

Empagran and the circuit split over the proper interpretation of the FTAIA gave the Supreme Court the opportunity to again address the extraterritorial reach of the Sherman Act.⁸⁷ Professor Harry First has said that it appears the Court wanted to revisit *Hartford Fire* and the approach taken by Justice Scalia in his dissent.⁸⁸ The situation was now complicated by foreign parties suing other foreign parties where their injuries did not have an effect in the United States.⁸⁹

III. THE FOREIGN TRADE ANTITRUST IMPROVEMENT ACT

The Foreign Trade Antitrust Improvement Act was enacted in 1982,⁹⁰ adding section 7 to the Sherman Act⁹¹ and exempting from the Sherman

84. *Hartford Fire*, 509 U.S. at 799. British law did not require the insurance companies to violate U.S. law, and so it was not impossible to comply with the laws of both countries. First, SYMPOSIUM, *supra* note 82.

85. Waller, *Twilight*, *supra* note 65, at 569. See also Gerber, *supra* note 40, at 296 (arguing that “by severely reducing conceptual constraints on U.S. jurisdictional claims, the Court has undermined decades of efforts to develop a more effective and internationally acceptable jurisdictional mechanism” and pointing out that some lower courts have interpreted the decision narrowly).

86. Eleanor M. Fox, *Remedies and the Courage of Convictions in a Globalized World: How Globalization Corrupts Relief*, 80 TUL. L. REV. 571, 578 (2005) [hereinafter Fox, *Remedies*].

87. 1 NANDA & PANSIUS, *supra* note 5 (pointing out that although the impact of the FTAIA on foreign plaintiffs had not been extensively litigated until recently, that changed with the contrasting approaches of the decisions of the Fifth Circuit in *Den Norske* and the Second Circuit in *Kruman*).

88. First, SYMPOSIUM, *supra* note 82, at 27.

89. Transcript of Oral Argument at *15, *F. Hoffman-La Roche, Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155 (2004) (No. 03-724). Assistant Attorney General R. Hewitt Pate stated that there were no cases prior to 1982, when the FTAIA was enacted, in which a foreign cartel injured parties in the United States and separately injured people abroad. *Id.*

90. Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6(a) (1982). The FTAIA provides:

Conduct involving trade or commerce with foreign nations.

This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

Act's reach export activity that does not have a negative effect on U.S. commerce.⁹² In effect, it legalized "export cartels."⁹³ The Court in *Empagran* explained the operation of the statute this way:

[The] language initially lays down a general rule placing *all* (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the "effect" must "giv[e] rise to a [Sherman Act] claim."⁹⁴

Thus, it endorsed the "effects test," requiring that the effects of the anticompetitive conduct on U.S. commerce "give rise to a claim" under the antitrust laws.⁹⁵ But it turns out that "a" doesn't always mean "a";

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Id.

91. Sherman Act, 1 U.S.C. § 1 (1890). *See also* 1 NANDA & PANSIUS, *supra* note 5.

92. *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 345 (D.C. Cir. 2003), *citing* *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796–97 n.23 (1993).

93. It is helpful to understand the political and economic background of the time: The FTAIA was "[e]nacted during a fit of industrial-policy enthusiasm and anti-Japanese hysteria[;] it legalizes U.S. export cartels—that is, price agreements and output restrictions that would earn their practitioners prison time if targeted at American consumers." Michael Greve & Richard Epstein, *Foreign Headaches*, NAT'L L.J., July 12, 2004, *available at* <http://www.federalismproject.org/masterpages/publications/foreign%20headaches.html>. An export cartel is composed of a group of producers within a single country whose conduct is directed solely at foreign markets. James R. Atwood, *Conflicts of Jurisdiction in the Antitrust Field: The Example of Export Cartels*, 50 L. & CONTEMP. PROBS. 153, 154 (1987).

94. *Empagran I*, 542 U.S. at 161 (internal citations omitted).

95. *Empagran*, 315 F.3d at 344.

sometimes it means “the.”⁹⁶ Congress did not define it, leaving courts to ponder⁹⁷ whether the claim necessarily had to be the plaintiff’s own, or whether it was only necessary that *someone* had a claim.⁹⁸

The district court’s decision applied the “restrictive view” of the FTAIA, that is, a plaintiff’s claim is restricted to injuries that actually arise from the effects of defendants’ antitrust conduct on U.S. commerce.⁹⁹ The plaintiffs had sought a determination based on the “less restrictive view,”¹⁰⁰ which would provide the court with jurisdiction over a foreign plaintiff suing a foreign defendant if *any* U.S. plaintiff—even the government—has a hypothetical cause of action (that is, a claim that some party *could* bring, even if it has not).¹⁰¹ On appeal, rather than adopting the position of the Fifth Circuit or the Second Circuit, the D.C.

96. In fact, entire articles have been written about the ambiguity of the word “a” in this context. See generally Whittaker & Thomas, *supra* note 15; Mehra, *Anachronism*, *supra* note 28. Judge Higgenbotham wrote, “The word ‘a’ has a simple and universally understood meaning. It is the indefinite article If the drafters of FTAIA had wished to say ‘the claim’ instead of ‘a claim,’ they certainly would have.” *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 432 (5th Cir. 2001) (Higgenbotham, J., dissenting).

97. *United States v. LSL Biotechnologies*, 379 F.3d 672, 678 (9th Cir. 2004) (“Federal courts did not shower the FTAIA with attention for the first decade after its enactment. But in the last ten years, and in particular the last five years, the case reporters have steadily filled with decisions interpreting this previously obscure statute.”).

98. Mehra, *Anachronism*, *supra* note 28 (“In other words, even if the plaintiff’s claim need not arise from the domestic effect, there must be a potential Sherman Act claim that another private party could bring arising from that effect.”).

99. *Empagran*, 315 F.3d at 340 (“The District Court held that, under FTAIA, a plaintiff must establish that the injuries it seeks to remedy actually arose from the anticompetitive effects of the defendants’ conduct on United States commerce. In other words, it is not enough for a plaintiff to show that other persons were injured by such United States effects; the United States effects themselves must give rise to plaintiff’s claim. This *restrictive view* of FTAIA’s jurisdictional reach finds support in the Fifth Circuit.”). See also *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001).

100. *Empagran*, 315 F.3d at 340–41 (“[Plaintiffs] contend that the District Court misconstrued FTAIA . . . according to [plaintiffs], Congress did not limit jurisdiction to the ‘the same claim’ as that on which the jurisdictional effects are based. Rather, Congress provided only that ‘a’ claim cognizable under the Sherman Act must exist. Once a jurisdictional nexus exists, FTAIA does not limit the types of plaintiffs who may seek relief. Thus, according to [plaintiffs], it does not matter that the transactions in which they purchased vitamins took place outside of U.S. commerce. This *less restrictive view* of FTAIA’s jurisdictional reach finds support in the Second Circuit.”) (emphasis in original). See also *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384 (2d Cir. 2002).

101. Here the claim was not hypothetical; the government and numerous private plaintiffs had already sustained their cause of action under the Sherman Act in the original domestic *Vitamins* litigations. First, *Vitamins*, *supra* note 12, at 713–19; *Empagran*, 315 F.3d at 352.

Circuit carved out yet another approach, although one closer to that of the Second Circuit: where the anticompetitive conduct has an effect on U.S. commerce, that conduct must give rise to a claim by someone (not necessarily the plaintiff); a government cause of action is not in itself a sufficient basis for jurisdiction.¹⁰² Because the cartel's actions had obviously given rise to antitrust claims by U.S. parties,¹⁰³ the circuit court reversed the district court's decision and held that it had subject matter jurisdiction¹⁰⁴ (and that the plaintiffs had standing to bring their claims),¹⁰⁵ thus setting the stage for Supreme Court review of what was now a three-way circuit split.

102. *Empagran*, 315 F.3d at 350. The court held:

Our view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former. We hold that, where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone, even if not the foreign plaintiff who is before the court. Thus, the conduct's domestic effect must do more than give rise to a government action for violation of the Sherman Act, but it need not necessarily give rise to the particular plaintiff's private claim. This interpretation has the appeal of literalism.

Id.

103. See First, *Vitamins*, *supra* note 12, at 718–19.

104. *Empagran*, 315 F.3d at 357, 359. The court did not entertain the plaintiffs' alternative theory that their injuries were a consequence of defendants' harm to U.S. commerce. The theory was:

[Plaintiffs'] complaint states a viable cause of action even under the District Court's *restrictive view* of FTAIA. [Plaintiffs] contend that [defendants] caused injury to purchasers outside of the United States as a result of the anticompetitive effects of price changes and supply shifts in United States commerce. Not only was United States commerce directly affected by the worldwide conspiracy, [plaintiffs] say, but the cartel raised prices around the world in order to keep prices in equilibrium with United States prices in order to avoid a system of arbitrage. Thus, according to [plaintiffs], the "fixed" United States prices acted as a benchmark for the world's vitamin prices in other markets. On this view of the alleged facts, [plaintiffs] claim that the foreign plaintiffs were injured as a direct result of the increases in United States prices even though they bought vitamins abroad.

Id. at 341 (emphasis in original). The Supreme Court ultimately remanded for consideration of this point. *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 175 (2004).

105. Although the District Court did not rule on the issue of antitrust standing, the Appeals Court reviewed it and found that the plaintiffs' injury was an injury of the type

With the Fifth Circuit holding a “restrictive” view, the Second Circuit holding a “less restrictive” view, and the D.C. Circuit carving out a view somewhere between the two, the Supreme Court granted certiorari on this very narrow ground: whether the FTAIA exception to the Sherman Act applies to a situation in which foreign plaintiffs allege a wholly foreign injury, that is, one not dependent on injury to U.S. commerce.¹⁰⁶

Why were there so many different interpretations of the FTAIA? It is widely considered to be a poorly drafted statute,¹⁰⁷ full of “double negatives, triple negatives, carve-ins and carve-outs and a proviso that is an exception to one of the exceptions,”¹⁰⁸ and even its legislative history is contradictory.¹⁰⁹ But, according to the Supreme Court’s interpretation of

that the antitrust laws are intended to prevent (antitrust injury). *Empagran*, 315 F.3d at 357 (“The foreign purchasers have constitutional standing. They allege that they suffered injury-in-fact when they paid inflated prices for vitamins directly to the defendants . . . There is no dispute that the foreign plaintiffs in this case have been injured by paying inflated prices for vitamins.”).

106. *Empagran I*, 542 U.S. at 160.

107. *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 300 (3d Cir. 2002) (describing the statute as “inelegantly phrased” and referring to its “convoluted language”). One commentator has “translated” the FTAIA into “human readable form” thus:

Plaintiffs (may) have a claim involving foreign commerce under the Sherman Act if:

1. the conduct in question has a direct, substantial, and reasonably foreseeable effect
 - a. on domestic commerce or on import commerce; or
 - b. on American export commerce; and
2. such effect gives rise to a claim under the Sherman Act.

U.S. Jurisdiction Over Foreign Antitrust Claims After Empagran: Many Questions Remain Open, Latham & Watkins, July 8, 2004, at 1, 2, http://www.lw.com/resource/Publications/_pdf/pub1032_1.pdf.

108. Shenefield, SYMPOSIUM, *supra* note 34, at 29.

109. H.R. REP. NO. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487. See also *Empagran*, 315 F.3d at 352–56, for its review of the legislative history. Although the Supreme Court appeared to find the statute’s history definitive, the circuit court found much in the record that each side could rely on. Salil Mehra breaks down the House testimony in a table to show that one can find statements to support precisely opposite points of view. Salil K. Mehra, *More is Less: A Law-and-Economics Approach to the International Scope of Private Antitrust Enforcement*, 77 TEMP. L. REV. 47, 65–66 (2004) [hereinafter Mehra, *More is Less*] (arguing that “[t]he ‘legislative history is clear’ argument is deeply flawed . . .” Not only is the testimony not clear, but “[t]he subcommittee that originally considered the bill rejected a Business Roundtable-proposed version of the language at issue that would have limited recovery to ‘injury so caused in the United States.’ This failed version of the FTAIA would have enacted the ‘narrow view.’”).

the legislative history, Congress' intent was to "make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets."¹¹⁰

From the text of the House Report it appears that the FTAIA was not limited to conduct involving U.S. exports.¹¹¹ The bill's original language referred only to "export" trade, but it was broadened to "other than import" trade.¹¹² It has been argued, however, that its language does not support providing additional causes of action or additional standing, but only limits the Sherman Act's jurisdiction.¹¹³

Given the lack of unanimity on the interpretation of the FTAIA, three policy arguments have dominated the debate: (1) deterrence, (2) burden on the courts, and (3) the impact on development of antitrust regimes in countries that either have no antitrust laws or have underdeveloped systems.

Deterrence has been the most hotly debated of these arguments, with advocates on each side of the issue claiming it supports their position. On one side is the view that opening U.S. courtroom doors to a potential flood of additional lawsuits will have an enormously detrimental effect on deterrence.¹¹⁴ The U.S. government's amnesty program reduces the punishment for the first cartel member to come forward with information

110. *Empagran I*, 542 U.S. at 161.

111. H.R. REP. NO.67-686. David Gerber points out that "[g]iven that Congress often does not specify the geographical scope of legislation . . . the courts must resort to presumptions regarding congressional intent." Gerber, *supra* note 40, at 297.

112. A House Report noted that the House Judiciary Committee broadened the original bill, which referred only to "export trade or export commerce," and changed that language to "trade or commerce (other than import trade or import commerce)." The *Empagran* Court noted that the Committee "did so deliberately to include commerce that did not involve American exports but which was wholly foreign." *Empagran I*, 542 U.S. at 163.

113. Mehra, *Ends and Means*, *supra* note 37, at 349 (explaining that "the FTAIA is drafted as a limitation on the Sherman Antitrust Act's jurisdiction."). The point was made by Assistant Att'y Gen. R. Hewitt Pate:

[T]he statute cannot on its terms expand jurisdiction by reason of its language, which begins with a statement that the antitrust laws shall not apply, and then puts the plaintiff back where it was prior to the FTAIA if certain conditions are met. In no case can the statute operate to give additional causes of action or create additional standing on behalf of parties who didn't have it prior to the FTAIA.

Transcript of Oral Argument at *18, *Empagran I*, 542 U.S. 155 (No. 03-724).

114. See *infra* text accompanying notes 116-20.

about a cartel's activities; the argument is that companies, when considering taking advantage of the amnesty program, assess their financial exposure to other governmental and private actions flowing from the criminal admission.¹¹⁵ But if their civil liabilities are almost certain to be magnified because of an increase in the pool of potential (non-U.S.) plaintiffs, or if that risk, at minimum, makes it difficult even to estimate the potential damages, potential whistle-blowers may decline to come forward, and detection of the cartel's illegal activities will be hampered.¹¹⁶ The U.S. Department of Justice submitted an amicus brief arguing that the Court of Appeals' interpretation of the FTAIA would "substantially interfere" with the government's enforcement of the antitrust laws.¹¹⁷ In fact, it said, "the theoretical possibility of additional deter-

115. Since 1993, when the DOJ revised its leniency policy, the "U.S. amnesty programme has become 'the most effective generator of international cartel cases' for the division and 'unquestionably, the single greatest investigative tool available to anti-cartel enforcers'." William J. Baer, Tim Frazer & Luc Gyselen, *International Leniency Regimes: New Developments and Strategic Implications*, GLOBAL COMPETITION REV., <http://globalcompetitionreview.com/ara/international.cfm> (last visited Mar. 5, 2006) (citing U.S. Dept. of Justice, *Status Report: An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program* (2004), <http://www.usdoj.gov/atr/public/guidelines/202531.htm>; Address by Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Dept. of Justice, *Detecting and Deterring Cartel Activity Through an Effective Leniency Program*, Nov. 21–22, 2000, <http://www.usdoj.gov/atr/public/speeches/9928.htm>). The DOJ is so concerned about protecting the viability of its amnesty program that "it will not share information provided by an amnesty applicant with foreign antitrust enforcement authorities (unless permitted by the applicant)." *Id.* (citing Address by Gary R. Spratling, Deputy Asst. Att'y Gen., Antitrust Division, U.S. Dept. of Justice, *Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy—An Update*, Feb. 16, 1999, available at <http://www.usdoj.gov/atr/public/speeches/2247.htm>). Observers have noted the irony that the Department of Justice sided here "with the very vitamins defendants it had prosecuted." Joe Sims, *U.S. Supreme Court Tackles International Antitrust Issues*, Jones Day, Aug. 2004, http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S1032.

116. William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L L. PROC. 309, 311 n.9 (2003) [hereinafter Kovacic, *Extraterritoriality*]. See also Donald C. Klawiter, *Global Cartel Enforcement in 2004: Penalties, Leniency Considerations and Coordination*, GLOBAL COMPETITION REV., *The Antitrust Review of the Americas 2004: US Cartels*, http://www.globalcompetitionreview.com/ara/us_cartels.cfm (arguing, before the Supreme Court decision, that if *Empagran* were upheld, "the damage risk increases several-fold and may create, for some companies, a significant disincentive to apply for leniency.").

117. Brief for the United States as Amicus Curiae Supporting Petitioners at 20–21, *Empagran I*, 542 U.S. 155 (No. 03-724) (arguing that the amnesty program has been more valuable to the Department of Justice "than all of the Division's search warrants, secret audio or videotapes, and FBI interrogations combined . . . Faced with joint and several liability for co-conspirators' illegal acts all over the world, a conspirator could not

rence . . . would come only at the expense of weakening the ability of the United States government to discover the wrongdoing in the first place.”¹¹⁸ Governments of a number of other countries with developed antitrust regimes filed briefs taking the same position.¹¹⁹

On the other side is the view that the threat of treble damages exerts a powerful deterrent effect on potential antitrust violators, from which American consumers benefit. This view was articulated in the majority opinions in *Pfizer v. Government of India*¹²⁰ and *Kruman v. Christie's Int'l*,¹²¹ and in Judge Patrick Higginbotham's widely cited dissent in *Den Norske v. HeereMac*.¹²² The D.C. Circuit in *Empagran* found the deterrence argument to be “most compelling”¹²³ in deciding that it should take the “less restrictive view” of the FTAIA, citing Judge Higginbotham's opinion for the proposition that “a global price-fixing scheme could sustain monopoly prices in the United States even in the face of domestic liability, since the profits from abroad would subsidize the U.S. operations.”¹²⁴

Another policy concern is the potential impact on U.S. courts if the FTAIA provided wider access to foreign plaintiffs. Observers predicted

readily quantify its potential liability. The prospect of civil liability to all global victims would provide a significant disincentive to seek amnesty from the government.” The amnesty program, in the government's judgment, “deters cartel behavior more effectively than any increase in private litigation after the cartel has been exposed,” and so deterrence is best maximized, they argue, “not by maximizing the potential number of private lawsuits, but by encouraging conspirators to seek amnesty and expose cartels in the first place.”)

118. *Id.* at 23.

119. See Brief of the United Kingdom in Support of Petitioners at 9–13, *Empagran I*, 542 U.S. 155 (No. 03-724); Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 28–29, *Empagran I*, 542 U.S. 155 (No. 03-724).

120. *Pfizer Inc. v. Government of India*, 434 U.S. 308, 314–15 (1978).

121. *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 403 (2d Cir. 2002).

122. *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 434–35 (5th Cir. 2001).

123. *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 355–57 (D.C. Cir. 2003). The D.C. Circuit said of the deterrence argument:

We are persuaded that, if foreign plaintiffs could not enforce the antitrust laws with respect to the foreign effects of anticompetitive behavior, global conspiracy would be under-deterred, since the perpetrator might well retain the benefits that the conspiracy accrued abroad The U.S. consumer would only gain, and would not lose, by enlisting enforcement by those harmed by the foreign effects of a global conspiracy.

Id. at 356.

124. *Id.* at 256, quoting *Den Norske*, 241 F.3d at 435 (Higginbotham, J., dissenting).

that already burdened courts would be forced to deal with extremely difficult cases involving complex procedural issues and factual inquiries.¹²⁵ The Sherman Act covers not only price-fixing, the adjudication of which is fairly straightforward, but also other more complex and subjective antitrust issues.¹²⁶ If the FTAIA did not preclude jurisdiction over foreign plaintiffs whose antitrust claims were independent of U.S. effect, plaintiffs would be able to bring claims on any antitrust basis.¹²⁷

The third policy concern is that the extension of our antitrust reach into what should arguably be the jurisdiction of other states would retard the

125. *Den Norske*, 241 F.3d at 431 (“Any reading of the FTAIA authorizing jurisdiction” in the case “would open U.S. courts to global claims on a scale never intended by Congress.”). The issue was raised in oral argument before the Supreme Court in *Empagran*. Stephen M. Shapiro, attorney for petitioners-defendants, stated:

[C]onsider global plaintiffs from 192 countries coming to the United States and asking a single district court judge to decide how much they’ve been overcharged, how much competition there was locally, what trade barriers there were that might have prevented competition, calculate the damages for every man, woman, and child on the face of the Earth that perhaps . . . has an antitrust claim.

Transcript of Oral Argument at *11, *F. Hoffman-La Roche, Ltd. v. Empagran S.A.* (*Empagran I*), 542 U.S. 155 (2004) (No. 03-724). When a member of the court commented, “I suppose that’s the penalty for engaging in a worldwide conspiracy,” *id.* at *11–12, Shapiro answered, “But that penalty is imposed on our district court judges. They would . . . be forced to untangle these incredibly different procedural problems . . . U.S. courts are not world courts equipped to do this.” *Id.* at *12. The U.S. government’s *amicus curiae* brief argued the same point, noting that for plaintiffs who would be allowed to sue under the D.C. Circuit’s holding, the statutory inquiry would turn on claims and persons not before the court. “The court of appeals’ decision thus would thrust upon federal courts the potential for burdensome and protracted satellite litigation that is far removed from the claim before the court.” Brief for the United States as Amicus Curiae Supporting Petitioners at 23, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724).

126. Transcript of Oral Argument at *17–18, *Empagran I*, 542 U.S. 155 (No. 03-724). Attorney General R. Hewitt Pate argued,

[T]o pursue this path would embroil the district courts around the country in all forms of satellite litigation, and it’s very important to recognize that this is not a test that would apply only to a notorious worldwide conspiracy, such as was at issue here, but would apply to rule of reason cases, joint venture cases, could apply even to Section 2 cases under the Sherman Act any time a plaintiff was able to allege that some other plaintiff somewhere suffered from a U.S. effect that was related to that conduct So in our judgment, the Court should pay attention to the practical realities of enforcement.

Id.

127. *Id.*

development of antitrust law abroad.¹²⁸ Europeans believe that an overbroad application of U.S. jurisdiction would weaken private antitrust enforcement in Europe's courts.¹²⁹ Courts need a steady diet of cases to feed the development of a body of jurisprudence that will in turn facilitate private enforcement of antitrust claims; if those cases are attracted to the United States, foreign antitrust development will suffer.¹³⁰

IV. THE SUPREME COURT'S SURPRISING DECISION IN *EMPAGRAN*

The Supreme Court's decision in *Empagran*¹³¹ was less surprising than its reasoning.¹³² It reversed the D.C. Circuit and held that U.S. courts do *not* have subject matter jurisdiction over foreign plaintiffs when their claims are based on injuries that are independent of injury to U.S. plaintiffs,¹³³ and remanded the case back to the circuit court for consideration of an alternate theory (which was not before it): whether there would be jurisdiction if the effects were *not* independent.¹³⁴

128. Transcript of Oral Argument at *9, *Empagran I*, 542 U.S. 155 (No. 03-724). Petitioners' attorney Stephen M. Shapiro argued,

Congress wanted the treble damage remedy to be available to protect our commerce. It expected other countries to adopt their own laws to deal with overcharges within their own territories, and other nations, of course, have done just that. They've passed over 100 different pieces of legislation all around the world, from Albania to Zambia, we see new antitrust laws that have been passed, and it would discourage that process if the U.S. courts attempted to subsume all of these foreign overcharge disputes into our court system.

Id.

129. See Margaret Bloom, *Should Foreign Purchasers Have Access to U.S. Antitrust Damages Remedies? A Post-Empagran Perspective from Europe*, 61 N.Y.U. ANN. SURV. AM. L. 433, 436 (2005).

130. *Id.* at 451.

131. The unanimous 8-0 decision was written by Justice Breyer. *Empagran I*, 542 U.S. 155. Justice Sandra Day O'Connor recused herself because she owns shares of Procter & Gamble, which was seeking to bring suit on behalf of its foreign affiliates. Sandra Rubin, *U.S. Antitrust Reach Shortened*, NAT'L POST, June 30, 2004, available at 2004 WL 85149593 (2004).

132. Ronald W. Davis, *Empagran and International Cartels—A Comity of Errors*, 19 ANTITRUST 58, 59 (2004).

133. “[When t]he price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse effect . . . the FTAIA exception does not apply (and thus the Sherman Act does not apply) . . .” *Empagran I*, 542 U.S. at 164.

134. *Id.* at 175. Thomas C. Goldstein, attorney for plaintiffs-appellants, has pointed out that Justice Breyer, in his opinion, wrote seven times, four of them in italics, that the Court was “only reaching the question of whether or not there is a claim when the injury

What was surprising was the Court's approach. Justice Breyer took merely four short paragraphs of a 17-page opinion to deal with the lower courts' linguistic disagreements over the meaning of the phrase "gives rise to a claim."¹³⁵ The opinion dismissed the basis for appellate disagreement, holding that it makes just as much "linguistic sense to read the words 'a claim' as if they refer to the 'plaintiffs' claim' or 'the claim at issue'" as to read it to mean "a" claim, that is, anyone's claim.¹³⁶ Although conceding that plaintiffs' linguistic arguments might be the "more natural reading of the statutory language," it concluded that considerations of comity and history make it clear that was not the FTAIA's intent.¹³⁷

Rather than parsing the words of the statute, the Court revisited the purpose of the FTAIA and found that Congress "designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce"¹³⁸ and used the principle of comity to help determine the scope of the statute. Because an ambiguous statute must be construed to "avoid unreasonable interference with the sovereign authority of other nations,"¹³⁹ and since the FTAIA was certainly ambiguous, it would be unreasonable to apply our antitrust laws to foreign conduct where that conduct did not cause domestic injury.¹⁴⁰ The justification, the Court said, for such "interference seems insubstantial."¹⁴¹

An example illustrates the Court's concern with how a broad application of the FTAIA could interfere in foreign affairs: It hypothesized a situation in which, under the circuit court's theory, a buyer in a foreign country would be able to sue his own domestic supplier in a U.S. court

simply by noting that unnamed third parties injured [in the United States] by the American [cartel member's] conduct would also have a cause of action. Effectively, the United States courts would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, *but unhappy with its own sovereign's provisions for private antitrust enforcement*, provided that a different plain-

overseas is completely unrelated to the injury of the United States." Goldstein, *Perspectives*, *supra* note 33.

135. *Empagran I*, 542 U.S. at 173–74.

136. *Id.*

137. *Id.* at 174. *See also* 1 NANDA & PANSIUS, *supra* note 5.

138. *Empagran I*, 542 U.S. at 169. This view has ample support in the House Report of the bill's passage, as the Court noted. *Id.*

139. *Id.* at 164. The Court noted that harmony among those sovereign interests are more important "in today's highly interdependent commercial world." *Id.* at 165.

140. *Id.*

141. *Id.*

tiff had a cause of action against a different firm for injuries that were within U.S. [other-than-import] commerce.¹⁴²

The Court rejected the plaintiffs' argument that because most other nations have laws against price fixing,¹⁴³ there is little likelihood that litigating a price-fixing claim among foreign parties in the United States would interfere with the interests of other nations.¹⁴⁴ It observed that there are still major differences among the antitrust laws of those countries that have antitrust regimes,¹⁴⁵ and, while it is true that price-fixing is universally prohibited by countries that have antitrust laws, even those countries disagree dramatically about remedies. The application of our treble-damages provisions to conduct abroad, it noted, has "generated considerable controversy."¹⁴⁶

The Supreme Court also dismissed the parties' positions on deterrence. The Court noted that although the defendants' arguments about deterrence made sense,¹⁴⁷ so did those of the plaintiffs and the numerous "supporting enforcement-agency amici" who made arguments to the con-

142. *Id.* at 166, quoting P. AREEDA & H. HOVENKAMP, ANTITRUST LAW § 273 (Supp. 2003) (emphasis added).

143. See Shenefield, *Coherence*, *supra* note 38, at 402 ("[T]here exists today a rough consensus on certain—but not all—core antitrust principles. Most antitrust laws share certain features. Virtually all competition regimes prohibit cartels. Most also condemn certain kinds of vertical arrangements. Most forbid the exclusionary exploitation of monopoly or abuse of a dominant market position. In addition, prohibitions of anticompetitive mergers are commonplace and many national laws also impose premerger notification obligations.").

144. *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 167 (2004), citing *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 797–99 (1993).

145. See Kovacic, *Extraterritoriality*, *supra* note 116, at 309 ("A half-century ago, only one country, the United States, had antitrust statutes and active enforcement. Today over ninety jurisdictions have competition laws, and the number will exceed one hundred by the decade's end."). The differences, however, create problems for business and enforcement. "The multiplication of antitrust laws raises concerns that enforcement by jurisdictions with dissimilar substantive standards, procedures, and capabilities will discourage legitimate business transactions and needlessly increase the cost of controlling anticompetitive conduct." *Id.* Note also that there are countries that have no antitrust laws.

146. *Empagran I*, 542 U.S. at 167–68. The decision also noted briefs filed by Germany, Canada and Japan that argued that to apply our remedies would "permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody" and would undermine their own antitrust enforcement policies "by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty." *Id.*

147. *Id.* at 174–75.

trary.¹⁴⁸ It said that, despite considerable disagreement about the impact of private suits on the deterrence of illegal cartel behavior, there was not enough empirical evidence on either side,¹⁴⁹ and it found neither argument ultimately convincing enough to alter its conclusion that the statute should be read narrowly.¹⁵⁰

148. *Id.* at 174. Amici included the DOJ, the United Kingdom, Germany, Canada, and Japan. In particular, the U.S. government sees the exposure of foreign cartels to increased liability in the United States, especially through the treble damages provision, as a threat to its leniency programs. See William E. Kovacic, General Counsel, Federal Trade Commission, *Private Participation in the Enforcement of Public Competition Laws* (May 15, 2003), <http://www.ftc.gov/speeches/other/030514biicl.htm> [hereinafter Kovacic, *Private Participation*], for an in-depth discussion of the DOJ's leniency program. Indeed, the *Vitamins* prosecution itself might not have been so successful if Rhone-Poulenc had not taken advantage of the leniency program and come forward with evidence against its fellow conspirators. First, *Vitamins*, *supra* note 12, at 715–16.

149. *Empagran I*, 542 U.S. at 174–75. One of the arguments is that leniency programs may become less effective as an anti-cartel device when private actions proliferate and the exposure to damages increases. See generally Kovacic, *Private Participation*, *supra* note 148 (“Private rights of action diminish, if not eliminate, the gate-keeping authority of public prosecutors and reduce their ability to control the development of policy by their selection of cases . . . and magnify the role of the courts in implementing the law.”). Kovacic continues:

A court might seek to correct . . . perceived infirmities in the antitrust system by recourse to means directly within its control—namely, by modifying doctrine governing liability standards or by devising special doctrinal tests to evaluate the worthiness of private claims. [Arguably, this is what is happening here.]

. . . [In particular, courts may] “equilibrate” the antitrust system . . . [by constructing] doctrinal tests under the rubric of “standing” or “injury” that make it harder for the private party to pursue its case; . . .

. . . [T]he hypothesis helps explain the modern evolution of U.S. antitrust doctrine. Since the mid-1970s, the U.S. courts have established relatively demanding standards that private plaintiffs must satisfy to demonstrate that they have standing to press antitrust claims and have suffered “antitrust injury.”

Id. But one commentator has argued that the differing goals of compensation and deterrence have been conflated in this argument. See Hannah L. Buxbaum, *Jurisdictional Conflict in Global Antitrust Enforcement*, 16 LOY. CONSUMER L. REV. 365, 373–74 (2004) (arguing that deterrence could be accomplished through public regulation rather than through private enforcement, and that although the United States has an additional interest in permitting private plaintiffs to sue and receive compensation for their injuries, “it has no such interest with respect to foreign plaintiffs. The broad view therefore unnecessarily conflates the goal of compensation with the goal of deterrence.”).

150. *Empagran I*, 542 U.S. at 174–75.

Clearly the Court was concerned with judicial administration as well.¹⁵¹ The Court rejected as “unworkable” the plaintiffs’ suggestion that courts should take “account of comity considerations case by case.”¹⁵² The Court was concerned that the wide range of antitrust issues that courts would have to confront in applying foreign law could result in “procedural costs and delays [that] could themselves threaten interference with a foreign nation’s ability to maintain the integrity of its own antitrust enforcement system.”¹⁵³

Ultimately, the Court said,

[P]rinciples of prescriptive comity counsel against the Court of Appeals’ interpretation of the FTAIA . . . [I]f America’s antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.¹⁵⁴

So, after years of debate among courts and scholars about the meaning of a single word in the FTAIA, and after hundreds of pages of arguments and briefs about the potential effect of its decision on deterrence of cartel behavior worldwide, the Court resurrected comity, an issue that had been dormant in antitrust law since *Hartford Fire*, to help construe the statute’s scope, even though the issue of comity was not even briefed or discussed as the case made its way through the lower courts.¹⁵⁵

151. Edward D. Cavanagh, *Empagran and the International Reach of U.S. Antitrust Laws*, 21 NYSBA ANTITRUST L. SEC. SYMP. 24 (2005) [hereinafter Cavanagh, SYMPOSIUM] (commenting that when Justice Rehnquist hears that a broad reading of the statute could invite a lot of plaintiffs to our courts, “his ears perk up very, very quickly, and he gets very interested in the argument.”).

152. *Empagran I*, 542 U.S. at 168.

153. *Id.* at 168–69.

154. *Id.* at 169.

155. It is not surprising that it was not, since *Hartford Fire* “pretty much kill[ed] off the concept of comity either in government cases or in private cases.” Waller, *Courtroom*, *supra* note 1, at 527. *See also* Fox, *Remedies*, *supra* note 86 (arguing that, “in its rhetoric, the *Empagran* Court launched a new life for comity.”).

V. ROUTE TO ANOTHER CIRCUIT SPLIT?

Although the Court may have resolved the circuit split over the meaning of “gives rise to a claim,”¹⁵⁶ its decision did not resolve the parties’ dispute in *Empagran*,¹⁵⁷ and it did little to provide guidance to lower courts.¹⁵⁸ Indeed, it has made their jobs more complex.¹⁵⁹ One scholar, in fact, has argued that the broad view of FTAIA construction—which would provide a court with jurisdiction over a foreign plaintiff as long as there were at least a hypothetical U.S. plaintiff with a cause of action—would at least have the virtue of greater certainty: parties would be clear about their exposure, leading to more settlements and less litigation.¹⁶⁰

156. Goldstein, *Perspectives*, *supra* note 33, at 4 (stating that “if we look behind [the decision] at what it is the Supreme Court thought it was doing, it thought it was resolving a circuit split between the Fifth Circuit’s *Den Norske* decision and D.C. Circuit’s ruling that ‘a claim’ meant ‘any person’s claim.’”).

157. Duke Law, *supra* note 23 (arguing that the decision “leaves the biggest question in the case undecided”). An article on Arnold & Porter LLP’s website immediately after the decision was published predicted:

Future plaintiffs in virtually every international cartel case (as well as all manner of non-cartel cases) will likely attempt to circumvent the Court’s *Empagran* ruling by asserting their participation in a “global” market—and arguing that, as a matter of economics, they could not have suffered injury “but for” the U.S. effects of any alleged anti-competitive conduct.

The Supreme Court Decision in Empagran, Arnold & Porter LLP, June 2004, at 1, 5 (on file with the *Brooklyn Journal of International Law*).

158. See, e.g., *U.S. Courts Reach Different Results on Issue Left Open by the U.S. Supreme Court’s Decision in Empagran*, ANTITRUST L. NEWSL., July 2005, at 2, <http://www.bakernet.com> (follow “Resources,” “Law Alerts,” “Global Publications,” and choose “July 2005 North American Antitrust Law Newsletter” hyperlink). See also *Perspectives on Empagran*, ANTITRUST SOURCE, Sept. 2004, at 1, 6, <http://www.abanet.org/antitrust/source/sept04/Sep04Empagran.pdf> (providing remarks by Jonathan S. Franklin, commenting that the business community “values certainty in legal applications, perhaps sometimes even over correct results.”) [hereinafter Franklin, *Perspectives*].

159. *Perspectives on Empagran*, ANTITRUST SOURCE, Sept. 2004, at 1, 2–3, <http://www.abanet.org/antitrust/source/sept04/Sep04Empagran.pdf> (providing remarks by Edward Swaine) [hereinafter Swaine, *Perspectives*]. Swaine argues as follows:

[The decision] failed to resolve any but the most extreme and easiest instances of foreign claims—that is, those claims that are completely estranged from U.S. effects, on which it is easiest to reach a view—and licensed a standardless inquiry into the relationship between antitrust markets. This will likely bedevil the lower courts.

Id.

160. Mehra, *More is Less*, *supra* note 109, at 60.

But if the Court's goal was to provide limits to U.S. extraterritorial antitrust jurisdiction,¹⁶¹ it did not do so clearly. The issue, as the Court framed it, encompassed only the most obvious, and perhaps only hypothetical, situation.¹⁶² Still undecided was the question of whether foreign plaintiffs could bring an action where the foreign injury was *not* independent of U.S. harm—that is, in the case when “the anticompetitive conduct’s domestic effects were linked to that foreign harm.”¹⁶³ Courts in various circuits already have answered this question differently since *Empagran*.¹⁶⁴

In the months immediately following the publication of the decision, practitioners commenting on it accurately predicted that future actions would be framed to take advantage of the door that the Court had left open.¹⁶⁵ They speculated that foreign plaintiffs would claim their injuries were dependent on the success of conspiracies affecting U.S. markets,¹⁶⁶

161. 1 NANDA & PANSIUS, *supra* note 5.

162. Duke Law, *supra* note 23. The article contends:

Arguably, for many products national markets can no longer be separated; instead, there is one world market, and a price fixing conspiracy needs to be worldwide in order to succeed. Where markets are separable, it makes sense that each country should restrain itself to regulating its own market. Yet where such separation is impossible, the effects doctrine breaks down, and new, alternative instruments of determining and restricting jurisdiction will be necessary. The Court did not address this problem, yet in assuming separable markets it may have decided a case that was only hypothetical.

Id. Edward D. Cavanagh speculates that Justice Breyer, who wrote *Empagran*, articulated the issue extremely narrowly to get the maximum number of justices to sign on to the opinion, and to achieve a unanimous result. Cavanagh, SYMPOSIUM, *supra* note 151, at 25. Even then, Justice Scalia, joined by Justice Thomas, apparently felt compelled to pen a short opinion stating they concurred because “the language of the statute is readily susceptible of the interpretation the Court provides . . .” *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 176 (2004) (Scalia, J., concurring).

163. Limiting the issue to the case in which the adverse foreign effect is independent of any domestic effect. *Empagran I*, 542 U.S. at 175.

164. *See infra* Part V.

165. *See Sims, supra* note 115 (predicting “[t]hat the plaintiffs’ bar will use it [the fact that the Court ‘left the door open a small crack’] to bring foreign antitrust claims seems virtually certain.”).

166. *See Clifford Chance LLP, Recent Developments in Antitrust Litigation in the UK and the U.S.*, July 2004 (“It is certain that there will be no dearth of plaintiffs willing and able to test this reach [of the FTAIA exception] by claiming that their injury in worldwide markets was dependent on the success of a conspiracy in US markets.”) (on file with the *Brooklyn Journal of International Law*).

leading lower courts to grapple with complex evidence of worldwide economic effects.¹⁶⁷

Indeed, a review of practitioners' commentary immediately after the opinion was published showed an initial sense of relief tempered by a sense that much was still left to be determined. Among the most optimistic were comments such as these: "good news for companies facing treble damages actions"¹⁶⁸ and "defendants . . . are free from the threat that an entire worldwide class of potential plaintiffs can seek treble damages" in U.S. courts.¹⁶⁹ Others observed that the questions left open were "sure to consume significant time and resources in the years ahead"¹⁷⁰ and speculated on the likelihood of a growth in litigation.¹⁷¹ But within

167. See *U.S. Supreme Court Limits Application of U.S. Antitrust Laws to Foreign Applications*, June 2004, Kelly Drye, http://www.kelleydrye.com/resource_center (type "Empagran" in Keyword search box). The writers predicted:

In cases where the market is international, American plaintiffs' lawyers will now plead in their complaints that the injury to foreign plaintiffs is linked to the domestic effects of the alleged violation. They will then work with their hired economists to develop evidence and arguments to support that allegation. The defense lawyers and their experts will seek to show the opposite. The lower courts will have to grapple with the meaning of this part of the Supreme Court's opinion, in particular what evidence will be sufficient to trigger application of the FTAIA.

Id.

168. Arnold & Porter, *supra* note 157 ("This is good news for companies facing civil antitrust treble damages actions. However, the decision is not definitive. It leaves key questions unanswered about the viability of foreign purchaser claims in an allegedly 'global' market where plaintiffs can claim some interrelationship, as a matter of economics, between the foreign and domestic effects of the underlying conduct.").

169. *Supreme Court Decides That Most Foreign Antitrust Plaintiffs Cannot Sue for Treble Damages Under the Sherman Act*, Proskauer Rose LLP, June 2004, at 1, 2, http://www.proskauer.com/site_search_in (type "Sherman Act" in Keyword search box) ("The immediate effect of the decision in *Empagran* is that most defendants alleged to have engaged in global anticompetitive conduct—both United States firms and foreign firms—are free of the threat that an entire worldwide class of potential plaintiffs can seek treble damages and attorneys' fees in the United States courts. In most cases, foreign purchasers from such defendants will be unable to recover their damages . . . even where there is proof that the defendants violated the Sherman Act and perhaps the competition laws of other countries.").

170. *New Supreme Court Decision Resolves Hotly-Disputed Issues of Antitrust Liability Flowing From International Cartel Activity*, Hughes Hubbard & Reed LLP, June 2004, at 1, <http://www.hugheshubbard.com/news.asp> (follow "Publications" hyperlink).

171. *F. Hoffman-La Roche Ltd. v. Empagran: Supreme Court Restricts Extraterritorial Reach of U.S. Antitrust Laws*, Wilmer Cutler Pickering Hale & Dorr, June 2004, at 3, <http://wilmerhale.com/publications> (type "Empagran" in Keyword search box). The firm's writers predicted:

only a few months, practitioners were beginning to anticipate what facts a plaintiff would have to plead to get past a motion to dismiss,¹⁷² and what further semantic parsing would be necessary.¹⁷³

What was not in question was that plaintiffs would exploit the ambiguities.¹⁷⁴ As expected, plaintiffs in actions already before the courts quickly recast their claims to ensure that their injuries were seen as *dependent* on U.S. effects.¹⁷⁵

A. Remand—Proximate Cause

On remand, the D.C. Circuit took up the question still left open by the Supreme Court, namely, what was to be the standard in a case where the plaintiff's injury was *not* independent? Would it be "but-for" causation, or something more?¹⁷⁶ Plaintiffs framed their argument as follows:

Empagran should put an end to most U.S. antitrust suits for injuries in foreign commerce premised on allegations that the unlawful conduct also affected U.S. commerce. We are, in particular, likely to have fewer cases in U.S. courts brought by consumers injured overseas as a result of global antitrust conspiracies We are, however, likely to see additional litigation about whether some plaintiffs that purchased overseas can sue in the United States if they can allege that their injuries were linked to effects on U.S. markets; and, if so, under what circumstances, [sic] the courts might allow such claims.

172. See Sims, *supra* note 115 ("If a boilerplate statement that the alleged foreign injury is linked to the alleged domestic injury is enough, then *Empagran*, unfortunately, may not have as great an effect in practice as it should One hopes that the Court of Appeals on remand in the *Empagran* case, and other courts in other cases, will require a significant factual showing.").

173. See also Jane Whittaker, *The Empagran Case: Closing the U.S. Courtroom Door?*, Practical Law Company, Aug. 2004, <http://competition.practicallaw.com/2-102-8926> ("The apparent victory for the cartelists in *Empagran* may not be as conclusive as they would wish. The case may have moved on from the meaning of 'a claim' to the interpretation of what amounts to independent foreign injury or indeed quantifying the word 'entirely' which seems to qualify the level of independence Certainly *Empagran* is not the end of the story."). See also Tony Woodgate & Jane Jellis, *Private EC Antitrust Enforcement*, GLOBAL COMPETITION REV., <http://www.globalcompetitionreview.com/ear/private.cfm> (last visited Mar. 5, 2006) ("Commentators on both sides of the Atlantic await, [sic] how this 'facilitation' test will be interpreted.").

174. Rubin, *supra* note 131 (quoting Bill Rowley, head of the antitrust group at McMillan Binch, as stating, "There is no more inventive a bunch of people in the world than U.S. plaintiff counsel and they will quickly be able to make very convincing arguments.").

175. See, e.g., *BHP New Zealand Ltd. v. UCAR International, Inc.*, 106 F. App'x. 138 (3d Cir. 2004) (not precedential).

176. Thomas C. Goldstein, who argued the plaintiffs' case, laid out the issue at the ABA Section of Antitrust Law Brown Bag Luncheon discussion: "[W]hat degree of relationship is required Is it 'but for' causation? Is it something else? How intrinsic does

Because the [defendants'] product (vitamins) was fungible and globally marketed, they were able to maintain super-competitive prices abroad only by maintaining super-competitive prices in the United States as well. Otherwise, overseas purchasers would have purchased bulk vitamins at lower prices either directly from U.S. sellers or from arbitrageurs selling vitamins imported from the United States, thereby preventing the [defendants] from selling abroad at inflated prices. Thus, the super-competitive pricing in the United States "gives rise to" the foreign super-competitive prices from which the [plaintiffs] claim injury.¹⁷⁷

In what has come to be known as *Empagran II*,¹⁷⁸ the D.C. Circuit, relying on the hints provided by the Supreme Court¹⁷⁹ and adopting the argument of the government's amicus brief in the case,¹⁸⁰ rejected the idea that pleading a single global market¹⁸¹ would be enough to satisfy

the injury to the United States have to be for it to be said that it gave rise to the injury overseas?" Goldstein, *Perspectives, supra* note 33, at 4.

177. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd. (Empagran II)*, 417 F.3d 1267, 1270 (D.C. Cir. 2005).

178. *Id.*

179. Edward T. Cavanagh, *The FTAIA and Empagran: What Next?*, 58 SMU L. REV. 1419 (2005) [hereinafter Cavanagh, *What Next?*]. Cavanagh cites the prediction of former Assistant Attorney General John Shenefield that "the framework for any decision in *Empagran II* had been embedded like the da Vinci Code in *Empagran I*. *Id.* at 1433. Cavanagh maintained:

[It would be] implausible that a unanimous Court, after undertaking a detailed analysis of the policies underlying the FTAIA and after concluding that jurisdiction was lacking, would have remanded the matter to the circuit court with the expectation of a different result. Rather, it is more likely that the Supreme Court was simply giving the D.C. Circuit a roadmap to correct its error and save face.

Id. at 1437.

180. Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. ANN. SURV. AM. L. 415, 426 n.51 (2005). Delrahim, former Deputy Assistant Attorney General in the Antitrust Division of the Department of Justice, argued the Division was concerned that the plaintiffs' position presents a "slippery slope" and "no workable method" for drawing lines between cases that should be heard in district courts, and those that should not. *Id.* at 427.

181. Transcript of Oral Argument at *38, *F. Hoffman-La Roche, Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155 (2004) (No. 03-724). Stephen M. Shapiro stated:

[T]he statutes here hinge jurisdiction on commerce. Lawyers can always draw a global conspiracy. Economists can always say there's a global market, and these issues would be enormous quagmires for the district courts if that's what our courts' jurisdiction turned on. Congress did not intend that. It intended a clear jurisdictional benchmark by focusing on our commerce . . . and the plain-

the FTAIA requirement that the U.S. effects of anti-competitive conduct would be enough to give rise to defendants' claims of foreign injury. "Gives rise to," held the court, "indicates a direct causal relationship, that is, proximate causation."¹⁸²

It appears the D.C. Circuit got the Supreme Court's message on comity: it held that "[t]o read the FTAIA broadly to permit a more flexible, less direct standard than proximate cause would open the door to just such interference with other nations' prerogative to safeguard their own citizens from anti-competitive activity within their own borders."¹⁸³

B. Other Cases

Although *Empagran II* brought some clarity to the issue, the D.C. Circuit is not, after all, the Supreme Court. Courts in other circuits have ruled differently on the issue that the Supreme Court left open.¹⁸⁴ Although there seems, since *Empagran II*, to be a growing consensus that proximate causation, and not but-for causation, should be the standard, the limit of the Supreme Court's holding has left room for differing interpretations, and observers note there are still questions to be decided.

The first case in this line that was decided after *Empagran I*, *Sniado v. Bank Austria AG*,¹⁸⁵ was quickly dismissed by the Second Circuit. The case involved allegations that European banks fixed currency exchange fees, and the plaintiff, an American citizen, claimed he was injured when he exchanged currencies while he was traveling in Europe.¹⁸⁶ On remand from the Supreme Court, plaintiffs took advantage of the opening left by the *Empagran I* decision, arguing that his injury was *not* independent of the effect on U.S. commerce.¹⁸⁷ But the court found that the plaintiff had alleged merely a "worldwide conspiracy" (not claiming even a "but-for" predicate for his injury), which it found insufficient in light of

tiff before the court has to be alleging treble damages based on that particular injury.

Id.

182. *Empagran II*, 417 F.3d at 1271. *But see* Hanno Kaiser, *The End of the Empagran Saga. The D.C. Circuit Rules for the Defendants in Empagran II*, ANTITRUST REV., Aug. 2, 2005, <http://www.antitrustreview.com/archives/175> (arguing that proximate causation is not implied in the claim that "X gave rise to Y.>").

183. *Empagran II*, 417 F.3d at 1271.

184. Shenefield, SYMPOSIUM, *supra* note 34, at 29.

185. *Sniado v. Bank Austria AG*, 378 F.3d 210 (2004).

186. *Sniado v. Bank Austria AG*, 352 F.3d 73, 75–76 (2003).

187. *Sniado*, 378 F.3d at 212.

Empagran I; it vacated its prior order and affirmed the lower court's dismissal of the case.¹⁸⁸

In the same month, however, a district court in the Second Circuit refused to dismiss a claim involving distributors of chemical products in India.¹⁸⁹ The court in *MM Global Services* had previously found (before *Empagran I* was decided) that alleged resale price-fixing in India had resulted in "spillover effects" that inflated prices for the same chemicals in the United States.¹⁹⁰ Defendants now moved to dismiss on the grounds that *Empagran I* required a foreign plaintiff to show that the effects on domestic commerce gave rise to their foreign injuries, while the plaintiffs argued that their foreign injuries had an effect on domestic commerce.¹⁹¹ But the court held it had jurisdiction because the domestic harm and the foreign harm were "linked"; it accepted plaintiffs' view that *Empagran I* was limited to whether the court had jurisdiction over foreign effects that are "entirely independent" of domestic effects.¹⁹² Here, because the effects flowed back and forth, they were held to be not entirely independent.¹⁹³

Scholars and practitioners found this holding to be "difficult to harmonise with the result in *Sniado*"¹⁹⁴ and "at odds with the Supreme Court's interpretation" and policy goals.¹⁹⁵ But if the Supreme Court had adopted a clearer standard, the plaintiffs here would not have been able to exploit

188. *Id.* at 213.

189. *MM Global Services v. Dow Chemical Co.*, 329 F. Supp. 2d 337 (D. Conn. 2004).

190. Mark P. Edwards & Jonathan D. Fischbach, *Still Searching for the Meaning of the FTAIA: Federal District Court Sustains Sherman Act Claim by Foreign Distributor Suffering Injury in India*, MORGAN LEWIS ON COMPETITION, Nov. 2004, at 3, <http://www.morganlewis.com/index.cfm> (follow "Publications," "Search," and type "Empagran" into "Keyword" field).

191. *MM Global Services*, 329 F. Supp. 2d at 342. See also Cavanagh, *What Next?*, *supra* note 179, at 1438.

192. Cavanagh, *What Next?*, *supra* note 179, at 1438.

193. *MM Global Services*, 329 F. Supp. 2d at 342–43.

194. Donald C. Klawiter & J. Clayton Everett, *Global Cartel Enforcement in 2005: Empagran, Executives and Equilibrium*, GLOBAL COMPETITION REV. (2005) (on file with the *Brooklyn Journal of International Law*).

195. Edwards & Fischbach, *supra* note 190. They also claim that under the court's theory, "Empagran has preserved subject matter jurisdiction for cases brought by foreign firms operating overseas where an 'effect' on United States commerce, even an indirect and attenuated one, results from foreign anticompetitive conduct." They argue this is at odds with another section of the FTAIA and also runs contrary to a decision in the Ninth Circuit, *United States v. LSL Biotechnologies, Inc.*, 379 F.3d 672 (9th Cir. 2004), where an agreement between a Mexican and Israeli company concerning the sale of seeds in the United States was considered to be too remote to be "direct."

the ambiguity it left open.¹⁹⁶ As one observer noted at the time, "If that type of allegation is sufficient to survive a motion to dismiss . . . the exception that the Supreme Court declined to address [whether U.S. courts may exercise jurisdiction in cases where foreign injuries are 'not independent' of effects on U.S. commerce] may end up swallowing the rule."¹⁹⁷

If the Supreme Court intended a proximate cause standard, a decision that got it wrong was *In re Monosodium Glutamate Antitrust Litigation*,¹⁹⁸ where the plaintiffs' argument was essentially identical to the "alternative" argument made in *Empagran II* that the foreign injury was not independent.¹⁹⁹ This district court found it did have jurisdiction, just a month before the court in *Empagran II* found the opposite.²⁰⁰

The court's holding differed from *Empagran II* and was even in conflict with *Empagran I*.²⁰¹ The allegations amounted only to but-for causation and did not meet the proximate cause standard under *Empagran II*.²⁰² But the court also weighed comity and deterrence differently from the Supreme Court, finding that, in cases of dependent foreign harm, comity is not to be considered and deterrence is of greatest importance.²⁰³ It is difficult to square that view with *Empagran I*, which held that courts should avoid interfering with other nations' sovereign authority.²⁰⁴

Since *Empagran II*, at least three cases have been dismissed at the district court level, two on the theory that but-for causation is not sufficient (*eMag Solutions v. Toda Kogyo Corp.*,²⁰⁵ in the Northern District of California, and *Latino Quimica-Amtex v. Akzo Nobel Chemicals*,²⁰⁶ in the Southern District of New York) and one for lack of direct effect (*CSR Limited v. Cigna Corp.*,²⁰⁷ in the District of New Jersey). The *Empagran*

196. Edwards & Fischbach, *supra* note 190.

197. Klawiter & Everett, *supra* note 194.

198. *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790 (D. Minn. 2005).

199. Cavanagh, *What Next?*, *supra* note 179, at 1438.

200. *In re Monosodium Glutamate*, 2005 WL 1080790.

201. Cavanagh, *What Next?*, *supra* note 179, at 1439.

202. *Id.*

203. Hanno Kaiser, *After Empagran: In re Monosodium Glutamate Antitrust Litigation*, ANTITRUST REV., <http://www.antitrustreview.com/archives/45> (May 27, 2005).

204. Cavanagh, *What Next?*, *supra* note 179, at 1439.

205. *eMag Solutions v. Toda Kogyo Corp.*, 2005 WL 1712084, at *6 (N.D. Cal. 2005) (slip copy).

206. *Latino Quimica-Amtex v. Akzo Nobel Chemicals*, 2005 WL 2207017, at *9 (S.D.N.Y. 2005) (slip copy).

207. *CSR Ltd. v. Cigna Corp.*, 2005 WL 3479908, at *20 (D.N.J. 2005).

saga itself finally ended in January 2006 when the Supreme Court denied a writ for certiorari from the *Empagran* plaintiffs.²⁰⁸

Timeline of Cases Applying FTAIA

<i>DATE</i>	<i>CASE</i>	<i>COURT</i>	<i>DISPOSITION</i>
June 2004	Empagran I	Supreme Court	Remanded
Aug. 2004	Sniado	2d Circuit	Dismissed
Aug. 2004	LSL Biotechnologies	9th Circuit	Dismissed
Aug. 2004	MM Global Services	District of Connecticut	Jurisdiction found
Aug. 2004	UCAR	3d Circuit	Remanded
May 2005	Monosodium Glutamate	District of Minnesota	Jurisdiction found
June 2005	Empagran II	D.C. Circuit	Dismissed
July 2005	eMag	Northern District of California	Dismissed
Sept. 2005	Latino Quimica-Amtex	Southern District of New York	Dismissed
Dec. 2005	CSR Ltd.	District of New Jersey	Dismissed

VI. CRITIQUE

Many commentators believe that the current confusion is rooted in the Supreme Court's approach to the case. By ignoring the allegations in the *Empagran* complaint, and deciding merely a hypothetical case,²⁰⁹ the Court left the real issues to the lower courts.²¹⁰ Practitioners argue that the decision and its progeny will cause "uncertainty [that] could be per-

208. *Empagran S.A. v. F. Hoffman-La Roche Ltd.*, 126 S. Ct. 1043 (Mem.) (2006).

209. Duke Law, *supra* note 23.

210. See Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels*, 72 U. CHI. L. REV. 265, 266 (2005); Davis, *supra* note 132, at 58, 63–64. The *Empagran I* Court has even been criticized on its inability to address such private law issues. See E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1573–74 (2004) ("The securities and antitrust cases that are taken and decided [in the years since Justice Powell's retirement] are less important and the decisions seem less coherent than in the earlier period [between the time Justices Powell and Rehnquist joined the court in 1972 until Powell's retirement]. This is a Court whose members had little in the way of experience with private law before arriving at the high court.").

petuated for many years, thereby compounding the chilling effect that U.S. antitrust laws may have on foreign business transactions occurring wholly outside the U.S.”²¹¹ The stability of private markets and public confidence in those markets hinge on businesses being able to depend on clear standards.²¹² Because *Empagran I* did not provide guidelines, it is argued, the uncertainty that existed before the decision remains, and cases will continue to have high settlement value because “the question of whether foreign injury is ‘inextricably intertwined’ with domestic injury will require a detailed factual inquiry.”²¹³

While the Second Circuit made it clear in *Sniado* that alleging a worldwide conspiracy is not enough to survive a motion to dismiss for lack of subject matter jurisdiction,²¹⁴ and the D.C. Circuit now requires proximate causation, scholars, practitioners, and businesspeople are still troubled. Their concern is reflected in comments submitted to the U.S. Antitrust Modernization Commission by the International Chamber of Commerce, which noted that although the D.C. Circuit Court has rejected the but-for approach, “there can be no assurance that such an approach would not be embraced by another appellate court or by a district court.”²¹⁵

The Supreme Court’s decision has also been criticized for its failure to properly distinguish between “effect” and “conduct.”²¹⁶ Professor Eleanor Fox argues that “harm is never caused proximately from the U.S. effect,” but rather, by the *conduct* that is barred by the Sherman Act.²¹⁷ She says that the Supreme Court’s approach will lead to under-deterrence.²¹⁸ The focus on effect also ignores the element of intent.²¹⁹

211. International Chamber of Commerce, *Comments on Selected Issues for Study by the U.S. Antitrust Modernization Commission*, § 3.5 (Sept. 25, 2005), available at http://www.amc.gov/public_studies.htm (follow “International” hyperlink).

212. Sullivan & Thompson, *supra* note 210.

213. Edward D. Cavanagh, *Empagran: A Post Script*, ANTITRUST PRACTITIONER, Dec. 2004, at 6 [hereinafter Cavanagh, *Post Script*].

214. Klawiter & Everett, *supra* note 194. See also John H. Shenefield, Jonathan M. Rich & J. Clayton Everett, *Second Circuit Construes FTAIA in Dismissing Claims Against Bank Austria*, MORGAN LEWIS ON COMPETITION, Oct. 2004, at 1, 2, <http://www.morganlewis.com/index.cfm> (follow “Publications,” “Search,” and type “Empagran” into “Keyword” field) (“The Second Circuit’s decision in *Sniado* provides little guidance about what degree of ‘interdependence,’ if any, is sufficient to establish a predicate for subject matter jurisdiction. It does make clear, however, that alleging a ‘worldwide conspiracy,’ without more, is insufficient.”).

215. International Chamber of Commerce, *supra* note 211, § 3.3.

216. Fox, Testimony, *supra* note 66, § IV.

217. *Id.* § IV.

218. *Id.* § IV.

219. 1 NANDA & PANSIUS, *supra* note 5.

In the meantime, even legislative action has overtaken *Empagran*, arguably shifting the balance of the original argument. Only weeks after the *Empagran* Supreme Court decision, Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act,²²⁰ which reduces treble damages in civil litigation to actual damages for antitrust conspirators who cooperate with the government.²²¹ The new law also increases criminal fines and maximum jail terms. A former Deputy Assistant Attorney General in the Department of Justice's Antitrust Division welcomed the new law as evidence that Congress "understands how the prospect of massive civil liability can deter violators from seeking amnesty,"²²² and in that light would seem to be aligned with the *Empagran* Court's decision not to further extend liability. But the Court did not determine whether that liability helped or hurt deterrence. It could be argued that an *Empagran* decision that allowed foreign claims would increase deterrence under the new law.²²³

It is also strange that *Empagran I* was inconsistent with other decisions this term that narrowed extraterritoriality,²²⁴ and especially with its decision in *Intel v. Advanced Micro Devices*,²²⁵ where the Court not only

220. Antitrust Criminal Penalty Enhancement and Reform Act, Pub. L. No. 108-237, §§ 201–21, 118 Stat. 661, 665–69 (2004).

221. Daniel J. Bennett, Note, *Killing One Bird With Two Stones: The Effect of Empagran and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 on Detecting and Detering International Cartels*, 93 GEO. L.J. 1421, 1451–52 (2005).

222. Delrahim, *supra* note 180, at 424.

223. Bennett, *supra* note 221, at 1453–54 ("An increase in potential civil liability for those who violate the Sherman Act might [if *Empagran* had been decided to extend jurisdiction to foreign plaintiffs] thus increase the incentives to participate in the amnesty program, and thus increase deterrence of anticompetitive conduct.").

224. Franklin, *Perspectives*, *supra* note 158, at 7 (citing four other cases involving extraterritoriality, and referring to *Empagran* as an "outlier," in the sense that in all the others, the court held that U.S. jurisdiction could extend more broadly). *See also* Swaine, *Perspectives*, *supra* note 159 (saying the decision "endorsed—without explanation—an approach to international comity that was facially inconsistent with the majority opinion in *Hartford Fire* . . . , and even with this Term's decision in *Intel* . . . " and will likely "defeat the objectives the Court identified: namely, reassuring foreign nations that their sovereign interests (in *reducing* antitrust enforcement, at least) will be respected, and clarifying for wrongdoers their potential liability (by *reducing* that potential liability, as it happens) and thus facilitating the Justice Department's amnesty program.") (emphasis in original).

225. *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004). *See* Franklin, *Perspectives*, *supra* note 158, at 7 (arguing that *Intel* is inconsistent with *Empagran*, and pointing out that while Justice Breyer wrote the majority opinion in *Empagran*, he dissented in *Intel*).

broadened the reach of U.S. law, but did so in that case over the objection of European Commission officials.²²⁶

Did the *Empagran* Court give too much deference to the interests of foreign nations? One measure of that deference is the decision's references to foreign nations' amici briefs.²²⁷ Said one practitioner,

That the Court ultimately used comity as the principal basis for a qualified victory for defendants is evidence of the influence of the amici, including the governments of Germany, Canada, the United Kingdom, Japan, and others, along with international businesses and organizations. They joined in a chorus of outrage over the American system of treble damages, class actions, joint and several liability rules, and the like—all of which, the amici pointed out, threatened to make the United States the forum of choice for plaintiffs around the world, and thereby to upset different legal balances struck in foreign jurisdictions.²²⁸

Fox goes further: “[T]he interests expressed in nations' amici briefs were either simply nationalistic (Japan wanted to protect the coffers of the Japanese conspirators) or speculative.”²²⁹

And is this issue actually about subject matter jurisdiction at all? Strangely enough, in a case that is generally discussed as being about subject matter jurisdiction, Justice Breyer used the term only once, and that was in quoting a treatise.²³⁰ In avoiding use of the term, he may have been signaling that the Court does not believe that that FTAIA is about subject matter jurisdiction, and that a plaintiff who pleads a wholly independent foreign injury does not state a claim under the Sherman Act as a substantive matter.²³¹ The practical significance of the distinction con-

226. Greve & Epstein, *supra* note 93 (arguing that the Supreme Court's decision in *Intel* only a week later suggests that *Empagran*'s promise of comity may prove empty—that decision broadly construed a federal comity provision regarding discovery requests, over the objection of the European Commission).

227. *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 167–68 (2004).

228. Davis, *supra* note 132, at 59–60.

229. Fox, *Remedies*, *supra* note 86, at 581 (referring to Japan's brief, which noted that “a worldwide foreign plaintiff class could seek damages of scores of billions of dollars from just two or three Japanese defendants . . . [putting] Japanese firms at a serious competition disadvantage with other firms in that industry.” Brief of the Government of Japan as Amicus Curiae in Support of Petitioners at 10, *Empagran I*, 542 U.S. 155 (No. 03-724)).

230. *Empagran I*, 542 U.S. at 166.

231. E-mail from Elinor Hoffman, Adjunct Associate Professor of Law, Brooklyn Law School (Mar. 22, 2006, 5:59 P.M. EST) (on file with author); 1 SPENCER WEBER WALLER, ANTITRUST & AMERICAN BUSINESS ABROAD § 9:7B (3d ed. 2005) [hereinafter WALLER, ANTITRUST ABROAD] (“[T]he Court did not specifically discuss the lingering question of whether proof of the requisite effects on the U.S. market were jurisdictional

cerns the burden of proof and the level of review: if it is jurisdictional, the action is a dismissal—the burden is on the plaintiff and an appeals court should defer to the district court; if it is an element of the claim, then the action is a motion for summary judgment—the burden is on defendant, and the appeals court may review de novo.²³²

What happens next? Some have said that because *Empagran I* was decided so narrowly, and neglected to address the more likely factual situations (indeed, perhaps all fact patterns, as it remains to be seen whether the hypothetical situation it did decide will ever occur), lower courts will disagree on how to apply its rule and another circuit split is inevitable.²³³ Writing in December 2005, Professor Spencer Weber Waller predicted, “Years of additional litigation or statutory change will be necessary to definitively resolve this critical question [whether foreign antitrust plaintiffs suffering injury abroad can bring their claims to U.S. courts]. The split in the circuits and the importance of the issue strongly suggests that the Supreme Court will accept a petition for certiorari in the near future in order to resolve this point.”²³⁴

VII. ALTERNATIVES TO THE *EMPAGRAN* APPROACH

After *Empagran*, there is still a vigorous debate among antitrust scholars about how domestic laws should accommodate global trade. On one side are those who believe that competition authorities should set their own standards and continue to work together informally; on the other are those who believe international competition authorities should adopt one standard for the world.²³⁵

Professor Harry First is one of the proponents of expanding the extraterritoriality of national law along with adoption of bilateral enforcement cooperation agreements; he believes that new structures are not necessary because “a system of international competition law is already evolving, even without the formal adoption of legal principles and without the establishment of any new enforcement mechanism.”²³⁶ This system, he

or substantive in nature, but the thrust of the Court’s opinion suggests that the Justices view the issue as a substantive element of the offense.”)

232. 1 NANDA & PANSIUS, *supra* note 5 (arguing that this issue has been “largely ignored” by the courts and that, although the FTAIA has been viewed as jurisdictional, “in practice most Circuit Courts have not been unwilling to assert their review powers”).

233. Cavanagh, *Post Script*, *supra* note 213, at 7.

234. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 13:23.

235. See Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 345–47 (2002) (describing the range of views on the subject).

236. First, *Vitamins*, *supra* note 12, at 712. See also Shenefield, *Coherence*, *supra* note 38, at 430 (noting that Sir Leon Brittan’s conclusion in 1992 was that “the only remedy

says, based on consensus and virtually unilateral enforcement, has created a de facto international competition law.²³⁷

But Professor Diane Wood has pointed out that the growing consensus that “national boundaries are of little if any relevance to the anticompetitive behavior of multinational enterprises” that led to the increasing use of independent extraterritorial jurisdiction around the world has ironically produced the very result it was intended to avoid—interdependence.²³⁸ There may be no way to make a distinction between foreign and domestic commerce “in a world where U.S. tax returns are prepared in India.”²³⁹ If the *Empagran* holding requires a “double effects test,” that is, a sufficiently adverse effect within the United States, and a U.S. effect that affects the foreign effect, then worldwide interdependence will ultimately make the test meaningless: if it is strictly applied, no foreign plaintiffs will be able to meet the test, and if it is loosely applied it could encompass virtually any case.²⁴⁰ This supports Professor Wood’s view that the wider application of extraterritorial jurisdiction leads to a greater need for international agreements.²⁴¹

available today is antitrust enforcement by the country in which the private conduct is taking place; other antitrust enforcement would be viewed as excessively extraterritorial.”).

237. First, *Vitamins*, *supra* note 12, at 727. But others have noted that the practical effect of cooperation agreements has been limited. Shenefield, *Coherence*, *supra* note 38, at 394. Eleanor Fox points out a reason: cooperation will work “only if the two jurisdictions see eye-to-eye on the anticompetitiveness of the restraint and the importance of the enforcement given other priorities.” Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT’L L. 911, 921 (2003) [hereinafter Fox, *Doha Dome*]. Edward Hand observed in a 2003 paper that “since 1991 we have made only one formal positive comity referral to the EU.” Edward T. Hand, *Department of Justice Experience in Reconciling Antitrust and Trade*, 47 N.Y.L. SCH. L. REV. 131, 135 (2003).

238. Wood, *supra* note 40, at 301–03 (pointing out the irony in that agreements on extraterritorial jurisdiction have given birth to new problems, which are pushing us back toward the model of international agreements on competition).

239. 1 NANDA & PANSIUS, *supra* note 5.

240. *Id.* § 8:13.

241. Wood, *supra* note 40, at 301. See also Shenefield, *Coherence*, *supra* note 38, at 388–89 (2004) for an overview of early attempts by the United States and international bodies to foster the development of antitrust law abroad. Shenefield states:

[A] goal of perfect convergence—coming to the same substantive point from different directions—is an illusion. It can never happen; it will never happen; and even if it could happen, it would in all probability be a bad thing. There are too many variations of country and culture to permit a uniform formulation of the law of competition to be successful everywhere and for all times.

Id. The opposite approach, however—each nation going its own way—results in “costly international enforcement chaos.” *Id.* at 389.

The international model, or “one-standard” view, is advocated by, among others, Professor Fox.²⁴² Antitrust authorities around the world have already taken steps in that direction: by creating a horizontal network of antitrust agencies (the International Competition Network, or ICN²⁴³) and by forming a World Trade Organization Working Group on the Interaction Between Trade and Competition Policy, although little action on that front has been taken to date.²⁴⁴

Perhaps comity no longer makes sense in a globalized economy.²⁴⁵ Fox argues that the comity doctrine works only on the “nation-to-nation level,” and does not take into consideration global concerns as proposed international antitrust models.²⁴⁶ Professor Waller maintains, in an article titled “The Twilight of Comity,” that more practical litigation matters (such as service of process, venue, personal jurisdiction, discovery, appellate review, and enforcement of judgments) restrain plaintiffs from suing, so that extraterritoriality and comity may no longer be of such great importance.²⁴⁷ This section considers other methods to achieve the Supreme Court’s goal in *Empagran*: to limit interference with other nations’ antitrust policies without harming global antitrust enforcement.

A. Reforming the FTAIA

It would be easy to conclude that the easiest way out of the muddle would be for Congress to rewrite the FTAIA. Given how badly written the statute is, it should be a good candidate for reform. In fact, the Antitrust Modernization Commission is studying this issue (among others)

242. See generally Fox, *Doha Dome*, *supra* note 237, at 911–12.

243. See International Competition Network Home Page, <http://www.internationalcompetitionnetwork.org> (last visited Mar. 5, 2006); see also Fox, Testimony, *supra* note 66, § I.

244. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 18:11; Fox, *Doha Dome*, *supra* note 237, at 911–12; see generally Friedl Weiss, *From World Trade Law to World Competition Law*, 23 FORDHAM INT’L L.J. 250 (2000). For a thorough analysis of the argument against putting antitrust enforcement within the WTO, see Shenefield, *Coherence*, *supra* note 38, at 430–32. For the opposing view, see Fox, *Doha Dome*, *supra* note 237, at 918 (“In trade disputes, the WTO provides judicialized panels whose resolutions are increasingly perceived as fair and legitimate. In competition law disputes, however, there is nowhere to go. The regulating nation is arbiter for the world.”).

245. Sam Foster Halabi, Recent Development, *The “Comity” of Empagran: The Supreme Court Decides that Foreign Competition Regulation Limits American Antitrust Jurisdiction Over International Cartels*, 46 HARV. INT’L L.J. 279, 293 (2005), citing Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., 183, 183 (1997).

246. Fox, Testimony, *supra* note 66.

247. Waller, *Twilight*, *supra* note 65, at 572, 578.

and will make a recommendation to the President and Congress.²⁴⁸ But experts differ on whether Congress should take on the task.

Many organizations representing business interests prefer a legislative approach, which they feel would provide the most certainty with regard to business transactions occurring entirely abroad.²⁴⁹ The International Commerce Commission is one such organization; it takes the view that Congress "is in the best position" to address the issue.²⁵⁰ Another is the Chamber of Commerce of the United States, which suggests that Congress codify the D.C. Circuit's proximate cause standard,²⁵¹ the Business Roundtable agrees, suggesting that if other courts diverge from the D.C. Circuit's approach, Congress should codify it.²⁵² The International Bar Association takes the same position, arguing that legislative action would provide legal certainty, that Congress is in the best position to consider policy implications of the extraterritorial effect of U.S. law, and that legislation would be faster than common law development.²⁵³

On the other hand, the American Bar Association believes the statute is best left as it is, and that the courts are "best suited" to deal with the issues left by *Empagran I*.²⁵⁴ Among its reasons is that causation standards are best developed in the courts; that Congress has generally left the setting of such standards to judicial interpretation, and that development of a post-*Empagran* jurisprudence would best be handled through the real-world circumstances of actual cases.²⁵⁵ This view has support in the tes-

248. Shenefield, SYMPOSIUM, *supra* note 34.

249. International Chamber of Commerce, *supra* note 211.

250. *Id.* § 3.6.

251. Chamber of Commerce of the United States of America, *Comments on Commission Issues Accepted for Study*, § 4 (Nov. 8, 2005), available at http://www.amc.gov/public_studies.htm (follow "International" hyperlink).

252. *Comments of the Business Roundtable Regarding the Issues Selected for Study by the Antitrust Modernization Commission*, Antitrust Modernization Commission, § 6(B) (Nov. 4, 2005), available at http://www.amc.gov/public_studies.htm (follow "International" hyperlink).

253. International Bar Association, *Submission to the US Antitrust Modernization Committee*, at 13–15, 16 (Jan. 27, 2006), available at http://www.amc.gov/public_studies.htm (follow "International" hyperlink).

254. American Bar Association, Antitrust Section, *Submission to the Antitrust Modernization Commission Concerning Whether Congress Should Amend the FTAIA to Clarify the Circumstances in Which the Sherman Act Applies to Extraterritorial Anticompetitive Conduct*, § VII (Feb. 8, 2006), available at http://www.amc.gov/public_studies.htm (follow "International" hyperlink).

255. *Id.* § VI (B) (2),(3) (arguing that, if the Antitrust Modernization Commission does recommend that Congress revise the FTAIA, the language "should reflect clear, bright-line standards that simplify the analysis and provide the courts and public with practical guidance." *Id.* at § VII.).

timony of James Atwood, who argues that “legislative initiatives do not always solve the problems they set out to address,” a view that perhaps has no greater support than in the experience of the FTAIA itself;²⁵⁶ and Randolph Tritell, Assistant Director for International Antitrust at the Federal Trade Commission, who testified that, in light of recent decisions, “there does not appear to be a need to seek legislative clarification at this time.”²⁵⁷

Congressional consideration of the FTAIA could, however, open up a can of worms—the original purpose of the FTAIA in protecting U.S. export cartels may not play well on the foreign trade relations front. As Professor Fox asks, “Can we legitimately embrace jurisdiction when our ox is gored but disclaim jurisdiction when our ox is goring?”²⁵⁸ She takes the view that export cartel exceptions should be abolished,²⁵⁹ and proposes repealing the FTAIA and substituting a simple provision in its place: “The Sherman and FTC Acts shall not apply to harms not within the United States and not on U.S. territory.”²⁶⁰

B. Standing

It is curious that the issue at the heart of *Empagran* has been addressed only through the lens of subject matter jurisdiction and not through standing.²⁶¹ The circuit court in *Empagran* found that the plaintiffs had antitrust standing,²⁶² and the Supreme Court avoided the issue entirely,²⁶³ saying that “[t]he question of who can or cannot sue is a matter for other

256. James R. Atwood, Testimony before the Antitrust Modernization Commission, Hearings on International Issues, § 5 (Feb. 15, 2006), http://www.amc.gov/commission_hearings/international_antitrust.htm.

257. Randolph W. Tritell, Testimony before the Antitrust Modernization Commission, Hearings on International Issues, § I (Feb. 15, 2006), http://www.amc.gov/commission_hearings/international_antitrust.htm.

258. Fox, Testimony, *supra* note 66, § V.

259. *Id.*

260. *Id.* § IV (suggesting the Webb-Pomerene Act and Export Trading Certificate of Review Act should also be repealed). For a discussion of the WPA and ETC, see Margaret C. Levenstein & Valerie Y. Suslow, *The Changing International Status of Export Cartel Exemptions*, 20 AM. U. INT’L L. REV. 785, 789–804 (2005).

261. Cavanagh, SYMPOSIUM, *supra* note 151, at 25 (“I think all these cases could be decided on standing.”).

262. *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 357 (D.C. Cir. 2003).

263. Cavanagh, *What Next?*, *supra* note 179, at 1440. Cavanagh believes the Circuit Court’s reasoning was overruled by the Supreme Court in *Empagran I*, even though the Supreme Court did not reach the standing issue because it overturned the Circuit Court’s decision on other grounds. *Id.* at 1445.

statutes (namely, the Clayton Act) to determine.²⁶⁴ Decisions on foreign purchasers' standing in other courts are "sparse,"²⁶⁵ but at least two courts have rejected standing for foreign purchasers²⁶⁶ and one of those held that participation in the U.S. market is "crucial" to establishing antitrust standing.²⁶⁷ Yet one of the issues of importance to the Supreme Court—judicial administration—could be addressed more easily through standing.²⁶⁸

To establish antitrust standing, a threshold question that is separate from the question of subject matter jurisdiction,²⁶⁹ a plaintiff must overcome three limitations.²⁷⁰ First, he must meet constitutional requirements of standing under the Clayton Act²⁷¹ by establishing "injury-in-fact or threatened injury-in-fact caused by the defendant's alleged wrongdoing."²⁷² Second, he must establish "antitrust injury" by showing that the injury suffered is "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."²⁷³ This establishes that the plaintiff's injury is not just any injury, but an injury made illegal by the Sherman Act. Finally, a plaintiff must be a "proper plaintiff" according to a set of factors known as the *Associated General Contractors*²⁷⁴ factors: these include "the proximity ('remoteness') of the causal connection between the defendant's antitrust violation and the plaintiff's harm, evidence of an actual intent to cause that harm, whether there are more direct victims, the speculativeness of the plaintiff's claimed injury, and the potential for duplicative recovery or

264. *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 173 (2004).

265. Cavanagh, *What Next?*, *supra* note 179, at 1440.

266. *Id.* at 1446 (referring to *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 732498 (N.D. Cal. 1997) and *In re Microsoft Corp. Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001)).

267. Cavanagh, *What Next?*, *supra* note 179, at 1447 (referring to *In re Microsoft*, 127 F. Supp. 2d at 715).

268. Comment, *Federal Statutes and Regulations, Foreign Trade Antitrust Improvement Act*, 118 HARV. L. REV. 476, 483–84 (2004).

269. Cavanagh, *What Next?*, *supra* note 179, at 1440. For a detailed analysis of this issue, see *id.* 1440–51.

270. WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 1:9 (2004) [hereinafter HOLMES, HANDBOOK].

271. Clayton Act, 15 U.S.C. §§ 12–27 (1914).

272. HOLMES, HANDBOOK, *supra* note 270 (citing *Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F. 3d 799 (D.C. Cir. 2001)).

273. William C. Holmes, *Jurisdiction and Standing in the International Arena*, 14 LOY. CONSUMER L. REV. 537, 544 (2002) [hereinafter Holmes, *Jurisdiction*] (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

274. *Associated General Contractors*, 459 U.S. at 538–44 (1983).

overly complex apportionment of damages.”²⁷⁵ Simply put, application of standing requirements limits antitrust claims “to those who are in the best position to prosecute the claim and bars those claims arising from a ripple effect.”²⁷⁶

One of the merits of approaching the issue through standing is that the concerns that underpin standing analysis parallel, in some respects, the policies that inform decisions on subject matter jurisdiction.²⁷⁷ Both address judicial efficiency, detection, and deterrence.²⁷⁸ And the test for standing is proximate cause,²⁷⁹ now arguably the predicate for subject matter jurisdiction. Using standing doctrine, a court’s view on subject matter jurisdiction, whether narrow or broad, would not matter as greatly.

Professor Cavanagh believes that foreign plaintiffs would face “formidable hurdle[s]” to establishing standing if the standard were applied properly.²⁸⁰ Resolution of foreign claims under the standing doctrine would be easier than applying the FTAIA, he says.²⁸¹ Using standing analysis would be “more logical”²⁸² and avoid the “strange and strained construction of the FTAIA” that the Supreme Court set out in *Empagran*.²⁸³ In fact, Cavanagh argues, the Supreme Court should have decided the standing issue in *Empagran*.²⁸⁴

Perhaps the criticisms of the Supreme Court’s decision and the ramifications of the continuing development of the jurisdictional issues in

275. Holmes, *Jurisdiction*, *supra* note 273.

276. Edward D. Cavanagh, *Antitrust in the Second Circuit*, 65 ST. JOHN’S L. REV. 795, 810 (1991).

277. Davis, *supra* note 132, at 63 (pointing out that “the issues in *Empagran* have much in common with the issues in *Illinois Brick*,” the leading case on the standard for standing).

278. *Id.* at 63 (“Just as *Illinois Brick* balanced judicial efficiency, deterrence of violations, and other relevant factors to establish an extra-statutory rule as to who may sue and who may not, so also the *Empagran* scenario demands a careful analysis and balancing of judicial efficiency, cartel detection, and cartel deterrence.”).

279. Cavanagh, *What Next?*, *supra* note 179, at 1448.

280. Cavanagh, *Post Script*, *supra* note 213, at 7.

281. Cavanagh, *What Next?*, *supra* note 179, at 1431.

282. Holmes, *Jurisdiction*, *supra* note 273, at 546.

283. Fox, *Testimony*, *supra* note 66, § IV. *See also* Holmes, *Jurisdiction*, *supra* note 273, at 537 (“Rather than address the issue as one of standing, the courts have articulated an exceedingly intricate jurisdictional analysis under the [FTAIA] that few can hope to truly understand and that arguably does harm to both the statutory language of the Act and its legislative history.”).

284. Cavanagh, *What Next?*, *supra* note 179, at 1431.

lower courts will bring more attention to the issue of standing in foreign plaintiff antitrust litigation.²⁸⁵

C. Forum Non Conveniens

The real question should be this: should foreign antitrust plaintiffs be allowed to use U.S. courts to sue foreign defendants when the transactions occurred entirely outside the United States, when the behavior has already been discovered and the U.S. government has successfully concluded a criminal action, and when U.S. plaintiffs have separately pursued, or are pursuing, their own claims? In such cases, it would appear that all U.S. interests have been dealt with. The *Vitamins* cartel members acted on the international stage; now that so many countries have antitrust regimes, one might well ask why all claims against these actors should be litigated in the United States. If a means can be found to ensure that there is a venue in foreign courts in which to litigate such claims dismissed from U.S. courts, two of the policy concerns at issue—burden on the courts and impact on development of antitrust regimes—would be resolved, and overall deterrence would be only marginally reduced.²⁸⁶

A doctrine that has been used only infrequently in transnational antitrust litigation, but which may see renewed interest since *Empagran* (especially since the Supreme Court raised it in oral argument) is *forum non conveniens*.²⁸⁷ Waller believes the doctrine “holds considerable promise for use in foreign commerce antitrust litigation.”²⁸⁸ *Forum non conveniens* permits a court to abstain from the exercise of jurisdiction on the motion of a defendant when the forum chosen by the plaintiff is unjust to the defendant, and where a more convenient forum exists to hear the dispute.²⁸⁹ This common law doctrine, established in *Gulf Oil Corp. v. Gil-*

285. Cavanagh, *Post Script*, *supra* note 213.

286. See Buxbaum, *supra* note 149, at 373 (arguing that the policy goal of deterrence could be satisfied through public regulation with a high level of aggregate fines imposed by the United States and other countries, rather than through private enforcement).

287. Transcript of Oral Argument at *29, *F. Hoffman-La Roche, Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155 (2004) (No. 03-724).

288. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27 (“The use of *forum non conveniens* would mean that litigation of jurisdictional questions would shift from the all or nothing proposition of whether the United States has jurisdiction to whether the U.S. is the *best* forum for resolution of the dispute.”) (emphasis in original). See also 1 WALLER, ANTITRUST ABROAD, *supra* note 231, § 6:17 (arguing that *forum non conveniens* provides a powerful addition, if not a substitute, for disputes over jurisdiction and comity in appropriate transnational antitrust cases).

289. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27. Notice that jurisdiction is assumed. See Sandage, *supra* note 75, at 1707–08 (“The defendant’s objection in such

*bert*²⁹⁰ and developed in *Piper Aircraft Co. v. Reyno*,²⁹¹ requires a court to consider the presence of a suitable forum in another country, the plaintiff's nationality, the relevance of what nation's law would control the case, and a balance of "public" and "private" factors.²⁹²

Using forum non conveniens to decline hearing cases that have a closer connection with another country has the virtue of encompassing comity values, because it similarly addresses respect for the interests of the foreign sovereign.²⁹³ In addition, because the availability of another forum to hear the dispute is a factor in considering dismissal under forum non

a motion is typically not a challenge to the subject matter jurisdiction of the court per se, but rather an assertion of the impropriety of that particular court's exercising its jurisdiction over the case because litigation in such an inconvenient forum amounts to an illegitimate exercise of state power.").

290. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

291. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

292. William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1666 (1992).

293. Mladen Don Kresic, Note, *The Inconvenient Forum and International Comity in Private Antitrust Actions*, 52 FORDHAM L. REV. 399, 418 (1983). According to Kresic:

[C]omity analysis stresses national concerns and ignores the litigants' interests. Forum non conveniens, however, encompasses the requirement of comity within the framework of existing law. All factors used in balancing public or national interests involved in an antitrust action under *Timberlane* can be adequately weighed in a public interest analysis under forum non conveniens The opportunity given to defendants to present all national interest factors favoring dismissal under the public interest consideration of forum non conveniens should help reduce tensions caused by extraterritorial extension of the antitrust laws The strong public interest in American antitrust enforcement should also play a major role in the forum non conveniens analysis. Thus, the interest that a foreign state has in the litigation must outweigh the effects that the alleged antitrust violations have in the United States [I]f there is an anticompetitive effect in the United States, but it is outweighed by the effect in a foreign nation, then the suit may be dismissed in favor of an action brought in another forum.

Id. See also Reynolds, *supra* note 292, at 1714 ("The American courts' willingness to defer to the exercise of foreign jurisdiction not only shows the respect due other sovereigns, but is increasingly necessary in an ever-shrinking world."). Mladen Kresic and John Sandage's arguments against the broader use of comity analysis—because it is too complicated for judges and not appropriate for the judicial branch to engage in political balancing—show why forum non conveniens is a more appropriate tool in this arena. See generally Kresic, *supra*; Sandage, *supra* note 75. But see Bates, *supra* note 46, at 314 (arguing that using forum non conveniens in this way would stretch the doctrine beyond recognition into a diplomatic device).

conveniens,²⁹⁴ protections for plaintiffs can be built in:²⁹⁵ a court may condition dismissal on defendants' acceptance of the jurisdiction of the foreign court to ensure that the interests of foreign parties and governments can be addressed without depriving the plaintiff of a remedy.²⁹⁶ The litigation would then proceed in the foreign court, subject to foreign law and procedure.²⁹⁷ For this reason, dismissal for forum non conveniens has an advantage over dismissal for lack of subject matter jurisdiction or for reasons of comity: it ensures that the plaintiff gets its day in court and that defendants do not escape liability.²⁹⁸

In weighing the factors for or against dismissal for forum non conveniens under *Reyno*, a difference in the substantive law to be applied is not generally given great weight,²⁹⁹ although dismissal will not be granted in a case in which the remedy provided by the alternative forum is "so

294. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27. It may complicate matters, however, if some of the plaintiffs in an action are from countries that have developed antitrust regimes and some are from countries that do not.

295. Reynolds notes that *Reyno* specifically endorses some measure of discrimination against foreign plaintiffs: "When the home forum has been chosen [by plaintiff], it is reasonable to assume that the choice is convenient. When the plaintiff is foreign, however, this assumption is made less reasonable." Reynolds, *supra* note 292, at 1693.

296. 1 WALLER, ANTITRUST ABROAD, *supra* note 231, § 6:17. See also Reynolds, *supra* note 292, at 1666–67 (pointing out that courts "routinely condition dismissal on the defendant's waiving the foreign limitations period and agreeing to accept service in a foreign jurisdiction," that they may also "condition a dismissal on the defendant's promise to pay any judgment" and that they "should also condition the dismissal on the willingness of the foreign court to hear the case—including third-party claims—a condition that assures the availability of the alternative forum." See also John Fellas, *Choice of Forum in International Litigation*, 704 PLI/LIT 239, 307 (2004) ("If the proponent of dismissal fails to comply with the order, the action will be reinstated in the U.S.")).

297. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27 (pointing out that there must be a meaningful remedy available, but it need not be as generous as that available in the United States for forum non conveniens to apply).

298. 1 WALLER, ANTITRUST ABROAD, *supra* note 231, § 6:17 ("The doctrine of forum non conveniens has the appealing feature of eliminating the all or nothing aspect of litigation over jurisdiction to prescribe.").

299. Reynolds, *supra* note 292, at 1670, quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981) ("The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry."). See also Erika Nijenhuis, Comment, *Antitrust Suits Involving Foreign Commerce: Suggestions for Procedural Reform*, 135 U. PA. L. REV. 1003, 1038–39 (1987), citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (in which the Court subordinated U.S. interests in antitrust enforcement to an arbitration agreement between the parties specifying a Japanese tribunal, even though Japanese antitrust enforcement (at the time) was not nearly as robust as in the United States.).

clearly inadequate or unsatisfactory that it is no remedy at all,”³⁰⁰ something that the *Empagran* Court was concerned with.³⁰¹ This means there must not only be a criminal antitrust statute, but there must be a private right of action.³⁰²

Although such rights are not as widely available outside the United States, there is now a private right of action in the European Union.³⁰³ As noted earlier, the number of countries with developed antitrust regimes is growing. Certainly the type of case dealt with here—per se price fixing violations—is covered by the laws of all countries that have such regimes.³⁰⁴ And although Ecuador and Ukraine, two of the countries from which the plaintiffs in *Empagran* came, may not provide adequate anti-

300. Reynolds, *supra* note 292, at 1671, quoting *Reyno*, 454 U.S. at 254. See also Fel-las, *supra* note 296, at 284 (pointing out that a Brazilian forum was held to be adequate even though Brazil did not permit punitive damages in *De Melo v. Lederle Labs.*, 801 F.2d 1058 (8th Cir. 1986)).

301. Transcript of Oral Argument at *33, *F. Hoffman-La Roche, Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155 (2004) (No. 03-724). The Court asked if defendants were proposing that the Court make a distinction between countries that have antitrust laws and those that do not. There is a danger that “[a]n aggressive policy favoring com-ity-based dismissals might create a two-tiered system, where foreign plaintiffs from de-veloped antitrust regimes such as the EU, Australia, and Canada are often barred from U.S. courts, while plaintiffs from many developing countries are admitted.” Sprigman, *supra* note 210, at 282. See also Reynolds, *supra* note 292, at 1667–68, for an overview of this issue, and Buxbaum, *supra* note 149, at 374–76, arguing that the doctrine of forum non conveniens could solve some of the procedural difficulties, but noting that because “dismissal on that basis is permissible only when there is an adequate alternative remedy abroad . . . a U.S. court would have no authority to order dismissal of a case involving a foreign transaction if the country in question did not permit private rights of action at all.”

302. Buxbaum, *supra* note 149, at 375–76. See also 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27 (arguing that if dismissal based on forum non conveniens is not warranted because a particular jurisdiction does not have a private right of action covering the subject matter of U.S. antitrust law, “[t]hat is only a reason to deny a motion in a particular case . . . and not to deny the applicability of the doctrine in its totality.”).

303. See Donncadh Woods, *Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431 (2004).

304. Dorsey D. Ellis, Jr., *Projecting the Long Arm of the Law: Extraterritorial Criminal Enforcement of U.S. Antitrust Laws in the Global Economy*, 1 WASH. U. GLOBAL STUD. L. REV. 477, 496–97 (2002) (noting that price-fixing agreements are unlawful under every competition law and universally deplored as adversely affecting consumer welfare). See also Reynolds, *supra* note 292, at 1681 (“The fact that a foreign forum has a strong interest in the outcome of the case may support a decision to dismiss an action. Often the foreign forum has a strong interest in having its own law applied in its own courts.”).

trust laws,³⁰⁵ the home countries of some, if not all, of the cartel members provide for private damage claims.³⁰⁶

It may be difficult for district court judges to make determinations about the adequacy of foreign antitrust regimes, both due to the complexity of the review and the fact that precedent provides little value for a current assessment,³⁰⁷ in addition, such judgments would likely be protested by foreign countries.³⁰⁸ It has been suggested that the U.S. Department of Justice should annually review foreign countries' antitrust regimes to determine whether they provide adequate relief for private parties, and that jurisdiction over cases where both plaintiff and defendant are foreign should be barred in such cases by amending the Clayton Act.³⁰⁹ Such a policy would have the benefit of consistency and predictability, and the executive branch is better positioned to assess the political tradeoffs,³¹⁰ although such determinations would probably be even more highly resented by foreign governments as an intrusion into their own political systems.³¹¹ While such a policy would be in keeping with a forum non conveniens analysis, it is probably not necessary.³¹²

Of course, a defendant who moves to dismiss on grounds of forum non conveniens generally does so because he wants the case dismissed entirely, not because he would rather have the case heard in another

305. They may be technically adequate. Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 HASTINGS INT'L & COMPETITION. L. REV. 205, 221–23 (2005) (explaining that both these countries have recently enacted antitrust statutes which appear to be “robust” and allow for private damages, but it is questionable how adequate they really are).

306. Germany is part of the EU; Japan has an antitrust regime. See Fellas, *supra* note 296, at 278 (“[M]ost courts have granted motions to dismiss on grounds of forum non conveniens notwithstanding the fact that foreign law does not provide the *same* remedy as that available under U.S. law, as long as there is *some* remedy under foreign law.”) (emphasis added).

307. Jonathan T. Schmidt, Note, *Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, 31 YALE J. INT'L L. 211, 256 (2006).

308. Wurmnest, *supra* note 305, at 223.

309. Schmidt, *supra* note 307, at 258–59 (suggesting a detailed review that would “distinguish the types of claims for which a country’s relief is adequate from those for which it is inadequate.”).

310. Robert Walter Trenchard, *The Scope of Antitrust Jurisdiction Abroad: A Classic Conflicts-of-Law Problem*, at 31 (2004), available at <http://ssrn.com/abstract=533462>.

311. Bates, *supra* note 46, at 314–15 (arguing that comity is a better approach to the issue).

312. Fellas, *supra* note 296, at 284.

venue.³¹³ So defendants would be unlikely to make such a motion. (The perceived advantages for foreign plaintiffs in U.S. courts, however, such as treble damages and liberal enforcement of judgments, may be less advantageous than they appear at first blush: in many instances the plaintiff may only retain single damages or its equivalent anyway, due to foreign “claw-back” provisions, the fact that U.S. courts do not grant interest on damages as they do elsewhere, and the reduction of the availability of treble damages under the new Antitrust Criminal Penalty Enhancement and Reform Act.³¹⁴) However, although forum non conveniens is almost always considered on the motion of a party, there does not appear to be a bar to the court doing it sua sponte.³¹⁵

313. Transcript of Oral Argument at *34–35, *F. Hoffman-La Roche, Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155 (2004) (No. 03-724). Plaintiffs’ attorney Thomas C. Goldstein stated:

If there’s some substantial remedy available in another country, then you can go somewhere else. But they didn’t file that motion because they’re trying to get rid of the case with respect to the majority of bulk vitamins commerce and with respect to most of the commerce in these worldwide markets for which there is no remedy.

Id. See 1 WALLER, ANTITRUST ABROAD, *supra* note 231, § 6:17 (“Defendants often are not seeking to litigate in their home courts versus the United States, they more commonly seek outright dismissal.”) But there are other reasons a defendant may prefer a foreign venue over the United States even if the case cannot be dismissed outright: extensive discovery procedures, compulsory process, and treble damages. Reynolds, *supra* note 292, at 1673–74.

314. See Kresic, *supra* note 293, at 425 (“[F]oreign statutes, such as the British ‘claw back’ provisions, enable defendants to recover the punitive portion of the damages awarded in a United States action. Therefore, the remedy available in a foreign forum may be no less adequate than the one obtained in an American court.”). Waller also points out:

Plaintiff would also be free from further jurisdictional challenges If the end product is an enforceable judgment for single damages, it is difficult to say plaintiff is worse off than if the outcome had been a monumental treble damage jury verdict against a defendant with no U.S. assets and little prospect for enforcement abroad.

2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27. The new Antitrust Criminal Penalty Enhancement and Reform Act reduces the availability of treble damages for anti-trust conspirators who cooperate with the U.S. government. See *supra* note 215.

315. *Fine v. McGuire*, 433 F.2d 499, 501 (D.C. Cir. 1970) (“It is fair to suppose that the general contemplation was that transfer under 1404 would be triggered by a motion. This is not to say that a district judge may not initiate consideration of the convenience factor, but *ordinarily* at least he will not take action unless a party, and that party can be the plaintiff, files an appropriate motion.”) (emphasis added). In the context of enforcement of private forum selection clauses in international contracts, Hannah Buxbaum says

Perhaps it is time for the Court to add one or more factors to consider in forum non conveniens analysis, including the following: when all the defendants and all the plaintiffs are foreign entities;³¹⁶ when the U.S. government has successfully concluded criminal actions against the defendants; and when U.S. plaintiffs have separately pursued, or are pursuing, their own claims against defendants. If these factors are considered, and a court initiates the analysis sua sponte in such circumstances, with appropriate conditions regarding defendants' acceptance of foreign jurisdiction, the courts will have achieved the policy goals of the Supreme Court's *Empagran* decision.³¹⁷

It should be mentioned that the federal courts are split over whether, and under what circumstances, a district court may dismiss an antitrust case, specifically, on forum non conveniens grounds.³¹⁸ Clearly there is

that the court could raise forum non conveniens sua sponte in response to public interests, such as judicial efficiency, based on a reading of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Hannah L. Buxbaum, *Forum Selection in International Contract Litigation: The Role of Judicial Discretion*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 185, 198 (2004).

316. As a measure of how much litigation in this area has changed, virtually all case law and commentary on this subject assumes that at least one party—plaintiff or defendant—is domestic. *See generally*, e.g., Sandage, *supra* note 75; Kresic, *supra* note 293; Reynolds, *supra* note 292; Nijenhuis, *supra* note 299.

317. *See* Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?* 26 HOUS. J. INT'L L. 385, 399 (2004), observing that “it should be an acknowledged purpose of forum non conveniens doctrine to achieve the balance that is lacking in American law That, in fact, is what many courts are doing today, when, although they speak of convenience and inconvenience, their eyes seem fixed on the presence or absence of a domestic regulatory interest.” *See also* Bates, *supra* note 46, at 314–15 (pointing out that forum non conveniens asks a court to dismiss a case over which it has already concluded it has subject matter jurisdiction, personal jurisdiction, and that venue is proper, and arguing that this sequence of analysis makes forum non conveniens a poor means by which to limit the extraterritoriality of U.S. law).

318. *See generally* Lonny Sheinkopf Hoffman & Keith A. Reilly, *Forum Non Conveniens in Federal Statutory Cases*, 49 EMORY L.J. 1137 (2000), for a detailed analysis of the circuit split and statutory authority involved in this issue, and noting that *Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 609 (2d Cir. 1998) held that an antitrust suit is subject to dismissal under the forum non conveniens doctrine. *Id.* at 1173–74. The authors argue that, absent a clear statement of congressional intent to abrogate the doctrine, the better rule is to presume that courts have the discretion to decline jurisdiction. They propose a rule that the court should exercise it first to ensure that the forum with the most significant interest in the dispute adjudicates it; only secondarily when it would be seriously inconvenient for the suit to proceed in the forum court. *See also* Reynolds, *supra* note 292, at 1703 (arguing that the correct approach would be to ensure that the federal right is adequately protected in the foreign forum); Sandage, *supra* note 75, at 1713 (countering arguments that Congress has determined that U.S. antitrust law should extend to cases that courts would dismiss on forum non conveniens grounds; he points out that “it is simply inherent in the doctrine of forum non conveniens that

authority for the proposition that courts may do so,³¹⁹ although it may be necessary for the Supreme Court to resolve the split.³²⁰

It is also curious that little has been written about choice of law in the context of this issue. It is apparently assumed that once subject matter jurisdiction is established, the relevant law to be applied is the *lex fori*, or U.S. law.³²¹ If a court did a choice of law analysis that found a foreign antitrust law to be applicable, at least some of the advantages that plaintiffs have in bringing suit in U.S. courts would be undermined (although discovery, damages, and other procedural issues would be governed by the *lex fori*).

VIII. CONCLUSION

This Note argues that the Supreme Court's *Empagran* decision provides little guidance to courts or parties on the extraterritorial effect of U.S. antitrust law when foreign plaintiffs sue foreign defendants for injuries sustained outside the United States, with further circuit splits bound to develop due to the narrowness of its holding. Absent revision of the FTAIA, other legal doctrines, including the test for antitrust standing and the doctrine of forum non conveniens, could be used to address the issue.

S. Lynn Diamond*

courts will exhaust adjudicative jurisdiction and dismiss a case even where legislative jurisdiction would go further . . . [otherwise] the convenient forum doctrine would be meaningless . . .").

319. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27.

320. *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944 (1st Cir. 1991) may be instructive; Justice Breyer, then Chief Judge of the First Circuit Court of Appeals, who wrote the opinion in *Empagran*, endorsed using forum non conveniens in a federal statutory case (with regard to securities regulation). In discussing domestic cases, he said that the statute at issue, § 1404(a), "at the least reflects a congressional policy strongly favoring transfers We can find no good policy reason for reading the special venue provisions as if someone in Congress really intended them to remove the courts' legal power to invoke the doctrine of forum non conveniens in an otherwise appropriate case." *Id.* at 949–50. Although then-Judge Breyer distinguished antitrust cases from securities cases, his comments about the growth in international commerce and the need to use forum non conveniens to "help the world's legal systems work together, in harmony," *id.* at 950, prefigure his concerns in *Empagran*.

321. 1 WALLER, ANTITRUST ABROAD, *supra* note 231, § 6:17.

* B.A. Cornell University, J.D. Brooklyn Law School (2006). I would like to thank Professors Claire Kelly, Elinor Hoffman, Amos Shapira, and Spencer Weber Waller for their helpful comments. I especially want to thank Art Feinglass for his support, encouragement, and enduring patience.

**A DISPROPORTIONATE RULING FOR ALL
THE RIGHT REASONS:
*BEIT SOURIK VILLAGE COUNCIL V.
THE GOVERNMENT OF ISRAEL***

I. INTRODUCTION

On March 9, 2002, a Palestinian suicide bomber walked into Jerusalem's popular Moment Café as though he was an ordinary customer looking to order coffee or a snack.¹ When he reached the center of the café, he detonated himself, killing eleven people.² Three weeks later, during the Jewish holiday of Passover,³ twenty-five-year-old Abd al-Basit Awdah, a Hamas⁴ activist, blew himself up in Netanya's Park Hotel during a *seder*⁵ attended by 250 grandparents, mothers, fathers, and children.⁶ Twenty-nine people lost their lives and 140 others were injured in the explosion.⁷ Since September 2000, there have been over eight hun-

1. Lisa Katz, *Most Deadly Terrorist Attacks in Israel*, http://judaism.about.com/library/1_terrorism/bl_worstattacks.htm. See also Etgar Lefkovits & David Rudge, *11 Killed in Jerusalem Suicide Attack: Two Terrorists Open Fire at Netanya Hotel Killing 3, Wounding More than 50*, JERUSALEM POST, Mar. 10, 2002, at 1A, available at LEXIS, News Library Jpost File.

2. *Id.*

3. Passover is a spring festival celebrated by Jews lasting seven days in Israel and eight days in the Diaspora (lands outside of Israel). The holiday commemorates the Exodus from Egypt. 13 ENCYCLOPEDIA JUDAICA *Passover* 163 (1972).

4. Hamas was formed in late 1987 as an outgrowth of the Palestinian branch of the Muslim Brotherhood. Hamas has used various tactics, including political and violent, to reach their goal of establishing an Islamic Palestinian state in place of Israel. "Hamas activists, especially those in the Izz el-Din al-Qassam Brigades, have conducted many attacks—including large-scale suicide bombings—against Israeli civilian and military targets, suspected Palestinian collaborators, and Fatah rivals." U.S. Dep't of State, *Background Information on Foreign Terrorist Organizations, Released by the Office of the Coordinator for Counterterrorism* (Oct. 8, 1999), <http://www.state.gov/s/ct/rls/rpt/fto/2801.htm#hamas>.

5. Taking place on the first two nights of the eight day holiday of Passover, the *seders* are the most important events in the Passover celebration. They are a time for families to come together and recount the story of the Jews' exodus from Egypt and their journey to Israel. *The Passover Seder*, <http://www.holidays.net/passover/seder.html>.

6. Human Rights Watch, *Suicide Bombing Attacks on Civilians*, <http://www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002-03.htm>. See also David Rudge, *20 Die in Netanya Pessah Massacre*, JERUSALEM POST, Mar. 29, 2002, at 1A, available at LEXIS, News Library Jpost File.

7. Katz, *supra* note 1.

dred such attacks in Israel, making terrorism in Israel both horrifying and commonplace.⁸

As of March 2006, more than 3,800 Israelis and Palestinians have died and over 21,000⁹ have been injured during the second *Intifada*¹⁰—a potent reminder that the peace process that once seemed so promising has crumbled.¹¹ From an Israeli perspective, no place is secure from the

8. See HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel [2004] P.D. 46(2) ¶ 1, available at <http://62.90.71.124/eng/verdict/framesetSrch.html>.

9. See Middle East Policy Council, Conflict Statistics, <http://mepc.org/resources/mrates.asp> (last visited Apr. 5, 2006) (stating that 999 Israelis and 3844 Palestinians have lost their lives); see also Maj. Gen. Uzi Dayan, *Special Policy Forum Report—In Defense of the Fence*, Washington Institute for Near East Policy, Peacewatch, No. 437 (Dec. 19, 2003), available at <http://www.washingtoninstitute.org/watch/Peacewatch/peacewatch2003/437.htm>.

10. *Intifada* literally means uprising. The first *Intifada* spanned six years beginning in December 1987 and continuing until September 1993 (the signing of the Oslo Accord). This period was marked by continuous Palestinian uprisings, including rioting, rock throwing, and illegal road blocks in an effort to contest Israel's presence in Gaza and the West Bank. See generally CAPTAIN (RES.) UZI AMIT-KOHN ET AL., ISRAEL, THE "INTIFADA" AND THE RULE OF LAW 27–28 (1993). The second *Intifada*, like the first, also began with rock throwing. While some argue that it was caused by Ariel Sharon's controversial visit to the Temple Mount—a holy site shared by both Jews and Muslims where Abraham was to sacrifice Isaac and Mohammad is thought to have ascended to heaven—others believe that Yassir Arafat, the Palestinian Prime Minister, planned to call for an uprising regardless of Sharon's actions. Since September 2000 until the present, this latest *Intifada* has exploded into a full blown guerilla war of suicide bombers and military incursions. Ziv Hellman, *The Beginnings of the Second Intifada: In September 2000, a New Wave of Violence Erupted*, http://www.myjewishlearning.com/history_community/Israel/Overview_IsraeliPalestinian_Relations/Intifada_I/Intifada2.htm.

11. See David Makovsky, *How to Build a Fence*, 83 FOREIGN AFFAIRS 50, 50 (2004). Chief Justice Aharon Barak provides a brief history of the Israeli Palestinian peace process in *Beit Sourik Village Council v. The Government of Israel*. He states:

Since 1967, Israel has been holding the areas of Judea and Samaria in belligerent occupation. In 1993 Israel began a political process with the PLO, and signed a number of agreements transferring control over parts of the area to the Palestinian Authority. Israel and the PLO continued political negotiations in an attempt to solve the remaining problems. The negotiations, whose final stages took place at Camp David in Maryland, USA, failed in July 2000 . . . a short time after the failure of the Camp David talks, the Israeli-Palestinian conflict reached new heights of violence In September 2000, the Palestinian side began a campaign of terror against Israel and Israelis. Terror attacks take place both in the area [Judea and Samaria] and in Israel. From September 2000 until the beginning of April 2004, more than 780 attacks were carried out within Israel. During the same period, more than 8200 attacks were carried out in the area.

Beit Sourik, HCJ 2056/04 ¶ 2.

threat of attack: “in public transportation, in shopping centers and markets, in coffee houses and in restaurants,” Israeli citizens struggle with the perpetual fear of terrorism.¹² Homemade bombs filled with nails and shrapnel, snipers overlooking highways and small communities, and Qassam rockets¹³ fill the thoughts of parents daily as they send their children to school or kiss one another goodbye on their way to work.¹⁴

In the past, Israel responded to terrorist threats in several ways, most notably through military incursions into the Occupied Territories.¹⁵ In 2002 alone, the Israeli Defense Force¹⁶ carried out two large-scale military operations between March and June, operation “Defensive Wall”¹⁷

12. *Beit Sourik*, HCJ 2056/04 ¶ 2; see also Emanuel Gross, *The Struggle of a Democracy Against Terrorism—Protection of Human Rights: The Right to Privacy Versus the National Interest—The Proper Balance*, 37 CORNELL INT’L L.J. 27, 28 (2004) (“Since its establishment, the State of Israel has been subject to incessant terrorist attacks. Streets, buses, and places of mass entertainment transformed in the blink of an eye into fields of death is not the scene of a nightmare but a daily reality. The cost of terrorism is unbearable. The lives of thousands of innocent civilians have been brutally cut short, and the existence of tens of thousands of injured men and women has been changed unrecognizably; the Israeli experience is suffused with bereavement, pain, frustration and anger. Coping with the constant fear of imminent terrorist attacks imprints its own indelible mark on every aspect of daily life, political, cultural, social and economic.”).

13. “The Qassam-1 and Qassam-2 are rockets that were developed by the Islamic terrorist group Hamas in the Gaza Strip with the aid of the Palestinian Authority (PA)” Mara Karlin, *Palestinian Qassam Rockets Pose New Threat to Israel*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/Terrorism/Qassam.html>.

14. See Michael Nakoryakov, *Terrorism Will End One Day—It Just Has to Run Out of Excuses*, SALT LAKE TRIBUNE, Jan. 12, 2003, at AA5.

15. *Beit Sourik*, HCJ 2056/04 ¶ 2. This Note refers to the Israel-occupied regions by the names that are most commonly used in the international debate: “West Bank,” “Gaza Strip,” or “the Occupied Territories.” The biblical terms “Judea” and “Samaria”—as the West Bank is officially called in Israel—are used as they appear in quoted texts or in formal titles. This Note uses the terms “occupied territories,” “military government,” “occupying power,” and “occupant” as they are normally used in international law. Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. INT’L L. 1, 1 n.1 (1994). Although somewhat geographically ambiguous, the West Bank constitutes the “area west of the Jordan River taken over by Israel in the 1967 Six Day War.” AMIT-KOHN ET AL., *supra* note 10, at 24.

16. The Israeli Defense Force (IDF) is one of the most elite forces in the world. In Israel, enrollment in the IDF is mandatory for both men and women. The IDF is highly regarded in Israel and commands great respect. See 9 ENCYCLOPEDIA JUDAICA 690 (1972).

17. Justice Barak described Operation Defensive Wall as follows:

Within the framework of Operation Defensive wall, the army carried out a wide-ranging operation of detention. The IDF entered Palestinian cities and villages and detained many suspects. At the height of the activity about 6000 people were detained During the first stage of these detentions, the detainees

and operation "Determined Path."¹⁸ Despite the commitment of significant resources and effort, the terrorist attacks, although reduced, have not ceased.

In April 2002, the Ministers' Committee for National Security, a Committee under the Minister of Defense,¹⁹ reached a decision to build a security fence²⁰ between Israel and the West Bank for the stated purpose

were brought to temporary facilities, which were set up at brigade headquarters. Here the detainees were initially screened, a process whose duration extended between a few hours and two days. At this point, a substantial number of the detainees were released. During the second stage, those who remained were transferred to a central detention facility in the area, located at Ofer Camp, for further investigation.

HJC 3278/02 Center for Defense of the Individual v. IDF Commander [2002] ¶ 2 (unpublished).

18. Operation Determined Path has been described as follows:

As part of this operation, which was initiated at the end of March 2002, the IDF forces entered various areas of Judea and Samaria. Their intention was to detain wanted persons as well as members of several terrorist organizations Among those detained were persons who were not associated with terrorism; some of these persons were released after a short period of time.

HJC 3239/02 Marab v. IDF Commander in the West Bank [2002] ¶ 1 (unpublished); *see also Beit Sourik*, HJC 2056/04 ¶ 2.

19. The Ministers' Committee for National Security works directly with the Prime Minister to discuss and establish national security policy. *See* Israel Ministry of Foreign Affairs, *Ministers' Committees*, <http://www.mfa.gov.il/mfa>. The Minister of Defense "heads and operates the defense system. The minister is aided by assistants, advisors, and a staff directly subordinate to him. These units are responsible for coordination of operations in Judea-Samaria and the Gaza District, the emergency economic system, internal auditing of the defense system, Youth and Nahal, soldiers' ombudsman, rural settlement affairs, and infrastructure." Ministry of Foreign Affairs, *Ministry of Defense*, http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1999/8/Ministry+of+Defense.htm [hereinafter MFA]. The Ministry of Defense is responsible for overseeing the construction of the security fence. *Id.*

20. This Note will refer to the fence predominantly as the "security fence" or as the "fence." However, the fence is not always referred to as a "security fence." In *Beit Sourik*, the Court refers to the fence as a "separation barrier," a "separation fence," and as a "wall." *Beit Sourik*, HJC 2056/04 ¶¶ 6, 7, 43. When referred to in a derogatory manner, the fence is called an "apartheid fence" and as an "annexation barrier." International Solidarity Movement, Archive for the 'Beit Sira' Category, <http://www.palsolidarity.org/main/category/beit-sira/> (last visited Apr. 5, 2006). As Nir Keida surmises:

All these terms refer to a physical barrier, normally 50–60 meters wide, which when completed should span approximately 720 km. The barrier comprises of a 3 meter high electronic warning fence, barbed wire, a ditch on the Eastern side, a patrol road, and a fine-sand path to detect intrusions. In only 3% of its path

of “improv[ing] and strengthen[ing] operational capability in the framework of fighting terror, and to prevent the penetration of terrorists from the area of Judea and Samaria into Israel.”²¹ This pronouncement came under severe scrutiny and opposition from the international community.²²

will the Separation Barrier comprise of a physical wall, mostly where there is risk of sniper rifle against Israeli highways.

Nir Keida, *An Examination of the Authority of the Military Commander to Requisition Privately Owned Land for the Construction of the Separation Barrier*, 38 ISR. L. REV. 247, 248 n.2 (2005).

21. *Beit Sourik*, HCJ 2056/04 ¶ 2.

22. See generally Anti-Defamation League, *Arab Media Review: Anti-Semitism and Other Trends February–March 2004—Focus: Israel’s Security Fence* (depicting Arab reaction to the fence and cartoons that have appeared in newspapers around the world damning Israel’s decision to build the fence), http://www.adl.org/Anti_semitism/arab/as_arabmedia_05_04/asam_fence_05_04.asp (May 11, 2004). On July 11, 2004, the International Court of Justice in The Hague ruled that the security fence was built illegally and must be dismantled. The “ICJ is the principal judicial organ of the UN, and its decision . . . constitutes a non-binding advisory opinion rendered at the request of the UN General Assembly.” Yuval Shany, *Examination of Issues of Substantive Law: Capacities and Inadequacies: A Look at the Two Separation Barrier Cases*, 38 ISR. L. REV. 230, 231 (2005). Israel, along with several other countries including the United States, ignored the Court’s ruling and felt that the Court did not have jurisdiction in this matter. Many in the academic community rejected the ICJ’s opinion as well. Alan Dershowitz, a professor of law at Harvard, wrote:

The International Court of Justice is much like a Mississippi court in the 1930s. The all-white Mississippi court, which excluded blacks from serving on it, could do justice in disputes between whites, but it was incapable of doing justice in cases between a white and a black. It would always favor white litigants. So, too, the International Court. It is perfectly capable of resolving disputes between Sweden and Norway, but it is incapable of doing justice where Israel is involved, because Israel is the excluded black when it comes to that court—indeed when it comes to most United Nations organs.

Alan Dershowitz, *Israel Follows its Own Law, Not Bigoted Hague Decision*, JERUSALEM POST, July 11, 2004, at 2, available at LEXIS, News Library Jpost File. While Israel was not bound by the ICJ opinion, there exist both similarities between the ICJ’s advisory opinion and the HCJ’s holding in *Beit Sourik*, as well as many differences. In his introduction to the *Israel Law Review*’s double issue pertaining strictly to issues involving the security fence, David Kretzmer asserted that the most important similarities between the two opinions are that:

[B]oth courts found that construction of the barrier on the route under review was incompatible with international law (albeit that the Supreme Court decision refers only to one specific segment of the barrier). However, the differences between the two opinions are more striking than their similarities. Thus, for example, the Supreme Court ignored the legal status of the Israeli settlements on the West Bank, and even regarded protecting the residents of these settlements

Like so many of Israel's other policies concerning the Occupied Territories, the building of the fence has had a polarizing effect.²³ On the one hand, many Israelis, scholars, and military officials postulate that Israel should do whatever it takes to secure its borders and to ensure the safety of its citizens, while on the other hand, there are those, primarily human rights activists and scholars, who believe that *any* action Israel takes in conjunction with the Palestinians constitutes a human rights violation.²⁴

as a legitimate security interest of the military commander. The ICJ discussed the legal status of the settlements, stated that they had been established in violation of Article 49(6) of the Fourth Geneva Convention and opined that their illegality under international law meant that the barrier surrounding them was unlawfully constructed. The Supreme Court conducted a detailed analysis of the concrete facts relating to the segment of the barrier under review. The ICJ opinion is based on a series of generalities and a partial, it would seem, inaccurate description of the facts. Lack of any rigorous examination of the facts or of specific segments of the barrier is conspicuous by its absence in the Advisory Opinion. The Supreme Court rejected the argument that the barrier could not be built on the eastern side of the Green Line, if security considerations favored such a route. Implicit in the Advisory Opinion is the assumption that any barrier to protect people in Israel from terrorist attacks arising from the West Bank should be built on the Israeli side of the Green Line.

David Kretzmer, *Introduction*, 38 ISR. L. REV. 6, 10–11 (2005). A copy of the ICJ's opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, is available at www.icj-cij.org.

23. See Tovah Lazaroff & Dan Izenberg, *PM Accepts Ruling*, JERUSALEM POST, July 2, 2004, at 2, available at LEXIS, News Library Jpost File. See also Jonathan Grebinar, *Responding to Terrorism: How Must a Democracy Do It? A Comparison of Israeli and American Law*, 31 FORDHAM URB. L.J. 261 (2003) ("As democracies, the United States and Israel are subject to a great deal of criticism with respect to legislation used to combat terrorism. Responding to terrorism, a question often arises regarding the measures that a democratic state may legally apply in order to effectively protect its citizens and yet continue to honor human rights."); but see Caroline B. Glick, *Without Prejudice*, JERUSALEM POST, Jan. 23, 2004, at 1, available at LEXIS, News Library Jpost File.

24. Arguments against Israel's treatment of human rights focus primarily on its military. Emanuel Gross, *Democracy's Struggle Against Terrorism: The Powers of Military Commanders to Decide Upon the Demolition of Houses, the Imposition of Curfews, Blockades, Encirclements and Declaration of an Area as a Closed Military Area*, 30 GA. J. INT'L & COMP. L. 165, 201 (2002) ("Opponents of Israeli actions involving the demolition of houses, point out the danger involved in granting discretionary powers to the military commander, who will tend to see a 'military necessity' in situations where no such necessity exists."); see generally International Solidarity Movement, Archive for the 'Beit Sira' Category, <http://www.palsolidarity.org/main/category/beit-sira/> (last visited Apr. 5, 2006) (referring to the security fence as the "annexation barrier" and the "Israeli Apartheid Wall"); see also Simon, *supra* note 15, at 26 n.128 ("The Military Government's policies are frequently criticized as violating Palestinian human rights by the Jewish and Arab political parties on the left of the political spectrum, as well as by various

These differing views were magnified in early February 2004 when Israeli bulldozers and construction workers entered the areas surrounding the impoverished village of Beit Sourik to begin building the security fence.²⁵ For the people of Beit Sourik, the security fence represented the casting of a shadow over their rights.²⁶ In an interview, Village Council Chairman Muhammad Khaled Kandil stated that the construction of the fence was a sign that

[The Israeli] Army [was going to] cut us off from our livelihood and surround the village with a wall. We'll be denied access to 6,500 dunams²⁷ of our land. This is a quiet village that has never been under curfew, yet soon we will be in a prison. We'll be left to die.²⁸

non-governmental organizations including *B'Tselem*, Amnesty International, Middle East Watch, the ICRC, UNRWA, and the Lawyers' Committee for Human Rights.”)

25. Daniel Ben-Tal, *It Takes a Village*, JERUSALEM POST, June 11, 2004, at 11, *available at* LEXIS, News Library Jpost File. While Beit Sourik is the primary village discussed in this case, “the petition, as originally worded, attacked the orders of seizure regarding lands in the villages of Beit Sourik, Bidu, El Kabiba, Katane, Beit A’anan, Beit Likia, Beit Ajaza and Beit Daku.” *Beit Sourik*, HCJ 2056/04 ¶ 9. In describing where these villages are geographically located, the Court stated that “[t]hese lands are adjacent to the towns of Mevo Choron, Har Adar, Mevasseret Zion, and the Jerusalem neighborhoods of Ramot and Giv’at Zeev, which are located west and northwest of Jerusalem.” *Id.* The Court further described the petitioners as “the landowners and the village councils affected by the orders of seizure. They argue that the orders of seizure are illegal. As such, they should be voided or the location of the separation fence should be changed. The injury to petitioners, they argue, is severe and unbearable.” *Id.*

26. *See id.* *See also* Ruth Wedgwood, *Whitepapers on The International Court of Justice and the Israeli “Fence,”* General Assembly Referral on “Legal Consequence of the Construction Of a Wall in the Occupied Palestinian Territory” (Feb. 23, 2004), *available at* http://www.defenddemocracy.org/publications/publications_show.htm?doc_id=212024.

27. One dunam equals one thousand square meters which equals 0.25 acre.

28. Ben-Tal, *supra* note 25. The petitioners further argue that their injuries are both severe and unbearable. Over 42,000 dunams of their lands are affected. The obstacle itself passes over 4,850 dunams, and will separate between petitioners and more than 37,000 dunams, 26,500 of which are agricultural lands that have been cultivated for many generations. Access to these agricultural lands will become difficult and even impossible Use of local water wells will not be possible. As such, access to water for crops will be hindered. Shepherding, which depends on access to these wells, will be made difficult. Tens of thousands of olive and fruit trees will be uprooted. The fence will separate villages from tens of thousands of additional trees. The livelihood of many hundreds of Palestinian families, based on agriculture, will be critically injured. The separation fence will harm the villages’ ability to develop and expand.

Beit Sourik, HCJ 2056/04 ¶ 9. Muhammad Khaled Kandil’s reference to a curfew is surely meant to imply that his village has never been associated with suicide bombers or

To rectify what they felt was a stripping of their rights as humans, the villagers and councilmen of Beit Sourik sought the Israeli Supreme Court's assistance in stopping what they felt was an illegal construction of a fence.²⁹

On a larger scale, Palestinians argue that the "wall" restricts their freedom of movement, disrupts their everyday lives, and causes them to lose land and their livelihood.³⁰ It is further argued that the placement of the fence, and even the fence itself, are clear indications that Israel is setting permanent borders³¹ and thus illegally annexing the land.³² These are legitimate and real concerns, magnified by the growing belief that the peace process between Israel and the Palestinians is indefinitely stalled.³³

On June 30, 2004, in *Beit Sourik Village Council v. The Government of Israel*, the Supreme Court of Israel, sitting as the High Court of Justice,³⁴

troublemakers since curfews are often imposed in such areas during times of heightened security. Ben-Tal, *supra* note 25.

29. *See id.* *See also Beit Sourik*, HCJ 2056/04 ¶ 2.

30. Wedgwood, *supra* note 26.

31. The argument made by the Palestinians centers on the belief that because the security fence does not pass along Israel's border, but instead through areas of the West Bank, Israel is trying to annex areas of Israel in violation of international law. *See Beit Sourik*, HCJ 2056/04 ¶ 10; *but see* Makovsky, *supra* note 11, at 51 ("A properly constructed fence could achieve multiple objectives: reduce violence by limiting the infiltration of suicide bombers into Israel, short-circuit the deadlock on achieving a two-state solution, advance the debate in Israel about the future of most settlements, and perhaps even provide an incentive for Palestinians to return to the negotiating table. Even without negotiation, the fence would function as a provisional border and could be modified in the future if Palestinians make real progress in halting terrorism against Israel and agree to restart talks.").

32. Wedgwood, *supra* note 26.

33. *See generally* Yorman Dinstein, *Whither the Peace Process?*, 70 TEMP. L. REV. 237 (1996); *see also* Makovsky, *supra* note 11; Gross, *supra* note 24.

34. Depending on the type of case before the Court, the Supreme Court also functions as the High Court of Justice. This dual role

is unique to the Israeli system because as the High Court of Justice, the Supreme Court acts as a court of first and last instance. The High Court of Justice exercises judicial review over the other branches of government, and has powers "in matters in which it considers it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal." As the High Court of Justice, the Supreme Court hears over a thousand petitions each year. Often these cases are high-profile ones challenging acts of top government officials. Through its jurisdiction as a High Court of Justice, the Supreme Court upholds the rule of law and strengthens human rights.

Israel Ministry of Foreign Affairs, *The Judiciary: The Court System*, <http://www.mfa.gov.il/MFA/Government/Branches%20of%20Government/Judicial/The%20Judiciary-%20The%20Court%20System> (last visited Apr. 6, 2006) [hereinafter MFA, *The Judici-*

delivered a landmark judgment that attempted to quell international animosity and solve the political divide that plagued the State of Israel in its decision to erect a security fence. The ruling was made with the intention of striking the proper balance between the security needs of Israel and the human rights of Palestinians.³⁵ The Court ruled that the overarching motivation for building the fence was for security and not political purposes, and as a result, that the State of Israel was permitted to build the fence. However, the Court additionally held that the fence's route, as chosen by the Ministry of Defense, did not properly balance the security needs of Israel against the fence's adverse affect on the Palestinians' quality of life.³⁶ Consequently, the Court ruled that certain portions of the fence were illegal. In coming to this conclusion, the Court used the proportionality test,³⁷ which deals with the "balance between the realization of the declared purpose and the extent to which fundamental rights are infringed," as well as with the "logical and empirical connections between the declared purpose and the means chosen."³⁸ This particular

ary]. From this point forward, this Note will refer to the "Supreme Court" and the "High Court of Justice" interchangeably despite their separate functions as is commonly done in legal articles.

35. Dan Izenberg, *High Court to Hear Fence Petitions*, JERUSALEM POST, Aug. 17, 2004, at 2, available at LEXIS, News Library Jpost File.

36. See *Beit Sourik*, H CJ 2056/04 ¶ 67.

37. Courts have generally adopted two definitions of proportionality, and even then several Justices continue to disagree on its proper meaning. One definition commonly used is that proportionality is a form of review to determine if the administrative authority in question "chose the method of obtaining its goal that causes the minimal injury to individuals." Marcia Gelpe, *Constraints on Supreme Court Authority in Israel and the United States: Phenomenal Cosmic Powers; Itty Bitty Living Space*, 13 EMORY INT'L L. REV. 493, 525 (1999). This test focuses on the "means chosen by the authority, and not to its goals." *Id.* A comparison has been made to "American law for determining the validity of statutory classifications that interfere with fundamental rights. Under American law, such a classification is valid only if it is narrowly tailored to achieve a very important state interest." *Id.* at 526. Justices also define proportionality as:

Determination of whether the means chosen will reach the goal, whether they will do so with the least possible injury to individuals, and whether there is an appropriate relationship between the utility of the administrative action and the injury it causes This test allows the Court to perform not only a cost-benefit analysis of the administrative action . . . but also . . . ask whether any incremental action designed to achieve a greater good justifies the incremental injury it causes.

Id. at 525–26.

38. Moshe Cohen-Eliya, *The Formal and the Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence*, 38 ISR. L. REV. 262, 263 (2005).

judgment has continuing implications as Supreme Court President Aharaon Barak³⁹ plans to use this petition “as a model for establishing guidelines for handling all the petitions which challenge sections of the security fence in different parts of the country.”⁴⁰ As a result of the Supreme Court’s judgment, Israel was compelled to reconsider the path of various segments of the fence all over the country.⁴¹

Part II of this Note briefly explains the role of the Israeli Supreme Court and reviews the legal structure of the territories. In addition, it examines the High Court’s authority to review administrative actions and how military activities fit within that authority. Finally, it surveys the role military orders play in the territories. Part III analyzes the proportionality test used by the Court in its attempt to balance the goals of the military against the rights of the petitioners. Part IV provides background concerning the construction of the security fence and the purported reasons for its erection. Part V of this Note is separated into two parts. First it examines the Court’s recent treatment of military orders, specifically the order to build the fence. Second, this section argues that the Court failed to provide the government and the military the proper deference necessary when reviewing the unique decision to build a fence. This Note concludes that while the Court’s ruling helped to ease international concern regarding the negative effects the fence will pose to Palestinians, it ultimately detracted from the democratic process of the State of Israel

39. Aharaon Barak is the sitting President of the Supreme Court of Israel and the author of the opinion in *Beit Sourik*.

40. Izenberg, *supra* note 35, at 2 (stating that the Court focused heavily on the principle that the barrier “should not encroach on Palestinian homes or cut farmers off from their land.” In all, this particular ruling directly canceled thirty kilometers of a forty kilometer section of the barrier between Maccabim and Givat Ze’ev, on Jerusalem’s northwest outskirts). In fact, the High Court relied heavily on its decision in *Beit Sourik* when determining whether a portion of the security fence, which “[p]ursuant the military commander’s orders . . . was built, surrounding [Alfei Menashe, an Israeli town in the Samaria area] . . . from all sides, and leaving a passage containing a road connecting the town to Israel,” was proportional to the military’s stated purpose of security needs in *Mara’abe v. The Prime Minister of Israel*. HCJ 7957/04 *Mara’abe v. The Prime Minister of Israel* [2005] IsrSC ¶ 1. Sticking closely to its ruling in *Beit Sourik*, the Court determined that Israeli government and military must, “within a reasonable period, reconsider the various alternatives for the separation fence route at Alfei Menashe, while examining security alternatives which injure the fabric of life of the residents of the villages of the enclave to a lesser extent.” *Mara’abe*, HCJ 7957/04 ¶ 116.

41. See *id.* See generally Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT’L & COMP. LAW 721 (2001).

by improperly applying a test in an effort to influence military policy meant to be decided by other branches of the government.⁴²

II. THE ISRAELI LEGAL STRUCTURE

Before examining the Court's handling of *Beit Sourik Village Council v. The Government of Israel*, it is essential to clarify the legal system in the Occupied Territories.⁴³ This section will first explain the role and structure of the Supreme Court of Israel within the Occupied Territories. Next, this section will discuss the prevailing law in the West Bank and Gaza as stipulated by international law and as applied by the State of Israel. Finally, this section will examine the development of the military commander's power to implement policies that affect the fundamental safety of Israeli citizens as well as the nature of the Court's ability to review these policies.

A. Supreme Court of Israel

Similar to other States' judicial systems, the Supreme Court of Israel is the highest judicial tribunal and the court of last resort in Israel.⁴⁴ The Court is composed of fourteen justices with each case being overseen by three or more.⁴⁵ The Israeli Supreme Court is consistently recognized as a just, honorable, and able institution.⁴⁶ The Court has played a large role in forming Israeli civil liberties and shaping the rights of individuals—

42. The purpose of this Note is not to belittle or undermine the competency of the Supreme Court of Israel—a Court whose Justices and holdings are held in the highest regard across the international legal community. Simon, *supra* note 15, at 22. Nor is this Note going to argue that the Court, and specifically Aharaon Barak, had anything but the best intentions in determining that the security fence was disproportionately damaging to the Palestinians. In addition, this Note will not dispute the need for judicial safeguards to military actions under certain circumstances. This Note will conclude that it is the government's role to make security decisions, and that the Court's aggressive attempt to ease international criticism of the fence by circumventing the policy of the State for its own undermines the very democratic values it so desperately tries to celebrate. Additionally, the author recognizes the strong argument to be made that without judicial review of military decisions the rights of Palestinians and even many Israelis would be threatened without any mechanism to protect them. However, the Note does not pose that the High Court should not hear cases involving military decisions, but rather that such decisions should be given true deference, and not a mere illusion to deference.

43. See generally Simon, *supra* note 15, at 18.

44. Brian Farrell, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119*, 28 BROOK. J. INT'L L. 871, 880 (2003).

45. MFA, *The Judiciary*, *supra* note 34.

46. See Simon, *supra* note 15, at 22.

both within Israel and the Occupied Territories.⁴⁷ In order to do so, however, the Court first needed to expand its ability to make such decisions.⁴⁸ The Court accomplished this judicial expansion⁴⁹ primarily while acting in its second role as the Land's High Court of Justice.⁵⁰ In this role, the Court rules over institutions and people conducting public functions prescribed by the law, as well as matters involving government decisions.⁵¹

It is primarily in the capacity as the High Court of Justice that it has "achieved prominence in the Israeli political system, and it is in this role that it exercises review over actions of the authorities in the Occupied

47. Israel's recognition of civil liberties has been described as follows:

Before 1992, Israel had no Basic Laws defining individual human rights. During this period, the Israeli Supreme Court identified numerous individual rights that it found worthy of special protection. The Court called these rights 'basic values' or 'principles of the constitutional structure of our country.' The Court found such norms in various sources: Israel's Declaration of Independence, the United Nations' Universal Declaration of Human Rights, the democratic nature of the State, the inherent nature of man, considerations of justice and decency, 'the legacy of all advanced and enlightened states,' and 'the democratic freedom-loving character of our State.' These rights so identified include the following: gender equality, equality on the basis of nationality, presumption of innocence, freedom of association, freedom of movement, freedom of expression, privacy, dignity of man, freedom of property, integrity of the body, judicial integrity, freedom to strike, freedom of demonstration, freedom of conscience, and freedom of occupation. The Israeli Supreme Court created, or recognized, these values and rights through a process that American jurists might call constitutional common law. The Court itself referred to such rights as those 'not recorded in texts.' Similarly, the Court, through case law, established the principles of separation of powers and checks and balances.

Gelpe, *supra* note 37, at 506–08.

48. Because Israel does not have a written constitution, the Supreme Court has paved the way for what is referred to as a "judicial bill of rights." Zaharah Markoe, *Expressing Oneself Without a Constitution: The Israeli Story*, 8 CARDOZO J. INT'L COMP. L. 319, 323 (2000); Gelpe, *supra* note 37, at 493.

49. By "judicial expansion," this Note refers to the apparent willingness of the Israeli Supreme Court to expand its ability to review and adjudicate on matters that in the past were considered by the Court to be outside of their expertise.

50. MFA, *The Judiciary*, *supra* note 34; see also DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 10 (2002) ("It is mainly in the [role as the High Court] that the Court has achieved prominence in the Israeli political system, and it is in this role that it exercises review over actions of the authorities in the Occupied Territories.").

51. The Israeli Supreme Court website (English version), *Judicial Authority*, <http://elyon1.court.gov.il/eng/system/index.htm>.

Territories.”⁵² The Court’s jurisdiction over public functions has provided the legal basis for its review in various spheres,⁵³ including all decisions and actions made by the military government in the Occupied Territories.⁵⁴ In fact, the Court has asserted original jurisdiction over “virtually every power exercised by the branches of government,⁵⁵ and is competent to order them to perform or refrain from performing any action.”⁵⁶ This includes the ability to grant occupants of the territories requests to be heard by the Court.⁵⁷ The Court’s willingness to allow Palestinians to bring actions against the military government is considered by some to be unprecedented in similar situations.⁵⁸

52. *See id.* Captain Uzi Amit-Kohn provides an interesting perspective on the power and influence of the High Court over military commanders. He states:

This judicial review by Israel’s highest Court has not only provided a form of redress for the grievances of Area inhabitants and a safeguard for their rights; it has also provided a powerful symbol and reminder to the officials of the military government and Civil Administration of the supremacy of law and legal institutions and of the omnipresence of the Rule of Law The importance of judicial review lies not only in those cases which actually reach the Courts (between 150 and 300 annually in recent years), but also in the fact that before acting the officials involved know that their acts may be subjected to judicial scrutiny.

AMIT-KOHN ET AL., *supra* note 10, at 17.

53. *See* KRETZMER, *supra* note 50, at 11. Kretzmer also states:

The jurisdiction of the Court, as a High Court of Justice, is at present defined in section 15 of the Basic Law: Judiciary Under section 15(c) of this law, the Court has the power to deal with matters in which it sees need to grant a remedy for the sake of justice and which are not within the jurisdiction of another court or tribunal According to section 15(d)(2) the Court has the power to grant orders to state authorities, local authorities, their officials and other bodies and persons fulfilling public functions under law, to do an act or to refrain from doing an act in lawfully performing their duties.

Id.

54. *See* Simon, *supra* note 15, at 20–21.

55. The Israeli government has three main branches: the executive, the legislative, and the judiciary. *See* MFA, *supra* note 19.

56. Simon, *supra* note 15, at 22.

57. *See* HJC 337/71 Christian Society for the Holy Places v. Minister of Defense [1971] 26(1) P.D. 574 [English summary: 2 ISR YHR (1972) 354].

58. Gross, *supra* note 24, at 208 (“There are no other precedents for a person in occupied territory having recourse to the Supreme Court of the Occupying State against that state’s military commander.”). *Id.* This “unprecedented phenomenon of allowing the civilian population access to the occupying power’s national courts and subjecting the military government’s conduct to domestic judicial review has added a unique element to this occupation.” *Id.*; Simon, *supra* note 15, at 23 n.116 (“Unlike the discretionary juris-

Most relevant to this study is the Court's handling of cases involving the military. Despite Israel's original plan to establish a constitution, one was never implemented.⁵⁹ However, in 1992, Israel adopted a number of Basic Laws of Human Dignity and Liberty, which act as a miniature constitution.⁶⁰ Using the Basic Laws as its premise, the Israeli High Court has the capacity to review the legality of government officials' actions, including military commanders.⁶¹ In recent years, actions taken by the military and by the *Knesset*⁶² have been declared in "violation of the Basic Law of Human Dignity and Liberty."⁶³ However, the Court does not generally have the ability to review the legislation passed by the *Knesset*. Consequently, "primary legislation is . . . the highest form of law."⁶⁴

In an early attempt to establish unwavering control in the territories, the government argued in *Hilu v. State of Israel* that military orders are equivalent to primary legislation and the Court should therefore not have judicial review over such actions.⁶⁵ This argument was rejected by the Court, which determined that "military orders are a form of delegated, rather than primary, legislation."⁶⁶ Ultimately, this led the Court to hold

diction held by the U.S. Supreme Court, the Israeli Supreme Court has mandatory jurisdiction; it adjudicates every case submitted to it."); *see also* EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 119 (1993) (Hebrew).

59. *See* Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585, 588 (1996).

60. Conversation with Professor Amos Shapira, Faculty of Law Tel-Aviv University and visiting Professor at Brooklyn Law School (Apr. 1, 2006).

61. *See infra* Part IV. Judicial review is anchored in the status of the military commander as a public official, and in the jurisdiction of the High Court of Justice to issue orders to bodies fulfilling public functions by law under § 15(3) of Basic Law: The Judiciary. *Mara'abe*, HJC 7957/04 ¶ 31.

62. The *Knesset* is Israel's legislature and is comprised of 120 members.

Members are elected every four years within the framework of parties that compete for the electorate's votes. Each party chooses its own *Knesset* candidates as it sees fit. The major function of the *Knesset* is to legislate laws and revise them as necessary. Additional duties include establishing a government, taking policy decisions, reviewing government activities, and electing the President of the State and the State Comptroller.

Israel Ministry of Foreign Affairs, *The Knesset*, <http://www.mfa.gov.il/MFA/Government/Branches+of+Government/Legislative/The%20Knesset>.

63. Quoted from a conversation with Professor Amos Shapira, *supra* note 60.

64. Farrell, *supra* note 44, at 882.

65. *See generally* HJC 302/72 *Hilu v. State of Israel* [1972] 27(2) P.D. 169, *translated in* 5 ISR. Y.B. HUM. RTS. 384 (1975).

66. Farrell, *supra* note 44, at 897, *citing Hilu*, HJC 302/72 169, *translated in* 5 ISR. Y.B. HUM. RTS. 384 (1975).

that as a part of the government administration, military commanders and their actions should be reviewed under Israeli administrative law.⁶⁷

Under the theory that the rules of administrative law, which apply to all Israeli government authorities, also apply to military commanders, the Court has actually gone beyond the level of review which is necessary under international law.⁶⁸ In *Al-Taliya v. Minister of Defense*, Justice Shamgar mentioned the duty and power accorded to military commanders under international law, but added: “The exercise of powers by the respondents will be examined according to the criteria which this court applies when it reviews the act or omission of any other arm of the executive branch, while taking into account, of course, the duties of the respondents that flow from the nature of their task[s].”⁶⁹ Justice Shamgar further explained that:

Extending grounds of judicial review beyond the rules of belligerent occupation has allowed the Court to argue that in protecting the rights of residents in the Territories it has gone much further than required by international law. Furthermore, because administrative law may be regarded as an internal constraint, whereas international law may be seen as an external constraint, the political implications of overturning an act of the military on the grounds of Israeli administrative law are less threatening than overruling the same act on grounds of international law. This may explain why, when alternative grounds exist for overruling an act, the Court has sometimes seemed to place greater emphasis on administrative law.⁷⁰

In keeping with its effort to protect individuals living within the Occupied Territories, the Court adopted the principle of proportionality as the standard with which it would review military decisions.⁷¹ By applying

67. See H CJ 393/82 Jam’iyat Ascan v. IDF Commander in Judea and Samaria [1982] P.D. 37(4) 785, 793, cited in *Beit Sourik*, H CJ 2056/04 ¶ 24; see also H JC 69/81 Abu Aita v. IDF Commander in Judea and Samaria [1981] 37(2) P.D. 197, 230–31, translated in 13 ISR. Y.B. HUM. RTS. 348 (1983).

68. See KRETZMER, *supra* note 50, at 27.

69. KRETZMER, *supra* note 50, at 27, citing H CJ 619/78 *Al-Taliya v. Minister of Defense* [1978] 33(3) PD 505, 512.

70. See *id.* at 27, citing *Al-Taliya*, H CJ 619/78 505, 512.

71. See *Beit Sourik*, H CJ 2056/04 ¶ 36–40. In determining which standard to use in order to adjudicate the legality of the fence, the Court recognized that:

Proportionality is not only a general principle of international law. Proportionality is also a general principle of Israeli administrative law. At first a principle of our case law, then a constitutional principle, enshrined in article 8 of the Basic Law: Human Dignity and Freedom, it is today one of the basic values of the Israeli administrative law. The principle of proportionality applies to every act

the proportionality principal, it can be argued that the Court is merely placing the proper checks and balances on the government and military's authority in the Occupied Territories.⁷²

B. The Law of the Land in the Occupied Territories

In 1967, during the course of the Six Day War,⁷³ Israel captured the West Bank, Gaza, and the Golan Heights.⁷⁴ Since then, Israel has ruled these territories under a system of belligerent occupation.⁷⁵ In such a regime, the military is given power over all governmental functions including legislating, adjudicating, collecting taxes, policing, and other admin-

of the Israeli administrative authorities. It also applies to the use of the military commander's authority pursuant to the law of belligerent occupation.

Id. ¶ 38 (citations omitted). *See also* Gross, *supra* note 24, at 184 ("The requirement of proportionality has been applied in the case law of the Supreme Court in a number of senses. Thus, for example, the Court has instructed the military commander to conform the exercise of his power to the severity of the case and the gravity of the circumstances. Consideration must be given not only to the gravity of the acts of which the terrorist is suspected, but also to the degree of participation of the rest of the household in advancing these acts. Also taken into account is the degree of influence which the demolition of the home will have on the other inhabitants thereof.")

72. During a conversation, Professor Shapira stated that as a parliamentary system, Israel's governmental structure does not offer the same modality of the separation of powers as the United States' form of government. Consequently, it is essential that each branch of government perform the proper checks and balance of powers on each other.

73. The Six Day War was fought between Israel on one side and Egypt, Jordan, and Syria on the other. "The war was the most dramatic of all wars fought between Israel and the Arab nations, resulting in a depression in the Arab world lasting many years. The war left Israel with the largest territorial gains from any of the wars the country had been involved in: Sinai and Gaza Strip were captured from Egypt, East Jerusalem and West Bank from Jordan and Golan Heights from Syria." *Six Day War*, ENCYCLOPEDIA OF THE ORIENT, <http://i-cias.com/e.o/sixdaywr.htm>.

74. *See* David Kretzmer, *Constitutional Law*, in INTRODUCTION TO THE LAW OF ISRAEL 39, 56 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995).

75. *Id.* Belligerent occupation occurs when a State seizes control of its enemy's territory after a period of war. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1899, at 122 (James B. Scott ed., 1920) (Address of Delegate Martens). The law of belligerent occupation

recognizes that military needs will be the major concern of every army of occupation. Nevertheless, because the occupying army has control over the occupied territory the occupying power has the duty to take over the first and most basic task of every government: maintaining law and order and facilitating everyday life.

KRETZMER, *supra* note 50, at 57.

istrative tasks that are provided for by law.⁷⁶ Despite following the law of belligerent occupation, the Israeli government has refrained from recognizing its rule over the Occupied Territories as such.⁷⁷ This policy allows the government greater latitude when implementing policies and enforcing security measures within the Territories.⁷⁸

Unlike the government, the Israeli Supreme Court recognizes Israel's rule over the West Bank and Gaza as a belligerent occupation.⁷⁹ In doing so, the Court has decided to enforce the Hague Convention, which is recognized as the accepted form of international law with regard to belligerent occupation.⁸⁰ Justice Barak, in a summary of the principles defining the power of the military government⁸¹ in the Occupied Territories, stated: "The military commander may not consider the national, economic or social interests of his own country, unless they have implications for his [country's] security interest or the interests of the local

76. See Kretzmer, *supra* note 74, at 58; see also *Beit Sourik*, HCJ 2056/04 ¶67, citing Meir Shamgar, *Observance of International Law in the Administered Territories*, in 1 ISR. Y.B. HUM. RTS. 276 (1971) (citing proclamations of the Military Commander). This principle was further expressed by the commanders of the IDF upon taking control of the Territories in "Section 3 of the Proclamation on Law and Administration [which] stated: Any power of government, legislation, appointment, or administration with respect to the Region or its inhabitants shall henceforth be vested in me alone and shall be exercised only by me or by a person appointed by me to that end or acting on my behalf." KRETZMER, *supra* note 50, at 27.

77. See KRETZMER, *supra* note 50, at 19, 33. The Israeli government is not opposed to the Geneva Convention and the Hague Convention. Rather, "it argues that since neither Jordan nor Egypt held good title to the West Bank and Gaza, the Occupied Territories were not under the sovereignty of a 'High Contracting Party' . . . the government argues that the legal status of the Occupied Territories precludes application of the law of belligerent occupation." Simon, *supra* note 15, at 20; see also Robert Klein, *The Security Fence from a Legal Perspective: Question 4—Is Israel an "Occupying Power"?*, JEWISH AGENCY FOR ISRAEL, <http://www.jafi.org.il/education/actual/conflict/fence/2-4.html> ("the present [4th Geneva] Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" and states that the West Bank and Gaza "are not under sovereignty of a High Contracting Party").

78. See KRETZMER, *supra* note 50.

79. See HCJ 606/78, 610/78 *Ayyub v. Minister of Defense* [1978] 33(2) P.D. 113, 117, translated in 9 ISR. Y.B. HUM. RTS. 337 (1979); see also Simon, *supra* note 15, at 20.

80. See Simon, *supra* note 15, at 20.

81. The term "military government" is synonymous with the term "military commander" as the military commander has several government-like functions in the Occupied Territories. In addition, for the purposes of this Note, it reflects the connection between the military and the government of Israel with regard to the decision making of how to proceed with the security of Israel.

population.”⁸² Conversely, the Court does not adhere unconditionally to the Geneva Convention.⁸³ According to the predominant understanding of international law, in order for the Court to be bound by the Geneva Convention, the Convention would have to be adopted into law by the Israeli legislature, which has not yet happened.⁸⁴ Nonetheless, there are many instances in which the Court has referred to the Convention to support or reject the military government’s actions.⁸⁵

As a general matter of international law, the two principal influences on the law of belligerent occupation are the Fourth Geneva Convention of 1949⁸⁶ and the Regulations Annexed to the Fourth Hague Convention

82. See KRETZMER, *supra* note 50, at 68.

83. Kretzmer argues that in applying international law:

The Supreme Court has relied on the distinction between customary law and conventional law. Following the British tradition, customary international law is regarded as part of the common law of the land that will be enforced by the domestic courts unless the legislature has provided otherwise. On the other hand, conventional law will not be enforced by the domestic courts unless it has been incorporated in the domestic legal system through parliamentary legislation. In this regard, the Court has held that the Hague Regulations Concerning the Law and Customs of War on Land, 1907, are part of customary law, which the Geneva Convention Concerning the Protection of Civilian Persons in Time of War, 1949 (the Fourth Geneva Convention), is part of conventional law. Thus, the Court will enforce the provisions of the Hague Regulations, but not those of the Fourth Geneva Convention. Nevertheless, on more than one occasion, the Court has agreed to interpret provisions in the Geneva Convention, but only to hold that the authorities had not violated those provisions.

Kretzmer, *supra* note 74, at 57; see also Simon, *supra* note 15, at 20.

84. Simon, *supra* note 15, at 20 (stating that it does not appear as though the Convention will be adopted into Israeli law anytime in the near future).

85. See *id.* at 20 (citing numerous Israeli cases referring to the convention).

86. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Farrell, *supra* note 44, at 915 (“It is often noted that the Israeli Supreme Court has not ruled that the Fourth Geneva Convention is applicable to the West Bank and Gaza. It is less often mentioned that the Court has never ruled that the Convention is not applicable. The Court has essentially avoided the issue.”). With regard to the security fence, several articles of the Geneva Convention are relevant. See Fourth Geneva Convention, *supra*, art. 23 (providing the importance of the freedom of movement); art. 28 (referring to the relationship between populated areas and the need for military operations); art. 33 (laying out the difference and legality of collective punishment versus restrictive measures); art. 46 (regarding restrictive measures affecting property rights); art. 53 (determining that the destruction of property by an Occupying Power is only justified under military necessity); see also Klein, *supra* note 77. Yet, for the most part, the Court, in its decision regarding the fence, focuses on the internationally accepted principle of proportionality in determin-

of 1907.⁸⁷ At the core of these sets of laws is the desire to allow the occupying power the ability to safely and securely oversee its interests, while ensuring that it does not encroach upon the human rights of the occupied inhabitants.⁸⁸ This body of law “neither condones nor outlaws occupations;”⁸⁹ rather, it recognizes the reality of such occupations and tries to make them as equitable as possible.⁹⁰

Besides the law of belligerent occupation, there are three other primary legal systems in the Occupied Territories: (1) the local law that was in effect in the territories when Israel assumed control during the Six Day War;⁹¹ (2) all military orders given by military commanders post-occupation; and (3) the current law in the State of Israel, which is not always completely applicable to the Territories, but nonetheless has pertinent implications on the review of military decisions.⁹²

C. Military Orders⁹³

As discussed in Part II.B, *supra*, the rules of international law provide that the military commander of Israel overseeing the Occupied Territories has power to legislate in the West Bank.⁹⁴ This system of military control was established by proclamation shortly after Israel took control

ing whether the security fence fits within the balance of national security versus humanitarian rights. See *Beit Sourik*, HCJ 2056/04 ¶ 38.

87. Simon, *supra* note 15, at 19, quoting Regulations Annexed to the Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295, T.I.A.S. No. 539.

88. *See id.*

89. *Id.*

90. *Id.*

91. Examples of local laws generally applicable in the Occupied Territories are the Defense (Emergency) Regulations which “were part of the local law prevailing there immediately prior to Israeli occupation. Following the international law principles that an occupying power should not change the law in the occupied territory, Israeli military authorities in the territories exercise power under the same regulations as in Israel, but these regulations are considered local rather than Israeli law.” Baruch Bracha, *Checks and Balances in a Protracted State of Emergency—The Case of Israel*, in 34 ISR. Y.B. HUM. RTS. 124, 45–46 n.25 (2003).

92. Kretzmer, *supra* note 74, at 56. The scope of this Note does not allow for in-depth analysis of each of these systems of law. Instead, this Note will reflect upon their impact when appropriate within the confines of the Court’s ability to alter government and military orders regarding the security of Israeli citizens.

93. For a full discussion of this topic, see SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 465 (1994).

94. See KRETZMER, *supra* note 50, at 27 (“Under the rules of international law, when an army occupies enemy territory all governmental power, including legislative power, is concentrated in the hands of the military commander.”).

of the West Bank and Gaza in 1967.⁹⁵ Military commanders have used this power freely in order to promulgate military orders ranging from administrative issues and security, to education and taxes.⁹⁶ However, as the Court in *Beit Sourik* articulated, the power of the military commander is not that of a sovereign.⁹⁷ As such, the military is not permitted to pursue every activity it deems preferable, regardless of whether primarily motivated by security considerations or other considerations.⁹⁸ The power of the commander is principally restrained only by the process of balancing the security interests of Israel against the needs of the Palestinians.⁹⁹

Of primary importance to this Note is whether or not military orders should be “regarded as parallel to primary legislation and thus immune

95. Farrell, *supra* note 44, at 879, citing Raja Shehadeh, *The Legislative States of Military Occupation*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* 152 (Emma Playfair ed., 1992). Section 3 of the Proclamation of Law and Administration states: “Any power of government, legislation, appointment, or administration with respect to the Region or its inhabitants shall henceforth be vested in me alone and shall be exercised only by me or by a person appointed by me to that end or acting on my behalf.” KRETZMER, *supra* note 50, at 27.

96. See KRETZMER, *supra* note 50, at 10.

97. L. Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 L.Q. REV. 363, 364 (1917), quoted in Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 104, 106 (1978).

98. Farrell, *supra* note 44, at 880.

99. *Beit Sourik*, HCJ 2056/04 ¶ 34, citing Yoram Dinstein, *Legislative Authority in the Administered Territories*, 2 LYUNEI MISHPAT 505, 509 (1972) (Hebrew) (“The law of war usually creates a delicate balance between two poles: military necessity on one hand, and humanitarian considerations on the other.”). The Supreme Court has discussed this balance in many cases. Providing a brief explanation of the power of the military commander within the confines of the Hague Convention, Justice Barak states:

The Hague Convention authorizes the military commander to act in two central areas: one—ensuring the legitimate security interest of the holder of the territory, and the other—providing for the needs of the local population in the territory held in belligerent occupation. . . . The first need is military and the second is civilian-humanitarian. The first focuses upon the security of the military forces holding the area, and the second focuses upon the responsibility for ensuring the well being of the residents. In the latter area the military commander is responsible not only for the maintenance of the order and security of the inhabitants, but also for the protection of their rights, especially their constitutional human rights. The concern for human rights stands at the center of the humanitarian considerations which the military commander must take into account.

Beit Sourik, HCJ 2056/04 ¶ 34, citing HJC 10356/02 Hess v. Commander of the IDF Forces in the West Bank [2002] P.D. 58(3) 443, 456 ¶ 8.

from review, or as parallel to subordinate or delegated legislation, [and] hence subject to review under the rules of administrative law.”¹⁰⁰ In matters of national security, it is almost a universal phenomenon that courts remain extremely careful about engaging in such matters.¹⁰¹ As former Justice of the Supreme Court Itzhak Zamir cautioned, issues of national security are often clouded in secrecy, or are of vital importance to policies concerning national interests, and it is therefore not always appropriate for the Court to intervene.¹⁰² He further wrote that the Court should “leave the responsibility in such matters to the competent authorities, political or professional, civil or military. Such an attitude may be especially understandable, and possibly justifiable in Israel, given the State’s constant exposure to security risks.”¹⁰³ Yet, over the years, the Court has both expanded its jurisdiction over administrative actions, as well as expanded the realm of administrative legislation to include military orders.¹⁰⁴ As a result, military orders are reviewed under both international law and Israeli administrative law.¹⁰⁵ The latter standard is ap-

100. KRETZMER, *supra* note 50, at 27–28.

101. Itzhak Zamir, *Administrative Law in Israel*, in PUBLIC LAW IN ISRAEL 37 (Itzhak Zamir & Allen Zysblat eds., 1996).

102. *See id.*

103. *Id.*

104. Gelpe, *supra* note 37, at 528; *see, e.g.*, H CJ 69/81 Abu Itta v. IDF Commander in Judea and Samaria [1981] P.D. 37(2) 197 [English summary: 13 ISR YHR (1983) 348]. Judicial review of administrative decisions in Israel developed as follows:

Judicial review of administrative actions was introduced in [the land that would eventually become the State of] Israel during the period of the British Mandate. It was copied from the law in England at the time, with one important difference. In England, petitions to review administrative decisions could be brought in a lower court, sitting under the title of the High Court of Justice. In the British Mandate, which ruled the area now comprising the State of Israel from World War I until 1948, this authority was placed in the hands of the Supreme Court alone. Lower courts had judges drawn from the local Arab and Jewish population. The British authorities did not entrust review of their actions to these local judges, but rather located review in the Israeli Supreme Court, where a majority of the justices were English. The system was maintained after the establishment of the State, perhaps because only the Supreme Court was viewed as strong enough to control the governmental authorities and to protect civil rights from encroachment.

Gelpe, *supra* note 37, at 523.

105. *See* Kretzmer, *supra* note 74, at 56. *See also* H CJ 393/82 Jam’iyat Ascan v. IDF Commander in Judea and Samaria [1982] P.D. 37(4) 785, 793, *quoted in Beit Sourik*, H CJ 2056/04 ¶ 24 (“Together with the provisions of international law, ‘the principles of the Israeli administrative law regarding the use of governing authority’ apply to the military commander.”).

plied to all branches of Israel's government, regardless of whether the actions being reviewed took place in the Territories or in the sovereign State of Israel.¹⁰⁶

III. PROPORTIONALITY

The principle of proportionality¹⁰⁷ is recognized as both a general standard of international law and a fundamental principle of Israeli administrative law.¹⁰⁸ At the core of the principle is the belief that the means applied to achieve a given end should not be unduly excessive.¹⁰⁹ In the framework of military action or armed conflict, the principle seeks to balance the need to achieve a particular military objective against the rights and needs of those affected by that particular action.¹¹⁰ In its earliest form, and as applied presently in most English jurisdictions, the proportionality test was a standard with which to judge reasonableness.¹¹¹ In

106. *Id.*

107. The term proportionality as a general notion derives from the word "proportion," which signifies "the due relation of one part to another" or "such relation of size etc., between things or parts of things as renders the whole harmonious." See *Proportionality*, 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1140 (1992), quoting THE SHORTER OXFORD ENGLISH DICTIONARY (3d ed. 1973) [hereinafter ENCYCLOPEDIA].

108. *Beit Sourik*, HCJ 2056/04 ¶ 38–39; see also ENCYCLOPEDIA, *supra* note 107, at 1140–41.

109. See Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT'L L. REV. 465, 467 (2005) (stating that "one should not use a sledge hammer to crack a nut"); see also Gross, *supra* note 24, at 185 (commenting on the test of proportionality with regard to home demolitions, Gross states: "According to the test of proportionality, which is one of the cornerstones in the examination of the reasonableness of the decision of the military commander according to administrative law, where it is possible to achieve a deterrent effect by something less than demolishing the entire house this must be done. Likewise, where it is possible to achieve the deterrence by sealing the house this must suffice.").

110. Olivera Medenica, *Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality?*, 23 LOY. L.A. INT'L & COMP. L. REV. 329, 363 (2001) (focusing exclusively on the principle of proportionality as it affects armed conflicts. In effect, the Article argues that "as methods of warfare reached higher levels of sophistication, concerns about the safety and protection of citizens emerged, and proportionality became a focal point of the laws of armed conflict. The notion that a belligerent's right to use force is limited had the effect of continuing the prohibition on the use of specific means of warfare. It further restricted the use of non-prohibited means of warfare to the extent that the means were deemed proportional to the achievement of a military objective.").

111. Itzhak Zamir, *Unreasonableness, Balance of Interests and Proportionality*, in PUBLIC LAW IN ISRAEL 332 (Itzhak Zamir & Allen Zysblat eds., 1996). Relying on Israeli case law, Zamir defined "unreasonableness" as "an established ground of review which has been developed and defined through the case law. An administrative decision is un-

some jurisdictions, including Israel, the test is now recognized as its own distinct ground of judicial review.¹¹²

The principle of proportionality consists of three subtests which the Court applies to determine if the governmental objective and the means used to achieve that objective are proportional to each other.¹¹³ The first subtest calls for “the objective to be related to the means,” or put another way, that there is a rational connection between the two.¹¹⁴ The second subtest requires that the administrative body employ the least harmful means in order to achieve its objective.¹¹⁵ The third subtest demands that the “damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means.”¹¹⁶

As its own basis for review, the proportionality test expands the Court’s scope of review by providing it with the ability to review the administrative process as well as the end result.¹¹⁷ Consequently, the High Court is afforded an effective channel through which to control administrative discretion.¹¹⁸ By applying this standard to military decisions such as the security fence, the Israeli High Court has, in recent years, become much more willing to intervene and apply its own position on matters of security.¹¹⁹

Further expanding the influence of the Court in Israeli administrative law is the High Court’s apparent merging of the domestic and international rationales of the principle of proportionality.¹²⁰ Rather than recognize the distinct differences between the international and domestic spheres with regard to the development and application of proportional-

reasonable, according to case law, if it is capricious or arbitrary, manifestly unjust, made in bad faith, or oppressive.” *Id.* at 327.

112. *Id.* at 332.

113. *Beit Sourik*, HCJ 2056/04 ¶ 40.

114. *Id.* at ¶ 41.

115. *Id.* (stating that this is referred to as the “least injurious means” test).

116. *Id.* (“The test of proportionality ‘in the narrow sense’ is commonly applied with ‘absolute values,’ by directly comparing the advantage of the administrative act with the damage that results from it. However, it is also possible to apply the test of proportionality in the narrow sense in a ‘relative manner.’ According to this approach, the administrative act is tested vis-à-vis an alternate act, whose benefit will be somewhat smaller than that of the former one. The original administrative act is disproportionate in the narrow sense if a certain reduction in the advantage gained by the original act—by employing alternate means, for example—ensures a substantial reduction in the injury caused by the administrative act.”).

117. *Id.*

118. *Id.*

119. Zamir, *supra* note 101, at 37.

120. *See infra* notes 121, 124.

ity, the Court appears to take the method of review from domestic law and the scope of its applicability from international law.¹²¹ As a principle of domestic law, “proportionality has the function of relating means and ends properly or of balancing conflicting but equally high ranking fundamental rights and freedoms. It primarily fulfils a guiding function for the law-applying authorities rather than in itself being a substantive, concrete legal norm.”¹²² Under international law, the range of issues for which the principle of proportionality can be applied is greater than in domestic law and includes issues such as reprisal and self-defense,¹²³ humanitarian law,¹²⁴ economic sanctions,¹²⁵ and human rights administration.¹²⁶

121. ENCYCLOPEDIA, *supra* note 107, at 1140 (stating that from an international standpoint, the principle of proportionality was first recognized as a customary international law dealing with reprisal and self-defense. Recently, the applicability of this principle has expanded beyond instances of self-defense and spread into areas involving humanitarian law, economic sanctions, and human rights administration). The principle is often compared to “other open constitutional principles, the concrete legal meaning of which must be ascertained in their application to individual cases.” *Id.* at 1141. This principle has found great acceptance in domestic law and is often mentioned synonymously with the principles of reasonableness and necessity. *Id.*

122. *Id.* at 1140–41.

123. While the scope of the right is smaller under domestic law, both domestic and international law allow States to defend themselves against violations of their rights perpetrated by other States or actors. *Id.*

124. The principle of proportionality has long been firmly established in humanitarian law as it is inherent in principles of necessity and humanity which form the basis of humanitarian law. The prohibition of unnecessary suffering (Article 23(c) of Hague Convention IV of 1907) was the first codification of the principle of proportionality which had, however, already been accepted in international customary law. Today it has found broad recognition in the new rules for victims of armed conflicts in Protocol I Additional to the Geneva Red Cross Convention of 1949. *Id.* at 1142.

125. Another area where the principle of proportionality is relevant for the determination of the legality or illegality of State actions is that of economic sanctions. If such measures are taken by way of reprisal, the applicability of the principle of proportionality is mandatory since only proportionate acts of reprisal are permissible. *Id.* at 1143.

126. *See generally id.* at 1140–44 (stating that the principle of proportionality has also been firmly established in the universal and regional administration of the law of human rights. As human rights and fundamental freedoms do not guarantee limitless freedom to the individual but are necessary subject to certain restrictions in the public interest, it is an accepted principle in domestic as well as international law that the scopes of the individual’s enjoyment of human rights and the limits to it have to be brought into due relations); *see also Beit Sourik*, H CJ 2056/04 ¶ 39 (“Both international law and the fundamental principles of Israeli administrative law recognize proportionality as a standard for balancing the authority of the military commander in the area with the needs of the local population.”).

IV. THE SECURITY FENCE

In order to comprehend the immensity of the decision to build the fence, as well as the fears of many Palestinians, it is necessary to understand where the fence will be located and what the fence actually entails. This first part of this section presents the basic geographical placement of the fence, while the second part briefly explains the composition of the fence.

A. Security Fence Policy

In July 2001, the Defense Cabinet, on the recommendation of the Fence Bureau, approved the Security Fence program. At the time, the Cabinet believed that the fence would consist of three separate obstacle sections totaling 80 kilometers (50 miles), one each in Um el Fahem, Tulkarem, and Jerusalem, for the purpose of preventing illegal entry into Israel.¹²⁷ However, over time, it became evident that in order to be effective, the obstacle would have to be continuous and more advanced.¹²⁸ These concerns were addressed when the responsibility of constructing the fence was placed in the hands of the Ministry of Defense in April 2002.¹²⁹ The Ministry of Defense determined that the construction of the security fence would take place in four phases and the final obstruction would be approximately 728 kilometers (452 miles) in length.¹³⁰

The first phase (Phase A), which was approved in August 2002, consisted of 137 kilometers (85 miles) of fence from Salim to Elqana and 20 kilometers (12.5 miles) in northern and southern parts of Jerusalem.¹³¹

127. Ministry of Defense, *Israel's Security Fence*, <http://www.seamzone.mod.gov.il/pages/eng/purpose.htm>.

128. *Id.*

129. *Id.*

130. Consulate General of Israel in San Francisco Department of Media and Public Affairs, *The Security Fence: Facts and Figures*, <http://www.israeemb.org/la/news/Fence/Fence%20Presentation%20New%20York.ppt> [hereinafter *Facts and Figures*]. The actual length and route of the fence is continually changing. Jewish Virtual Library, *Israel's Security Fence*, <http://www.jewishvirtuallibrary.org/jsourc/Peace/fence.html> ("As a result of the modifications, the length of the barrier is expected to be approximately 416 miles.").

131. *Id.* In *Mara'abe*, the Court states:

The separation fence discussed in the petition before us is part of phase A of fence construction. The separation fence discussed in *The Beit Sourik Case* is part of phase C of fence construction. The length of the entire fence, including all four phases, is approximately 763 km. According to information relayed to us, approximately 242 km of fence have already been erected, and are in operational use. 28 km of it are built as a wall (11%). Approximately 157 km are currently being built, 140 km of which are fence and approximately 17 km are

Due to topographical and security needs,¹³² 8 kilometers (5 miles) of the fence were formed by concrete walls.¹³³ This phase of the fence was completed in July 2003.¹³⁴ Phase B, which extends sixty kilometers (forty miles) from Salim to Tirat-Zvi and to Mt. Avner has also been completed.¹³⁵ The next phase of the fence is divided into three segments, C1, C2, and C3. All three parts were approved in 2003 and will incorporate Jerusalem.¹³⁶ The first section, C1, will consist of three segments comprising approximately 64 kilometers (40 miles) in the areas between Beit Sahur and the Olive Junction, Qalandyia and Anatot, as well as specified sections around Bir Nabala.¹³⁷ As with Phase A, certain sections of this fence will require concrete walls as a result of sniper fire in certain places.¹³⁸ Phases C2 and C3 include “the fence between Elkana and the Camp Ofer military base, a fence east of the Ben Gurion airport and north of planned highway 45, and a fence protecting Israeli communities in Samaria (including Ariel, Emanuel, Kedumim, Karnei Shomron).”¹³⁹ This section is currently under construction and when completed will be nearly 150 kilometers long.¹⁴⁰ In certain areas, depending on security needs, an actual wall, as opposed to a fence, will be built.¹⁴¹ Finally, as approved by the Ministry of Defense in October 2003, Phase D will consist of a 52 kilometer (32 mile) fence in Tunnels Batir, a 30 kilometer (19 mile) section in Batir Surif, and a 93 kilometer (58 mile) addition in Surif Carmel.¹⁴²

wall (12%). The building of 364 km of the separation fence has not yet been commenced, of which 361 km are fence, and 3 km are wall.

Mara'abe, HCJ 7957/04 ¶ 3.

132. *Facts and Figures*, *supra* note 130.

133. *Id.*; see also Ministry of Defense, *Israel's Security Fence*, *supra* note 127.

134. Ministry of Defense, *Israel's Security Fence*, *supra* note 127.

135. *Beit Sourik*, HCJ 2056/04 ¶ 5. This section of the fence was approved in December 2002. *Id.*

136. Jewish Virtual Library, *Israel's Security Fence*, *supra* note 130.

137. *Beit Sourik*, HCJ 2056/04 ¶ 6; see also *Facts and Figures*, *supra* note 130.

138. Ministry of Defense, *Israel's Security Fence*, *supra* note 127; see also Jewish Virtual Library, *Israel's Security Fence*, *supra* note 130.

139. *Mara'abe*, HCJ 7957/04 ¶ 3.

140. See *Facts and Figures*, *supra* note 130.

141. *Id.*

142. *Id.* The approximated lengths of the fence and areas provided are subject to change.

B. Composition of the Fence

The security fence “is a multi layered composite obstacle comprised of several elements.”¹⁴³ At its core stands a technologically advanced fence.¹⁴⁴ While this chain-link fence appears in many places similar to any other fence, it is equipped with underground and long-range sensors to help alert authorities of attempts to infiltrate the border.¹⁴⁵ On the external side of the fence is an anti-vehicle obstacle, generally in the form of a trench, which is intended to prevent vehicles from being able to smash into the fence.¹⁴⁶ Just beyond these obstacles, there is also an additional fence and barbed wire in order to slow the progress of intruders.¹⁴⁷ Closest to the fence on its internal side is a dirt road meant to preserve foot prints or other markings that will indicate a breach in security.¹⁴⁸ On both sides of the electric fence are patrol roads, which are used by the IDF and border patrol in their efforts to guard the area.¹⁴⁹ In addition to another fence on the interior side of the fence, landmines and unmanned armored vehicles are strategically placed along the barrier in order to deter individuals from trying to cross the fence in an unmarked area.¹⁵⁰

In most areas, the fence and its additional components are approximately 60 meters (180 feet) wide.¹⁵¹ This figure varies depending on certain restraints or necessities depending on the topography and environmental needs of certain areas.¹⁵² Likewise, some areas require higher fences and even concrete structures in order to prevent infiltration.¹⁵³

143. Ministry of Defense, *Israel's Security Fence*, *supra* note 127.

144. Jewish Virtual Library, *Israel's Security Fence*, *supra* note 130.

145. *Id.*; see also Ministry of Defense, *Israel's Security Fence*, *supra* note 127.

146. *Beit Sourik*, HCJ 2056/04 ¶ 7.

147. Ministry of Defense, *Israel's Security Fence*, *supra* note 127; see also *Beit Sourik*, HCJ 2056/04 ¶ 38.

148. *Beit Sourik*, HCJ 2056/04 ¶ 38.

149. *Id.*

150. See Jewish Virtual Library, *Israel's Security Fence*, *supra* note 130.

151. *Id.*; see also *Beit Sourik*, HCJ 2056/04 ¶ 38.

152. Ministry of Defense, *Israel's Security Fence*, *supra* note 127. See also *Beit Sourik*, HCJ 2056/04 ¶ 38.

153. *Beit Sourik*, HCJ 2056/04 ¶ 38.

V. DISPROPORTIONAL DEFERENCE

In Parts II, III, and IV *supra*, this Note addressed the Israeli legal system as relevant to the Occupied Territories, the principle of proportionality as used by the Court, and the position and construction of the security fence respectively. This part examines the deference with which the Court gives to the Israeli government and military regarding decisions of national security. This Note contends that the proportionality test as originally conceived and previously applied is an improper inroad through which the High Court of Justice enabled itself to review the Israeli government's and military's decision to erect the security fence. Additionally, this part focuses on the failure of the Court to recognize the unprecedented nature of the security fence and the overwhelming impact the fence has with regard to counterterrorism and the future of the region.¹⁵⁴ Finally, this section will argue that the proportionality test, while evolving in scope, was not intended to shatter the delicate balance between the need for judicial review of administrative actions and the necessary discretion afforded to military commanders when given the responsibility of protecting Israeli lives and developing counterterrorism measures.¹⁵⁵

A. The Court's Review of Military Orders

Since establishing the ability to review military orders, *supra* Part II.C, the Court has attempted to define the scope of its power.¹⁵⁶ Some scholars argue that the Court fails to fully address military actions by inconsistently applying the standards of review that it has set forth.¹⁵⁷ These scholars believe that the Court allows the military too much deference in shaping policy in the Territories, particularly with regard to determining the necessity of security actions.¹⁵⁸ Others, however, are adamant in their

154. The Court itself denied the political implications of the fence. *Beit Sourik*, HCJ 2056/04 ¶ 33. However, it is clear that the fence could lead to future talks between the Israeli government and Palestinian Authority, either as a result of lowered tension from diminished terrorist activity, or through the pressure undoubtedly caused by the social and economic implications of the fence. The scope of this Note does not go beyond the use of the proportionality test. While scholarly works have yet to appear in large numbers with regard to the fence, other issues involving the fence will only be addressed as necessary and only in connection to the test of proportionality.

155. *C.f.* Gross, *supra* note 24.

156. Zamir, *supra* note 101, at 37.

157. KRETZMER, *supra* note 50, at 29.

158. See Kretzmer, *supra* note 50, at 74; *but see* Gross, *supra* note 24, at 181.

belief that the Court lacks self-restraint.¹⁵⁹ Despite the disagreement between scholars, it is clear that the Court no longer defers to the *Knesset* or the military, but rather reviews security decisions as though they were any other administrative legislation.¹⁶⁰ As a result, security assessments have become a joint effort between the government, military, and judiciary.¹⁶¹ Such a situation is counterintuitive in a democratic system¹⁶² as it erodes the separation of powers.¹⁶³

159. Gelpe, *supra* note 37, at 493. Even others believe that the Court has found a proper balance between its own discretion and that of the military's. Detlev F. Vagts, *International Decision: Ajuri v. IDF Commander in West Bank. Case No. HCJ 7015/02 [2002] Isr. L. Rep. 1. Supreme Court of Israel, September 3, 2002*, 97 AM. J. INT'L. L. 173, 175 (2003) ("One admires the meticulous and courageous way in which the Israeli Supreme Court, acting as it did in the immediate vicinity of violence, approached the task of distinguishing between appropriate and inappropriate uses of the executive's security powers.").

160. See generally Bracha, *supra* note 91, at 39; see also Gelpe, *supra* note 37, at 493.

161. See generally Gross, *supra* note 24.

162. In the landmark decision for judicial review, *United Mizrahi Bank v. Migdal Cooperative Village*, Justice Barak validated judicial review as "an affirmation of democracy itself. [T]he judicial review of constitutionality is the very essence of democracy, for democracy does not only connote the rule of the majority. Democracy also means the rule of basic values and human rights as expressed in the constitution." Ralph Ruebner, *Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel—A Comparative Perspective*, 31 GA. J. INT'L & COMP. L. 493, 499–500 (2003), quoting CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* [1995] P.D. 49(iv) 221, translated in Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 ISR. L. REV. 259 (1999).

163. Cf. Gelpe, *supra* note 37, at 93; see also KRETZMER, *supra* note 50, at 191 ("In democratic countries, courts enjoy varying degrees of independence. This independence ensures that the judges' decisions are based on their conscience and are not dictated by other branches of government" and vice versa). But see J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* 272 (4th ed. 1991) ("Courts are part of the machinery of the authority within the State and as such cannot avoid the making of political decisions."). It is further argued that the evolution of the judiciary requires that it becomes involved in the political aspects of the other branches of government:

In the traditional view, the function of the judiciary is to decide disputes in accordance with the law and with impartiality. The law is thought of as an established body of principles which prescribe rights and duties. Impartiality means not merely an absence of personal bias or prejudice in the judge but also the exclusion of 'irrelevant' considerations such as his political or religious views.

A more sophisticated version of this traditional view sees the judiciary as one of the principle organs of a democratic society without whom government could be carried on only with great difficulty. The essence of their function is the maintenance of law and order and the judges are seen as a mediating influence.

The Court's increasingly aggressive position when reviewing military actions is apparent, despite language by the Court which purports a more balanced approach.¹⁶⁴ Justice Barak has stated on several occasions:

The Supreme Court, sitting as the High Court of Justice, reviews the legality of the military commander's discretion In exercising judicial review, we do not turn ourselves into experts in security affairs. We do not substitute the security considerations of the military commander with our own security considerations. We take no position regarding the way security affairs are run. Our task is to guard the borders and to maintain the boundaries of the military commander's discretion Thus, we shall not be deterred from reviewing the decisions of the military commander . . . simply because of the important security considerations anchoring his decision. However, we shall not substitute the discretion of the commander with our own discretion. We shall check the legality of the discretion of the military commander and ensure that his decisions fall within the zone of reasonableness.¹⁶⁵

In the past, such a statement could be construed to indicate that the Court was prepared to show the military great deference in reviewing military orders.¹⁶⁶ In fact, past case law demonstrates that when reviewing military officials' decisions in the Territories, the Court, more often than not, sided with the military government.¹⁶⁷ For some, the Court's propensity to side with the military government legitimizes Israel's Occupation and provides the government with a degree of autonomy over matters involving the West Bank and Gaza.¹⁶⁸ This belief seems to have lost prominence recently given that Justice Barak has also ruled:

The judgments of the Supreme Court stated more than once that the security considerations of the army, both inside Israel as well as in Judea, Samaria and Gaza, are subject to judicial review, and that this judicial review is not limited to questions of jurisdiction or the presence of security considerations . . . it extends to the whole gamut of grounds for review, including questions of reasonableness of the security considerations.¹⁶⁹

J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* 187–88 (2d ed. 1979).

164. For a comprehensive survey of the Court's increasing intervention in the actions of the security authorities, see Bracha, *supra* note 91, at 39.

165. *Beit Sourik*, HCJ 2056/04 ¶ 46.

166. Simon, *supra* note 15, at 24.

167. *Id.*

168. *Id.*

169. HCJ 910/86 *Ressler v. Minister of Defense* [1988] P.D. 42(2) 441, 486; *see* Simon, *supra* note 15, at 23 n.117.

One of the most common illustrations¹⁷⁰ of the Court's movement toward active management of military activity in the Occupied Territories is the review of military orders involving home demolitions.¹⁷¹ The stated military objectives for ordering home demolitions are to punish those who commit acts of terror against Israel and to deter those who are thinking about committing such acts.¹⁷² Similar to the reaction of many

170. There are many examples of military orders which the High Court has ruled on, however few are as widely discussed, both positively and negatively as home demolitions. While it would be impossible to go into each type of military action which has come under review by the Court, by using home demolitions, it is possible to grasp the difference between what this Note would consider a proper military action to be reviewed by the Court using the proportionality test, and the security fence, which this Note argues should be outside the Court's review. With this in mind, it is also important to note that in both instances, home demolitions and the building of the security fence, the Court should show extreme deference to the government and military commanders who take responsibility for the results of their actions.

171. Simon, *supra* note 15, at 7 ("The practice of home demolitions has been employed since . . . 1967."). Home demolitions are either carried out by blowing up the home with explosives or destroying the structure using a bulldozer. The authority to order home demolitions stems from Defense (Emergency) Regulations 1945, Palestine Gazette (No. 1442), Reg. 119, para. 2, at 1089 (Supp. II Sept. 27, 1945) [hereinafter Defense Emergency Regulations]. The regulation provides:

A military commander may by order direct the forfeiture to the Government of Palestine of any house, structure or land form in which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, detonated, exploded or otherwise discharged or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offence against these Regulations involving violence or intimidation or any Military Court offence, and when any house, structure or land is forfeited as aforesaid, the Military commander may destroy the house or the structure or anything in or on the house, the structure or the land.

Id.; see also Gross, *supra* note 24, at 181 (arguing that the "Regulation cannot be said to be inconsistent with the values of the State of Israel as a Jewish and democratic State since a democratic state must also equip its military commanders with efficient tools for fighting terrorism." The article articulates that it cannot be said that "fighting terrorism is an improper purpose."). *Id.*; see HJC 2722/92 Alamarin v. Commander [1992] P.D. 46(3) 693, 702 (Hebrew) (per Justice Cheshin), cited in Gross, *supra* note 24, at n.75.

172. Gross, *supra* note 24, at 181–82 ("It seems that the legislature intended to enable the military commander to respond in an effective and suitable manner to every act that impairs the security of the population or threatens public order. The military commander has broad power to order the confiscation of land and thereafter the demolition of the structure or structures of which the terrorist made use in the commission of the offense. Moreover, the military commander may make these orders even if the act of terror was

scholars with regard to the building of the security fence,¹⁷³ there are those who feel that home demolitions go far beyond their stated purpose and in fact result in collateral damage to innocent people, often times to terrorists' wives, children, parents, and siblings.¹⁷⁴ In order to remedy the conflict between the necessity of home demolitions and the fear of condoning collective punishment, the Court has sought to quell the two concerns by allowing those who feel bereaved by any military order to petition the High Court to contest the order's legality.¹⁷⁵

The impact of the Court's willingness to provide direct access to the High Court of Justice has been two-fold with regard to the military commanders' authority.¹⁷⁶ On the one hand, it has provided the Court with an effective method of supervising the military commanders' authority in an area which in the past was not always open to judicial intervention.¹⁷⁷ On the other hand, it has slowed down the response time of the military to certain threats and made the work of the military commanders more difficult.¹⁷⁸ Returning to the example of home demolitions, the Court's decision to allow for review has left the military unable to immediately destroy a terrorist's residence, as soldiers are now obligated to wait for the inhabitants of the home to exercise their rights before the Court.¹⁷⁹

However, because each home demolition is technically unrelated to the next, it seems reasonable for the Court to have review over this military action, especially since the success of one demolition is not dependent on the next. Herein lies the significant difference between home demolitions and the security fence: a ruling by the Court that a demolition is too extreme does not negatively affect the overall purpose of home demoli-

not committed from the relevant land. It is sufficient that the land served as the home of the terrorist.”).

173. See, e.g., Gross, *supra* note 24.

174. *Id.* at 182. For these scholars, home demolitions are more analogous to other forms of collective punishment, a prohibited form of justice under Israeli law. *Id.* (“The power given to the military commander under Regulation 119 is not the power of the collective punishment. Its exercise is not intended to punish the family members of the Petitioner. The power is administrative and its exercise is intended to deter and thereby preserve public order.”); see also Fourth Geneva Convention, *supra* note 86, art. 33(1) (“No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism [are] prohibited.”).

175. Gross, *supra* note 24, at 187.

176. *Id.* at 230.

177. *Id.*

178. *Id.*

179. *Id.*

tions, whereas allowing the Court to determine the proper route of a section of the fence can directly affect not only the quality of that particular region, but the effectiveness of the fence as a whole.

The construction of the security fence is unique from other instances in which the Court has applied the proportionality test because the fence represents a shift in Israel's policy towards terrorism. Instead of reacting to specific terrorist activity, the government is attempting to preemptively stop all terrorists from entering Israel from the Territories.¹⁸⁰ As a result, unlike situations dealt with in previous case law such as curfew orders, home demolitions, and the treatment of imprisoned terrorists, the security fence cannot be linked to several random acts of terrorism, but must be viewed in its entirety, as a policy decision designed to end all terrorism. Whereas the proportionality test can be properly applied to a home demolition to determine whether destroying a terrorist's home is proportional to the damage that he caused through his terrorist act, the Court does not have the means or the expertise to evaluate the government's overarching policy towards fighting terrorism as a whole.¹⁸¹

B. The Court Did Not Give the Military the Proper Deference Under Its Proportionality Test

When the Court applied the proportionality test to examine the military's decision to build the fence, the Court failed to properly weigh the authority of the military commander, and to show deference to his expertise. As the Court in *Beit Sourik* openly admitted, the Justices of the High Court "are not experts in military affairs."¹⁸² Consequently, at the outset of its analysis, the Court explained that when applying its proportionality test, it would not attempt to substitute its opinion for that of the military commander's, nor would it require that the opinion of the Court and the opinion of the commander correspond.¹⁸³ Instead, the Court stated that all it could do was "determine whether a reasonable military commander would have set out the route as this military commander did."¹⁸⁴ As a

180. *See generally id.*

181. *Cf. R. COTTERREL, THE SOCIOLOGY OF LAW* 235 (2d ed. 1992); *see also* KRETZMER, *supra* note 50, at 192 ("In some jurisdictions courts have avoided ruling in such situations, relying on doctrines of nonjusticiability or 'act of state' to justify their passivity.")

182. *Beit Sourik*, HCJ 2056/04 ¶ 46.

183. The Court in *Beit Sourik* stated: "We shall not examine whether the military commander's military opinion corresponds to ours—to the extent that we have an opinion regarding the military character of the route. So we act in all questions which are matters of professional expertise, and so we act in military affairs as well." *Id.*

184. *Id.*

result, the Court gave the impression that its final ruling as to the proportionality of the fence would be based heavily on the conclusions of the military commander. However, this was not the case, and while the Court purported to show deference to the military, in reality, it failed to do so.¹⁸⁵

The Court directly addressed the weight that should be given to the military commander when it determined that the opinion of the Council for Peace and Security¹⁸⁶ could not be adopted by the Court.¹⁸⁷ In fact, the Court stated that “at the foundation of this approach is our long-held view that we must grant special weight to the military opinion of the official who is responsible for security.”¹⁸⁸

185. *Id.* ¶¶ 45, 60, 62.

186. Members of the council moved to be joined as *amici curiae* and were granted recognition. The council of former military personnel submitted several affidavits claiming that the route of the security fence was unnecessary.

In an additional affidavit (from April 18, 2004), members of The Council for Peace and Security stated that the desire of the commander of the area to prevent direct flat-trajectory fire upon the separation fence causes damage from a security perspective. Due to this desire, the fence passes through areas that, though they have topographical control, are superfluous, unnecessarily injuring the local population and increasing friction with it, all without preventing fire upon the fence.

Petitioners, pointing to the affidavits of the Council for Peace and Security, argue that the route of the separation fence is disproportionate. It does not serve the security objectives of Israel, since establishing the route adjacent to the houses of the Palestinians will endanger the state and her soldiers who are patrolling along the fence, as well as increasing the general danger to Israel's security. In addition, such a route is not the least injurious means, since it is possible to move the route farther away from petitioners' villages and closer to Israel. It will be possible to overcome the concern about infiltration by reinforcing the fence and its accompanying obstacles.

Id. ¶ 18–19.

187. *Id.* ¶ 47 (“In this state of affairs, are we at liberty to adopt the opinion of the Council for Peace and Security? Our answer is negative.”).

188. *Id.* The Court continues to emphasize the importance of deferring to the opinion of the military commander. Vice-President M. Landau J. dealt with this point in a case where the Court stood before two expert opinions, that of the Major General serving as Coordinator of IDF Activity in the Territories and that of a reserve Major General. Thus wrote the Court:

In such a dispute regarding military-professional questions, in which the Court has no well founded knowledge of its own, the witness of respondents, who speaks for those actually responsible for the preservation of security in the administered territories and within the Green Line, shall benefit from the assumption that his professional reasons are sincere reasons. Very convincing evidence

The military's expertise is most pertinent in the third subtest of the proportionality principle since it examines whether the benefit derived from the fence is in proportion to the injury caused to the Palestinians as a result of its construction.¹⁸⁹ In order to determine if the route chosen by the military fulfilled the objective of gaining the greatest security advantage with the least harm to the inhabitants, the Court determined that it must weigh the opinions of the military against the claims of the inhabitants. The Court came to the conclusion that in many areas, the fence did not meet this standard, despite arguments by the military that the route was necessary to ensure the security of Israeli citizens.

In complete contrast to the Court's earlier dictum, it effectively ignored the military commander's reasoning behind the placement of the fence and instead turned to the Council for Peace and Security in several instances to find an alternative route.¹⁹⁰ The Court had previously stated that it could not adopt the opinion of the Council for Peace and Security;¹⁹¹ yet, when determining the route of the fence pursuant to Order no. Tav/107/03 and Order no. Tav/108/03,¹⁹² the Court held that the proposal provided by the Council could be considered.¹⁹³ Thus, while the Court stated one standard at the beginning of its opinion, during its examination it failed to abide by its rhetoric.

is necessary in order to negate this assumption. Justice Vitkon wrote similarly in *Duikat*, in which the Court stood before a contrast between the expert opinion of the serving Chief of the General Staff regarding the security of the area, and the expert opinion of a former Chief of the General Staff. The Court ruled, in that case, as follows: In security issues, where the petitioner relies on the opinion of an expert in security affairs, and the respondent relies on the opinion of a person who is both an expert and also responsible for the security of the state, it is natural that we will grant special weight to the opinion of the latter. Therefore, in our examination of the contrasting military considerations in this case, we give special weight to the fact that the commander of the area is responsible for security. Having employed this approach, we are of the opinion—the details of which we shall explain below—that petitioners have not carried their burden, and have not convinced us that we should prefer the professional expert opinion of members of the Council for Peace and Security over the security stance of the commander of the area. We are dealing with two military approaches. Each of them has military advantages and disadvantages. In this state of affairs, we must place the expert opinion of the military commander at the foundation of our decision.

Id. (citations omitted).

189. *Beit Sourik*, HCJ 2056/04 ¶ 59.

190. *Id.* ¶ 71.

191. *Id.* ¶ 47.

192. *Id.*

193. *Beit Sourik*, HCJ 2056/04 ¶ 71.

While the Court has attempted to develop the proportionality test and expand its application, neither past case law nor the scholarly works cited by the Court directly deal with a situation such as the security fence. In fact, of the material the Court cites to in the *Beit Sourik* opinion, the article most directly linked to the security fence states that the principle of proportionality “is often difficult to apply . . . especially in counterterrorist¹⁹⁴ operations.”¹⁹⁵ Thus, while the Court was correct in stating that “proportionality plays a central role in the law regarding armed conflict” and that “during such conflicts, there is frequently a need to balance military needs with humanitarian considerations,”¹⁹⁶ once the Court deemed security to be the motivation behind the fence, it should have provided the military commander greater deference in his determination as to the necessary route of the security fence.¹⁹⁷

Proponents of judicial intervention argue that it is necessary for the Court to have the ability to oversee all government and military decisions concerning national security because such decisions are most likely to run the risk of suppressing liberties.¹⁹⁸ The reality of the security fence is that it will cause hardships to the Palestinians—specifically with regard to the loss of land. As a result, it was proper for the Court to rule on the legality of the fence in general, to determine whether the military commander had the proper authority to order its construction. However, when the Court divided the security fence into various segments in order to apply the proportionality test, it disregarded the underlying rationale and justification for the fence as a whole.¹⁹⁹ The objective of the fence is to protect Israelis and to save lives.²⁰⁰ The Court could not justify trading

194. Counter-terrorism has been defined as “offensive military operations designed to prevent, deter and respond to terrorism.” Adam Roberts, *The Laws of War in the War on Terror*, in ISR. Y.B. HUM. RTS. 200 (Yoram Dinstein ed., 2002).

195. *Id.* at 200.

196. *Beit Sourik*, HCJ 2056/04 ¶ 37.

197. Cohen-Eliya, *supra* note 38, at 274 (“[I]t is common to grant the decision-maker margins of appreciation when he acts for the realization of the worthy purpose of national security.”).

198. SHIMON SHETREET, *JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY* 465 (1994).

199. *See* Makovsky, *supra* note 11, at 54–56 (stating that the two main purposes of the fence were security and to “spur the peace process” by forcing the Palestinians back to the negotiating table); *see also* *Beit Sourik*, HCJ 2056/04 ¶¶ 12, 15. In all, the Court examined eleven different orders by the military commander to construct different segments of the fence. Some of these segments only measured five kilometers in length. *See Beit Sourik*, HCJ 2056/04 ¶¶ 17, 49–50, 62, 65, 67, 71–72, 75, 77, 80–81, 86.

200. *Facts and Figures*, *supra* note 130 (“The Security Fence is a central component in Israel’s response to the horrific wave of terrorism emanating from the West Bank. The fence is a manifestation of Israel’s basic commitment to defend its citizens. Once com-

Israeli lives to safeguard the liberties of the Palestinians most affected by the fence. By separating the fence into segments, the Court was able to examine it in the same manner that it examined home demolitions and other military orders.

There is no doubt that the order to build the security fence was a drastic measure. However, without it, Israel would be forced to continue to fight terrorists using guerilla war tactics.²⁰¹ While the structure of the fence is temporary in theory, the objective behind the fence is permanent—lasting security and peace.²⁰² The fact that Israel has been in a constant state of emergency since its establishment in 1948²⁰³ is proof that the previous tools given to the military to secure its citizens were reactionary in nature—meant to punish those who committed terrorist acts and deter others from supporting terrorism—not to bring about a lasting peace.²⁰⁴ Although security appears to be the primary purpose of the fence, it is also possible that the government could be forcing its two-state solution to the current conflict or even trying to create a situation that forces the Palestinians into negotiating for peace. Regardless of the Justices' political views, they do not have the expertise or the authority to determine whether such policies are correct. As Justice Ben Porat argued in *Barzilai v. Government of Israel*:²⁰⁵

[I]t cannot be overlooked that those who discharge a clear security function find it especially difficult to act always within the law Naturally the smaller the deviation from the legal norm, the easier it would be to reach the optimal degree of harmony between the law and the protection of the State's security. But we, as judges who dwell among our people, should not harbour any illusions, as the events of the instant case well illustrate. There simply are cases in which those who are at the helm of the State, and bear responsibility for its survival and

pleted, the fence will substantially improve the ability of the Israeli Defense Force (IDF) to prevent the infiltration of terrorists and criminal elements into Israel.”) (emphasis removed); see Makovsky, *supra* note 11, at 55; see also *Beit Sourik*, H CJ 2056/04 ¶ 13.

201. See Gross, *supra* note 24, at 231.

202. Both the government of Israel and the Court recognize that the structure of the fence is temporary. However, if peace cannot be reached between the two sides, the fence will most likely remain in place. Already, the amount of terrorist attacks in areas where construction is complete are down significantly. See Makovsky, *supra* note 11, at 55.

203. Bracha, *supra* note 91.

204. *Id.* at 123.

205. H CJ 428/86 *Barzilai v. Government of Israel*, 40(3) P.D. 505, 579–80, *quoted in* Bracha, *supra* note 91.

security, regard certain deviations from the law for the sake of protecting the security of the State, as an avoidable necessity.²⁰⁶

In the case of the security fence, the objectives of stopping terrorism²⁰⁷ and shifting Israeli policy toward the idea of separation qualify this case as an instance where the necessity of building the fence as the government sees fit is essential to its overarching goals, and the Court should provide the government and military the deference that is necessary for it to achieve those goals.²⁰⁸

206. *Id.* at 125 n.10 (illustrating that the comments made by Justice Ben Porat were not shared by the majority of Justices in this particular case. Justice Shamgar, in response to Justice Ben Porat stated, "One cannot conceive of a sound administration without maintenance of the rule of law, for it is a bulwark against anarchy and ensures the State order. This order is essential for the preservation of political and social frameworks and the safeguarding of human rights, none of which can flourish in an atmosphere of lawlessness.").

207. *See* Dayan, *supra* note 9. In a speech regarding the security fence's ability to stop terrorism, Dayan stated:

There is ample evidence demonstrating the effectiveness of, and precedence for, the construction of a security fence. Whenever Israel has needed to provide a defensive measure against terrorists for the security of its citizens, it has constructed a fence (e.g., along its borders with Jordan, Syria, and Lebanon). Indeed, the fence in Gaza has been 100 percent effective in preventing terrorist infiltration. Similarly, Stage A of the West Bank fence has already been successful, forcing terrorist groups to scramble to move their headquarters to areas where there is no fence and greatly decreasing the number of criminal incidents along its route. Eventually, this fence will also eliminate the problem of illegal Palestinian immigration, which has already resulted in 150,000 illegal residents in Israel.

Id.

208. *Cf. id.* *See also* Bracha, *supra* note 91. It should be noted that in most instances, providing free reign to the military could lead to drastic and unnecessary results. Consequently, this Note does not argue that the Court should never review military decisions, nor that the Court cannot use the proportionality test to weigh the security benefit provided by a military order versus the negative effect that order poses to the Palestinians; rather, this Note asserts that the proper amount of deference must be provided to the Court, specifically in the case of the security fence. It is true that

[i]n a democratic society that loves freedom and security, there is no escape from balancing liberty and dignity, and security. Human rights cannot become a shovel for negating the security of the public and the state. There must be a balance, albeit a difficult and sensitive one, between the individual's dignity and freedom and the state security and public security.

Gross, *supra* note 24, at 231.

VI. CONCLUSION

Over the course of the past six years, the ongoing cycle of Palestinian terrorist attacks and Israeli military excursions into the Occupied Territories has become commonplace. During this period, known as the *Second Intifada*, Israel implemented forced curfews, border closings, additional security at checkpoints, and military operations in an attempt to thwart terrorism. Yet, none of these efforts subdued the threat of attack that Israeli citizens struggle with every day.²⁰⁹ Instead of escalating the severity of military missions or increasing the frequency of curfews and home demolitions, the government and military determined that the time was right to change the way Israel approached terrorism and proposed the idea of building a security fence that would act as a buffer between Israelis and Palestinians.

The decision to erect the fence came under immediate scrutiny from both Palestinians and much of the international community. Many of the concerns and questions surrounding the fence were answered in *Beit Sourik*, the Israeli High Court's landmark decision in which it ruled that while the State of Israel was permitted to build the fence, the fence's route, as chosen by the Ministry of Defense, disproportionately favored the security needs of Israel over the fence's adverse effects on the Palestinians' quality of life.²¹⁰ The Court stated that it would take into consideration the military's belief that the designated route was necessary for the security of Israel; however, its decision does not reflect deference to the military, but rather, it indicates that the Court used its own judgment when concluding that the fence's route was improperly determined by the military.²¹¹

209. *Beit Sourik*, HCJ 2056/04 ¶ 2.

210. *See id.* ¶ 67.

211. In the epilogue of his decision, Chief Justice Barak explains:

Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security.

This Note's assessment that the High Court must provide the military with greater deference with regard to its decision surrounding the fence is even more pertinent as the Court's holding in *Beit Sourik* was reinforced in its decision in *Mara'abe v. The Prime Minister of Israel*. In *Mara'abe*, the Court required the Israeli government and military to reconsider its placement of the security fence near Alfei Menashe, in order to minimize the negative effects of the fence on the Palestinians.²¹² By applying the proportionality test in such a way that it lessens the value of the military's opinions and goals, the Court is, in effect, substituting its own security beliefs for those of the individuals entrusted with the duty to protect Israeli citizens. While allowing the military too much deference can lead to undesirable results, the uniqueness of the fence as a temporary and defensive measure to prevent future terrorist activity in Israel should qualify it as an instance in which the Court should have provided the military with the utmost deference.

From a security standpoint, the determination of the fence's route must be based on the best possible course to ensure the safety of Israeli citizens. While the rights and needs of the Palestinians should be taken into consideration by the military and government when determining the route for the fence, finding a "less restrictive alternative"²¹³ in this particular instance is not an appropriate determination for the Court to make.²¹⁴ Once the Court established that the military took into account the adverse effects the security fence would have on Palestinians, the Court should have respected the commander's discretion.²¹⁵ Thus, the Court's use of the proportionality test to review the decision to construct the security fence was improper because it did not take into account the

Id. ¶ 59.

212. *Mara'abe*, HCJ 7957/04 ¶ 116.

213. See Bracha, *supra* note 91; see also *Beit Sourik*, HCJ 2056/04 ¶ 69.

214. See Gross, *supra* note 24, at 221–22.

215. *Beit Sourik*, HCJ 2056/04 ¶¶ 44–46. During the process of determining the route of the fence, the government stated that "every effort shall be made to minimize, to the extent possible, the disturbance to the daily lives of the Palestinians due to the construction of the obstacle." *Id.*

expertise of the military when dealing with specific aspects of the fence that directly pertain to the security of Israeli lives both present and future.

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* B.A., Tufts University (2003); J.D., Brooklyn Law School (2006). I would like to thank my family for their unconditional support and encouragement throughout law school, especially my wife, Naomi, for her love and patience. I am extremely grateful to Judge David Trager for his guidance, time, and insight throughout the note-writing process, as well as Professor Amos Shapira for his sage comments to final drafts. Finally, thank you to Michael Kwon, Kristin Savarese, Mason Allen, and everyone else at the *Journal*. All errors and omissions are my own.

THE POLITICS OF GAGGING: THE EFFECTS OF THE GLOBAL GAG RULE ON DEMOCRATIC PARTICIPATION AND POLITICAL ADVOCACY IN PERU

I. INTRODUCTION

The United States is one of the world's largest donor countries to global family planning activities.¹ The majority of its international grants to foreign providers come under the auspices of United States Aid for International Development (USAID) grants, making the United States an important player in global family planning.² The 2001 reinstatement of the historically controversial "Mexico City Policy" attaches wide ranging aid conditionalities to the receipt of USAID funding, and effectively enables the United States to dictate the domestic and international family planning policies of recipient countries.³ Many of these funding restrictions relate to the provision of abortion services and counseling.⁴ In addition, some of the policy's provisions are aimed at curtailing political advocacy for liberalized abortion regulation by foreign recipient non-governmental organizations (NGOs).⁵ The restrictions of the U.S. policy prevent advocacy and civil participation by these recipient NGOs, and

1. Sarah Wildman, *Abort Mission*, AMERICAN PROSPECT, Jan. 1, 2004, at 1, available at 2004 WL 63582840.

2. *Report on Impact of the Mexico City Policy on the Free Choice of Contraception in Europe*, Eur. Parl. Ass., Doc. No. 9901, at 1 (2003), available at <http://www.assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9901.htm> [hereinafter *Report on Impact of the Mexico City Policy*].

3. The Mexico City Policy is commonly referred to as the Global Gag Rule by the reproductive rights community because of its restrictions on speech and advocacy. It will be referred to as the "Global Gag Rule" or "Gag Rule" throughout this Note.

4. The provisions of the Gag Rule stipulate that a recipient country must agree that "it will not furnish assistance for family planning under this award to any foreign non-governmental organization that performs or actively promotes abortion as a method of family planning in USAID recipient countries." Presidential Memorandum on Restoration of the Mexico City Policy, 66 Fed. Reg. 61, 17303 (Mar. 28, 2001) [hereinafter Presidential Memorandum]. Additionally, in justifying this immediate reinstatement, President Bush expressed his belief that the Gag Rule would "make abortions more rare." Susan A. Cohen, *Global Gag Rule: Exporting Antiabortion Ideology at the Expense of American Values*, GUTTMACHER REPORT ON PUBLIC POLICY, June 1, 2001, at 1.

5. The Presidential memorandum that reinstated and amended the Global Gag Rule stipulated that "actively promoting abortion" is outlawed, and includes lobbying a foreign government to legalize or make abortion more available, and conducting a public information campaign on the benefits or availability of abortion. Presidential Memorandum, *supra* note 4, at 17306.

infringe on their right to free speech and their ability to speak out in a national democratic dialogue.⁶

This Note will examine the damaging effects of the Global Gag Rule on civil participation and political advocacy by NGOs focusing on reproductive rights in Peru and the overall effect this may have on the country's emerging conception of democracy. Peru provides an illustrative case study for the effects of the Global Gag Rule on women's health. Peru has some of the highest maternal death rates in the world; however, it also receives one of the largest amounts of USAID funding for family planning programs of any developing nation.⁷ Though many Peruvian NGOs have been forced to abandon their reproductive rights advocacy as a result of the Gag Rule, a few vocal Peruvian NGOs have continued to speak out against the rule itself.⁸ This continued advocacy in the face of the Gag Rule restrictions make Peruvian NGOs unique and provides valuable insight into the effects of the restrictions on speech and political advocacy.⁹

Part II will examine the global efforts to address unsafe abortions and place the Global Gag Rule in an international family planning context. This part will also provide a brief history of Peru's family planning program as well as an overview of the Global Gag Rule itself. Part III will examine USAID's democracy promotion program and the efforts of

6. See CENTER FOR REPRODUCTIVE RIGHTS, THE BUSH GLOBAL GAG RULE: ENDANGERING WOMEN'S HEALTH, FREE SPEECH AND DEMOCRACY, July 2003, at 1, <http://www.reproductiverights.org> [hereinafter THE BUSH GLOBAL GAG RULE] ("The Global Gag Rule erects barriers to the development of the democratic process in other countries . . ."). The Gag Rule has also failed to decrease the prevalence of abortion, the stated goal of President Bush in reinstating the restrictions. Susan A. Cohen, *Global Gag Rule: Exporting Antiabortion Ideology at the Expense of American Values*, GUTTMACHER REPORT ON PUBLIC POLICY, June 2001, at 1.

7. Judy Mann, *Bush's Gag Rule Decision Will Speak Loudly*, WASH. POST, Dec. 20, 2000, at C15.

8. The Gag Rule specifically limits advocacy for legalization of abortion, and many NGOs have taken this to outlaw advocacy against the Gag Rule itself. See *infra* note 67 and accompanying text for text and prohibitions of the Gag Rule; see *infra* note 155 and accompanying text for the conception among NGOs that the Rule prohibits speech even against the rule itself. Despite the Gag Rule's prohibition, Susana Galdos Silva, a leader in one of Peru's largest women's rights organizations, has repeatedly obtained specific permission from the United States to speak to the U.S. Senate and USAID officials about the effects of the Global Gag Rule on the women of Peru. This testimony is discussed further in Part III, though it must be noted here that Galdos Silva would not be able to speak out to her own congressional leaders about abortion under the Gag Rule. See Alyssa Rayman-Read, *The Sound of Silence*, 12 AM. PROSPECT 17 (2001).

9. See generally Susana Galdos Silva, Mexico City Policy: Effects of Restrictions, Testimony to Senate Foreign Relations Committee (July 19, 2001). This testimony will also be discussed further in Part IV.

NGOs to increase civil participation and advocacy and provide a brief history of Peru's own transition into democracy. This Note will explore the general theoretical and historical impact of NGOs on the democratic process and movements to increase civil participation, as well as the specific role that Peruvian NGOs play in their country. It will also investigate the real life effect of the Global Gag Rule on the democratic life of Peru.

This chilling of political activity in Peru by U.S.-imposed USAID restrictions is even more startling if one considers one of the other main objectives of USAID: to promote and facilitate democracy in emerging democracies.¹⁰ As an emerging and tenuous democracy, Peru presents a significant challenge to political activists, a challenge that is not made easier by the Gag Rule restrictions on political advocacy. Therefore, Part III will conclude with an analysis of the conflicting obligations placed on USAID in conducting a democracy project while monitoring NGO compliance with the restrictions on speech and political activity imposed by the Global Gag Rule.

Part IV will address the continued need for family planning funding and examine NGO reliance on gagged U.S. funding, as well as the levels of funding needed to accomplish international family planning goals. Finally, Part IV will recommend a course of action intended to move Peruvian NGOs and other foreign recipients away from reliance on USAID funding, allowing Peru to create its own, regionally appropriate, family planning and reproductive rights agenda through free and informed democratic debate and advocacy without constraint by USAID restrictions.

II. THE EVOLUTION OF INTERNATIONAL FAMILY PLANNING AND THE GLOBAL GAG RULE

A. Placing the Global Gag Rule in Context: Trends in International Family Planning

Globally, an estimated 13 percent of all maternal deaths are attributed to unsafe abortion procedures.¹¹ This is the equivalent of a large airplane

10. See USAID, http://www.usaid.gov/about_usaid/ (containing general information on the USAID objectives and a history of the organization). See also USAID, http://www.usaid.gov/our_work/democracy_and_governance/ (containing specific information on the organization's promotion of democracy across the world).

11. The World Health Organization estimates that of the "approximately 600,000 pregnancy related deaths each year, approximately 78,000 are related to complications resulting from unsafe abortions." Alan Guttmacher Institute, *Abortion in Context: United States and Worldwide*, 1 ISSUES IN BRIEF 4 (1999).

crashing every six hours, day and night.¹² As a result, nations at the Cairo International Conference on Population and Development (ICPD) identified illegal or clandestine abortion as a major public health problem.¹³

Clandestine abortion is recognized as a pressing issue by the international health community and has prompted heated discussion about how best to confront this epidemic.¹⁴ Because of the religious and political implications of a nation's abortion policy, the international health community has agreed to allow individual countries to make their own abortion policies.¹⁵ A plan of action was created at the Cairo ICPD that outlined goals for reducing maternal deaths, increasing access to family planning, and facilitating community education about reproductive health.¹⁶ Each country was left to implement the plan according to its national laws and religious or ethical values.¹⁷

The ability to independently determine a national abortion policy has allowed many countries to address the dangers of illegal abortion, while continuing to outlaw abortion itself.¹⁸ This has been the case in Peru.¹⁹

12. *Report on Impact of the Mexico City Policy*, *supra* note 2, at 6. The World Health Organization estimates that between 1995 and 2000 unsafe abortions resulted in about 78,000 maternal deaths. Sonia Correa & Judi Brown, *Abortion is a Global Political Issue*, WIN NEWS, July 1, 2003, at 4, available at 2003 WL 15940953. This number does not include the scores of women who are permanently injured because of these procedures and require extensive post-abortion care. For a brief description of post-abortion care, see SERVICE DELIVERY IMPROVEMENT DIVISION, USAID, POSTABORTION CARE (PAC) MEETING WOMEN'S HEALTH CARE NEEDS AFTER MISCARRIAGE AND UNSAFE ABORTION (2003) [hereinafter USAID, PAC].

13. Correa & Brown, *supra* note 12, at 2.

14. CENTER FOR REPRODUCTIVE RIGHTS, *BREAKING THE SILENCE: THE GLOBAL GAG RULE'S IMPACT ON UNSAFE ABORTION* 23 (2003) [hereinafter *BREAKING THE SILENCE*]; but see Jill M. Braken, *Respecting Human Rights in Population Policies: An International Customary Right to Reproductive Choice*, 6 *IND. INT'L & COMP. L. REV.* 197 (1995) (arguing that access to a legal abortion is an international human right based on various treatises, resolutions, and international customary law).

15. "Measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process." Programme of Action of the ICPD, ch. 8.25 (1994), available at http://www.unfpa.org/icpd/icpd_poa.htm.

16. GLORIA FELDT, *THE WAR ON CHOICE* 221 (2004).

17. Kaci Bishop, *Politics Before Policy: The Bush Administration, International Family Planning, and Foreign Policy*, 29 *N.C. J. INT'L L. & COM. REG.* 521, 526 (2004).

18. For example, many countries, including Peru, allow for post-abortion care and other methods of family planning such as contraceptive use, though they continue to outlaw abortion. See, e.g., USAID, PAC, *supra* note 12.

19. PERU PENAL CODE arts. 114-120 (making abortion generally illegal, but allowing exceptions if the mother's life is at risk or faces the threat of severe bodily injury). However, Peru has also invested millions in its family planning activities, and it addresses

Peru has some of the world's most restrictive abortion laws, highest rates of abortion, and highest maternal death rates.²⁰ It also receives one of the largest amounts of USAID funding for reproductive health and family planning programs of any developing nation.²¹ Over 350,000 Peruvian women still obtain illegal abortions annually,²² resulting in the hospitalization of one in seven women who receive them.²³ Peru has an abortion-related mortality rate that is estimated at twenty times the registered U.S. rate.²⁴ Illegal abortions, and complications from these back-alley procedures, are the second leading cause of maternal death in Peru, accounting for 22 percent of the overall maternal death rate.²⁵ The overall maternal mortality rate is 265 deaths for every 100,000 live births, and an estimated five women a day die from complications during pregnancy, delivery, or postnatal complications.²⁶

In light of these tragic statistics, it is not surprising that the Peruvian government declared the 1990s the Decade of Family Planning.²⁷ The main instruments of Peruvian population policy are the National Population Law and the Program on Reproductive Health and Family Planning 1996–2000.²⁸ Both bodies of legislation cite the need to encourage free

post-abortion care and other aspects of family planning in an effort to decrease maternal mortality. CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, LATIN AMERICA AND THE CARIBBEAN, PERU 169 (1997) [hereinafter WOMEN OF THE WORLD].

20. Only 35 percent of women live where abortion is permitted to save the woman's life or to prevent severe injury as Peru allows. Alan Guttmacher Institute, *Abortion in Context: United States and Worldwide*, 1 ISSUES IN BRIEF 3 (1999). Peru has an abortion rate that is estimated to be about sixty abortions per one thousand women, coming in ahead of all other Latin American countries. *Id.* at 4. Peru's abortion-related maternal mortality rate is 22 percent. WOMEN OF THE WORLD, *supra* note 19, at 172.

21. Judy Mann, *Bush's Gag Rule Decision Will Speak Loudly*, WASH. POST, Dec. 20, 2000, at C15.

22. Marianne Mollmann, Carnegie Council on Ethics and International Affairs, *Gagging Democracy*, HUMAN RIGHTS DIALOGUE 2.9, SPRING 2003: "MAKING HUMAN RIGHTS WORK IN A GLOBALIZING WORLD" at 2, available at <http://www.carnegiecouncil.org/printerfriendlymedia.php/prmID/943>.

23. BREAKING THE SILENCE, *supra* note 14, at 26. See *infra* Part IV for additional discussion on the the struggle across the globe to maintain sufficient levels of funding for family planning NGOs.

24. Correa & Brown, *supra* note 12, at 4.

25. WOMEN OF THE WORLD, *supra* note 19, at 172.

26. *Id.* at 163. The Center for Reproductive Law and Policy changed its name to the Center for Reproductive Rights. Documents from this organization in both its incarnations are cited in this Note. For information on this agency name change, see <http://www.reproductiverights.org/about.html#name>.

27. WOMEN OF THE WORLD, *supra* note 19, at 167.

28. *Id.* at 169.

and informed reproductive choice by individual couples and propose agency goals to reduce the number of deaths among mothers and children.²⁹ The Peruvian Constitution also established a national objective to raise awareness and protect the right of individuals and families to make their own free decisions about reproduction and family planning.³⁰ The Peruvian government has recognized reproductive health as a fundamental human right,³¹ and has created a major family planning campaign, *Reprosalud*,³² which has received over twenty-five million dollars of USAID funding.³³

Despite the clear commitment of the Peruvian government to promote maternal health and increase family planning services, abortion remains illegal in Peru.³⁴ And though roughly one third of all pregnancies in Peru end in abortion, it is still considered “a crime against life, body, and health.”³⁵ The Peruvian Penal Code prohibits abortion unless it is conducted in order to save the woman’s life.³⁶ Though there are mitigating

29. Law on National Population Policy (Legislative Decree No. 346), July 6, 1985, art. 1; WOMEN OF THE WORLD, *supra* note 19, at 170. Though Peru prohibits most abortions, counseling for abortion is not illegal in the country and may play an important part in some couples’ “free and informed” choice when faced with severe health risks. However, even this often life-saving counseling may be prohibited by the Global Gag Rule.

30. WOMEN OF THE WORLD, *supra* note 19, at 169.

31. *Id.* at 170.

32. *Reprosalud* is a massive public health and reproductive campaign that is being undertaken by the Manuela Ramos Movement (Manuelas). The Manuelas organization has a long history of developing women-centered, progressive programs to address women’s health issues. See generally JUDY BRUCE & DEBBIE ROGOW, POPULATION COUNCIL, QUALITY, CALIDAD/QUALITE: ALONE YOU ARE NOBODY, TOGETHER WE FLOAT: THE MANUELAS RAMOS MOVEMENT (2000).

33. See Mann, *supra* note 21. Unfortunately, the Manuelas had to abandon their long standing efforts to establish more liberal abortion laws in Peru in exchange for the money to fund *Reprosalud*. See *infra* Part III.C.

34. Peru is not alone in severely restricting access to legal abortions. Only 41 percent of all countries in the world have completely unrestricted abortion access. ALAN GUTTMACHER INSTITUTE, SHARING RESPONSIBILITY: WOMEN, SOCIETY AND ABORTION WORLDWIDE 21–22 (1999). A possible reason that Peru retains strict abortion laws is that 81 percent of the population of Peru is Catholic, though there may be other contributing factors as well. CIA WORLD FACTBOOK, PERU COUNTRY PROFILE, available at <http://www.cia.gov/cia/publications/factbook/geos/pe.html>. It is worth noting that abortion is not available for severe socioeconomic hardship in Peru as it is in 20 percent of the world’s countries. With 54 percent of Peru’s population living in severe poverty, it is likely that were this economic exception created, many more abortions would be obtained. Barbara J. Fraser, *How Peru Shelved its Registry of Conceived Persons*, PANOS FEATURES, Oct. 22, 2003 <http://www.panos.org.uk/newsfeatures/featuredetails.asp?id=1159>.

35. WOMEN OF THE WORLD, *supra* note 19, at 172; PERU PENAL CODE arts. 114–20.

36. *Id.*

factors that may ease some criminal responsibility, these exceptions are rarely invoked and not commonly understood.³⁷

The situation in Peru is just one example of the individualized regional policies that local governments have developed in order to address the ICPD family planning agenda.³⁸ However, against the backdrop of an international consensus on the need to address abortion with individualized regional education and legislation, the United States has imposed the Global Gag Rule.³⁹ The Gag Rule restrictions enforce a broad anti-abortion policy that effectively foists the moral and ethical values of the United States' conservative and religious right on international health advocates, and presses a pro-life agenda on any foreign NGOs receiving U.S. funding.⁴⁰

Ironically, though the United States does not agree with the ICPD consensus on the need to create regional abortion policies, it does agree with the ICPD assessment of maternal mortality rates and the dangers illegal abortions pose to women across the globe.⁴¹ The United States' duplicitous response to this danger has been to impose the Gag Rule while devoting over sixty million dollars to USAID projects aimed at reducing maternal mortality, and establishing a thirty-three country, multimillion dollar effort to address complications that arise from the same unsafe abortions.⁴²

U.S. reproductive rights organizations, as well as international agencies and family planning advocates, have documented the widespread and

37. BREAKING THE SILENCE, *supra* note 14, at 26.

38. Other regions have developed different strategies to address abortion. In 25 percent of all countries, abortion is permitted only to save a woman's life or is not permitted on any grounds. Conversely, in other countries that have legalized abortion, there are other restrictions such as the need for permission from a husband or parent, mandatory counseling, or limited authorized providers (the U.S. state laws would fall into this category). In addition, some countries that have legalized abortion have not advertised its availability. For example, in India where abortion has been legal for decades, many women still do not know that it is available. ALAN GUTTMACHER INSTITUTE, ISSUES IN BRIEF, ABORTION IN CONTEXT: UNITED STATES AND WORLDWIDE (1999) [hereinafter ABORTION IN CONTEXT].

39. CAIRO +5: ASSESSING US SUPPORT FOR REPRODUCTIVE HEALTH AT HOME AND ABROAD (1999).

40. See generally Mollmann, *supra* note 22.

41. See, e.g., USAID, PAC, *supra* note 12; Letter from Duff Gillespie, former Deputy Assistant Administrator of the Population, Health and Nutrition Center, *Mexico City and Postabortion Care*, Sept. 10, 2001, available at http://www.usaid.gov/our_work/global_health/pop/mcpolicy_memo.html.

42. USAID, PAC, *supra* note 12. Arguably, these abortion-related complications are being created by USAID itself by imposing Gag Rule restrictions on abortion provision, making a dangerous clandestine abortion more likely.

damaging effects of unsafe abortions on women's reproductive health.⁴³ However, since the Gag Rule's reinstatement, the number of unsafe abortions has increased.⁴⁴ Paradoxically, family planning organizations have found that a country's abortion rate does not closely correlate with whether abortion is legal or easily accessible.⁴⁵ "20 million of the 46 million abortions performed annually worldwide occur in countries with highly restrictive abortion laws."⁴⁶

While the legality of abortion does not seem to affect its prevalence, what does appear to be affected is the death rate of women undergoing abortions.⁴⁷ In developing countries where abortion is more likely to be illegal, there are 330 deaths per 100,000 abortions while in developed countries, where abortion is more likely to be legal, there are 0.2–1.2 deaths per 100,000 abortions.⁴⁸ It appears that the legalization of abortion does little to affect the prevalence of abortion in a country, while it drastically affects the numbers of women who die as a result.⁴⁹ The Gag Rule has failed to accomplish its goal to "reduce the incidence of abortion."⁵⁰ It also runs against the global trend towards liberalizing abortion rights, and most distressingly, further endangers the health of women all over the world by prohibiting any local advocacy to increase the legality of abortions, which limits women's access to safe abortions.⁵¹

B. A Brief History of the Global Gag Rule

Abortion rights and federal funding of abortion-related activities have long been contentious issues in American policy.⁵² The debate over abor-

43. See generally BREAKING THE SILENCE, *supra* note 14; Population Action International DVD: Population Action International, Access Denied: US Restrictions on International Family Planning.

44. Wildman, *supra* note 1, at 2. It does not appear that the Gag Rule is achieving its stated purpose to "reduce the incidence of abortion." Cohen, *supra* note 4, at 1.

45. Abortion levels are high in Latin American countries (such as Peru) where abortion is highly restricted, and in any given year, thirty-four abortions per one thousand women are performed in developing countries where abortion is generally more often illegal, while thirty-nine are performed in developed countries where it is more often legal. ABORTION IN CONTEXT, *supra* note 38, at 3.

46. *Id.*

47. "When abortion is largely illegal and must be performed clandestinely, it is often unsafe; in such situations, complication rates and maternal morbidity skyrocket." *Id.* at 4.

48. *Id.* at 5.

49. *Id.* at 3, 5.

50. Cohen, *supra* note 4, at 1.

51. *Id.*

52. Larry Nowels, Foreign Affairs, Defense, and Trade Division, Population Assistance and Family Planning Programs: Issues for Congress, at 3, available at http://www.dec.org/pdf_docs/PCAAB120.pdf.

tion funding has raged within Congress for decades.⁵³ For years these political efforts focused only on the domestic policy of the United States.⁵⁴ However, in 1973, the Helms Amendment was enacted to prohibit the use of federal funding for abortion services in the United States—it also applied to the Foreign Assistance Act of 1961, thus restricting the use of federal funding in foreign development assistance as well.⁵⁵

The extension of the Helms prohibition to foreign funding was a watershed moment in global-U.S. family planning activities and marked a novel attempt to affect policy worldwide. It was also perhaps a harbinger of things to come in the United States.⁵⁶ The United States became increasingly committed to influencing foreign policies with the use of foreign aid conditionalities and began to more fully “explore the direct use of humanitarian assistance to achieve specific political ends.”⁵⁷ Policies became more ambitious, and in 1984 during Reagan’s presidency, the Global Gag Rule was introduced by Executive Order.⁵⁸ The Gag Rule went even further than the Helms Amendment and prohibited family planning centers and health care advocates from using their own, non-U.S. money to discuss the impact of abortions, educate women on the

53. See generally FELDT, *supra* note 16, at 9 (2004) (providing a brief discussion of the Hyde Amendment which restricted Medicaid funding for abortion). In the first five years of the 1980s there were thirty roll-call votes related to the issue of abortion. In the last five years of the 1990s, there were 144.” *Id.* at 23 (quoting Senator Olympia Snowe).

54. *Id.*

55. Nowels, *supra* note 52, at 4; Republican Senator Jesse Helms authored the Helms Amendment. Senator Helms continued his campaign to restrict reproductive rights in the United States and abroad as chairman of the Senate Foreign Relations Committee. As Chairman, Senator Helms refused to hold hearings on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which is the only international human rights treaty that addresses family planning issues. Though CEDAW has been signed by over 150 countries worldwide, the United States remains the only industrialized country that has not ratified it. See generally WORKING GROUP ON THE RATIFICATION OF THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, HUMAN RIGHTS FOR ALL (2001), www.crlp.org/pub_fac_cedaw.html [hereinafter WORKING GROUP ON THE RATIFICATION OF CEDAW].

56. Encouraged by the success of the Helms Amendment, abortion proponents have proposed constitutional amendment or legislation to further prohibit abortion in every single Congress since 1973, though they have not succeeded in passing an absolute restriction on abortion. WORKING GROUP ON THE RATIFICATION OF CEDAW, *supra* note 55.

57. Humanitarian Policy Group, *Trends in US Humanitarian Policy*, HPG BRIEFING, Apr. 2002, at 1, available at <http://www.odi.org.uk/hpg/papers/hpgbrief3.pdf>.

58. Susan A. Cohen, *Abortion Politics and US Population Aid: Coping with a Complex New Law*, 26 INTERNATIONAL FAMILY PLANNING PERSPECTIVES 137, 137 (2000), available at <http://www.agi-usa.org/pubs/journals/2613700.pdf>.

availability of abortions, or advocate to their own governments for changes in restrictive abortion laws.⁵⁹

The Gag Rule remained in effect until 1993, when President Clinton revoked the order within two days of being sworn into office.⁶⁰ However, this respite was short lived; beginning in 1995, the Republican-controlled Congress pledged to make reinstatement of the Gag Rule a priority and pushed to enact it legislatively every year following its suspension.⁶¹ Congress was finally able to reinstate the Gag Rule in 1999 by holding up a congressional bill that provided over one billion dollars in back dues to the UN in exchange for reenactment of the regulations.⁶² Threatened with the loss of the United States' General Assembly vote in 2000,⁶³ President Clinton accepted reinstatement of the Gag Rule for one year.⁶⁴ However, in an attempt to limit its effect, President Clinton instructed USAID, the main implementing agency of the Gag Rule, to interpret its requirements in the least invasive manner.⁶⁵ When foreign NGOs were informed of the new U.S. policy, a vast majority of recipient organizations agreed to certify an agreement not to participate in abortion-related activities or advocacy in exchange for continued U.S. funding, but many clearly expressed that they were doing so "neither willingly nor easily."⁶⁶

Clinton's liberal interpretation of the Gag Rule was abandoned by President Bush,⁶⁷ who reenacted the Gag Rule in its strictest sense on his first business day in office.⁶⁸ Ironically, this day was also the twenty-eighth anniversary of *Roe v. Wade*, the United States Supreme Court de-

59. Wildman, *supra* note 1, at 1.

60. Cohen, *supra* note 58, at 137.

61. *Id.* at 137-38.

62. *Id.* at 137.

63. *Id.* at 137.

64. *Id.* at 145. However, as a result of this contentious passage, the Gag Rule was written to address the concerns of both sides of the abortion debate and represents a confusing maze of regulations and funding restrictions. This has created significant problems for foreign NGOs in their attempt to follow the confusing strictures of the rule; this vagueness has contributed in part to the silencing of NGO advocacy discussed later in this Note.

65. Nowels, *supra* note 52, at 5.

66. Cohen, *supra* note 58, at 138.

67. FELDT, *supra* note 16, at 203 (quoting Duff Gillespie, former Deputy Assistant Administrator of USAID, as stating, "Under the original Mexico City Policy, once the policy was made by the president, the political people explicitly gave it to the career people to implement in ways that would not harm the underlying programs. 'Let's continue to do the program,' we were told. While damage was done, it was minimized as much as possible. The big difference with the Bush Jr. gag rule is that it's much broader, it has a bigger agenda with zealots, if not fanatics, pushing it in a very aggressive way.").

68. THE BUSH GLOBAL GAG RULE, *supra* note 6.

cision upholding the right to an abortion in the United States.⁶⁹ In reinstating the Gag Rule, Bush announced that it was his “conviction that taxpayer funds appropriated should not be given to foreign nongovernmental organizations that perform abortions or actively promote abortion as a method of family planning in other nations.”⁷⁰ According to a White House spokesman, the reinstatement and renewed commitment to limiting foreign funding to promote U.S. political ideals signified a new approach to global family planning policy.⁷¹ Since President Bush’s Executive Order, there have been subsequent failed attempts in Congress to overturn the Global Gag Rule.⁷² With the gain in power of the conservative agenda throughout President Bush’s two terms, it is unlikely this deadlock will be changed in the near future,⁷³ and the aggressively pro-life agenda is likely to continue.⁷⁴

69. *Id.*

70. Presidential Memorandum, *supra* note 4.

71. Richard Boucher, White House Daily Briefing, Jan. 23, 2001, <http://www.state.gov/r/pa/prs/index.cfm?docid=12>.

72. Population Connection, *Senate Holds Hearing on Global Gag Rule*, LEGISLATIVE UPDATE: JULY 2001, at 1 available at http://www.populationconnection.org/Action_Alerts/alert200.html. In October 2001, the Senate approved language for an addition to the Foreign Operations Appropriations Act (H.R.2506). Press Release, Center for Reproductive Rights, *Senate Rejects Global Gag Rule* (Oct. 25, 2001), available at http://www.crlp.org/pr_01_1025gagrule.html. The added legislation, coined the “Global Democracy Promotion Act,” was designed to counteract the restrictions of the Global Gag Rule and found bi-partisan approval in a 96-2 vote. *Id.* Succumbing to a threat of a presidential veto, similar language had been struck down months earlier by the House in a 218-210 vote that stripped the pro-democracy amendment from the Foreign Relations Authorization Act (H.R.1646). Press Release, Center for Reproductive Rights, *House Retains Bush Global Gag Rule* (May 16, 2001), available at http://www.crlp.org/pr_01_0516ggrvote.html. More recent efforts have met the same end. In July 2003, the Senate again voted against the Gag Rule, recognizing its damaging effect on pro-democracy efforts across the world because of its restrictions on free speech. Statement by Nancy Northup, President of Center for Reproductive Rights (July 10, 2003), available at http://www.crlp.org/pr_03_0710ggr.html.

73. The 2003 vote in the Senate to repeal the Rule was close, and under pressure from the White House and the near certainty of a presidential veto, the House is unlikely to make another attempt to repeal the Rule. FELDT, *supra* note 16, at 213.

74. See, e.g., Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything to Lose*, HARPER’S, Nov. 2004, at 33–46 (providing a detailed examination of conservative pro-life efforts to push increasingly restrictive abortion legislation with particular attention to currently challenged legislation, the “Partial Birth Abortion Ban”).

C. Text and Interpretation of the Global Gag Rule

The Gag Rule has gone through numerous revisions and reinstatements and has been the subject of much controversy both nationally and globally.⁷⁵ However, throughout its incarnations, the actual regulations have remained relatively consistent. Some of the most relevant text of the Global Gag Rule reads:

Section 13(I):

Abortion is a method of family planning when it is for the purpose of spacing births. This includes but is not limited to, abortions performed for the physical or mental health of the mother.

Section 13(iii):

To actively promote abortion means for an organization to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.

A) This includes but is not limited to, the following:

III) lobbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning; and

IV) conducting a public information campaign in USAID recipient countries regarding the benefits and/ or availability of abortion.⁷⁶

Efforts to “alter” the abortion policies of a foreign government, an activity prohibited by the Gag Rule, have consistently included communicating with national leaders and government officials.⁷⁷ Banned methods

75. See, e.g., Statement by Susana Galdos Silva, available at http://www.crlp.org/pr_01_0214ggrsilva.html (condemning the restrictions on advocacy and free speech and arguing that Peru has a right to determine its own answer to the public health problem of illegal abortions). In addition, European parliamentarians from the Netherlands, Denmark, Russia, and the United Kingdom held a congressional briefing on the dangers posed by the Bush administration’s reinstatement of the Global Gag Rule. REPRODUCTIVE FREEDOM NEWS, vol. XI, July/Aug. 2002, available at http://www.crlp.org/rfn_02_07.html#bw1; see also a letter to the Bush Administration from thirty-six organizations, urging him to repeal the Gag Rule’s restrictions on free speech. Organizations that signed the letter include Catholics for a Free Choice, Alan Guttmacher Institute, Planned Parenthood Federation, Advocates for Youth, and the ACLU. The full text of the letter and list of organizations is available at http://www.crlp.org/pr_01_1105ggr.html.

76. MEXICO CITY POLICY AND US INTERNATIONAL FAMILY PLANNING ASSISTANCE, DEMOCRATIC OFFICE FOREIGN POLICY BRIEFS (Jan. 2001), available at http://www.house.gov/international_relations/democratic/fpb_mexico?city.html.

77. Cohen, *supra* note 58, at 138.

of advocacy also include public education campaigns and organizing mass media or demonstrations to achieve increased reproductive freedom.⁷⁸ Similarly, outlawed activities related to the “promotion of abortion” include providing information to pregnant women that abortion is available as an option, even if abortion is legal in that country.⁷⁹ Illegal “promotion” also includes conducting a public information campaign in a USAID recipient country on the benefits or availability of abortion.⁸⁰ The Gag Rule also precludes NGOs from accessing key political forums such as parliaments and executive branch officials.⁸¹

As a result of these aid conditionalities, Peruvian NGOs have been gagged from speaking out about the dangers of clandestine abortion as well as addressing the overall effect of the Gag Rule itself. Susana Galdos Silva, a member of the Manuelas, a Peruvian women’s NGO, spoke to the U.S. Congress in 2001 about the impact of the Global Gag Rule on democracy and health in Peru with special permission from the U.S. Congress: “Yesterday your government gave assurances in court that I could speak freely about abortion. And because a judge has affirmed this understanding, I feel comfortable speaking out. When I return to my country tomorrow, I will again be silenced.”⁸² Galdos Silva was able to speak in the United States about the dangers of the Gag Rule, and the continued damage to women’s health created by Peru’s restrictive abor-

78. *Id.* The frustrating effect of the Global Gag Rule is that not only is direct advocacy prohibited, but many organizations are reluctant to even reveal when they have been prevented from speaking out because of the Gag Rule. Though the Gag Rule does not explicitly ban speech that reports on the silencing effect of the Gag Rule itself, many organizations have taken the ban to cover this sort of speech as well. Therefore, research and interviews with gagged NGOs are anonymous and specific examples of organizations being prevented from speaking out because of the Gag Rule are rare. In an interview I had with Marianne Mollman, a researcher and staff member at Human Rights Watch, she explained that statements about the Global Gag Rule’s effect on NGOs in South America were provided on an anonymous basis, and examples of gagged speech were purely anecdotal. *But see* Silva, *supra* note 9 (noting her inability to speak in her own country and lobby her own legislature though she could speak to the U.S. Congress through a special appeal for permission).

79. Nowels, *supra* note 52, at 7.

80. *Id.*

81. BREAKING THE SILENCE, *supra* note 14, at 15.

82. Silva, *supra* note 9. Silva has spoken to U.S. lawmakers frequently about the Gag Rule. She has met with USAID and State Department officials, congressional hearings, and press conferences but was gagged from discussing abortion even when U.S. officials asked her direct questions about the policy. After obtaining special permission from a court for the July hearings, Silva noted, “the Gag Rule has taken away my freedom to speak about an important issue in my country A freedom that I had to ask a judge to give me back, temporarily, so that I could speak to you today.” *Id.*

tion policy, though she could not lobby Peruvian lawmakers. By gagging all information and advocacy on abortion geared towards liberalizing abortion laws, the Global Gag Rule effectively “prevents [foreign NGOs] from addressing the causes of unsafe abortion by putting it on the political and social agenda.”⁸³

However, notwithstanding the Gag Rule’s fairly explicit language outlawing recipient NGOs from conducting abortion related advocacy, translating the statutory language to apply to actual service delivery⁸⁴ and advocacy is less clear.⁸⁵ This unclear application of the Gag Rule to reproductive choice activism and the unilateral ability of USAID to declare an activity restricted has resulted in continuous skirmishes between international health NGOs and anti-abortion groups.⁸⁶

83. BREAKING THE SILENCE, *supra* note 14, at 15. The levels of funding that an organization relinquishes as a result of refusing to accept the Gag Rule’s provisions cannot be underestimated. International Planned Parenthood Federation (IPPF), a major reproductive rights organization that collaborates with NGOs worldwide to increase access to reproductive health services, lost twelve million dollars in expected USAID funding because it refused to accept the conditions of the reinstated Gag Rule. See IPPF website, <http://www.heldtoransom.org/impact.asp> for the effect of the Gag Rule on IPPF. For additional information on family planning clinic closures, decreased overall access to family planning, and effects on other organizations, see FELDT, *supra* note 16, at 205–13.

84. For example, shortly after the Mexico City Policy was restored by President Bush, a letter was circulated by USAID reminding field officers that the administration continued to support post-abortion care activities, and that organizations that supported these activities were not to be sanctioned. It is not clear if this letter was translated or forwarded to participating organizations, but it seems possible that if clarification was needed for USAID officers themselves, then local foreign NGOs may have been confused about the legality of this service under the Gag Rule as well. See Letter from Duff Gillespie, Deputy Assistant Administrator, Population, Health and Nutrition Center, to Colleagues (Sept. 10, 2001), *available at* http://www.usaid.gov/our_work/global_health/pop/mcpolicy_memo.html.

85. See generally BREAKING THE SILENCE, *supra* note 14 (providing first hand accounts from regional NGOs on the difficulty of applying and understanding the Global Gag Rule). Not only do the Gag Rule restrictions prevent individual NGOs from participating in advocacy, but they may create an overall climate that discourages any type of family planning related activity in USAID recipient countries.

86. For example, according to Delicia Ferrando of Pathfinder International, a family-planning NGO working in Peru and other countries, signs pointing to family-planning departments were removed from public health centers in the capital, Lima. Fraser, *supra* note 34. See also Press Release, CHANGE, Charges Against USAID-Peru Are Completely False Asserts Center for Health and Gender Equity (Feb. 19, 2003), *available at* <http://www.genderhealth.org/pubs/PR20030219a.pdf>. See also Letter to Natsios, USAID Administrator, *available at* <http://www.genederhealth.org/pubs/NatsiosUSAIDPeruLetter021804.pdf>.

This constant conflict has made some NGOs skittish about being perceived as violating the Gag Rule and losing badly needed funding.⁸⁷ Some international family planning organizations have spoken publicly about the perceived harassment of pro-choice NGOs. For example, in response to false allegations that Peruvian officials had violated the Gag Rule, the Center for Health and Gender Equity stated:

Previous campaigns by these same actors have led to numerous audits and investigations of USAID-Peru, none of which has found any evidence of violations of U.S. policy. Clearly this is not about abortion. Instead, the constant harassment of USAID-Peru constitutes an attack on the basic human rights of women and men to make informed and voluntary choices regarding their reproduction and childbirth. It is time to stop this harassment and support the funding and programs needed to improve the lives of women and their families.⁸⁸

Similar allegations that the Gag Rule had been violated by various NGOs were made during an October 2003 regional health conference in Peru.⁸⁹ The event was hosted by the Peruvian Ministry of Health and leading Peruvian NGOs to address the dangers of clandestine abortions and discuss the country's population policy in general.⁹⁰ Conference presentations that were alleged to violate the Gag Rule and included in complaints to USAID were "information on rates of unwanted pregnancy, unsafe abortion, and maternal mortality in Peru."⁹¹ These presentations also focused on building the capacity of local health providers to address critical issues such as adolescent pregnancy, contraceptive delivery, quality of care, prevention of sexually transmitted infections, and maternal and child health.⁹² Though the allegation of a Gag Rule violation was immediately debunked by various international organizations,⁹³

87. NGOs in Peru have reported, "No one knows at what point it becomes prohibited speech. . . . if we attend a general conference and the issue of abortion comes up we can speak. But we don't know how much we can talk about it before it crosses over into not being permitted anymore. We for example, can do research on unsafe abortion. But if we draw conclusions, someone can say 'that's lobbying.'" *BREAKING THE SILENCE*, *supra* note 14, at 11.

88. *CHANGE*, *supra* note 86.

89. *Id.*

90. *Charges Against USAID-Peru are Completely False Asserts Center for Health and Gender Equity*, US NEWSWIRE, Feb. 19, 2004, at 3.

91. *CHANGE*, *supra* note 86.

92. *Id.*

93. *Id.* Additional controversy has developed in Peru in response to recent attempts by the Peruvian Ministry of Health to allow the "morning after pill" in the country. This pill is a form of emergency contraception that may be taken immediately after unprotected sex and will prevent pregnancy. The pill is available in many countries from

it sparked significant debate in Peru about compliance by Peru's NGOs and the possibility of other regional violations.⁹⁴ Because of continued harassment, and because USAID has the sole ability to decide whether an NGO violated the Gag Rule stipulations, many organizations have erred on the side of caution and avoided any activity that could be construed as lobbying or activism.⁹⁵

Agency fear of lost funding as a result of a perceived violation of Gag Rule stipulations is not unfounded.⁹⁶ The Bush administration refused to continue longstanding funding to the United Nations Population Fund (UNFPA), an internationally funded source of family planning assistance funds for developing countries, because of allegations of Gag Rule violations.⁹⁷ Anti-choice groups claimed that UNFPA was involved in promoting coercive abortions and sterilizations in China, and as a result of heavy pressure from anti-choice groups, the U.S. State Department refused to distribute thirty-four million dollars appropriated by Congress

USAID for women seeking to prevent pregnancy. However, many anti-abortion groups see it as a non-surgical abortion. The pill is not outlawed by the Global Gag Rule and is being promoted by USAID and the World Health Organization, an international agency which receives USAID gagged funding. Despite the legality of the pill under USAID restrictions, 6000 Peruvians marched on Lima, demanding that President Alejandro Toledo overrule ongoing research on the pills' effect and halt efforts to distribute the pill women in Peru. Lifesite, *Peru's Health Minister is Pushing Forward with Morning After Pill*, Oct. 12, 2004, available at <http://www.lifesite.net/ldn/2004/oct/04101204.htm>.

94. For the USAID response to the allegations, see head of USAID, Andrew Natsios' letter to the international community, available at www.genderhealth.org/NatsiosUSAIDPeruLetter021804.pdf.

95. BREAKING THE SILENCE, *supra* note 14, at 10; Memorandum for all Contracting Officers and Negotiators, Restoration of the Mexico City Policy—White House Memorandum for the Acting Administrator of the US Agency for International Development (Revised), 66 Fed. Reg. 17, 303 (Mar. 29, 2001).

96. Though the Gag Rule is intended to restrict abortion related activity, the loss of funding for many agencies also results in a decrease in other available programs not covered by the Gag Rule, such as HIV/AIDS funding. For example, in Cambodia over three million dollars were lost that would have been used for HIV/AIDS funding and in Bangladesh fourteen individual family planning clinics were threatened with closure for lack of funding, ostensibly leaving the women in that region with less access to any kind of reproductive health services. See ACT UP, *How Bush's Policy Punishes Women Worldwide*, Aug. 5, 2004, http://www.actupny.org/reports/Bangkok/bush_gagrule.html; Marwaan Macan-Markar, *U.S. Bullying Tactics Come Under Fire at Meet*, Oct. 7, 2003, available at <http://www.commondreams.org/headlines03/1007-03.htm>.

97. Kaci Bishop, *supra* note 17, at 533–40; see also Susan A. Cohen, *Bush Bars UNFPA Funding, Bucking Recommendation of its Own Investigators*, GUTTMACHER REPORT, Oct. 2002, available at <http://www.guttmacher.org/pubs/tgr/05/4/gr050413.html>.

for UNFPA.⁹⁸ Despite later findings of the United States' own investigators that there was no evidence of illegal coercive abortion, the administration continued to refuse to release the funds.⁹⁹

III. DEMOCRATIC PARTICIPATION AND THE GLOBAL GAG RULE

Not only does the Global Gag Rule conflict with the international consensus established at the ICPD to allow states to determine their own abortion policies, it also conflicts with other major objectives of U.S. foreign policy.¹⁰⁰ USAID, the U.S. agency that distributes family planning funding to foreign NGOs, has many objectives in its involvement with foreign governments.¹⁰¹ While the Global Gag Rule restrictions operate within the USAID family planning program, USAID also maintains an extensive democracy promotion effort and pours money into developing democracies across the globe in order to facilitate and encourage their transition into democratic governance and foster civil participation.¹⁰² Over 70 percent of all USAID field missions worldwide have identified strategic objectives related to democracy and governance, making this one of the agency's major missions.¹⁰³

98. CENTER FOR REPRODUCTIVE RIGHTS, THE ANTI CHOICE MEASURES OF THE BUSH ADMINISTRATION, http://www.reproductiverights.org/hill_pri_bushadmin.html; see also Robert B. Bluey, *UNFPA Supports "Coercive Abortion" in China, New Evidence Suggests*, CNSNews.com, Mar. 7, 2003, <http://www.cnsnews.com/ViewCulture.asp?Page=%5CCulture%5Carchive%5C200303%5CCUL20030307a.html> (discussing pro-life allegations of coerced abortions).

99. See Cohen, *supra* note 97; see also BREAKING THE SILENCE, *supra* note 14, at 24; FELDT, *supra* note 16.

100. THE BUSH GLOBAL GAG RULE, *supra* note 6 (noting that the Global Gag Rule erects barriers to the development of the democratic processes, the promotion of civil society, and the enhancement of women's equality and participation in the political process. "Thus the Gag Rule severely undermines bedrock U.S. foreign policy objectives"). See also Mollmann, *supra* note 22.

101. The USAID homepage asserts that the agency supports long term and equitable economic growth and furthers U.S. foreign policy objectives by supporting economic growth, global health, agriculture, democracy, and humanitarian assistance. The agency conducts multiple programs across the world to accomplish these objectives. See the USAID website, http://www.usaid.gov/about_usaid/, for overall information on the agency and its missions and goals.

102. "Since its inception in 1965, USAID's population assistance program has been involved in all major innovations in international family planning, and is recognized for its leadership in the field. USAID support for family planning programs have helped developing countries provide family planning." USAID website, http://www.usaid.gov/our_work/global_health/pop/mcpolicy.html.

103. US AGENCY FOR INTERNATIONAL DEVELOPMENT, CENTER FOR DEMOCRACY AND GOVERNANCE, DEMOCRACY AND GOVERNANCE: A CONCEPTUAL FRAMEWORK 5 (1998)

A. Conflicting Objectives Within USAID Missions

The USAID Center for Democracy and Governance has identified five elements essential for civil society development and promotion of democracy,¹⁰⁴ including increased civil participation in the policy process, legal frameworks to protect and promote civil society, enhanced free flow of information, a strengthened democratic political culture, and increased institutional and financial viability of civil society organizations.¹⁰⁵ USAID has focused on these elements in its democracy promotion campaigns across the world, including its campaign in Peru.¹⁰⁶ It is difficult to reconcile this USAID objective to promote democracy with the chilling effect of Gag Rule restrictions.¹⁰⁷ Peru serves as a particularly illustrative example of these conflicting obligations. It receives one of the largest amounts of USAID funding for reproductive health and family planning programs of any developing nation, as well as major grants to facilitate its transition into democracy.¹⁰⁸

In the 1980s, Peru was plagued by civil violence and under increasingly totalitarian control by President Fujimori.¹⁰⁹ The regime was widely known for extensive human rights abuses and restrictions on speech and political expression across the country.¹¹⁰ Fujimori finally resigned in 2000 in a blaze of controversy.¹¹¹ Peru has been governed by democratically elected leadership, and reports from the international community are that “[d]espite gains in civil and political rights like freedom of expression, the justice system has not yet recovered from years of

[hereinafter CONCEPTUAL FRAMEWORK], available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacd395.pdf.

104. *Id.* at 16.

105. *Id.*

106. USAID/PERU, ANNUAL REPORT FY 2004, at 3–4 (June 15, 2004), available at <http://www.dec.org>. See also USAID Program Profile for Peru, http://www.usaid.gov/locations/latin_america_caribbean/country/program_profiles/peruprofile.html, which reports that USAID’s strategy concentrates on promoting the expansion of sustainable opportunities for improved quality of life for Peruvians through their democratic institutions and processes, and lists democracy, poverty reduction, health, and girls’ education among its goals for the region.

107. See Cohen, *supra* note 58, at 139.

108. Mann, *supra* note 7.

109. North-South Center Update, *Peru After Fujimori’s Resignation: Corruption, Transition, and Democracy*, <http://www.miami.edu/publications/newsupdates/Update41.html>.

110. HUMAN RIGHTS WATCH, PERU OVERVIEW, <http://hrw.org/english/docs/2004/01/21/peru6988.htm>.

111. Videos were released and aired revealing top officials in the Fujimori regime bribing public figures and committing other criminal acts. North-South Center Update, *supra* note 109.

corruption, and remains slow and inefficient.”¹¹² Even with new leadership, Peru has continued to struggle to realize full democratic participation, and civil dissatisfaction has continued.¹¹³

In order to provide support for the region’s democratic transition, USAID gave 7.6 million dollars to the Office of Transitional Initiatives to assist Peru in this political transformation.¹¹⁴ Additionally, USAID identified two major objectives for the region: advance national level policy reforms, and support health, education, and governance activities.¹¹⁵ A USAID report on the agency’s programs in the region emphasized efforts to facilitate inclusion of all Peruvians in the country’s political, social, and economic institutions and processes.¹¹⁶ However, it appears that USAID may be working against itself by implementing Gag Rule restrictions that bar particular politically charged speech and organizations from democratic participation, while maintaining an overall agency objective to involve an increased number of citizens in civil participation and promote democracy.

In order to achieve its strategic objective in Peru and assist in its development as an emerging democracy, USAID works directly with local “civil society organizations”¹¹⁷ rather than using an umbrella organization; this approach allows the agency to be more integrated with local organizations and allows Peruvians to have more involvement in their transition to democracy.¹¹⁸ Ironically, these are the same organizations that Peru has decided to utilize in its efforts to decentralize health care

112. HUMAN RIGHTS WATCH, *supra* note 110.

113. *Id.*

114. US AGENCY FOR INTERNATIONAL DEVELOPMENT, OFFICE OF TRANSITION INITIATIVES, ADVANCING PEACE AND DEMOCRACY IN PRIORITY CONFLICT PRIME COUNTRIES, 2001–2002 REPORT 36–37; *see also* USAID/ PERU ANNUAL REPORT, *supra* note 106, at 2 (“Popular dissatisfaction with political leadership feeds both legitimate opposition that would undermine the GOP’s [government of Peru] and the USG’s [U.S. government] efforts to pursue free market policies, as well as opposition that would seek to mobilize violent protests to destabilize/ topple the government . . . USG assistance can play a decisive role in ensuring that Peru emerges as economic, political, and social model for its neighbors . . .”).

115. *Id.*

116. *Id.*

117. “Civil society organizations are defined as any non-government organizations that are organized around a common interest of its members and that may have cause to interact with government institutions.” USAID/PERU, STRATEGIC OBJECTIVE CLOSEOUT REPORT, PD-ABX-044, at 6 (June 28, 2002), <http://www.dec.org>.

118. *Id.* at 4; *see also* US AGENCY FOR INTERNATIONAL DEVELOPMENT, CENTER FOR DEMOCRACY AND GOVERNANCE, CONDUCTING A DG ASSESSMENT: A FRAMEWORK FOR STRATEGY DEVELOPMENT 49 (Nov. 2000) [hereinafter CONDUCTING A DG ASSESSMENT].

services.¹¹⁹ As a consequence, the same agencies earmarked by USAID as cooperating agencies in the promotion of democracy are working under restrictive rules that specifically prohibit them from advocating or pushing for abortion liberalization, an issue that contributes to one of the biggest health issues in Peru.¹²⁰

In promoting cooperation with established Peruvian NGOs, USAID noted that civil society organizations founded on civil participation are often “the only viable opening for restructuring power and formulating a democratic social contract.”¹²¹ “Increasing civil participation in the policy formulation process is a key role for civil society.”¹²² These organizations also represent a more diverse citizen voice and are more likely to include the most impoverished and politically disadvantaged individuals of the population.¹²³ This diverse composition of NGOs makes them an indispensable voice in the political debate, especially in efforts to protect human rights or push for government reform.¹²⁴ Andrew Natsios, the di-

119. The Peruvian government has determined that the most effective way to promote informed reproductive choice is to decentralize family planning services and utilize established NGOs as access points to their population programs. WOMEN OF THE WORLD, *supra* note 19, at 170. It appears that both U.S. conservatives, as well as Peruvian family planning officials, have recognized NGOs as the primary access points for many women in the region to family planning services; sadly, in light of the Global Gag Rule’s specific restrictions on NGO advocacy, it seems that Peru could not have picked a more detrimental way to provide access to family planning information. Mann, *supra* note 7.

120. See, e.g., USAID/ PERU, CLOSEOUT REPORT, *supra* note 117, at 17 (reporting on the situation that the Manuelas faced when they received twenty-five million dollars of gagged USAID funding for their family planning program, *Reprosalud*, while also receiving close to two million dollars to “promote women’s political participation”).

121. CONCEPTUAL FRAMEWORK, *supra* note 103, at 16. USAID documents note that “the hallmark of a democratic society is the freedom of individuals to associate with like-minded individuals, express their views publicly, and petition their government.” *Id.* at 15. USAID has identified civil society organizations as an essential component of this freedom of association. These organizations include human rights groups, activist organizations, and media organizations and “play a vital role in educating the public and the government on important local and national issues.” *Id.*; see also US AGENCY FOR INTERNATIONAL DEVELOPMENT, CENTER FOR DEMOCRACY AND GOVERNANCE, HANDBOOK OF DEMOCRACY AND GOVERNANCE PROGRAM INDICATORS 117 (Aug. 1998), available at http://www.usaid.gov/our_work/democracy_and_governance/publications/dgtpindx.html#pnacc390 (follow link to list of Technical publications and select Handbook) [hereinafter USAID HANDBOOK].

122. CONCEPTUAL FRAMEWORK, *supra* note 103, at 16.

123. IPAS, *Governments and Donors Partner with NGOs*, INITIATIVES IN REPRODUCTIVE HEALTH POLICY, Jan. 1996, at 7. See also USAID HANDBOOK, *supra* note 121, at 117. This ability to represent and empower diverse viewpoints and minority interests may be even more essential in a country like Peru that has a recent history of extreme human rights abuses against minorities. HUMAN RIGHTS WATCH, *supra* note 110.

124. See CONCEPTUAL FRAMEWORK, *supra* note 103, at 3.

rector of USAID, has also noted the overwhelming importance of NGO involvement in any USAID project and focused on the critical role NGOs play in the shaping of policy and human rights, stating that NGOs “provide a unique knowledge of true conditions” in the places in which they are located.¹²⁵

However, in the ongoing fight for reform of Peru’s abortion policy and family planning activities, this working knowledge and diverse representation is wasted because of Gag Rule restrictions on political advocacy. Family planning NGOs who represent these disparate interests have important, unique insight into the perils and effects of unsafe abortion in Peru, but because of Gag Rule restrictions on speech and advocacy, they are silenced.

B. Free Speech is Essential to Political Advocacy and Democracy

NGOs were recognized by USAID as essential actors in democracy promotion, however much of an NGO’s ability to foster democratic participation hinges on its ability to speak openly and advocate to local and national government actors.¹²⁶ The importance of this freedom to disseminate information was also noted by Natsios, who insists that the most significant way that NGOs affect foreign policy is by facilitating the free flow of information and by speaking out on behalf of the population they represent.¹²⁷ This sentiment is echoed by reproductive rights advocates.¹²⁸ “Development of human rights throughout the world is dependent on the efforts of NGOs to gather, process, and disseminate information with their domestic constituencies as well as with world organizations like the UN and nation state governments.”¹²⁹ A routine part of USAID’s analysis of the success of local NGOs in the political process is an examination of the percentage of the populace that is aware of the NGO’s chosen issue or advocacy goal.¹³⁰ USAID has determined that

125. Brief for International Law Scholars as Amici Curiae Supporting Petitioner at 3, *Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183 (2001) (No. 01-6168).

126. *See id.* at 19–27 (discussing the importance of freedom of speech and association between NGOs).

127. ANDREW NATSIOS, *FAITH BASED NGOS AND US FOREIGN POLICY, THE INFLUENCE OF FAITH: RELIGIOUS GROUPS AND US FOREIGN POLICY* (2001).

128. Brief for the Petitioner, *supra* note 125, at 3, 19.

129. *Id.*

130. USAID HANDBOOK, *supra* note 121, at 127. USAID also tracks the numbers of community based organizations that exist and are conducting this information sharing and advocacy. A change in the numbers of these agencies is seen as a “victory” or “defeat” in USAID’s mission to develop a politically active society. However, many CSOs operate on a broad scale to address HIV, domestic violence, and economic equality as well as reproductive health. Arguably, USAID may be sabotaging its own democracy

this is a relevant measure of NGO success because “knowledge is a prerequisite to support and informed support is more useful than uninformed support . . . getting an issue on the public screen is an important contribution.”¹³¹

Although there is a general push within USAID to promote democracy and develop civil society networks within Peru, the stated policy of the U.S. government demands that advocacy for particular political reforms or legislation must be brought by the people of the region rather than by U.S. actors.¹³² Because women are often at the forefront of democratizing movements, much of USAID’s activity in foreign political reforms has been driven by local women’s advocacy groups.¹³³ This is certainly the case in Peru.¹³⁴ “The inclusion of women’s rights in a new constitution . . . and the establishment of links by women’s advocacy organizations, both with elected officials and with the population at large” was noted as encouraging evidence of increasing democratic participation.¹³⁵

This political involvement of women’s organizations is reflected by the tremendous policy success of feminist NGOs in UN conferences and global summits where major advances were made in the international law protecting human rights and women’s rights.¹³⁶ In response to this success, the number of foreign NGOs focusing on women’s rights has risen exponentially in the last few decades, and in the last forty years, the

promotion efforts, and facilitating “defeat” by cutting all funding to these agencies because of Gag Rule stipulations. *See, e.g.,* FELDT, *supra* note 16, at 209 (discussing the funding cuts in Zambia that resulted in total closure of clinics, resulting in a net loss of advocacy organizations). Entire sites are forced to close because of violations in one program, affecting the overall numbers of agencies available to advocate and participate in democracy efforts.

131. USAID HANDBOOK, *supra* note 121, at 127, 129.

132. “Our efforts must be demand driven—they must focus on nations whose people are pushing for reforms or have already secured it.” White House, *A National Security Strategy of Engagement and Enlargement*, 1996, cited by CONCEPTUAL FRAMEWORK, *supra* note 103, at 1.

133. USAID documents note that “women have been at the forefront of democratization movements in many countries.” CONCEPTUAL FRAMEWORK, *supra* note 103, at 4.

134. The Manuelas are a major recipient of USAID funding for democracy in Peru. USAID/ PERU, CLOSEOUT REPORT, *supra* note 121, at 17.

135. CONCEPTUAL FRAMEWORK, *supra* note 103, at 4.

136. Bonnie L. Shepard, *NGO Advocacy Networks in Latin America: Lessons from Experience in Promoting Women’s and Reproductive Rights*, NORTH SOUTH AGENDA, PAPERS, no. 61, Feb. 2003, at 5. This reliance on NGO efforts in women’s rights advocacy stems from a number of causes, including a better record of working within the community, proven responsiveness to local needs, and experience mobilizing and organizing exploited groups and poor women. BETSY HARTMAN, *REPRODUCTIVE RIGHTS AND WRONGS* 139–40 (1995).

number of agencies directly involved with women's rights has grown to six times its previous number.¹³⁷ In some arenas, the participation of NGO agencies rivals that of government agents.¹³⁸

It would appear then, that although there is local "demand driven" advocacy for overall increases in women's rights in countries receiving USAID, it has been a challenge for these organizations to translate their policy achievements in international conferences into improved policies and programs in their home countries.¹³⁹ While there is demand and support for women's advancement and involvement in civil society, actual change is slow in coming.¹⁴⁰

Through this analysis, it is clear that there is a consensus from within USAID, as well as among NGOs and government agencies, that NGOs are imperative to the development of civil society and major players in the political activity of emerging democracies.¹⁴¹ NGOs draw on their ability to reach a diverse group of citizens, and their inclusion of marginalized segments of society represents an essential voice in any national policy debate.¹⁴² It is also clear that one of the essential goals of any NGO, and a measurement of success used by USAID itself, is the ability of NGOs to disseminate information to an informed populace.¹⁴³ However, because of the Global Gag Rule, these agencies are denied democratic political participation, and it is this free flow of information that is

137. See MARGARET E. KECK & KATHERYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 11 (1998).

138. In 1995, at the UN Fourth World Conference on Women in Beijing, 4035 NGO representatives attended, while there were 4995 government delegates. IPAS, *Governments and Donors Partner with NGOs*, 1 INITIATIVES IN REPRODUCTIVE HEALTH POLICY 1, 1 (Jan. 1996), available at http://www.ipas.org/publications/en/initiatives_in_reproductive_health_policy/volume1_number1.pdf.

139. Shepard, *supra* note 136, at 6.

140. *Id.*

141. See generally KECK & SIKKINK, *supra* note 137 (discussing the roles of NGO networks in facilitating change in a variety of social causes, including the environment, women's rights, and human rights). See also Shepard, *supra* note 136, for a more specific discussion on the roles of NGOs in Latin America and the advocacy efforts of women's organizations to increase access to reproductive rights in the region.

142. Indicators for achieving USAID Agency Objective 2.3 (Increased Development of Politically Active Civil Society) are the numbers of groups representing marginalized constituencies as well as the percentage of mainstream agency leadership positions held by marginalized groups. USAID HANDBOOK, *supra* note 121, at 132.

143. Latin American NGOs have specifically identified three main strategies to advocate, including direct communication with decision makers, public educators, and the media, and constituency and alliance building with other agencies and public-private partnerships. With the Gag Rule in place, these fundamental avenues of advocacy are blocked because the free speech abilities of NGOs are blocked. Shepard, *supra* note 136, at 9.

specifically prevented by the Rule's restriction on advocacy. Moreover, the agency providing the gagged U.S. funding and enforcing the Rule's prohibitions is also promoting the democratic involvement and political advocacy of these gagged NGOs.¹⁴⁴

This contradiction between USAID's democracy goals and the Gag Rule limitations on speech is not missed by NGOs working in reproductive rights. "It is hard to see how the stifling of free debate . . . is helpful for the ideals of democracy and freedom that the U.S. government purports to support through its development work."¹⁴⁵ This conflict of goals is clear and presents a difficult situation for foreign NGOs who receive gagged USAID family planning funding but are also charged with the promotion of democracy by USAID funded projects.¹⁴⁶

C. Advocacy and Civil Participation by Family Planning NGOs in Peru

Peru is in the midst of drastic political changes and is facing an uphill battle towards democracy after emerging from a regime that restricted speech, violated minority rights, and condoned widespread discrimination and violence against women.¹⁴⁷ Under new leadership, Peru is moving slowly towards democracy with help from USAID.¹⁴⁸

144. See Cohen, *supra* note 58, at 138–39.

145. Mollmann, *supra* note 22.

146. The choice was presented to the International Planned Parenthood Federation (IPPF) which chose to forego millions of dollars in U.S. aid in order to retain its right to advocate for safer abortion across the globe. However, other groups were not as lucky, and because of their reliance on U.S. funding, were forced to accept the Gag Rule stipulations in order to stay in action, despite the clear conflict of interest with the agencies' mission to protect women and promote their democratic participation. BRUCE & ROGOW, *supra* note 32, at 12; FELDT, *supra* note 16, at 202.

147. See HUMAN RIGHTS WATCH, *supra* note 110 for a brief overview of the political history of Peru. In Peru, women are victims of domestic violence at astounding rates, and the government "alternatively refuses to intervene to protect women and punish their batterers or do so haphazardly and in ways that make women feel culpable for the violence." Human Rights Watch, *Women's Rights Division Index*, <http://www.hrw.org/women/index.php>. Between 1996 and 1998, there was also a government-led forced sterilization campaign which has only recently been recognized and addressed by the international community. Press Release, Center for Reproductive Rights, *Peru Acknowledges Human Rights Violations in forced Sterilization Cases that Ended in Death* (Oct. 17, 2002), available at http://www.crlp.org/pr_02_1017peru.html. For additional information on this sterilization program and other abuses of women's reproductive rights in Peru in the past, see CENTER FOR REPRODUCTIVE RIGHTS, *SILENCE AND COMPLICITY: VIOLENCE AGAINST WOMEN IN PERUVIAN PUBLIC HEALTH FACILITIES* (1999), available at http://www.crlp.org/pub_bo_silence.html#online.

148. US AGENCY FOR INTERNATIONAL DEVELOPMENT, OFFICE OF TRANSITION INITIATIVES, *ADVANCING PEACE AND DEMOCRACY IN PRIORITY CONFLICT PRIME COUNTRIES, 2001–2002 REPORT* 36–37.

However, because the Global Gag Rule creates a barrier to advocacy and a limitation on free speech related to abortion, Peruvian organizations are prevented from addressing one of the major health dangers in Peru.¹⁴⁹ No matter how much local demand for abortion reform is present in Peru, the Global Gag Rule restrictions make this women's issue specifically "off limits" for NGOs.¹⁵⁰ Though USAID is facilitating an increase in free speech and democracy in the region, NGOs that are enlisted to assist in this democratic transformation are prevented from certain political speech related to reproductive rights.¹⁵¹

This conflicting obligation has been assigned to one of Peru's largest family planning organizations, the Manuela Ramos Movement (Manuelas), a Peruvian NGO with over twenty years of experience in women's rights advocacy.¹⁵² The Manuelas were forced to address these dueling objectives when the United States reinstated the Global Gag Rule and simultaneously poured money into NGOs in Peru to promote democracy and increase political advocacy.¹⁵³

The Manuelas began as a "Lima-based women's collective that later evolved into an organization of national standing" on women's rights issues.¹⁵⁴ Because of their efforts to educate and lobby the national government on the dangers of abortion as a public health issue, the Manuelas

149. Twenty-two percent of all maternal deaths in Peru are related to unsafe abortions. WOMEN OF THE WORLD, *supra* note 19, at 172.

150. See text and interpretation of the Gag Rule, *supra* Part II.C. Additionally, this limitation often affects the overall financial stability of NGOs; funding limitations for one aspect of a reproductive rights organization often affects the overall vitality of the NGO. See Susan A. Cohen, *US Global Reproductive Health Policy: Isolationist Approach in an Interdependent World*, GUTTMACHER REPORT ON PUBLIC POLICY, June 2004, at 7-9. Centers in developing countries such as Peru often integrate health services in order to preserve resources as well as provide the most comprehensive services possible in a single visit. Wildman, *supra* note 1, at 2. "With the Gag Rule in place, centers that discuss abortion lose funding, regardless of how many vital services they provide." *Id.* As noted earlier, the United States is one of the largest state funders of international family planning efforts, and any family planning funding going to foreign NGOs from the United States is restricted under the Gag Rule. While USAID's overall contribution to family planning has not diminished, investigations on the Rule's real life impact reveal that "women are paying the price in lost family planning and related primary care services in those areas where the U.S. cutoff forced clinics to close." Cohen, *supra* note 150, at 8.

151. See *supra* Part II.C for a discussion of the advocacy prohibited by the Gag Rule.

152. BRUCE & ROGOW, *supra* note 32, at 3. The Manuelas began with an eye towards empowering low income women through grassroots training and political leadership. The name "Manuela Ramos" is considered "so ordinary and common as to signify 'every woman'" and speaks to the organization's emphasis on bringing together women in the community to advocate for themselves. *Id.*

153. See *id.* at 12.

154. BRUCE & ROGOW, *supra* note 32, at 2.

became leading advocates for a liberalized abortion policy in Peru.¹⁵⁵ Their previous advocacy efforts included publishing magazines, organizing meetings, attending congressional sessions and advocating the government for abortion reform. All these efforts had to be abandoned when they started cooperating with USAID on *Reprosalud*,¹⁵⁶ a multimillion dollar family planning initiative, and one of the biggest grants given out by USAID for family planning efforts.¹⁵⁷ However, when the organization shut down its abortion advocacy efforts, the Manuelas made it clear that it was not voluntary and protested that “[s]hackling the discussion of ideas impoverishes such public debate and in doing so, weakens democracy.”¹⁵⁸

This type of silencing of foreign reproductive choice advocates is precisely what the Global Gag Rule restrictions were intended to produce.¹⁵⁹ As noted earlier, the United States,¹⁶⁰ as well as Peruvian family planning officials, both recognized NGOs like the Manuelas as an important resource for women and major players in the family planning programs of the country, as well as valued partners in democracy development.¹⁶¹ However, this recognition by the United States was followed up by fund-

155. *Id.* at 2, 7–8.

156. *Id.* at 8. *Reprosalud* has been recognized as “an exceptional project example rather than the norm.” CAIRO +5: ASSESSING US SUPPORT FOR REPRODUCTIVE HEALTH AT HOME AND ABROAD (1999), available at http://www.reproductiverights.org/tools/print_page.jsp.

157. After much deliberation, the leaders of the NGO accepted the terms of the Gag Rule, and agreed to stop all advocacy for abortion rights since so much money was at stake. However, in protesting to the U.S. government, they stated:

In formulating public policy, individuals and institutions in leadership positions must draw on a foundation of full information, awareness, and understanding of social problems. As abortion is widely recognized as a public health problem in Peru, we consider that it is not feasible to legislate responsibly or create effective public policy in a context in which provision of information and opinion regarding various proposals has been restricted.

Cohen, *supra* note 58, at 138–39.

158. Cohen, *supra* note 58, at 138. The leaders of the Manuelas argued that had the Global Gag Rule restrictions been part of the original project agreement they would not have accepted the restrictive terms, and noted that “[w]e are now in the difficult position of having to choose between needed funding for a historic project, on the one hand, and essential democratic participation on the other.” Cohen, *supra* note 58, at 139.

159. See generally FELDT, *supra* note 16.

160. CONDUCTING A DG ASSESSMENT, *supra* note 118, at 49 (identifying of civil society organizations as effective means to promote democracy and facilitate civil participation).

161. WOMEN OF THE WORLD, *supra* note 19, at 170; Mann, *supra* note 7 (addressing the use of NGOs in Peru as access points for reproductive and health services).

ing restrictions to cut off advocacy by these highly effective organizations.¹⁶² This silencing of a major section of the reproductive rights community may have dire consequences to women's reproductive choice in Peru and presents a challenge to democracy in a region that is undergoing dramatic political change.¹⁶³

The effect of restricting speech and advocacy for reproductive rights can clearly be seen in Peru's recent push to amend its constitution. The Peruvian Constitution contains a clause protecting "the conceived"; this controversial clause has been intensely debated by Peruvian lawmakers and activists, as well as international reproductive rights organizations and abortion opponents.¹⁶⁴ While most Latin American countries contain clauses protecting life from conception, the proposed revisions to the Peruvian Constitution would also stipulate that "abortion is prohibited, save for exceptions permitted by law."¹⁶⁵ Though this change would clearly not create a legal right to an abortion, it may create more space for lawmakers and activists within Peru to create legislated exceptions to the restrictive abortion laws, an opportunity not overlooked by either reproductive choice advocates or anti-abortion proponents.¹⁶⁶

Peruvian NGOs explicitly reported that during the campaign, the Gag Rule prevented them from mounting a balanced and informed debate on the proposed constitutional amendment.¹⁶⁷ A major NGO in Peru reported that "we were a leader on advocacy for liberalization of abortion before, and now we cannot even sign on with our colleagues to a public statement on the constitutional clause on abortion. Our silence, the fact that we did not sign the public statement, surprised parliament members."¹⁶⁸ Another women's activist stated, "When other groups signed a public statement about the abortion clause, we could not sign It was like not being present in the debate about reproductive rights, which are so central to a woman's empowerment. We had to hide from any public

162. Cohen, *supra* note 58.

163. "The Gag Rule forbids NGOs from participating in their own country's democracy and also encourages governments to act in authoritarian manner." BREAKING THE SILENCE, *supra* note 14, at 15.

164. See, e.g., HLI PUBLICATIONS, SPECIAL REPORT FEBRUARY 2003 (PERU, ARGENTINA), http://www.hli.org/sr_2_2003.html; Correa & Brown, *supra* note 12, at 5; BREAKING THE SILENCE, *supra* note 14, at 11.

165. HLI PUBLICATIONS, *supra* note 164, at 5. However, some legal exceptions to Peru's restrictive abortion law already exist, but are rarely invoked and not widely known. A similar fate may befall any exceptions made to the constitutional amendment as well. See *supra* Part II.A.

166. See *supra* note 40.

167. BREAKING THE SILENCE, *supra* note 14, at 14.

168. *Id.* at 13.

statement on the abortion aspect.”¹⁶⁹ However, while these reproductive rights advocates were silenced by Gag Rule restrictions, anti-choice groups were not and were able to participate in the debate without restraint by the U.S. policy.¹⁷⁰ This unequal debate was noted with dismay by donors as well as advocates.¹⁷¹

The importance of public statements and maintaining a visible presence in Peru’s constitutional debate cannot be overstated.¹⁷² Such appearances and pronouncements are viewed by many advocates as minimal action that is indispensable for what an NGO should do to protect the rights of its constituency.¹⁷³ Some advocates would argue that if a network does not make a public statement at a critical political juncture, it has failed in its central mission.¹⁷⁴ Not only is this important for the legitimacy and advocacy of an individual NGO, but having a large number of NGOs speak “with an unlimited voice in a policy debate can increase the legitimacy of pro-rights stances, and thus the chances that the advocates’ views will carry more weight.”¹⁷⁵ Given this argument, the silencing of individual organizations affects the overall ability for even

169. *Id.* This statement was made by an anonymous Peruvian NGO. The anonymity of this source illustrates a central and frustrating limitation of the Gag Rule. It is impossible to tell how many organizations have actually been silenced because many organizations will not even formally report on their inability to speak because of the Gag Rule. Anecdotal references are generally given anonymously. One example of a specific formal statement on the Gag Rule was Susana Galdos Silva, who received special permission from a U.S. court to speak to the U.S. Congress in 2001. Rayman-Read, *supra* note 8.

170. THE BUSH GLOBAL GAG RULE, *supra* note 6, at 2. The Global Gag Rule restricts lobbying regional governments for less restrictive abortion policy, however the rule does not prohibit agencies receiving USAID funding from advocating for more restrictive legislation. This inequality was addressed by a U.S. court in *Center for Reproductive Law and Policy v. Bush*, 300 F.3d 183 (2d Cir. 2002). Though the court concluded that the Rule’s restriction “has bestowed a benefit on the plaintiffs’ competitive adversaries by rewarding their suppliers of information while withholding those grants from suppliers of information who deal with CRLP,” the court found that the United States can legitimately promote anti-abortion ideologies without also supporting pro-choice advocates as well. *Center for Reproductive Law and Policy*, 300 F.3d at 197.

171. “At least one of the largest organizations, historically, can’t participate. And so for any anti-choice political analyst, that is a triumph, right? Because you’ve got one organization with national presence blocked, a big one, one that eventually—if it weren’t for this policy—could make life a bit more difficult for you than at present.” BREAKING THE SILENCE, *supra* note 14, at 14.

172. “The most important impact of the Global Gag Rule can’t be measured. That is the chilling effect.” FELDT, *supra* note 16, at 203 (quoting Duff Gillespie, former Deputy Assistant Administrator of USAID).

173. Shepard, *supra* note 136, at 11.

174. *Id.*

175. *Id.* at 5.

non-gagged NGOs to advocate.¹⁷⁶ The prevailing perception of international health advocates is that women's and reproductive rights advocates are being drowned out of the international dialogue around access to abortion.¹⁷⁷ An overall chilling of reproductive advocacy seems to be occurring in Peru, and as seen in the constitutional debate, is hurting Peruvian NGOs' ability to advocate. One international donor noted that "the fact that there are fewer groups doing advocacy or fewer groups creating a counter balance against pro-life activists, this can lead to modifications [making abortions even harder to obtain]. In fact if it keeps going this way, they have already lost the constitution."¹⁷⁸

This silencing may have a damaging cyclical effect as well, for as NGOs continue to lose the ability to impact politics because of scattered or disparate voices, donors that provide much needed, non-gagged funding may divert these funds to more politically viable regions or causes.¹⁷⁹

IV. GLOBAL FUNDING SOURCES FOR FAMILY PLANNING NGOS

In light of the restrictions placed on NGOs who accept gagged U.S. funding, and the possibility of being forced to abandon important advocacy efforts in order to maintain USAID funding, many Peruvian NGOs have considered rejecting the USAID funding and retaining their right to free speech and political advocacy.¹⁸⁰ However, to understand why most

176. For example, International Planned Parenthood Federation refused to sign the certification agreement and is still advocating for liberalized abortion laws. FEDLT, *supra* note 16, at 202. However, other NGOs like the Manuelas have forfeited this right in exchange for badly needed gagged U.S. funding. BRUCE & ROGOW, *supra* note 32. Therefore, in a public debate, if the only pro-choice voice is IPPF, many lawmakers may assume that other, often regional, NGOs like the Manuelas do not share the concerns of IPPF, making their statement less powerful or politically legitimate.

177. See Shepard, *supra* note 136, at 7. Abortion related material is increasingly hard to find on websites of international health organizations, and many NGOs have either severely curtailed any abortion related activity, or stopped addressing that aspect of reproductive health altogether. *Id.* at 1, 8.

178. BREAKING THE SILENCE, *supra* note 14, at 13.

179. Shepard, *supra* note 136, at 39. It appears that this departure may be imminent or already occurring, as several regional advocates and donors have noted the general stagnation of the movement to expand the legal basis for abortion. *Id.* at 7.

180. After the 2001 reinstatement of the Gag Rule, nine organizations refused to certify the policy and accept its restrictions. The two largest recipients that rejected gagged U.S. funding were the IPPF and the World Health Organization. Conversely, in a White House Briefing, an official estimated that "450 non-U.S. based grantees received U.S. funds." Nowels, *supra* note 52, at 5. "The vast majority of these organizations will probably consent to the Mexico City Policy Restrictions, and thus would not choose to lose their funding." Boucher, *supra* note 71. But see Silva, *supra* note 9, discussing her organization's unwilling acceptance of the restrictions in exchange for U.S. funding and

NGOs have agreed to certify the USAID restrictions in exchange for funding, one must understand the difficulties family planning NGOs face in their efforts to stay afloat financially.

As the United States is the largest single donor to international population assistance, contributing over 43 percent of all global funding for international family planning, maternal health care, and prevention of sexually transmitted diseases, lost USAID funding has come as a severe blow to many NGOs.¹⁸¹ Though few NGOs have been able to refuse gagged funding, cuts have still translated into a not insignificant amount of lost funding for the few international NGOs who are unwilling to submit to the U.S. restrictions.¹⁸² Though many smaller agencies may receive other international funding from organizations such as the United Nations Population Fund, U.S. funding plays a part in many NGO budgets.¹⁸³ In addition, any agency that may receive both USAID funding and other independent funding, from UNFPA or private donors, must stop its abortion advocacy altogether because of the Gag Rule's prohibition on abortion services or advocacy using any money, including that collected from non-U.S. sources, if an agency receives U.S. funding.¹⁸⁴

Given current levels of global family planning funding for other nations, even if these additional sources were allowed under the Gag Rule, it is unlikely that NGOs would be able to refuse U.S. money entirely. According to the 1994 ICPD, "all countries should strive to make accessible, through primary health care systems, reproductive health to all individuals of appropriate ages as soon as possible and no later than the year 2015."¹⁸⁵ Despite the international community's apparent commitment to reproductive rights, as reflected by the goals of the ICPD, this

her continued fight to continue her organization's longstanding advocacy for abortion rights in Peru.

181. ANS ZWERVER, COMMITTEE ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN, IMPACT OF THE "MEXICO CITY POLICY" ON THE FREE CHOICE OF CONTRACEPTION IN EUROPE, EUR. PARL. ASS., Doc. No. 9901, 1 (2003). This report was created by the Assembly in an effort to address the impact of the Gag Rule on family planning efforts in Europe, and led to a draft resolution calling on member states to take a number of measures to reverse the negative impact of the Policy.

182. For additional discussion on lost funding, see *supra* text accompanying note 99.

183. Bishop, *supra* note 17, at 523.

184. See Silva, *supra* note 9.

185. CAIRO PROGRAM OF ACTION, ch. 7.6., available at http://www.unfpa.org/icpd/icpd_poa.htm#par7d6. The *Program of Action* addresses abortion as well, and states that though "in no case should abortion be used as a method of family planning, it also states that in circumstances where abortion is not against the law, such abortion should be safe." CAIRO PROGRAM OF ACTION, ch. 8.25, available at http://www.unfpa.org/icpd/icpd_poa.htm#par8d25.

commitment has not been supported by similarly ambitious funding levels.¹⁸⁶ International expenditures for global population activities yielded an estimate of 9.4 billion dollars in 2001, compared to a target figure for 2000 of 17 billion dollars.¹⁸⁷ In 2000, total expenditures on family planning accounted for only 45.6 percent of the target set by the program.¹⁸⁸ Developing countries were expected to provide over two thirds of the funding for ICPD initiatives, while industrialized nations were to supply only one third of the funding.¹⁸⁹ While developing countries contributed as much as 75 percent of their target funding, developed donor countries only produced 45 percent of the share that they had undertaken.¹⁹⁰ Given these numbers, it is currently unlikely that NGOs would be able to substitute large amounts of neutral funds for gagged U.S. funds.

A. Increase Alternate Funding Sources for Global Family Planning Programs

The Gag Rule restricts individual agencies from providing abortion related services. It also limits demand-driven political advocacy for increased access to abortions. Furthermore, studies have shown that the Gag Rule is not decreasing the prevalence of abortions and is only making the situation for pregnant women more perilous.¹⁹¹ Though a total repeal of the Global Gag Rule would clearly allow for increased advocacy and civil participation by NGOs, this remains a very remote possibility.

186. There were 179 countries involved in the creation of the ICPD Program of Action that explicitly addressed reproductive rights, family planning, and access to health care, and estimated that with full international involvement, universal access to services could be achieved. VERONIQUE DE KEYSER, COMMITTEE OF FOREIGN AFFAIRS, HUMAN RIGHTS, COMMON SECURITY AND DEFENSE POLICY, ANNUAL REPORT ON HUMAN RIGHTS IN THE WORLD IN 2003 AND THE EUROPEAN UNION'S POLICY ON THE MATTER, EUR. PARL. DOC. (2003/2005(INI)) (2004).

187. U.N. Econ. & Soc. Council, *Commission on Population and Development, Flow of Resources for Assisting in the Implementation of the Programme of Action of the ICPD*, U.N. Doc. E/CN.9/2003/1 (2003).

188. KARIN JUNKER, COMMITTEE ON DEVELOPMENT AND COOPERATION, REPORT ON POPULATION AND DEVELOPMENT: 10 YEARS AFTER THE UN CONFERENCE IN CAIRO, EUR. PARL. DOC. (2003/2133(INI)) 8 (2004).

189. *Id.* at 15. This designation placed a higher burden on developing nations to address the lack of reproductive health services in their countries, and these nations rose to the challenge.

190. See JUNKER, *supra* note 188, at 8, 15.

191. The stated reason for re-imposing the Gag Rule was to reduce the numbers of abortions. See *supra* notes 4, 50 and accompanying text.

Repealing the Gag Rule through court action appears unlikely.¹⁹² The policy has been challenged five times in U.S. courts, often based on the restrictions on free speech and association suffered by U.S. NGOs working abroad.¹⁹³ Each time, the court has dismissed the case for lack of standing or found the restrictions to be permissible.¹⁹⁴ Additionally, U.S. foreign policy has become increasingly conservative, making successful congressional action even more unlikely than it has been in the past.¹⁹⁵

Because of the relative failure of challenges to the rule based on constitutional grounds, and the improbability that positive action will be taken by other areas of the government, this Note proposes a shift away from efforts to completely repeal the Gag Rule. As long as the political climate in the United States remains hostile to women's rights and unfriendly to family planning activities that go beyond the ABC's, revoking the Global Gag Rule is unlikely.¹⁹⁶

As an alternative approach, activists in the United States and abroad should focus on securing access to alternative sources of funding by lobbying more conscientious nations and international bodies to increase state contributions to family planning programs. By providing family planning NGOs with neutral, non-gagged funding, reproductive rights advocates may enable previously gagged foreign NGOs to freely voice the concerns of their constituents and continue their efforts to achieve increased reproductive rights in their own countries. Though past efforts to increase financial assistance to international family planning programs have produced dismal results, creating an alternative source of funding that could take the place of the United States may be possible.

192. "All of the Challenges to the Mexico City Policy have failed. Due to standing requirements and justiciability limits of the courts it is unlikely that a domestic or foreign NGO will find the relief they seek in courts." Yvette Aguilar, *Gagging on a Bad Rule: The Mexico City Policy and its Effects on Women in Developing Countries*, 5 SCHOLAR 37, 74 (2002).

193. See *id.* at 67–74. Challenges have been brought by Alan Guttmacher Institute, DKT Memorial Fund Ltd., Planned Parenthood Federation of America, Pathfinder, and The Center for Reproductive Law and Policy (now known as the Center for Reproductive Rights), and all have been dismissed or reversed by higher courts.

194. *Id.*

195. The House and Senate both gained four Republicans in the 2004 election.

196. This is referring to Bush's refusal to provide funding to the Global Fund to Fight AIDS in favor of a U.S.-led fund that focuses on faith-based programs and religious charities that promote an abstinence-based approach to AIDS. See Esther Kaplan, *The Bush AIDS Machine*, NATION, Dec. 20, 2004, at 29.

B. Provide Funding to Address Agency-Specific Funding Cuts

In recognition of this shortfall in international family planning funding as well as the damage being done by the Gag Rule, some international bodies have begun to address the lackluster financing of neutral family planning activities. These bodies may be valuable allies to U.S. activists and foreign NGOs in search of alternate funding sources.

In 2003, the Parliamentary Assembly of the Council of Europe called on its member countries to make up the payments cancelled by the United States as a result of the Global Gag Rule.¹⁹⁷ This recommendation was echoed by a recent European Parliament Report that called upon the Commission to “take into account the devastating impact of the Mexico City Policy of the Bush Administration” and fill the budgeting gap provoked by the Policy.¹⁹⁸

These calls to fill “budgeting gaps” generally refer to larger providers such as UNFPA and IPPF who have lost massive amounts of funding as a result of the Gag Rule, though the financial need of other smaller NGOs has also been acknowledged.¹⁹⁹ It is clear that Europe has recognized the need to counteract the damage being done by the anti-choice U.S. abortion policy exemplified by the Global Gag Rule; however they have focused too narrowly on the issue of lost funding.²⁰⁰

197. JUNKER, *supra* note 188, at 15. Specifically, the Assembly called “on governments of its member states to prioritize, in their international development policies, the allocation of funds to those organizations which have lost funding as a result of the Mexico City Policy.” ZWERVER, *supra* note 181, at 3.

198. ANNE E.M. VAN LANCKER, COMMITTEE ON WOMEN’S RIGHTS AND EQUAL OPPORTUNITIES, REPORT ON SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS, EUR. PARL. DOC. (2001/2128(INI)) 11 (2002).

199. DE KEYSER, *supra* note 186, at 16. UNFPA funding was cut in response to unfounded allegations of abuses in China, and despite reports by the U.S. government’s own investigators that these charges were false, UNFPA lost thirty-two million dollars of U.S. funding. See *supra* Part III.A for further discussion of these charges and similar harassment of family planning organizations by pro-life groups.

200. Though the European Parliament Reports recognized the lack of commitment to funding by industrialized nations as a whole, they placed the blame for funding cuts squarely on the United States’ pro-life policy, and found that “conservative circles have succeeded in capping or even reducing funds for family planning and education.” JUNKER, *supra* note 188, at 10. However, the United States refutes this charge and argues that it has not reduced overall funding for family planning activities, it has just “utilized other providers” while maintaining roughly four hundred million dollars in annual contributions despite funding cuts. Robert Gehring, United States Department of State, *Statement at UNECE Population Forum* (Jan.12, 2004), http://www.unece.org/ead/pau/epf/part_react/pa_ts1/gehring.pdf. The United States claims that while it maintains its overall funding level, leaders in U.S. family planning policy “acknowledge that there are some disagreements about some policies between the U.S. government and some people

The international community should not wait for NGOs to be punished by USAID for breaking their silence and speaking up about the dangers of unsafe abortions in order to offer them alternative funding. There needs to be a broader international response that not only addresses specific cuts to agencies that result from perceived Gag Rule violations, but one that also provides an alternate source of funding for NGOs that do not want to accept the USAID restrictions.²⁰¹ The EU and other international bodies should continue to push their member states to increase individual state contributions to international family planning programs, and U.S. activists should focus on this alternative regime rather than continue challenging the constitutionality of the Gag Rule in U.S. courts.²⁰²

In response to the lackluster funding for ICPD goals coming from industrialized nations, the International Parliamentarians Conference on the Implementation of the Cairo Program in 2002 pressed nations to increase their contributions to population policy and sexual and reproductive health programs, and urged them to contribute 5–10 percent of their national budgets to these programs in order to meet ICPD goals.²⁰³ EU reports have gone even further, calling for legalization of abortion in order to combat the continued maternal mortality that results from unsafe abortions.²⁰⁴ These reports have recognized that while abortion should not be encouraged or used as a method of family planning, “legal and medically safe interventions [should] be possible for women who have no other

in the community of those interested in reproductive health.” *Id.* The acknowledgement of “disagreements” would be putting it lightly to say the least given the large amount of U.S.-based activism, pleading from hobbled NGOs, and international calls for the United States to rescind the Gag Rule.

201. Re-funding organizations such as UNFPA will clearly help combat the silencing effects of the Gag Rule; however this approach does nothing to assist NGOs like the Manuelas that have given up their rights to advocate for abortion, but have retained their USAID funding. Though these organizations may continue to operate, they do so under the Gag Rule restrictions and will continue to be gagged until an alternate source of funding is available.

202. This is not to say that the legality of the Gag Rule should never again be challenged; however, in the current political climate, alternative measures need to be utilized and activists should take an alternative tack as long as U.S. foreign policy remains largely ideology-driven.

203. European Parliament Resolution on Population and Development: 10 Years After the UN Conference in Cairo, EUR. PARL. DOC. (2003/2133(INI)) 5 (2004) [hereinafter European Parliament Resolution on Population and Development].

204. A 2002 report to the European Parliament underlined that abortion should not be promoted as a family planning method, but recommended that “in order to safeguard woman’s reproductive health and rights, abortion should be made legal, safe, and accessible to all.” VAN LANCKER, *supra* note 198, at 9.

way out of their difficulties, in order to protect their reproductive and mental health.”²⁰⁵

These EU sponsored reports led to a European Parliament Resolution on Population and Development in 2004. This resolution called for “a greater share of humanitarian and emergency aid to be used to benefit the reproductive health of people in emergency situations” and “to make more funding available for the protection of reproductive health.”²⁰⁶ The resolution also enacted a 2004 proposal to assure the “facilitation of medically safe abortions” and called for “legal and medically safe interventions to be possible.”²⁰⁷ Finally, the Resolution stated that healthcare aid should be allocated to developing countries while ensuring that “this aid is used also to maintain or restore reproductive health.”²⁰⁸

EU bodies have clearly demonstrated a commitment to women’s health through these resolutions as well as through their contribution of millions of dollars to fill funding gaps created by the Global Gag Rule. The EU presents the most immediate, natural ally for efforts to provide neutral family planning funding to foreign NGOs, however larger international bodies may also be tapped for increased financial commitment to the goals of the ICPD. The United Nations has professed a strong commitment to women’s rights, human rights, and health care, however financial contributions from UN organizations to global family planning programs amounted to just 17.6 percent of the ICPD target for 2000.²⁰⁹ It is distressing that the funding commitments for family planning are so meager, given the UN’s pledge to protect human rights and increase access to health care.²¹⁰ The EU has called on member states to coordinate activities among donor countries more efficiently in order to provide

205. JUNKER, *supra* note 188, at 11–12. These reports concluded that not only would legalization and access to safe abortions prevent mortality resulting directly from complications of clandestine abortions, it would also mean an overall “reduction in maternal mortality in developing countries since 14 percent of all women who do not survive labor are victims of botched abortions.” *Id.*

206. European Parliament Resolution on Population and Development, *supra* note 203, at 7.

207. *Id.* at 8–9.

208. *Id.* at 8.

209. DE KEYSER, *supra* note 186, at 30. See, for example, the Universal Declaration of Human Rights article 25(1) which included health care as a human right, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which was adopted by the UN General Assembly in 1979. The Convention provides social and economic protections for women as well as access to health care and reproductive health services. The Convention has been signed by 179 countries, though the United States is not included on that list. United Nations website, <http://www.un.org/womenwatch/daw/cedaw/>.

210. See United Nations website, <http://www.un.org/womenwatch/daw/cedaw/>.

family planning funding, and it seems that cooperation between the UN and the EU bodies would be a logical step.²¹¹

The United States has clearly moved to the right of the international community when it comes to reproductive rights, and this shift should not be reflected by the rest of the world.²¹² The broader international community should recognize the damage the U.S. policy is doing to reproductive rights and follow the suggestion of the EU by providing increased overall funding for family planning activities and strive for a universal 5–10 percent contribution to neutral global family planning programs by all member states of the UN and the EU.

The public health situation is only going to deteriorate. One billion young people will soon enter the reproductive phase of their lives, and increasing numbers of women will resort to illegal abortions.²¹³ Maternal mortality rates will only rise, and the restrictions on speech and advocacy created by the Global Gag Rule will wreak increasing havoc on women's health and plague developing democratic movements as speech and political activism are silenced.

According to the European Parliament, "access to reproductive health can only be guaranteed if the international community meets the goals set in the Cairo Program."²¹⁴ U.S. activists and NGOs should refocus their efforts to increase the level of neutral funding available for family planning activities through cooperation with the UN and the EU as well as other international bodies that share their commitment to women's health and political freedom and participation. International efforts to address the damage to health and democracy that has resulted from the Global Gag Rule should assist NGOs that have lost funding because of the Gag Rule restrictions, as well as NGOs that currently receive gagged funding, but would like to replace this funding in order to address massive and continued public health risks of illegal abortion. With this approach, organizations like the Manuelas that have a history of reproductive rights advocacy can move away from their reliance on gagged U.S.

211. JUNKER, *supra* note 188, at 12.

212. "The Global Gag Rule has only served to further isolate the United States in international affairs. Once a leader in family planning, and an inspiration to the world, the United States now has the reputation of being one of the most regressive, ideologically driven countries on the planet." FELDT, *supra* note 16, at 219.

213. JUNKER, *supra* note 188, at 10.

214. DE KEYSER, *supra* note 186, at 30.

funding and truly represent the interests of their constituents through political advocacy for increased access to abortion.

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* B.A., Wesleyan University; J.D., Brooklyn Law School (2006). I would like to dedicate this Note to the people that supported and encouraged me through law school, especially Jed Miley and my parents, Mary Perkins and Ernie Seevers, as well as Laurie Parise, and Professor Nan Hunter. I would also like to thank the Journal staff for their hard work in preparing this article for publication. Any errors or omissions are solely my own.

THE CHALLENGES MULTINATIONAL CORPORATIONS FACE IN PROTECTING THEIR WELL-KNOWN TRADEMARKS IN CHINA

I. INTRODUCTION

With the largest population in the world and an abundance of opportunities, China is considered by most foreign enterprises to be the “last great commercial frontier.”¹ Since opening its doors to the global community in 1979, the People’s Republic of China (China),² a nation of more than one billion consumers, has attracted foreign investors seeking to enter this vast market.³ Though companies are finding commercial opportunities in China, they are met by a number of challenges in the area of intellectual property (IP), including an increasing number of trademark violations⁴ by domestic companies infringing on

1. George O. White, *Enter the Dragon: Foreign Direct Investment Laws and Policies in the P.R.C.*, 29 N.C. J. INT’L L. & COM. REG. 35 (2003).

2. For this note, China refers to the People’s Republic of China, excluding Hong Kong. Although Hong Kong has been a Special Administrative Region of the PRC since 1997, China’s intellectual property laws will not apply to Hong Kong until 2047. See John Zarocostas, *Hong Kong Maintains Free-Trade Image*, J. COMMERCE, Dec. 9, 1998, at 3A.

3. Jessica Jiong Zhou, *Trademark Law & Enforcement in China: A Transnational Perspective*, 20 WIS. INT’L L.J. 415 (2002).

4. Article 52 of the Trademark Law of China reads:

Any of the following acts shall be an infringement of the exclusive right to use a registered trademark:

1. to use a trademark that is identical with or similar to a registered trademark in respect of the identical or similar goods without the authorization from the trademark registrant;
2. to sell goods that he knows bear a counterfeited registered trademark;
3. to counterfeit, or to make, without authorization, representations of a registered trademark of another person, or to sell such representations of a registered trademark as were counterfeited, or made without authorization;
4. to replace, without the consent of the trademark registrant, its or his registered trademark and market again the goods bearing the replaced trademark; or
5. to cause, in other respects, prejudice to the exclusive right of another person to use a registered trademark.

Trademark Law of the People’s Republic of China art. 52 (promulgated by the Standing Comm. of the Fifth Nat’l People’s Cong., Oct. 27, 2001, effective Dec. 1, 2001), *translated in* http://www.sipo.gov.cn/sipo_English/flfg/xgflfg/t20020416_34755.htm [hereinafter TL 2001].

the well-known marks of foreign companies.⁵ In particular, China's inconsistent treatment of foreign well-known marks poses serious concerns for overseas investors.⁶ Many foreign firms have expressed apprehension about entering the Chinese marketplace because of an inability to register their trademark as well-known.⁷ Therefore, effective trademark protection is critical to economic reform in China.⁸ The Chinese have recognized that respect for well-known marks is central to their economic reform,⁹ and have thus taken significant steps to provide greater protection of trademarks through their accession to international agreements, promulgation of rules and regulations, and amendments to their trademark law.¹⁰

Despite all of China's trademark and IP laws being in accordance with WTO requirements, the number of cases concerning trademark violations has risen dramatically in recent years.¹¹ In 2003, American coffee retailer Starbucks filed a lawsuit against a Shanghai-based café for trademark infringement, claiming that its logo and brand name had been copied by the Shanghai coffeehouse.¹² The case exemplifies the common problem of trademark piracy, where a domestic entity registers the well-known mark in China before the foreign trademark owner and then attempts to trade on the goodwill attached to the trademark or sell the registration to

5. *China Improves Trademark Protection for Overseas Investors*, PEOPLE'S DAILY (China), Aug. 5, 2000, available at http://english.people.com.cn/english/200008/05/eng20000805_47371.html. For the purposes of this note, "domestic" corporations are corporations incorporated under the laws of China, which are established and based in China.

6. Alisa Cahan, *China's Protection of Famous and Well-Known Marks: The Impact of China's Latest Trademark Law Reform on Infringement and Remedies*, 12 CARDOZO J. INT'L & COMP. L. 219, 222 (2004). There is currently no formal, universal definition for a "well-known" mark. A "well-known" trademark is considered to be a mark which is known to a substantial portion of the relevant public as being associated with the particular goods or services. *Id.*

7. Foreign companies were hesitant to enter the Chinese marketplace because after being denied registration of their marks there was "no precedent of protection from illegitimate business practices." *Id.* at 226.

8. PETER FENG, *INTELLECTUAL PROPERTY IN CHINA* 358 (2d ed. 2003).

9. *Id.* at 358.

10. Zhou, *supra* note 3, at 425-26.

11. In 2004, the Administrations for Industry and Commerce handled 51,851 trademark violations cases, a 38.31 percent increase from 2003. Of these, 5,494 of these cases involved a foreign entity, which is 1.6 times greater than the number in 2003. SIPO, *White Paper on the Intellectual Property Rights Protection in China in 2004*, http://www.sipo.gov.cn/sipo_english/ndbg/bps/t20050427_45415.htm (last visited Feb. 6, 2006).

12. Toh Han Shih, *Starbucks Sues in Shanghai Café Sign Spat*, SOUTH CHINA MORNING POST, Jan. 31, 2004, available at 2004 WLNR 6018187.

the owner for a handsome profit.¹³ The recently decided case demonstrates the progress China has made in trademark protection since joining the WTO, but also illustrates some of the challenges foreign companies still face in protecting their trademark in China.¹⁴

This note explores the challenges multinational corporations face in protecting their well-known trademarks in China by examining the Starbucks case and argues that although China is heading in the right direction in its IP reform, its success is challenged by China's weak and ineffective enforcement of IP laws. Part II of the note examines the development of trademark law in China, focusing on protection of well-known marks. Part III discusses trademark infringement claims filed by multinational corporations against domestic corporations, including the Starbucks case. Part IV evaluates the outlook for foreign investors under the current IP system, examining both the improvements China has made to IP laws and the challenges that multinational corporations still face in protecting their trademarks under the current system. Part V evaluates the current trademark enforcement system and proposes some changes to improve enforcement. Finally, the note concludes that while the Starbucks decision demonstrates that China is moving in the right direction with its trademark reform, to demonstrate that China is committed to protecting well-known trademarks, the Starbucks decision must be upheld on appeal. A favorable decision in favor of Starbucks on appeal and a stronger enforcement system will ensure that foreign well-known trademarks will be protected in China and thereby, China will remain attractive to foreign investors.

II. CHINA'S INTELLECTUAL PROPERTY PROTECTION SYSTEM

China has come to understand the importance of foreign investment to its economic reform and growth.¹⁵ After years of reform to meet World Trade Organization (WTO) standards, China acceded to the WTO on December 1, 2001.¹⁶ China's accession to the WTO promises greater market access for foreign investors and a more predictable commercial environment, which means there will likely be many more foreign com-

13. Cahan, *supra* note 6, at 220.

14. *Id.* at 221.

15. China offers preferential treatment, including tax incentives, to foreign investors to encourage investments in China. See John Zhengdong Huang, *An Introduction to Foreign Investment Laws in the People's Republic of China*, 28 J. MARSHALL L. REV. 471, 483 (1995).

16. WTO, Accession of the People's Republic of China, WT/L/432, Nov. 23, 2001. See also Karen Halverson, *China's WTO Accession: Economic, Legal and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319 (2004).

panies seeking to enter China's market.¹⁷ With China's entry into the WTO, the rules governing the Chinese marketplace have changed dramatically.¹⁸ China has come to realize the importance of protecting the intellectual property rights (IPR) of foreign corporations that seek to invest in the nation.¹⁹ Accordingly, China has strengthened its legal framework and amended its IPR and related laws and regulations to comply with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).²⁰

A. Brief History of IPR in China

The concept of trademark in China can be traced back as early as the Northern Zhou Dynasty (556–580 A.D.).²¹ The first Chinese intellectual property law was promulgated in the Tang Dynasty (618–906 A.D.),²² although the first formal trademark law was not enacted until 1904, during the Qing Dynasty.²³ IPR emerged in China in the late 1800s with the invention of the gunboat, the introduction of opium and the doctrines of “most favored nation” trading status and extraterritoriality.²⁴ But progress on trademark and IP laws in China came to a halt in 1949, with the

17. White, *supra* note 1.

18. “Since joining the WTO China has adopted or amended over 140 laws and regulations and deleted another 500 laws.” Cahan, *supra* note 6, at 223.

19. As further evidence of China's commitment to fighting intellectual piracy, a Beijing court recently ordered a flea market selling counterfeit clothing to pay up to 100,000 yuan in compensation to the foreign brand owners. This is believed to be the first time a Chinese court has punished a retail landlord for the infringing acts of a tenant. Amy Gu, *Coffee Shop Appeals on Starbucks Trademark*, STANDARD (Hong Kong), Jan. 19, 2006, available at http://www.thestandard.com.hk/news_detail.asp?we_cat=2&art_id=10237&sid=6291676&con_type=1&d_str=20060119.

20. Cahan, *supra* note 6, at 223; See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Results of the Uruguay Round, arts. 22–24, 33 I.L.M. 81 (1994) Including Trade in Counterfeit Goods, Dec. 15, 1993, pt. II, sec. 3, arts. 22–24 [hereinafter TRIPS] (setting forth general provisions, enforcement of and standards concerning intellectual property rights).

21. The early trademarks in the Zhou Dynasty were marks used by the Chinese to identify the source of the products. During the later Tang Dynasty, the marks were used by merchants to distinguish their goods from the goods of another. Some merchants and craftsmen designed their own logos to protect the reputation of their business. Some of the logos created during this time, such as the “Jingdezhen” mark, which designates the geographic origin, are still in use today. Zhou, *supra* note 3, at 417–18.

22. The Tang Dynasty enacted the first copyright law to handle the widespread use of printing. *Id.* at 417.

23. This trademark law was largely administered by foreigners who took control of China's trade during this time. *Id.* at 418.

24. FENG, *supra* note 8, at 3.

fall of the Nationalist government and the emergence of the People's Republic of China (PRC). When the Chinese Communist Party (CCP) came into power, all the laws, including IP laws, were abrogated.²⁵ It was not until the post-Mao Zedong era of the 1980s that China began building a formal legal system.²⁶

In remodeling their economic and political infrastructures to create a business environment more inviting to foreign investors, China followed accepted commercial principles of the Western world.²⁷ One of the areas heavily influenced by Western principles was in the creation of intellectual property laws.²⁸ China realized that in order to promote economic development in China and attract foreign investment, it was necessary to improve intellectual property protection.²⁹ Thus, China began signing treaties and joining IP rights organizations, starting with the World Intellectual Property Organization (WIPO) in 1980.³⁰

On December 1, 2001, China was formally admitted as a member of the WTO.³¹ To comply with WTO commitments, China made numerous changes to its laws and regulations including its trademark laws. To fulfill obligations to TRIPS and other international agreements, China has improved its legal framework by amending its trademark laws and has started to issue judicial interpretations and administrative regulations related to trademark protection.³² These measures demonstrate that China is committed to building a market economy and understands the role that an effective trademark protection system plays in this effort.

25. *Id.*

26. Prior to 1982, when the current Chinese constitution was enacted, China viewed its legal system in an inconsistent manner. Weiqui Long, *Intellectual Property in China*, 31 ST. MARY'S L.J. 63 (1999).

27. Julia Cheng, Note, *China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT'L L.J. 1941, 1942 (1998).

28. *See id.* at 1943.

29. "China's long-time inability to join the World Trade Organization (WTO) had been largely attributable to political oppositions from the U.S. and Europe, claiming, among other things, that China could not provide adequate protection for intellectual property rights." Zhou, *supra* note 3, at 416.

30. China joined the WIPO on June 3, 1980. Convention Establishing the World Intellectual Property Organization, July 14, 1967, 828 U.N.T.S. 3.

31. China joined the WTO on November 11, 2001, but was not formally admitted as a member until December 1, 2001. WTO, *supra* note 16.

32. Cahan, *supra* note 6, at 222.

B. Trademark Law in China

A trademark can be a company's most valuable asset.³³ A trademark is "a distinctive sign which identifies certain goods or services as those produced or provided by a specific person or enterprise."³⁴ Companies place value on trademarks because such marks identify and distinguish their goods or services from that of another.³⁵ There are a select number of names which are of enormous economic value. Analysts have suggested that "Nike" could be worth as much as seven billion dollars, while "Coca-Cola" has a value of ten times as much.³⁶ With globalization, international trademark rules have been developed to protect these marks in the international marketplace.³⁷ But many of these international rules rely upon the individual member nations to provide trademark protection in their respective countries.

In China, trademarks are primarily governed by the Trademark Law of the People's Republic of China (Trademark Law)³⁸ and the Implementing Regulations of the Trademark Law (Implementing Regulations).³⁹ The Trademark Law was first adopted in 1982 and was based upon a first-to-file system⁴⁰ for obtaining trademark rights.⁴¹ The most significant achievement of the law was that it protected a trademark owner's

33. *Id.* at 219.

34. WIPO, <http://www.wipo.int/about-ip/en/trademarks.html>. Trademarks seek to prevent a likelihood of confusion for consumers. Amanda S. Reid, *Enforcement of Intellectual Property Rights in Developing Countries: China as a Case Study*, 13 DEPAUL-LCA J. ART & ENT. L. & POL'Y 63, 72 (2003).

35. Reid, *supra* note 34, at 72. Trademarks represent the goodwill created by the company. *Id.*

36. James Gleick, *Get Out of My Namespace*, N.Y. TIMES MAG., Mar. 21, 2004, at 44.

37. Cahan, *supra* note 6, at 222.

38. *See generally* TL 2001, *supra* note 4.

39. Implementing Regulations of the Trademark Law (promulgated by Decree No. 358 of the State Council, Aug. 3, 2002, effective Sept. 15, 2002) (P.R.C.), *available at* <http://sbj.saic.gov.cn/english/show.asp?id=53&bm=flfg> [hereinafter Implementing Regulations]; Zhou, *supra* note 3, at 429–30.

40. Under the first-to-file rule, one is not required to provide evidence of prior use or ownership of the trademark to register it. However, one must prove actual use within a specified time to avoid losing the rights to that trademark. In contrast, a first-to-use system, found in the United States and Canada, require actual use of the trademark before one is allowed to acquire a right in that trademark. Scott A. McKenzie, Comment, *Global Protection of Trademark Intellectual Property Rights: A Comparison of Infringement and Remedies Available in China Versus the European Union*, 34 GONZ. L. REV. 527, 559–60 (1998).

41. TL 2001, *supra* note 4, art. 4. A "first-to-file" rule provides that the first applicant to file a registration for the trademark, rather than the first-to-use the trademark, is the legal owner of the trademark. Long, *supra* note 26, at 76.

exclusive right to use a registered mark and provided a private right of action for acts of infringement.⁴² Under the law, both enterprises and individuals were eligible to apply for trademark registration.⁴³

In addition to promulgation of domestic trademark laws, China sought to comply with international standards on IPR protection by signing onto international and multinational treaties and conventions.⁴⁴ In the early 1980s, China took steps to strengthen trademark protection, starting with the adoption of the Paris Convention for the Protection of Industrial Property (Paris Convention).⁴⁵ The Paris Convention was established to provide consistent application of uniform legal principles for persons, regardless of citizenship, seeking IPR protection in a member nation.⁴⁶ Subsequently in 1988, China adopted the International Classification of Goods and Services under the Nice Agreement, and became a formal member of the Nice Agreement in 1994.⁴⁷ In 1989, China signed the Madrid Agreement for the International Registration of Marks,⁴⁸ which governs international trademark registration.⁴⁹ Under the Madrid Agreement, China can reject trademarks which are not in conformity with the Chinese trademark registration policy.⁵⁰

These international conventions, treaties and agreements ratified by the National People's Congress play important roles in the legislative protection of IPR.⁵¹ The Chinese Constitution⁵² provides that these interna-

42. Zhou, *supra* note 3, at 426.

43. *Id.* The registration of the trademark was valid for ten years after approval, followed by a ten year renewal option. Trademark Law of the People's Republic of China of 1993, *translated in* 2 China L. Foreign Bus. (CCH) P 11-500 (1993) [hereinafter TL 1993].

44. Zhou, *supra* note 3, at 430.

45. The Convention aims to establish universal legal principles and the consistent application of those principles regardless of the citizenship of the individual seeking intellectual property rights protection. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

46. *Id.*

47. The Nice Classification system provides a list of classes (thirty-four classes for goods and eleven classes for services) and the Alphabetical List of Goods and Services. Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, June 15, 1957, as last revised May 13, 1977, 23 U.S.T. 1336, 550 U.N.T.S. 45.

48. Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, 828 U.N.T.S. 389 [hereinafter Madrid Agreement].

49. Measures for the Implementation of International Registration under Madrid Agreement, Apr. 17, 2003 (P.R.C.), *available at* <http://sbj.saic.gov.cn/english/show.asp?id=63&bm=flfg> [hereinafter Madrid Implementation Agreement].

50. Madrid Agreement, *supra* note 48, art. VII.

51. Long, *supra* note 26, at 67.

tional treaties will not only have the equivalent status as domestic laws, but these international laws will supersede domestic laws which fall within their scope.⁵³ In the past, China has been accused of failing to meet their obligations under international agreements,⁵⁴ but has in recent years made an effort to ensure its laws are in full compliance with international standards.

In order to comply with international standards and in response to criticism that China's trademark protection system failed to provide adequate enforcement against trademark infringement, both the Trademark Law and Implementing Regulations were revised in 1993.⁵⁵ But the amended laws still failed to meet international standards. In order to conform more closely to international standards and meet its obligations under TRIPS, the Trademark Law was amended on October 27, 2001 (TL 2001).⁵⁶ TL 2001 provides a claim for priority in accordance with the Paris Convention.⁵⁷ It also transferred the power of final adjudication of disputes from an administrative mechanism to a judicial mechanism.⁵⁸ The new mechanism provides for judicial review of all Trademark Review and Adjudication Board (TRAB) decisions, including cases involving the validity of trademark registration, allowing parties to institute legal proceedings if they are dissatisfied with the decision of the TRAB.⁵⁹

52. See XIAN FA (1999) (P.R.C.). China has adopted four constitutions (Zhonghua, Renmin, Gongheguo, and Xianfa), in 1954, 1975, 1978, and 1982. The current constitution, adopted in 1982, was amended in 1988, 1993, and 1999. XIAN FA (1999) (P.R.C.).

53. Long, *supra* note 26, at 67.

54. The United States has threatened, on three separate occasions in recent years, to use economic sanctions against China for failure to adequately protect IPR. One such occasion was in 1995, when the United States accused China of failure to abide by International Agreement Special 301. Andrew Evans, *Taming the Counterfeit Dragon: The WTO, TRIPS and Chinese Amendments to Intellectual Property Laws*, 31 GA. J. INT'L & COMP. L. 587, 597 (2003).

55. Zhou, *supra* note 3, at 427; Preston M. Trobert & Jia Zhao, *People's Republic of China*, in *INTELLECTUAL PROPERTY LAWS OF EAST ASIA* 233 (Alan S. Gutterman & Robert Brown eds., 1997). The revised Trademark Law extended the scope of protection to include service trademarks. A service mark is a mark related to services, as opposed to a trademark which is associated with goods. DELI YANG, *INTELLECTUAL PROPERTY AND DOING BUSINESS IN CHINA* 43 (Pervex N. Ghauri ed., 2003).

56. The Standing Committee of the National People's Congress adopted the amended Trademark Law at its twenty-fourth meeting. FENG, *supra* note 8, at 299. The TL 2001 brought China's legislation on trademark protection into full compliance with TRIPS standards. Cahan, *supra* note 6, at 231.

57. Compare TL 2001, *supra* note 4, with Paris Convention, *supra* note 45.

58. See TL 2001, *supra* note 4, art. 43.

59. FENG, *supra* note 8, at 300.

China also revised its intellectual property laws to respond to the growing number of foreign investors in China. If a foreign individual or company wishes to apply for trademark registration in China, it must do so through a Chinese trademark agent authorized by the State Administration for Industry & Commerce (SAIC).⁶⁰ Furthermore, any application for registration of a trademark must be submitted in the Chinese language.⁶¹ This means that multinational corporations must determine how to translate their name into Chinese characters before their name can be registered.⁶² Often when foreign corporations try to register this translated name, these corporations discover that their name has already been registered by a domestic trademark pirate. To fight these trademark pirates, China can rely on the “well-known marks doctrine.”⁶³

C. Well-Known Marks

Trademarks that are considered “well-known” in China are afforded a greater scope of protection.⁶⁴ The well-known marks doctrine provides that a mark will be protected in a nation, even if it is not actually used or registered in that nation, if the mark is well-known in that nation.⁶⁵ The doctrine is especially important to first-to-file nations, such as China, which generally do not protect unregistered marks.⁶⁶ The well-known marks doctrine also allows owners of well-known marks to prevent any-

60. Implementing Regulations, *supra* note 39, art. 7.

61. *Id.* art. 8.

62. A corporation has a number of options available when deciding how to translate its name. First, the name may be translated into Chinese characters based on pronunciation, by selecting Chinese characters which sound like the foreign brand name. Second, the name may be translated by selecting Chinese characters that sound close to the company name, but also carry certain meanings. Third, the name can be translated using a combination of the two methods. Yi Zhang, *Basics About Chinese Names*, <http://www.lexicool.com/article-chinese-names-yi-zhang.asp>.

63. The “well-known” marks doctrine is also sometimes referred to as the “famous marks doctrine.” In the Untied States, the “famous marks doctrine” can also refer to the status of a mark as a “famous mark” for the purposes of the United States Federal Anti-Dilution Act of 1996. A famous mark is a very strong mark that is widely recognized. J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARK & UNFAIR COMPETITION* § 29:61 (4th ed. 2002). A famous mark is known to a large portion of the public. Famous marks have a higher degree of reputation than well-known marks and therefore merit broader protection. A famous mark must be registered in at least the trademark owners home nation and have a value formulated by an internationally accepted method. Cahan, *supra* note 6, at 222.

64. TL 2001, *supra* note 4, art. 13.

65. MCCARTHY, *supra* note 63, § 29:61.

66. *Id.*

one from capitalizing on that mark and reputation in a country where that mark has not yet been used or registered. But the extent of protection offered to a well-known mark varies from country to country.⁶⁷ In China, the doctrine fights trademark pirates who register a well-known trademark before the rightful owner. If a mark is well-known, the trademark owner can apply for cancellation of the mark with the TRAB, request SAIC to stop the unauthorized use of identical or similar marks⁶⁸ or bring a case in the People's Court to stop use of the infringing mark.⁶⁹

The foundation of modern treaties and domestic laws providing protection for well-known marks internationally is Article 6*bis* of the Paris Convention.⁷⁰ Since China is a member of the Paris Convention, if a mark is considered well-known under the Paris Convention, China must recognize this well-known mark. This recognition is significant, because if the trademark is well-known, a member of the Paris Convention must protect the trademark even if it has not been registered.⁷¹ Thus, a well-known mark which is given protection under the Paris Convention would be an exception to China's first-to-file rule, which generally grants rights to the first to register the mark in China. While the date of application for trademark registration is the date on which the Trademark Office receives the application, if the applicant filed a trademark application in a country which is a member state of the Paris Convention, then the date of the Chinese application will relate back to the date of the original filing.⁷²

Well-known marks are also protected by TRIPS.⁷³ With respect to well-known marks, TRIPS has made more progress than the Paris Convention through the expansion of protection to include well-known service marks.⁷⁴ TRIPS also provides protection of well-known trademarks from use in different commodities and services, and a rough standard on how to determine well-known trademarks.⁷⁵ TRIPS also goes further

67. Bella I. Safro & Thomas S. Keaty, *What's in a Name? Protection of Well-Known Trademarks Under International and National Law*, 6 TUL. J. TECH. & INTELL. PROP. 33, 34 (2004).

68. Implementing Regulations, *supra* note 39, art. 45.

69. TL 2001, *supra* note 4, art. 53.

70. Cahan, *supra* note 6, at 227.

71. Paris Convention, *supra* note 45, art. 6*bis*.

72. *Id.* art. 4.

73. TRIPS, *supra* note 20, art. 16.

74. *See id.*, art. 16.2.

75. YANG, *supra* note 55, at 148. Article 16.2 of TRIPS provides that "in determining whether a trademark is well-known, Members shall take into account the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark." TRIPS, *supra* note 20, art. 16.2.

than prior international treaties and requires a member country to protect a well-known trademark or service mark, even if that mark was not registered in the country in question.⁷⁶

In response to demands by the United States for formal protection of well-known marks under the TRIPS guidelines and to encourage more foreign companies to apply for trademark registration, the SAIC issued the Interim Provisional Regulations on the Verification and Control of Well-Known Trademarks (Provisions) in 1996.⁷⁷ The Provisions loosely defined well-known trademarks as “registered trademarks which are of high repute and well-known to the relevant sector of the public.”⁷⁸ The Provisions granted the Trademark Office (CTMO) of SAIC, along with the TRAB, power of final review and adjudication of cases. Article 5 of the Provisions also established rather stringent requirements and procedures for the recognition of well-known marks.⁷⁹ Under these rules, no foreign well-known marks were registered by SAIC in the period of 1996–1999.⁸⁰

This led the United States and some European nations to put pressure on China to provide sufficient protection to foreign trademarks and im-

76. Cahan, *supra* note 6, at 230. Article 16.3 of TRIPS states:

Article 6bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect to which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use. This article intended to provide an exception to the principle of specialty, which stipulates that trademarks are only protected in relation to the same or similar goods or services that the mark has been registered for. In certain circumstances this article of TRIPS extends trademark protection to non-competing goods and services.

TRIPS, *supra* note 20, art. 16.3.

77. Cahan, *supra* note 6, at 225.

78. Provisional Regulations on the Verification and Control of Well-Known Trademarks (promulgated by the State Admin. for Industry and Commerce of the P.R.C., Aug. 14, 1996), art. 2, *translated in* http://www.wanhuida.com/english_ver/Law/Index.asp?InfoTypeID=9#.

79. FENG, *supra* note 8, at 358. The failure of foreign marks to be granted well-known status may have resulted from the SAIC interpretation used by the court which made it difficult for a mark presented in English to be considered well-known, since most of the Chinese public is unable to read English. Cahan, *supra* note 6, at 226.

80. Between 1996–1999, SAIC granted registration to eighty-seven marks as well-known, but none of these marks were registered by a foreign corporation. Cahan, *supra* note 6, at 226.

prove their laws on well-known trademarks.⁸¹ As previously mentioned, the Trademark Law was amended in 2001 to provide greater protection to well-known marks.⁸² The TL 2001 sets out the standards for certification and protection of well-known marks in Article 14.⁸³ While the new law does not explicitly define a well-known mark, it provides factors that should be considered in making a determination of a well-known mark.⁸⁴ Under TL 2001, the legal owner of an unregistered but well-known mark may bring a claim of opposition or cancellation of the previously registered mark.⁸⁵ Although the amended law maintains the “first-to-file” system, it grants some protection to an unregistered trademark owner against infringement. Operating under the principle of “exclusive right to use,”⁸⁶ the law provides that any “mala fide”⁸⁷ pre-emptive registration may be viewed as encroaching on the rightful owner’s goodwill in the unregistered well-known mark, established through use, if the pre-emptive registration is a duplication, imitation, or translation of the rightful owner’s unregistered mark, and is for identical or similar goods or services, and it is likely to mislead or confuse the public.⁸⁸ Therefore, after a well-known trademark has been established in China in accordance with Article 14,⁸⁹ any application or registration conflicting with the well-known mark will be rejected or prohibited from use.⁹⁰ Furthermore, the law is intended to provide well-known trademark status and protection to Chinese and foreign brands alike, as required by international treaties.⁹¹

In another step towards compliance with their international agreements,⁹² China strengthened their protection for well-known marks by

81. *Id.*

82. TL 2001, *supra* note 4, art. 13.

83. FENG, *supra* note 8, at 300; TL 2001, *supra* note 4, art. 14.

84. These include (1) reputation of the mark to the relevant public; (2) time of continued use of the mark; (3) consecutive time, extent and geographical area of advertisement of the mark; (4) records of protection of the mark as a well-known mark; and (5) any other factors relevant to the reputation of the mark. TL 2001, *supra* note 4, art. 14.

85. *Id.* arts. 13, 30.

86. “A trademark provides protection to the owner of the mark by ensuring the exclusive right to use it to identify goods or services, or to authorize another to use it in return for payment.” WIPO, *supra* note 34.

87. A “mala fide” registration is a registration in bad faith. FENG, *supra* note 8, at 368.

88. *Id.*

89. TL 2001, *supra* note 4, art. 14.

90. FENG, *supra* note 8, at 368.

91. Cahan, *supra* note 6, at 231.

92. See Paris Convention, *supra* note 45; TRIPS, *supra* note 20; Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, P.R.C.-U.S., 34 I.L.M. 881 (1995).

promulgating three new regulations: the Rules for Recognition and Protection for Well-Known Trademarks,⁹³ the Implementation Policy for the Madrid International Registration,⁹⁴ and the Measures Regarding Registration and Administration of Collective Marks and Certification Marks.⁹⁵

The Provisions on the Determination and Protection on Well-Known Trade Marks (WKTm), which came into force on June 1, 2003, replaced the Provisions from 1996.⁹⁶ The WKTm provides more detailed procedures on filing applications for well-known trademark status and on filing claims for relief against infringements.⁹⁷ According to WKTm, well-known trademarks are defined as trademarks that are widely known to the relevant public and enjoy a high reputation in China.⁹⁸ Another major change made by WKTm is the elimination of the state-maintained record of the trademarks that have been given well-known status. Under WKTm, for each new dispute that arises, trademark owners may now file opposition to a trademark application made by a third party or file for revocation of a registered trademark by applying for recognition of their trademark as well-known by submitting relevant evidence.⁹⁹ Despite the promulgation of such new laws, the number of infringement claims, particularly those filed by foreign companies against Chinese companies, continues to rise.¹⁰⁰ Moreover, despite the amended trademark laws and WKTm, foreign marks still do not receive equal treatment with domestic marks. Out of forty-three marks given well-known status under the Implementing Regulations of the Trademark Law and the Recognition and Protection Rules of the Well-Known Trademarks in 2004, forty were for companies based in mainland China.¹⁰¹

93. Provisions on the Determination and Protection of Well-Known Marks, Apr. 17, 2003 (P.R.C.), available at <http://sbj.saic.gov.cn/english/show.asp?id=57&bm=flfg> [hereinafter WKTm].

94. Madrid Implementation Agreement, *supra* note 49.

95. Measures Regarding Registration and Administration of Collective Trademarks and Certification Trademarks, Apr. 17, 2003 (P.R.C.), available at <http://sbj.saic.gov.cn/english/show.asp?id=60&bm=flfg>.

96. WKTm, *supra* note 93, art. 17.

97. International Trademark Association, *Asia Pacific Update*, Oct. 2003, <http://www.inta.org/asiapacific/ap200310.html#5>.

98. WKTm, *supra* note 93, art. 2. WKTm further provides that “[r]elevant sectors of the public shall include consumers of the type of goods and/or services to which the mark applies, operators who manufacture the said goods or provide the said services, and sellers and other persons involved in the channels of distribution of the type of goods and/or services to which the mark applies.” *Id.*

99. International Trademark Association, *supra* note 97.

100. SIPO, *supra* note 11.

101. Cahan, *supra* note 6, at 232.

III. TRADEMARK INFRINGEMENT CLAIMS

After China's entry into the WTO, the nation eased restrictions on its trade and markets for foreign investment,¹⁰² and has enhanced its appeal to foreign investors.¹⁰³ Similar to Starbucks, many multinational corporations see the economic potential of investing in China. However, a major concern for these foreign investors is the protection of their well-known trademarks.¹⁰⁴ The Starbucks case highlights the importance of special protection for well-known marks in a "first-to-file system" like China. Unlike the United States, which uses a "first-to-use" trademark registration policy,¹⁰⁵ in China, trademarks can be registered by a company, which may not be connected to the registered trademark.¹⁰⁶ Under such a "first-to-file" system, a trademark can be registered by a third-party, called a trademark pirate, who has no connection to the mark. This leads to a situation where the legal trademark owner must take administrative or judicial action to stop the unauthorized use of its mark.

A. Claims Against Domestic Defendants

The Starbucks decision is significant because it is the first case decided under the amended TL 2001 and WKTM, which were enacted to provide greater protection to well-known marks.¹⁰⁷ In cases prior to WKTM, foreign companies were often not successful in protecting their well-known marks. South Korea's Hyundai Motors paid an undisclosed sum to a Beijing company, Zhejiang Xiandai Group (Zhejiang), which had registered

102. China has agreed to a significant reduction of tariffs to open up their market to foreign goods and has agreed to a five-year phase out of import quotas. DANIEL C.K. CHOW, A PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA 251 (2002).

103. White, *supra* note 1, at 35. China has taken a number of steps to protect and attract foreign investors, including enacting new foreign investment laws, amending its Constitution and establishing the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), to administer China's foreign trade and economic cooperation arrangements. The responsibilities of MOFTEC include: (1) to promulgate laws, regulations and policies; (2) to coordinate foreign trade, investment, and economic development; (3) to create nationally strategic plans; and (4) to administer all foreign investment contracts, laws, and regulations. *Id.* at 37. In 2005, China was the largest recipient of foreign direct investment. Foreign direct investment in China reached a record \$60.6 billion in 2005. *World Investment Report 2005*, BUS. LINE, Oct. 11, 2005, available at 2005 WLNR 16474946.

104. CHOW, *supra* note 102, at 179, 186.

105. Lanham Act, 15 U.S.C. § 1051 (2004).

106. Long, *supra* note 26, at 75.

107. Associated Press, *Starbucks Aims for 30,000 Stores Globally*, N.Y. TIMES, Oct. 14, 2004, available at <http://www.nytimes.com/aponline/business/AP-Starbucks-Growth.html?ex=1098805520&ei=1&en=32589ca41cdd75cb> (last visited Oct. 14, 2004).

and used the “xiandai qiche” trademark—the widely accepted Chinese translation for Hyundai Motors.¹⁰⁸ After being unable to register “xiandai qiche,” Beijing Hyundai Motors approached Zhejiang about purchasing the trademark after the first of its Sonata models finished production in Beijing at the end of 2002.¹⁰⁹ The “xiandai” trademark had been registered by Zhejiang for 43 products, including cars, in 1996. The registration of the trademark cost 100,000 yuan (approximately US\$12,000), but sources close to Zhejiang estimate that Zhang Pengfei, the chairman of the company, earned about 40 million yuan (approximately US\$5 million) from the sale of the trademark to Hyundai.¹¹⁰

In a more recent case, Toyota, a Japanese auto manufacturer, filed suit against the Geely Group, a domestic auto manufacturer for trademark infringement at the end of 2003.¹¹¹ Toyota claimed that the logo of Geely’s signature economy model car, the Merrie, was very similar to that of Toyota, and therefore infringed on Toyota’s well-known trademark. To support this claim, lawyers for Toyota provided a report by the Beijing-based Shaohai Market Investigation, which provided that out of 317 consumers surveyed, almost 67 percent believed the Merrie logo to be that of Toyota, while only 6.9 percent were able to associate the logo with Geely.¹¹² But in November 2003, the No. 5 Civil Division of the Beijing No. 2 Intermediate People’s Court handed down a decision that the two logos were sufficiently different. The Court, relying on China’s Trademark Law, held that the survey should only be composed of consumers or potential consumers.¹¹³ Moreover, the Court felt that Toyota’s claim lacked “legal basis and fact,” because not only are the logos sufficiently different, but consumers will not be confused because other characteristics of the vehicles, particularly the price, are vastly different.¹¹⁴ The case is significant because although China does not follow a com-

108. David Fang, *Hyundai Pays High Price to Win Back Trademark Rights*, SOUTH CHINA MORNING POST, Feb. 21, 2004, available at 2004 WLNR 5967039.

109. *Id.*

110. *Id.*

111. Liu Li, *Logo Likeness Doesn’t Hold in Court*, CHINA DAILY, June 9, 2004, available at http://www.sipo.gov.cn/sipo_english/gfxx/iprspecial/t20040906_34278.htm.

112. *Id.*

113. The deputy presiding judge, Shao Minyan, stated, “According to Chinese law, similar trademarks mean that the charged trademark is easy to mislead consumers in thinking it has special relation with products of the registered trademark of the plaintiff.” *Id.*

114. The court found in comparing the logos that “although the exterior outlines are both elliptical, the Japanese logo is simple, whereas the Chinese logo is comparatively more complicated.” *Id.*

mon law system,¹¹⁵ many believe that it will likely influence future automobile trademark lawsuits.¹¹⁶

The Toyota and Hyundai cases demonstrate the favoritism that Chinese courts sometimes accord to a local entity over a foreign company. Such favoritism raises concerns by foreign companies who fear that China's IP laws are not being applied consistently or fairly. However, in certain cases, including the Starbucks case, the courts have found in favor of the foreign company. In one case similar to the Starbucks case, the international beverage company Coca-Cola successfully stopped a Chinese company from using a mark similar to theirs. Coca-Cola alleged infringement through transliteration of its mark.¹¹⁷ Transliteration has been a common way for by companies to render their mark in Chinese. Through this method, a company chooses Chinese characters that represent the foreign word's sound.¹¹⁸ In this 1997 case, Coca-Cola filed suit against a can manufacturer in Zhejiang province who used the Chinese words "Ke Le," which is the transliteration of "Cola" and the second element of Coca-Cola's famous mark, to market their can products.¹¹⁹ In creating their Chinese mark, Coca-Cola used both the transliteration and conceptual method.¹²⁰ The Company chose "ke kou ke le," which in Mandarin sounds very close to Coca-Cola, and the literal translation of the words has the positive meaning of "permitting the mouth to rejoice."¹²¹ Coca-Cola brought a successful action with the Administration for Industry and Commerce, under both its English and Chinese trademark registrations.¹²² Coca-Cola was able to stop the "Chinese factory from using the Chinese transliteration of Cola as a mark for their can products, because it would mislead consumers to associate the unauthorized cans with the Coca-Cola Company."¹²³ Similarly, the court in the Starbucks case also considered whether the Chinese translation of a foreign well-known brand name would mislead consumers.

115. China operates under a civil law system. Michele Lee, Note and Comment, *Franchising in China: Legal Challenges When First Entering the Chinese Market*, 19 AM. U. INT'L L. REV. 949, 986 (2004).

116. Li, *supra* note 111.

117. Cahan, *supra* note 6, at 240.

118. This is also known as the "phoenetic method." *Branding Lost (and Found) in Translation*, CHINA BRIEF, June 2004, available at <http://www.amcham-china.org.cn/amcham/show/content.php?Id=100&menuid=04&submid=04>.

119. Cahan, *supra* note 6, at 241.

120. The "conceptual method" uses Chinese characters that represent the literal meaning of the foreign words. *Branding Lost (and Found) in Translation*, *supra* note 118.

121. Cahan, *supra* note 6, at 241.

122. *Id.* at 240.

123. *Id.*

B. The Starbucks Case

As a result of increased trade across borders, the global intellectual property community has recognized the need for protection of trademark rights in different languages.¹²⁴ To address this issue, China's TL 2001 provides that using a phonetically similar mark to another's trademark on a similar product or service is a ground upon which to base a claim for trademark infringement.¹²⁵ Starbucks, the U.S.-based coffee company, alleged this type of trademark infringement in their suit against a Shanghai coffeehouse filed in December 2003. Starbucks, named after a character from the classic American novel *Moby Dick*,¹²⁶ claimed trademark infringement against a Shanghai company, Xingbake Coffee Shop Ltd. (Shanghai Xingbake).¹²⁷ The two coffeehouses share the same three characters—xing, ba, ke—in Chinese pinyin.¹²⁸ In Chinese, “Xing” means “star” and “bake” phonetically sounds like “bucks.”¹²⁹

Starbucks launched its chain of coffee houses in Taiwan in 1998 and subsequently authorized a Taiwanese company, the President Group, to operate the business in China.¹³⁰ The business registered “Xingbake” as their Chinese name, and subsequently opened coffeehouses using that name in Taiwan and Hong Kong.¹³¹ In May 2000, seeking to expand into the Shanghai market, Starbucks and the President Group jointly established the Shanghai President Starbucks Shareholding Company and subsequently discovered that Shanghai Xingbake registered the enterprise name “Xingbake” with local authorities in March 2000.¹³² Although Starbucks had not yet entered the Shanghai market at that time, “Xingbake” had been used in Taiwan as the Chinese translation for Starbucks

124. Safro & Keaty, *supra* note 67, at 35.

125. See Mingli Chen & Corinne Marie Pouliquen, *Doing Business in China: Protecting Your Trademark Assets*, INT'L LEGAL NEWS, May 3, 2004, http://www.iln.com/2004_newsletter/may/na_epstein_becker_pouliquen.htm.

126. *Legal Battle Brews Between Starbucks and Chinese Coffee Shop*, AGENCE FRANCE PRESSE, Aug. 6, 2003, available at 2003 WL 69497517.

127. Shih, *supra* note 12.

128. Zhang Yong, *Starbucks Sues over Trademark Infringement*, CHINA DAILY, Feb. 16, 2004, available at http://www.chinadaily.com.cn/english/doc/200402/16/content_306362.htm. Pinyin is a system of writing Mandarin Chinese in Romanization. Edward A. Gargan, *Chinese as it's Written: Wildly Different Strokes*, N.Y. TIMES, Nov. 10, 1986, at A4.

129. *Id.*

130. *Starbucks Sues Domestic Coffee Bar Chain for Trademark Infringement*, CHINA IP EXPRESS, Feb. 13, 2004, available at http://www.iprights.com/publications/chinaipexpress/ciex_196.asp.

131. *Id.*

132. *Id.*

since 1998.¹³³ Fearful that the trade name Shanghai Xingbake would lead to customer confusion, Starbucks tried to stop Shanghai Xingbake from using "Xingbake" in its name.¹³⁴

After an unsuccessful attempt to reach an out of court settlement, Starbucks sought administrative protection of its trademark from the Shanghai AIC, the local branch of the SAIC. The Shanghai AIC issued an order in September 2000 that called for the café to remove any signs, logos, and names similar to Starbucks.¹³⁵ Shanghai Xingbake failed to obey the order and subsequently opened another outlet in July 2003, on the city's trendy Nanjing Road.¹³⁶ Starbucks then warned Shanghai Xingbake to remove all logos and names similar to Starbucks, but the manager of Shanghai Xingbake refused to do so.¹³⁷

The manager for the Shanghai Xingbake felt there had been no trademark infringement.¹³⁸ He claimed since the company "never applied for any Chinese or English trademarks . . . there is no trademark infringement at all."¹³⁹ Rather, he argued that Starbucks' complaint was invalid because Shanghai Xingbake is using a "legitimate company title, instead of a trademark."¹⁴⁰ However, according to attorneys for Starbucks, a trademark is of greater importance than a trade or company name under Chinese law in this particular situation.¹⁴¹ In initiating the suit, lawyers for Starbucks argued that "big brand owners like Starbucks have invested

133. Yong, *supra* note 128.

134. *Id.*

135. Shih, *supra* note 12.

136. *Id.* Prior to the decision, Shanghai Xingbake had plans to open an additional thirty to fifty franchise outlets in downtown Shanghai. *Legal Battle Brews Between Starbucks and Chinese Coffee Shop*, *supra* note 126.

137. *Starbucks Should Probably Win an Intellectual Property Case Against a Similarly Named Local Wire*, EIU VIEWSWIRE CHINA, Mar. 17, 2004, available at 2004 WLNR 13988794.

138. Yong, *supra* note 128.

139. *Id.*

140. *Id.* Shanghai Xingbake's argument relies on a Chinese law which treats trademark registrations and registrations of enterprise names separately. There is currently no regulation that provides that once a name has been registered as a trademark name, it cannot be registered as an enterprise name. In China, trademarks are registered with the CTMO, whereas enterprise names are registered with the local AICs. Generally, there is no conflict between trademarks and enterprise names. The conflict arises between well-known trademarks and enterprise names, as it did in the Starbucks case. Interview by Emma Barraclough with An Qinghu, Director General, China Trade Mark Office, *Inside World's Busiest Trade Mark Registry: Trade Mark Applications in China have Risen by 80,000 in Each of the Past Two Years and the Rapid Growth Looks Set to Continue*, MANAGING INTELL. PROP., Nov. 1, 2004, at 25 [hereinafter Qinghu Interview].

141. *Starbucks Should Probably Win an Intellectual Property Case Against a Similarly Named Local Wire*, *supra* note 137.

heavily into building their brands. In this case, the integrity of the brand is at stake.”¹⁴²

In its suit, Starbucks wanted Shanghai Xingbake to cease using “Xingbake,” as well as its logo, which is of a similar color and design as that of Starbucks.¹⁴³ With such similarities between the two coffeehouses, Starbucks argued that the probability of consumer confusion is high.¹⁴⁴ The manager of Shanghai Xingbake argued that its logo was not copied, but was designed by its own staff member.¹⁴⁵ In addition, he argued that he registered the trade name on October 20, 1999, whereas Starbucks did not apply for its name until January 2000.¹⁴⁶ Moreover, he asserted that at the time Shanghai Xingbake registered its name, most Chinese people were unfamiliar with Starbucks.¹⁴⁷ The manager said that any similarity between the two brand names is coincidence, because he had not heard of Starbucks at the time.¹⁴⁸ But Starbucks argued that the facts and circumstances of the case supported its claims that the Shanghai Xingbake is operating in bad faith. Starbucks registered their trademark for the purpose of operating a coffee shop, which is also what Shanghai Xingbake is doing.¹⁴⁹

Starbucks also sought damages of 500,000 yuan (approximately US\$62,500), the maximum amount of damages allowable under TL 2001.¹⁵⁰ While the case was pending in the Second Intermediate People’s Court of China, the court froze Shanghai Xingbake’s bank account and seized objects related to the case, including name cards and menus.¹⁵¹ On December 31, 2005, the court handed down a decision finding that Shanghai Xingbake had engaged in unfair competition by using the Chinese translation of Starbucks in its company name and by using a similar design logo for its cafes.¹⁵² The court ordered both branches of Shanghai

142. Shih, *supra* note 12.

143. *Id.*

144. *Id.*

145. *Legal Battle Brews Between Starbucks and Chinese Coffee Shop*, *supra* note 126.

146. *Starbucks Sues Domestic Coffee Bar Chain for Trademark Infringement*, *supra* note 130.

147. *Legal Battle Brews Between Starbucks and Chinese Coffee Shop*, *supra* note 126.

148. *Id.*

149. *Id.*

150. *Starbucks Sues Domestic Coffee Bar Chain for Trademark Infringement*, *supra* note 130.

151. Shih, *supra* note 12.

152. Monica Soto Ouchi, *Starbucks in Battle to Protect its Name*, SEATTLE TIMES, Oct. 9, 2005, available at http://seattletimes.nwsourc.com/html/business/technology/2002549239_starside09.html.

Xingbake to cease using “xingbake” and ordered Shanghai Xingbake to pay 500,000 yuan to Starbucks.¹⁵³

Although Shanghai Xingbake filed an appeal against the court’s decision,¹⁵⁴ the case is of great importance because it is the first decision made by a local court on infringement of a well-known mark under the revised trademark law, TL 2001 and WKTm.¹⁵⁵ In China, the first to register a mark will generally prevail in an infringement claim.¹⁵⁶ However, under TL 2001 and WKTm, which was passed as a result of pressure from foreign companies to protect their well-known brands, well-known marks are accorded special protection.¹⁵⁷ The Shanghai No. 2 Intermediate People’s Court found that the marks “Starbucks” and “Xingbake,” along with its logo design are considered well-known marks in China as a result of “their widespread use, publicity and reputation.”¹⁵⁸ Thus, as a well-known mark, although Starbucks registered the mark in Shanghai after Shanghai Xingbake, Starbucks was able to prevail.¹⁵⁹ Moreover, since Xingbake is a well-known mark, the court found that Shanghai Xingbake was acting in bad faith by using the mark in an attempt to benefit from the goodwill and reputation of Starbucks.¹⁶⁰

The Starbucks decision is not only evidence that Chinese courts will protect the well-known marks of foreign corporations from infringement

153. Yin Ping, *Judge rules for Starbucks in Copyright Violation Case*, CHINA DAILY, Jan. 2, 2006, available at www.chinadaily.com.cn/english/doc/2006-01/02/content_508607.htm.

154. Shanghai Xingbake argues that the Shanghai No. 2 Intermediate People’s Court should have taken into account the date on which Shanghai Xingbake registered its trademark, rather than when the mark was first used and that it registered “xingbake” in October 1999, two months before Starbucks, although it did not open its business until the following year. Amy Gu, *Coffee Shop Appeals on Starbucks Trademark*, STANDARD (Hong Kong), Jan. 19, 2006, available at http://www.thestandard.com.hk/news_detail.asp?we_cat=2&art_id=10237&sid=6291676&con_type=1&d_str=20060119.

155. Associated Press, *supra* note 107.

156. Ouchi, *supra* note 152.

157. *Id.*

158. Ping, *supra* note 153; Kenny Wong & Eugene Low, *Starbucks Well-Known Marks Win Out Over Local Name Registration*, Feb. 6, 2006, <http://www.commliba.org/modules.php?name=News&file=article&sid=145>. According to an Interpretation by the Supreme People’s Court, the higher/intermediate People’s Courts have jurisdiction to identify a well-known trademark in trademark disputes upon request of the party concerned according to Article 14 of the TL 2001. Interpretations of the Supreme People’s Court of Several Issues Concerning the Application of the Law to the Trial of Civil Dispute Cases Involving Trademarks, art. 22, Oct. 10, 2002, effective Oct. 16, 2002 (P.R.C.), translated in <http://www.colaw.cn/findlaw/ip/trademarks.htm>.

159. Ping, *supra* note 153.

160. Wong & Low, *supra* note 158.

by domestic entities,¹⁶¹ but also provides some guidance as to what constitutes a well-known mark in the Chinese courts. This is especially important since China has been criticized for the lack of consistency in their determinations of well-known marks¹⁶² and has been asked to publish the criteria that it used for assessing trademarks and to provide guidance on how the office will apply the new well-known trademarks laws in practice.¹⁶³ One factor the courts appear to consider is evidence that the brand owner placed advertisements in several countries over a period of time.¹⁶⁴ The Shanghai Court in the Starbucks listed “publicity” as a factor it considered in making the well-known determination.¹⁶⁵ Similarly, in an earlier decision, *Inter IKEA Systems B.V. v. Beijing CINET Co.*, the Intellectual Property Chamber of Beijing’s Second Intermediate People’s Court found IKEA to be a well-known mark because their goods and services had been advertised for an extended period of time around the world.¹⁶⁶ Another factor cited by the Starbucks court in making the determination of a well-known mark was reputation,¹⁶⁷ which was also considered in *IKEA*.¹⁶⁸ The Starbucks court may have also considered evidence of registrations in other countries around the world as a factor for well-known status. This factor comes from an ad hoc determination of “Pizza Hut” as a well-known mark by the CTMO.¹⁶⁹ In making this

161. *Id.*

162. Qinghu Interview, *supra* note 140.

163. *Id.*

164. Edward Eugene Lehman, Camilla Ojansivu, & Stan Abrams, *Well-Known Trademark Protection in the People’s Republic of China—Evolution of the System*, 26 *FORDHAM INT’L L.J.* 257, 272 (2003).

165. Ping, *supra* note 153.

166. Lehman, Ojansivu, & Abrams, *supra* note 164, at 272.

167. Ping, *supra* note 153.

168. The court considered that IKEA had enjoyed tremendous popularity in the world and prestige among its customers. Lehman, Ojansivu, & Abrams, *supra* note 164, at 272.

169. Well-known status was granted to Pizza Hut by a Chinese court in 1987. There, an Australian company applied to register the trademark “Pizza Hut” for cake products in China. However, the Chinese Trademark Office, based on the evidence of its registrations of the mark in over forty countries, found that the Pizza Hut Company, an American company, was the original creator of the trademark. The application by the Australian company was rejected and by virtue of the court decision, the “Pizza Hut” mark was granted well-known status. Lehman, Ojansivu & Abrams, *supra* note 164, at 259. The decision to grant Pizza Hut well-known status was economically beneficial for China. In the years following the Pizza Hut decision, Pizza Hut announced it would open fifty more chains to join the fifty chains already open across China. *Pizza Hut to Open 50 More Chain Stores in China*, *PEOPLE’S DAILY*, available at http://english.people.com.cn/english/20010821_77830.html.

decision, the CTMO concluded that Pizza Hut was well-known based on the company's registration of its mark in over forty countries.¹⁷⁰

The Starbucks decision was an important victory for Starbucks and China. The company, one of the world's largest coffee chains, views Shanghai, where thirty-eight of the eighty-three Starbucks' outlets in China are located, as a battleground in its fight to establish dominance in the Chinese market.¹⁷¹ As part of its global growth strategy, Starbucks has decided to focus its efforts on a few countries where it sees great potential.¹⁷² In particular, Starbucks will focus on expanding in China, which the company believes could become one of its largest markets.¹⁷³ China also reaps economic benefits from the decision. If Starbucks had received an unfavorable decision, Starbucks might have scaled back their plans for expansion in the country. But now that its trademark has been recognized as well-known in China, Starbucks can continue to invest in China, with peace of mind that its trademark will be accorded special protection. Moreover, in addition to expanding the number of stores in China, Starbucks is also spending money in China to promote socially responsible projects.¹⁷⁴

The decision is also good news for potential investors. In the past, foreign corporations criticized Chinese courts for their favoritism of the local party in infringement actions, but this decision seems to suggest the tides may be turning. Now, it is the domestic corporation who alleges mistreatment by the People's Court. After the decision came down, Jiang Xian, Shanghai Xingbake's attorney, argued that "[t]he court was too nice to the American company. It should have treated the companies, whatever their nationalities, in the same, fair way."¹⁷⁵ But it is too early to tell whether other courts will follow the Starbucks decision, despite it being widely reported in the news. China has a civil law system, where prior decisions have no binding authority, although they can be used as persuasive authority.¹⁷⁶ However, although there is no reporting system

170. *Pizza Hut to Open 50 More Chain Stores in China*, *supra* note 169.

171. *Legal Battle Brews Between Starbucks and Chinese Coffee Shop*, *supra* note 126.

172. The company decided to adopt this strategy, rather than expanding rapidly into many new countries. Other markets where the company sees potential include Russia, Brazil and India. Associated Press, *supra* note 107.

173. *Id.*

174. In September 2005, Starbucks announced the creation of a \$5 million fund to promote education in China. In creating the fund, Starbucks seeks to "raise its profile in a market it hopes will be its second largest after the United States." *Starbucks Announces \$5 million Fund in China*, CHINA DAILY, Sept. 19, 2005, available at http://www.china-daily.com.cn/english.doc/2005-09/19/content_479140.htm.

175. Gu, *supra* note 154.

176. Lee, *supra* note 115.

of cases between the provinces,¹⁷⁷ there is evidence that courts are applying China's well-known trademarks laws consistently. In June 2004, Starbucks filed a civil lawsuit against a coffeehouse, located in a five-star hotel in Qingdao, which was using the "Starbucks" mark. On December 21, 2005, the court in that case held that its unauthorized use of the Xing, Ba, Ke characters, along with Starbucks, Frappuccino and a logo similar to Starbucks' logo infringed Starbucks trademark rights.¹⁷⁸ These two victories are strong signs to foreign investors that Chinese courts are applying Chinese trademark laws in a consistent manner and are treating foreign and domestic parties alike.

V. OUTLOOK FOR MULTINATIONAL CORPORATIONS ENTERING THE CHINESE MARKET

The Starbucks decision was an important case for the Chinese trademark protection system. The case demonstrates the progress China has made in protecting well-known marks, but also draws attention to the challenges that foreign corporations still face in protecting their trademarks. Although China has fulfilled its obligations under TRIPS and other international treaties,¹⁷⁹ protection of intellectual property, particularly China's weak enforcement of IP laws, remains a major source of contention between China and foreign nations.¹⁸⁰

A. Trademark Laws and Regulations

China has made great improvements to their IPR protection system. With China's accession into the WTO, China has overhauled all of its IP laws to meet international standards.¹⁸¹ China's modern laws provide

177. There is currently no formal reporting system between the provinces or between the central government and the provinces. Nanping Liu, *A Vulnerable Justice: Finality of Civil Judgments in China*, 13 COLUM. J. ASIAN L. 35, 98 n.109 (1999).

178. Emma Barraclough, *Starbucks and Ferrero Celebrate China Victories*, MANAGING INTELL. PROP., Feb. 2006, available at <http://www.managingip.com/includes/magazine/PRINT.asp?SID=610648&ISS=21306&PUBID=34>.

179. International treaties have been among the least effective methods of protecting IPR. This is primarily a result of a failure to provide a global enforcement mechanism. Moreover, China and other nations have demonstrated that compliance with obligations of treaties and actually protecting intellectual property rights are not the same thing. Greg Creer, Note and Comment, *The International Threat to Intellectual Property Rights Through Emerging Markets*, 22 WIS. INT'L L.J. 213, 241 (2004).

180. *Japan Asks China to Step Up Enforcement Against Trademark Breaches*, ASIAN ECON. NEWS, Oct. 25, 2004, available at LEXIS, ACC-No. 123588168.

181. Zhou, *supra* note 3, at 430.

remedies for trademark law violations, including civil liability, administrative sanctions and criminal punishment.¹⁸²

In 1978, China entered into a legal reform program to create a legal system that would foster economic growth.¹⁸³ Since then, China has passed more than 350 laws and 6,000 regulations to support the development of an international business economy. However, the effectiveness of such laws is challenged by a number of factors. First, although, the “rule of law” exists in China,¹⁸⁴ at least in theory, the Chinese people continue to distrust a system of formal laws.¹⁸⁵ Second, as a result of inconsistent interpretation of laws and the Constitution, where existing legislation sometimes contradicts the Constitution,¹⁸⁶ it is difficult to determine which laws should be followed. A third difficulty with Chinese legislation is that vagueness leaves room for corruption and inconsistent administration of laws by provinces who adjust the laws to meet their needs.¹⁸⁷

The ambiguity which exists in trademark law poses a serious concern for those who administer the laws and those who try to follow them. In particular, there is no clear definition of what constitutes a well-known mark in China. Both the Paris Convention and TRIPS fail to explicitly define the process for verification of a well-known mark.¹⁸⁸ Under the Paris Convention, the definition of what constitutes a well-known mark is left to the “competent authority” of the nation in which protection is sought.¹⁸⁹ In China, the lack of a specific definition of a well-known mark has caused significant problems, including self-awarded well-known trademarks, well-known trademark trading, and counterfeit

182. Reid, *supra* note 34, at 91.

183. Pitman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 LAW & SOC. INQUIRY 465 (2004).

184. See William C. Jones, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA'S LEGAL SYSTEM 39–40 (C. Stephen Hsu ed., 2003) (arguing that it is unclear what “rule of law” meant to Chinese officials who asserted the idea during Den Xiaoping's early reforms and that a very broad view would be that “rule of law” suggested that all institutions were associated in some way with the concept of law).

185. Glenn R. Butterson, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 Ariz. L. Rev. 1081, 1114 (1996).

186. Lee, *supra* note 115, at 962.

187. *Id.* at 962–63.

188. YANG, *supra* note 55, at 149.

189. MCCARTHY, *supra* note 63, § 29:62.

trademarks.¹⁹⁰ The lack of certainty has also led many foreign companies to be hesitant to apply for well-known status.¹⁹¹

The current WKTM offers a more detailed explanation of the meaning of a well-known trademark than the prior Provisions.¹⁹² WKTM defines a well-known trademark as “a mark that is widely known to the respective public and also maintains high reputation in China,”¹⁹³ and the 2001 TL provides a number of factors to consider in determining if a mark is well-known.¹⁹⁴ However, the definition and the factors remain broad and subjective, allowing for interpretation by the courts and administrative agencies. This subjective nature can be especially problematic in a nation such as China, whose legal system has been criticized for lack of independence and local protectionism.¹⁹⁵ For guidance, China could look to the factors considered by WIPO in making a determination of a well-known trademark,¹⁹⁶ as well as the standards used by Western nations in determining well-known status.

190. YANG, *supra* note 55, at 151.

191. Since 1996, the TMO has recognized over two thousand well-known marks, all of which are domestic enterprise-owned marks. FENG, *supra* note 8, at 360.

192. WKTM, *supra* note 93.

193. The Regulations further provide that the “relevant public” means the respective consumers using goods or services represented by the trademark, other persons manufacturing such goods or providing such services, and sellers and respective people involved in sales channels. *Id.* art. 2.

194. TL 2001, *supra* note 4, art. 14.

195. See Lehman, Ojansivu & Abrams, *supra* note 164, at 270–71.

196. WIPO adopted these factors in the Joint Resolution Concerning Provisions on the Protection of Well-Known Marks. Article 2(1) of this Joint Resolution provides a number of factors that should be considered when making a determination of a well-known trademark:

(1) Factors for Consideration

(a) In determining whether a mark is a well-known mark, the competent authority shall take into account any circumstances from which it may be inferred that the mark is well known.

(b) In particular, the competent authority shall consider information submitted to it with respect to factors from which it may be inferred that the mark is, or is not, well known, including, but not limited to, information concerning the following:

1. the degree of knowledge or recognition of the mark in the relevant sector of the public;
2. the duration, extent and geographical area of any use of the mark;
3. the duration, extent and geographical area of any promotion of the mark, including advertising or publicity and the presentation, at fairs

B. Chinese Social and Political Culture

Another obstacle in strengthening China's IPR protection comes from China's history and culture, which do not elevate IPR in the same manner as Western nations.¹⁹⁷ In Ancient China, treatises were created by "borrowing" from classics and the work of other scholars without giving formal credit to the sources.¹⁹⁸ From about 100 B.C. until 1911 A.D., the principles of Confucianism dominated Chinese society and culture.¹⁹⁹ Confucian principles celebrate the good of the community over the pursuit of individual reward.²⁰⁰ These principles were carried over when the PRC was established in October 1949 by the CCP.²⁰¹ The Party formulated a body of law, heavily influenced by Marxist-Leninist principles. The laws did not consider literary, scientific and artistic works to be per-

or exhibitions, of the goods and/or services to which the mark applies;

4. the duration and geographical area of any registrations, and/or any applications for registration, of the mark, to the extent that they reflect use or recognition of the mark;

5. the record of successful enforcement of rights in the mark, in particular, the extent to which the mark was recognized as well known by competent authorities;

6. the value associated with the mark.

(c) The above factors, which are guidelines to assist the competent authority to determine whether the mark is a well-known mark, are not pre-conditions for reaching that determination. Rather, the determination in each case will depend upon the particular circumstances of that case. In some cases all of the factors may be relevant. In other cases some of the factors may be relevant. In still other cases none of the factors may be relevant, and the decision may be based on additional factors that are not listed in subparagraph (b), above. Such additional factors may be relevant, alone, or in combination with one or more of the factors listed in subparagraph (b), above.

Gen. Rep. of the Assemblies of the Members States of World Intellectual Property Organization (WIPO), Joint Resolution Concerning Provisions on the Protection of Well-known Marks, WIPO Doc. A/34/13, art. 2(1) (1999), available at http://www.wipo.int/about-ip/en/development_iplaw/doc/pub833.doc.

197. Reid, *supra* note 34, at 90.

198. *Id.*

199. Evans, *supra* note 54, at 589.

200. *Id.*

201. Kristie M. Kachuriak, *Chinese Copyright Piracy: Analysis of the Problems and Suggestions for Protection of U.S. Copyrights*, 13 DICK. J. INT'L L. 599, 603 (1995). The CCP is the highest authority over both the state and society. The CCP participates in all government institutions through a specially chosen party secretary. Reid, *supra* note 34, at 88.

sonal property. Rather, to remove class inequities, such property was considered to be collectively owned by the state.²⁰² It was only following the death of Mao in 1976 that China gave recognition to intellectual property rights.²⁰³

Despite the creation of such laws, the protection of IPR is hindered by the Confucian tradition, which cherishes the concept of “li” in societal relationships.²⁰⁴ The Chinese people are guided by a tradition which encourages individuals to understand their responsibilities and obligations to others and be prepared to take into consideration the views of others, in order to avoid confrontation and create a harmonious society.²⁰⁵ As a result of this tradition, there was little demand for a system of litigation to protect individual rights, including intellectual property rights.²⁰⁶

These Confucian principles have also had a strong influence on China’s political culture. Many aspects of Confucianism were embraced by the Communists and continue to flourish in Chinese society today.²⁰⁷ In China, laws are considered the “concrete formulation of the Party’s policy.”²⁰⁸ These Confucian and Communist principles provide the ideological bases of most of China’s laws, which do not address the idea of providing “property-like protection for products of individual intellect.”²⁰⁹ This has created a political climate under which China does not promote IPR in the same manner as the United States and other Western nations.²¹⁰

China’s political culture has been cited as a central reason for the weakness of the nation’s intellectual property laws and enforcement.²¹¹ A memorandum from the United States Department of State noted that “China’s leaders must increasingly build consensus for new policies

202. Kachuriak, *supra* note 201, at 603.

203. Intellectual property rights were first defined in the General Principles of the Civil Law (effective January 1, 1987) as civil rights of citizens and legal persons. *Id.* at 604.

204. The concept of “li” is broadly translated as etiquette or “rites.” Butterson, *supra* note 185, at 1109.

205. Peter K. Yu, *The Second Coming of Intellectual Property Rights in China*, 24, OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY, NO. 11, from Benjamin N. Cardozo School of Law Yeshiva University (2002).

206. *Id.*

207. Butterson, *supra* note 185, at 1113.

208. FENG, *supra* note 8, at 11.

209. Reid, *supra* note 34, at 92.

210. *Id.* at 90.

211. The Chinese political system, under which the state determines which ideas may be disseminated, clashes with a system protecting IPR, where an individual has the right to decide who may use their expression of ideas and how they may be used. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANCE OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 119 (1995).

among party members, influential nonparty members, and the population at large.”²¹² China will continue to face difficulties in building a truly effective intellectual property regime, unless they are able to make a change in the political culture. Therefore, in addition to the promulgation of laws, China must educate its officials and the Chinese public on the nature of IP and encourage protection of IPR.

IV. CHALLENGES IN ENFORCEMENT

Although the Starbucks decision provides hope that China is moving towards a stronger IP system of protection for foreign brands, multinational corporations still face a number of challenges, especially from China's weak enforcement of IP laws. Although China has made significant progress in the laws governing trademarks, China has not yet established an effective enforcement system to protect trademarks. This raises serious concerns for foreign investors because enforcement is the key to protection of IPR in China.²¹³ Although foreign pressure on China has been effective in getting IPR protection laws promulgated, the pressure has been less successful in strengthening enforcement.²¹⁴

A. Administrative Mechanisms of Protection

Under China's "dual track" enforcement system, IPR are enforced by both administrative agencies and the courts.²¹⁵ A trademark owner may either go to the local AIC to report a case of infringement, or pursue a civil or criminal action in a court. For trademark infringement claims, most parties still currently prefer to use administrative measures.²¹⁶ China has established a number of administrative bodies to strengthen protection of IPR. There are three agencies under the State Council who are in charge at the national level: the National Administration for Copyright (NCA), the State Intellectual Property Office (SIPO) and SAIC.²¹⁷

212. Reid, *supra* note 34, at 89.

213. Reid, *supra* note 34.

214. *Id.*

215. In recent years, as a result of reforms for TRIPS compliance, the extensive power of these government agencies has become somewhat curtailed. FENG, *supra* note 8, at 16–17.

216. The administrative mechanism is particularly effective in situations of counterfeit goods. If a counterfeit was found in a market, within days a raid could be conducted. But where there is rampant counterfeiting, the administrative measures are not as effective. *Secrets of Success in China*, MANAGING INTELL. PROP., Apr. 2005, at 10 [hereinafter Roundtable].

217. FENG, *supra* note 8, at 16. The primary responsibilities of the NCA are the implementation and enforcement of the Copyright Law. SIPO is responsible for the development and coordination of China's official IPR policy, but the majority of its daily work

The administrative enforcement for trademark matters is regulated by the CTMO of the SAIC,²¹⁸ but AICs across the nation participate in enforcement of trademark cases and cracking down on trademark counterfeiting and infringement.²¹⁹

The protection of IPR through an administrative mechanism has become increasingly important.²²⁰ According to SIPO, in 2004, SAIC launched a nationwide crackdown upon trademark counterfeiting and infringement, under which AICs from all levels have intensified enforcement of trademark cases.²²¹ But these administrative enforcement efforts are hindered by localism, a lack of financial resources and the inadequacy of penalties against infringers.²²² Localism refers to the emergence of administrative bureaucracy in regions across China as a result of Beijing's decision to enhance local autonomy.²²³ As a result of the decentralization and rise of localism, Beijing's central power was eroded and corrupt local officials filled the power vacuum.²²⁴ This poses problems for protecting IPR because local officials often profit from counterfeit goods through kickbacks or bribes or may even be involved with the production of illegal goods and services.²²⁵ In some cases the

involves patent law administration. *Id.* at 19. The Trademark Office of the SAIC is responsible for trademark registration, administrative recognition of well-known marks and enforcement of trademark protection. Trademark Office Under the State Administration for Industry and Commerce, <http://sbj.saic.gov.cn/english/organization/introduction.asp>.

218. Qin Jize, *Creating a Sound Environment for Trademark Growth*, Aug. 9, 2004, http://www.sipo.gov.cn/sipo_English/gfxx/iprspecial/t20040902_34274.htm.

219. SIPO, *supra* note 11. Some trademark owners may first seek assistance from a local AIC to collect evidence of trademark infringement because these offices have their own market information database. Zhou, *supra* note 3, at 441.

220. Zhuge Beihua & Wang Yao, *The Benefits of Administrative Action: While Interest in Court Action Grows Steadily, Administrative Remedies Still Offer Trade Mark Owners in China Many Advantages*, *MANAGING INTELL. PROP.*, Feb. 1, 2005, at S54 (arguing that as the market economy system develops and the legal system improves in China, judicial protection will become the dominant method for protecting trademark rights, but that administrative protection of trademark rights is indispensable at this time).

221. Under the Action Plan of Conducting Special Operation Right of Registered Trademark Protection issued by SAIC, AICs across the nation conducted special operations to protect registered trademarks. Over 24,000 trademark infringement cases were investigated and dealt with by the AIC, including 3,838 cases involving a foreign company. SIPO, *supra* note 11.

222. Evans, *supra* note 54, at 591.

223. With China's decision in 1979 to move from a planned economy to a market economy, Beijing decided to enhance local autonomy to facilitate the transition. Evans, *supra* note 54, at 590.

224. *Id.*

225. *Id.* at 591.

local infringer is a local government entity.²²⁶ In one case, the Peninsula Group, an international hotel company, brought an action against a state-owned power company who built a hotel called the "Peninsula Hotel" in Yichang.²²⁷ The Peninsula Group, which operates hotels in New York, Beverly Hills, and the Far East, is currently trying to stop the power company from using its name and logo on the hotel.²²⁸

As demonstrated by the Starbucks case, China's enforcement of judgments by an administrative body is weak. Prior to commencing its suit against Shanghai Xingbake in court, Starbucks obtained an order from the Shanghai AIC that called for the café to remove any signs, logos, and names similar to Starbucks.²²⁹ But Shanghai Xingbake failed to obey the order, and Starbucks pursued judicial actions to protect its rights.²³⁰ If administrative mechanisms of protection were more successful in stopping infringement, fewer parties would need to initiate legal proceedings, thereby reducing the number of legal proceedings in China's backlogged courts.

The inability of administrative agencies to enforce orders is due in part to a lack of financial resources and trained staff.²³¹ The lack of resources has also created a backlog of trademark application review.²³² In 2004, CTMO received the most trademark applications since its creation, with a total of 762,000 for both goods and services. This was an increase of more than 27 percent from the previous year.²³³ For trademark registration applications, the CTMO received 587,926 applications covering goods and services. Of these, 10.26 percent were from foreign applicants.²³⁴ The CTMO was able to examine less than half of the number of

226. *China Pressed to Forcefully Attack Intellectual Property Theft*, STATES NEWS SERVICE, Jan. 13, 2005 (LEXIS, SNS File). Simon Parry, *How to Counterfeit a Five-Star Hotel on the Cheap*, NATIONAL POST, May 1, 2004, available at 2004 WL 76448796.

227. The 154-room hotel, with an exterior that resembles the Hong Kong Peninsula Hotel, is located in Yichang, a tourist destination at the head of China's Three Gorges Dam. The interior of the hotel comes nowhere near the international standards of luxury which are associated with the Peninsula Group. Parry, *supra* note 226.

228. *Id.*

229. Shih, *supra* note 12.

230. *Id.* Article 53 of TL 2001 provides: "Where any interested party is dissatisfied with decision on handling the matter, it or he may, within fifteen days from the date of receipt of the notice, institute legal proceedings in the People's Court according to the Administrative Procedure Law of the People's Republic of China." TL 2001, *supra* note 4, art. 53.

231. Evans, *supra* note 54, at 590.

232. Fang, *supra* note 108.

233. SIPO, *supra* note 11.

234. This is also the first time the number of foreign trademark registration applications exceeded 60,000. *Id.*

trademark registration applications it received²³⁵ According to An Qinghu, the director-general of the CTMO, the office needs a staff of about 245, but currently operates with just 210 employees.²³⁶ But the problem is not simply a lack of staff, but also a lack of training for staff.

Although, it is the responsibility of the local governments to provide the money and personnel to allow the agencies to carry out their duties, they are often reluctant to do so because it is more financially beneficial for them to allow the violators to continue their activities.²³⁷ Although China understands that protection of IPR is essential to their economic reform, many Chinese officials still regard IP protection as a secondary issue.²³⁸

There has been pressure from the international community for China to improve administrative protection of IPR. For example, the United States has argued that to protect American IPR, the Chinese government should extend its administrative power with greater force than allowed under Chinese constitutional principles, such as providing administrative protection of non-existing rights under current Chinese laws and legal principles.²³⁹ Although the United States would like the Chinese government to extend its administrative power further than allowed under the Chinese Constitution to protect IPR, such administrative protection is unlikely because an administrative regulation cannot create rights that do not exist in current law and legal principles.²⁴⁰

B. Judicial Protection of IPR

Judicial protection of IPR will likely play an increased role in trademark protection in the future. In compliance with TRIPS obligations, China must allow judicial review of final decisions from administrative

235. In 2004, of the 587,926 applications it received, the TMO examined 244,852 trademark registration applications. *Id.*

236. Qinghu Interview, *supra* note 140.

237. *Id.* Local authorities, who have a history of defying central orders, are willing to turn a "blind eye" to IP violations of a lucrative local business to prevent the loss of jobs and wealth from the locality. Evans, *supra* note 54, at 591.

238. Judge Jiang Zhipei, the Chief Justice of the Intellectual Property Rights Tribunal of China's Supreme People's Court said, "China is still a developing country. Although a lot of big cities are very developed, there are still many places where people don't have enough to eat. There are more urgent issues to be addressed than IP Protection." Roundtable, *supra* note 216.

239. The suggestion may run into difficulties because in the area of human rights, the United States has argued that the Chinese government exercises too much administrative power. Long, *supra* note 26, at 91.

240. *Id.*

agencies.²⁴¹ To meet these obligations, China has taken significant steps to build a judicial structure to protect IPR. In 1993, the Beijing Intermediate People's Court created its own Intellectual Property Rights Tribunal, the first court to be devoted solely to intellectual property cases.²⁴² Similar intellectual property courts have been established in Shanghai, Tianjin, Guangzhou, Fujian Province, Jiangsu Province, Hainan Province, and the Special Economic Zones.²⁴³

An infringement action can be brought as a civil matter by the trademark owner or as a criminal prosecution.²⁴⁴ A civil court proceeding has some advantages over administrative actions. In a civil court action, the trademark owner can obtain a preliminary injunction from the People's Court either before or at the time a suit is filed.²⁴⁵ A timely decision can also be made in certain civil cases. According to the Chinese Civil Procedure Act, civil cases are usually handled within six months from the filing date, with an additional three months for an appeal.²⁴⁶ However, cases involving foreign parties do not adhere to such a time frame. Rather, as demonstrated by the Starbucks decision, cases involving foreign parties can take years.

Trademark infringement can also be criminally prosecuted under China's Criminal Laws, which make it a crime to intentionally use another party's registered trademark, sell merchandise under a fake trademark, and manufacture any representation of a registered mark without authorization from the registered owner.²⁴⁷ Criminal prosecution has in-

241. FENG, *supra* note 8, at 17.

242. Appeals from the Tribunal would go to a special court affiliated with the Beijing High People's Court. Zhou, *supra* note 3, at 431.

243. *Id.*

244. Meg Utterback, *Options for Enforcement of Intellectual Property Rights in China*, MONDAQ, Feb. 22, 2006, available at 2006 WLNR 3080880.

245. TL 2001, *supra* note 4, art. 57. This measure was put in place to comply with Article 50.1 of TRIPS which provides:

The judicial authorities shall have the authority to order prompt and effective provisional measures: (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance; (b) to preserve relevant evidence in regard to the alleged infringement.

TRIPS, *supra* note 20, art. 50.1.

246. Both the civil case and the appeal time can be extended for special circumstances. He Zhonglin, *Enforcement of Intellectual Property Law in Post-WTO China*, BCLA Seminar, July 25, 2002, available at <http://chinaiprllaw.com/english/forum/forum40.htm>.

247. Criminal Law (promulgated by the Second Session of the Fifth Nat'l People's Cong. on July 1, 1979, amended by the Fifth Session of the Eighth Nat'l People's Cong.,

creasingly become a more popular choice for enforcement because it serves as the greatest deterrent.²⁴⁸ Criminal enforcement may be initiated by a request from a private party.²⁴⁹ Conviction for trademark infringement crimes may result in imprisonment of up to three years, and in severe cases for certain violations, up to seven years.²⁵⁰ In 2004, the Supreme People's Court issued the "Interpretation by the SPC in Handling Criminal Cases of Infringing Intellectual Property"²⁵¹ to make it easier to bring a criminal prosecution for infringement.²⁵²

Despite the increased importance of judicial enforcement, such enforcement is also plagued by many of the problems impacting administrative enforcement, including lack of resources, difficulty in enforcing judgments and inadequacy of penalties. Another common complaint about enforcement is the difficulty in receiving determinations of infringement and enforcing judgments.²⁵³ The TL 2001 made some improvements in this area.²⁵⁴ The 1993 Trademark Law required proof of subjective knowledge or intention with respect to the sales of counterfeit marked goods.²⁵⁵ The TL 2001 no longer requires the subjective knowledge test, requiring only proof of sales of infringing goods.²⁵⁶ These changes make it somewhat easier to receive a determination of infringement. In addition to providing damages for "illegal gains or actual losses," the TL 2001 also provides compensatory damages for "reason-

Mar. 14, 1997), arts. 213–15 (P.R.C), translated in <http://www.colaw.cn/findlaw/crime/criminallaw1.html> [hereinafter Criminal Law].

248. August Zhang, *China: The Impact of New Judicial Interpretations in Intellectual Property-Related Criminal Cases*, Jan. 5, 2005, available at <http://www.iprights.com/publications/articles/article.asp?articleID=265>.

249. Under the Criminal Procedure Act (1996) and the accompanying judicial interpretations, an individual may report a crime of IP infringement to the police, which can lead to a criminal prosecution. Zhonglin, *supra* note 246.

250. Criminal Law, *supra* note 247, art. 213.

251. Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property (Adopted at the 1331st Session of the Judicial Comm. of the Supreme People's Ct., Nov. 2, 2004, and the 28th Session of the Tenth Procuratorial Comm. of the Sup. People's Procuratorate, Nov. 11, 2004, effective Dec. 22, 2004), translated in <http://www.colaw.cn/findlaw/ip/infringing.htm>.

252. The current Interpretation reduces the numerical thresholds needed to trigger criminal IPR prosecutions compared with the previous Interpretations, which came into effect in 2001. Now, only half of the amount set out in the prior Interpretations is required to trigger criminal prosecution.

253. FENG, *supra* note 8, at 300.

254. The 1993 law disproportionately favored the defendant because of the difficulty in proving the infringer's "illegal gains." *Id.*

255. *Id.*; TL 1993, *supra* note 43, arts. 38(2), 4.

256. FENG, *supra* note 8, at 301; TL 2001, *supra* note 4, art 52(2).

able expenses” incurred by the rightful trademark owner in combating the infringement.²⁵⁷ The People’s Court, in cases where neither illegal gains nor actual losses can be calculated, may in its discretion award damages of up to 500,000 yuan, depending upon the circumstances of the infringement.²⁵⁸

Judicial enforcement is also impeded by the lack of judicial independence. Although the Constitution grants the People’s Court “power of independent adjudication,”²⁵⁹ there are many factors which hinder such independence. The Court must still adhere to the CCP’s “unified leadership,”²⁶⁰ which can lead to the shaping of an outcome by the Party. In addition, the Court remains dependent on the People’s Congress for its annual budget and personnel appointments.²⁶¹ External pressure can be effective because unlike federal judges in the United States, Chinese judges do not have tenure and can thus face removal from their position if they render a verdict that the Party does not like.²⁶² Fear of removal can result in judges unreasonably denying motions for transfer of forum, delivering verdicts favorable to local parties or refusing to respect the former judgments by other courts.²⁶³

Furthermore, decisions of local judges may be reviewed by individual “Adjudication Committees,” which are authorized to direct the proper verdict or grant appeals to higher courts for certain cases involving important legal or economic matters.²⁶⁴ This creates challenges for protection of IPR because members of the Adjudication Committee are often loyalists to the CCP or individuals with connections to local businesses.²⁶⁵ But China’s WTO accession may put an end to this problem because the WTO is allowed to review Chinese court decisions and determine whether they were adjudicated impartially.²⁶⁶ Such a check is likely to reduce political influence and corruption of the judicial process.²⁶⁷

Although trademark infringement is a serious and growing problem in China, it is not given sufficient attention by the government. Under the law, trademark counterfeiting on any scale will be considered a criminal

257. FENG, *supra* note 8, at 300.

258. *Id.* at 300; TL 2001, *supra* note 4, art. 56.

259. XIANFA art. 126 (2004) (P.R.C.).

260. FENG, *supra* note 8, at 25–26.

261. *Id.*

262. Cheng, *supra* note 27, at 1989.

263. *Id.* at 1992.

264. Evans, *supra* note 54, at 592.

265. *Id.*

266. *Id.* at 614.

267. *Id.*

offense, but other forms of trademark infringement can only be considered to be a civil offense.²⁶⁸ This presents a challenge because of the difference in damages and punishment attached to the offenses. In addition, because the government feels that counterfeiting is a more serious offense than other forms of trademark infringement, the Chinese authorities have paid less attention and provided fewer resources to combating these trademark infringement claims.²⁶⁹

There are additional difficulties for courts at the local level. There is currently no formal communication system between the localities. At the local level, the People's Congresses are allowed to promulgate laws and regulations to implement the laws handed down by the national legislature, and sometimes create laws that fail to comply with the regulations of the national government.²⁷⁰ This makes it difficult for judges to find the applicable law. Furthermore, while the National People's Congress and the Supreme People's Court publish their laws and opinions in official gazettes, their counterparts at the provincial level do not.²⁷¹ This results in an inconsistent application of laws among different localities which adds an additional challenge for trademark protection. However, the review mechanism of the WTO may reduce the influence of local entities on judicial decisions and ensure that there is uniformity and consistency in the decisions.²⁷²

Similar to administrative enforcement, judicial enforcement also suffers from a lack of financial resources and trained professionals. The Chinese judicial system lacks attorneys and judges who are trained and educated about the particulars of national and international IP laws.²⁷³ This problem stems from the Cultural Revolution when all law facilities were closed from 1966–1976.²⁷⁴ As a result, there is not merely a scarcity of trained IP attorneys, but a general scarcity of attorneys.²⁷⁵ The current legal system only produces about seven hundred lawyers a year.²⁷⁶ Moreover, many of these attorneys are too young and inexperienced to serve

268. Counterfeiting is a form of trademark infringement involving an unauthorized identical or substantially similar copy of a trademark. Other forms of trademark infringement, considered less serious under the Chinese law include copying of trade dress, package design, or the partial copying of a trademark that will lead to consumer confusion. CHOW, *supra* note 102, at 186–87.

269. *Id.*

270. Zhou, *supra* note 3, at 434–35.

271. *Id.* at 435.

272. Evans, *supra* note 54, at 614.

273. *Id.* at 593.

274. Butterson, *supra* note 185, at 1119.

275. Cheng, *supra* note 27, at 1993–94.

276. *Id.*

serve as judges, which has created a legal system in which many judges are retired army sergeants, who have never had a formal legal education.²⁷⁷ The lack of trained judges is particularly devastating in China, where judicial proceedings are of an inquisitorial, rather than an adversarial, nature.²⁷⁸

China has sought to remedy this problem by creating the China Intellectual Property Training Center, which was established in 1997 by the government to train professionals on intellectual property matters.²⁷⁹ It is essential that China has judges and lawyers who are knowledgeable in IP matters because of the court's increased role in IPR protection.

C. Strengthening Enforcement

Despite the weaknesses of the current enforcement system, there is hope for improvement. Recognizing the shortcomings of the current system, Chinese officials are beginning to pay more attention to enforcement. In a speech during an event to mark World Intellectual Property Day, Ma Lianyuan, Vice-Director of the State Intellectual Property Office said, "China will shift from its previous focus on IPR legislation to law enforcement and supervision."²⁸⁰ In support of this effort, Beijing launched "China's Action Plan on IPR Protection" in March 2006. A major component of this initiative is aimed at improving IPR law enforcement efforts.²⁸¹ But to improve enforcement, China, rather than giving grand speeches on reform and issuing elaborate initiatives on paper, must pursue methods which emphasize action rather than words. During a trip to Beijing in January 2005, the United States Commerce Secretary Donald Evans announced that "[r]hetoric without results is worthless. We need deeds, not words, from the Chinese government. The lack of tangible and real results creates skepticism at home about China's commitment."²⁸²

277. *Id.*

278. *See id.*

279. The CIPTC is the first national training center dedicated to providing education on intellectual property issues and practice. SIPO, Annual Report, ch. IX, available at http://www.sipo.gov.cn/sipo_English/ndbg/nb/ndbg2004/t20050902_53469.htm.

280. Edward Lanfranco, *China Launches New IPR Plan*, UPI, March 10, 2006, available at <http://www.upi.com/InternationalIntelligence/view.php?StoryID=20060310-093054-6734r>.

281. The initiative, which covers trademark, copyright and patent, includes seven dedicated enforcement campaigns with various code names, eight regular enforcement initiatives and twenty supplementary measures. *Id.*

282. *China Pressed to Forcefully Attack Intellectual Property Theft*, *supra* note 226.

Most of the obstacles to effective enforcement cannot be solved overnight. Education about the importance of IPR is essential to improve enforcement. But educating the public about IPR and training attorneys and judges on the principles and laws governing the protection of trademarks are gradual processes that will take substantial time. Likewise, China cannot fundamentally change the political ideology of the nation in a short time. Pressure from foreign nations, along with China's strong desire for foreign investment will put internal pressure on the CCP to make changes to shift the Party's ideology to value IPR. But this too will be a long process. Therefore, in addition to promoting education, China should pursue more effective enforcement by imposing steeper penalties and improving coordination between the administrative and judicial bodies responsible for enforcing trademark laws.

It has been argued that since many of the infringers are companies, the best way to punish them for infringement would be to use financial punishments.²⁸³ Under TRIPS, China's criminal IP penalties for willful trademark counterfeiting must be "sufficient to provide a deterrent."²⁸⁴ But China's fines and sanctions are currently inadequate to deter infringement. In China, damages can consist of the infringer's profits or the damages sustained by the plaintiff, plus the cost of the action.²⁸⁵ Although most observers of the current Chinese enforcement system agree that awards based on the actual damages sustained by the plaintiff would be more effective in compensating the plaintiff and in deterring infringement, authorities rarely award these damages, preferring to award the infringer's profits.²⁸⁶ This occurs because it is much more difficult to calculate the damages suffered by the plaintiff than to calculate the infringer's profits. Since most enforcement officials are not properly trained to perform such calculations, the less effective method of calculating infringer's profits is used.

The current maximum statutory award of 500,000 yuan (approximately US\$62,500)²⁸⁷ available to a successful plaintiff in China is too low to

283. Professor Zheng Chengsi, a director of the Intellectual Property Centre at the China Academy of Social Sciences, argues that economic punishments would be more successful than stronger criminal sanctions in effective enforcement. Roundtable, *supra* note 216.

284. TRIPS, *supra* note 21, art. 61.

285. TL 2001, *supra* note 4, art. 56.

286. Daniel C.K. Chow, *Enforcement Against Counterfeiting in the People's Republic of China*, 20 NW. J. INT'L & BUS. 447, 458 (2000).

287. TL 2001, *supra* note 4, art. 56. Contrast this to the U.S. system where a successful plaintiff in a civil action against a counterfeiter can recover both defendant's profits and damages sustained by the plaintiff, in addition the costs of the action. Chow, *supra* note 286, at 459.

serve as a deterrent. In the United States, statutory damages can go up to \$100,000 where the counterfeiting was not willful and can go as high as \$1,000,000 when the violation was willful.²⁸⁸ To fulfill its obligations to TRIPS and to provide stronger enforcement of IPR, China should increase the maximum statutory amount awardable under the Trademark Law. China must also provide guidance to judges, administrative officials, lawyers and the general public on the method that will be used to calculate damages in infringement cases. It is only when the public is aware of the severe financial consequences of infringement activities that they can be deterred from infringement.

To strengthen enforcement, China must also improve coordination between the entities responsible for enforcing trademark laws. Effective IPR enforcement requires coordination and cooperation between the vast number of Chinese IP-related agencies and courts on both the national and local levels. Currently, there are a number of agencies and courts involved in enforcement.²⁸⁹ For administrative enforcement, difficulties arise from the lack of coordination between these bodies and from the confusion in determining which of these bodies has jurisdiction over the particular infringement action.²⁹⁰ Multiple agencies may have jurisdiction over a matter, but the lack of communication, along with the rivalries between agencies, frustrates enforcement efforts. Administrative enforcement bodies have also been criticized for failing to refer administrative cases for criminal prosecution to the Supreme People's Court.²⁹¹ By referring infringement cases for prosecution, experts believe that the increase of criminal punishments for infringement will act as a deterrent.²⁹²

China should also consider creating a centralized IP body to lead efforts in coordination between the various agencies and courts at both the national and local levels. This centralized body would supervise the enforcement entities at the local and national levels to ensure that laws are

288. Chow, *supra* note 286, at 459.

289. These agencies include the Trademark Division of the AICs, Economic Subdivisions of the AICs, Technical Supervision Bureau, Customs, Social Order Divisions of the Public Security Bureau, the Economic Crimes Investigation Divisions of the Public Security Bureaus, and others. *Preliminary Report on Counterfeiting Practices in the People's Republic of China: Hearing on "China and the WTO: Compliance and Monitoring"* before the US-China Economic & Security Review Comm., Feb. 5, 2004 (report submitted by Timothy P. Trainer, President, International Anti-Counterfeiting Coalition, Inc.), available at http://www.uscc.gov/hearings/2004hearings/written_testimonies/04_02_05_wrts/timothytrainer.htm.

290. Roundtable, *supra* note 216.

291. Hillary Hollingsworth, *The Quest for Thought Protection: China's Intellectual Property*, 1 BUS. L. BRIEF (AM. U.) 45, 46 (2004).

292. *Id.*

properly enforced. Such oversight could reduce the enforcement problems caused by localism by ensuring that local authorities handle cases in a fair and consistent manner and do not accord the local party special treatment. But even if China does not centralize enforcement powers in a single administrative agency,²⁹³ China must provide guidance to the local authorities in the cities and provinces concerning enforcement of IP laws. Beijing should set out the responsibilities and jurisdiction of each agency, along with procedures for transferring actions between agencies and for criminal prosecution. By improving coordination among the agencies and courts, judicial and administrative resources can be conserved and cases can move through the system in a more efficient manner.

VI. CONCLUSION

Foreign investors should be encouraged by the Starbucks decision. The landmark decision is a sign that the Chinese courts are complying with their TRIPS obligation and granting well-known trademarks the requisite protection. These investors should also be encouraged by the increased recognition of foreign-owned well-known trademarks. In 2005, pursuant to WKTM, China recognized thirty foreign-owned trademarks from nine different countries, as well-known marks in China.²⁹⁴ To further demonstrate that the nation can be trusted to protect well-known marks, the Starbucks decision should be upheld on appeal. Such a decision will not only send a message to potential infringers that China is committed to fighting trademark infringement, but also serve as a sign to potential investors that Chinese courts will consistently apply the Trademark Law and WKTM.

Despite these promising signs of improvement, China's IP infringement rates are among the highest in the world. To ensure that multinational companies remain interested in investing in China, the nation must continue to strengthen their trademark protection. While China has adopted intellectual property laws that fulfill the requirement of TRIPS, for such laws to be effective in combating trademark violations, they must be coupled with a legal system which is founded on the "rule of law" and free market principles. While China has established a legal

293. It has been argued that China may not be ready to have a single centralized enforcement agency that supervises all the other agencies. To create such a centralized body, power and resources would have to be shifted from bodies that currently possess that power. Given the current political climate in China, these parties may not be ready to hand over such power. Chow, *supra* note 286, at 474 n.103.

294. Dorsey & Whitney, *China & Hong Kong: Recent Developments in Intellectual Property*, MONDAQ BUS. BRIEFING, Mar. 7, 2006 (LEXIS, MONDAQ File).

framework providing protection of IPR, the central concern now lies with enforcement of those rights. Without adequate and effective enforcement, the new IP laws enacted by China will have little value. Realizing that improving enforcement is crucial to the success of its IP system, China has shifted its focus from promulgation of laws to enforcement. To strengthen administrative and judicial enforcement, the nation must make fundamental changes to the current political and cultural ideology. China must not only provide training to judges and attorneys, but also must educate the general public on the value of IPR protection.

While many challenges still lie ahead, China's progress should not be overlooked. China's system of IPR protection has made great improvements over a relatively short span. The achievements that China has made in protecting IPR in slightly over two decades have taken hundreds of years in some other nations.²⁹⁵ There is a Chinese proverb which says, "A journey of a thousand miles begins with a single step." Based upon the progress that China has made in a relatively short amount of time, it appears that China has taken a step in the right direction.

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295. Kachuriak, *supra* note 201, at 604.

* B.A., Georgetown University (2002); J.D., Brooklyn Law School (2006). I would like to thank the editors and staff of the *Brooklyn Journal of International Law* for their hard work and dedication in bringing this Note to publication. Sincere thanks to my friends and my brother who provided me with encouragement whenever I lost sight of the end. I dedicate this Note to my parents, Tony and Daisy Wong, for their love and support throughout my education.