ARTICLES

The Merging of International Trade and Investment Law

Sergio Puig

State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities

Bruce W. Klaw

Forced Sterilization and Mandatory Divorce: How a Majority of Council of Europe Member States' Laws Regarding Gender Identity Violate the Internationally and Regionally Established Human Rights of Trans* People

Rebecca Lee

Leniency in Chinese Criminal Law? Everyday Justice in Henan

Benjamin L. Liebman

The Need for Federal Preemption and International Negotiations Regarding Liability Caps and Waivers of Liability in the U.S. Commercial Space Industry

Matthew Schaefer

Securing the Resources of the Deep: Dividing and Governing the Extended Continental Shelf

Clive Schofield

REVIEW

Review of The UNCITRAL Arbitration Rules—A Commentary (Second Edition) by David D. Caron and Lee M. Caplan

Jawad Ahmad
ABOUT THE JOURNAL

The Berkeley Journal of International Law (BJIL) (ISSN 1085-5718) is edited by students at U.C. Berkeley School of Law. As one of the leading international law journals in the United States, BJIL infuses international legal scholarship and practice with new ideas to address today’s most complex legal challenges. BJIL is committed to publishing high-impact pieces from established and newer scholars likely to advance scholarly and policy debates in international and comparative law. As the center of U.C. Berkeley’s international law community, BJIL hosts professional and social events with students, academics, and practitioners on pressing international legal issues. The Journal also seeks to sustain and strengthen U.C. Berkeley’s international law program and to cultivate critical learning and legal expertise amongst its members.

Website: http://scholarship.law.berkeley.edu/bjil/


Subscriptions: To receive electronic notifications of future issues, please send an email to bjil@law.berkeley.edu. To order print copies of the current issue or past issues, contact Journal Publications, The University of California at Berkeley School of Law, University of California, Berkeley, CA 94720. Telephone: (510) 643-6600, Fax: (510) 643-0974, or email JournalPublications@law.berkeley.edu.

Indexes: The Berkeley Journal of International Law is indexed in the Index to Legal Periodicals, Browne Digest for Corporate & Securities Lawyers, Current Law Index, Legal Resource Index, LegalTrac, and PAIS International in Print. Selected articles are available on LexisNexis and Westlaw.

Citation: Cite as Berkeley J. Int’l L.

Submissions: The editors of the Berkeley Journal of International Law invite the submissions of manuscripts. Manuscripts will be accepted with the understanding that their content is unpublished previously. If any part of a paper has been published previously, or is to be published elsewhere, the author must include this information at the time of the submission.

Citations should conform to The Bluebook: A Uniform System of Citation (19th ed.) except where common sense dictates otherwise. Please review our website for additional submissions guidance and send all manuscripts to bjilsubmissions@law.berkeley.edu.

Sponsorship: Individuals and organizations interested in sponsoring the Berkeley Journal of International Law should contact the Editors-in-Chief at bjil@law.berkeley.edu.

Copyright: Copyright for material published in the Journal is held by the University of California Regents except where otherwise noted.
BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 33                       2015                       NUMBER 1

CONTENTS

Articles

THE MERGING OF INTERNATIONAL TRADE AND INVESTMENT LAW
Sergio Puig .................................................................1

STATE RESPONSIBILITY FOR BRIBE SOLICITATION AND EXTORTION: OBLIGATIONS, OBSTACLES, AND OPPORTUNITIES
Bruce W. Klaw ............................................................60

FORCED STERILIZATION AND MANDATORY DIVORCE: HOW A MAJORITY OF COUNCIL OF EUROPE MEMBER STATES’ LAWS REGARDING GENDER IDENTITY VIOLATE THE INTERNATIONALLY AND REGIONALLY ESTABLISHED HUMAN RIGHTS OF TRANS* PEOPLE
Rebecca Lee ...............................................................114

LENIENCY IN CHINESE CRIMINAL LAW? EVERYDAY JUSTICE IN HENAN
Benjamin L. Liebman ..................................................153

THE NEED FOR FEDERAL PREEMPTION AND INTERNATIONAL NEGOTIATIONS REGARDING LIABILITY CAPS AND WAIVERS OF LIABILITY IN THE U.S. COMMERCIAL SPACE INDUSTRY
Matthew Schaefer ......................................................223

SECURING THE RESOURCES OF THE DEEP: DIVIDING AND GOVERNING THE EXTENDED CONTINENTAL SHELF
Clive Schofield ..........................................................274

Reviews

REVIEW OF THE UNCITRAL ARBITRATION RULES—A COMMENTARY (SECOND EDITION) BY DAVID D. CARON AND LEE M. CAPLAN
Jawad Ahmad ............................................................294
Members

ASHLEY ANDERSON  
HANI BASHOUR  
MICHAEL BIRK  
CHRISTINE CHEN  
JOYCE CHEN  
YANQUN CHEN  
GEORGELLE CUEVAS  
GREGORY DE LA IGLESDIA  
LUCAS A. EVARISTA DOS SANTOS  
XIUFENG FENG  
ZHENGHAO FU  
ELIZABETH FULTON  
ANTOINE GUILMAIN  

JIM HURDER  
RABIA JAVAID  
PETER JUNG  
TOMOHIKO KOBAYASHI  
AYLIN KUZUCAN  
ZHIYU LI  
PEDRO MARTINI  
JULIA OLIVER  
HUGO PIGUET  
ADITI RANADE  
CHELSEA RICE  
KELSEY QUIGLEY  
REMI SALTER  
KAREN SEIF  
LYDIA SINKUS  
OLIVIER SINONCELLI  

Faculty Advisor

MARCI HOFFMAN  
KATE JASTRAM  

VIRGINIA SMITH  
LIANA SOLOT  
JESSIE STEFANIK  
ZHUORAN TANG  
NATALIA TCHOUKLEVA  
SERGIO TORRES  
JOZEFIEN VAN CAENEGHEM  
AARON VOIT  
DAWEI WANG  
CHRISTOPHER YANDEL  
DUJUAN YUAN  
CHRISTINA ZHAO
The Merging of International Trade and Investment Law

Sergio Puig*

“The whole is greater than the sum of its parts.”
Aristotle

This Article presents an account of how and why international trade and international investment law are merging. It describes this phenomenon as resulting from the dynamics of the treaty-making process and the strategies employed by litigation parties at the time of the enforcement of treaty rules. The Article makes two separate, but interrelated claims: first, it argues that the combined use of trade and investment remedies allows litigants to go beyond seeking compliance and compensation, the two traditional types of relief available in international economic law. Like other areas of public law litigation, the strategic parallel, sequential or combined use of legal processes may be used to destabilize governments’ regulatory activity, to shape the interpretation of rules outside an ordinary process, or to relitigate issues settled in one regime through the venue of another. Second, it argues that the merger at issue creates specific, yet not insurmountable, challenges for the development of international law and sketches the main legal tools available to address the most pressing matters. This analysis, based on four case studies, is a timely intervention given the current negotiations of the two most significant commercial

* Associate Professor and Co-Director of the International Trade and Business Law Program, James E. Rogers College of Law, University of Arizona. I would like to thank Negar Katirai, Larry Helfer, David A. Gantz, Joost Pauwelyn, María José Cordero, David Sloss, Lawrence Friedman, Associate Justice Mariano-Florentino Cuellar, Allen S. Weiner, Deborah Hensler, Greg Shaffer, Michael P. Malloy, Andrea Bjorklund, Jenny Martinez, Anupam Chander, William S. Dodge, Diego Gil, Robert Wai, Horatia Muir-Watt, Richard Baldwin, Markus Wagner, and David G. Victor for their helpful criticisms, advice and/or suggestions on earlier drafts. Thanks also to the staff of the Berkeley Journal of International Law for expert editing and helpful substantive suggestions and to the generosity of the University of Arizona Summer Research Grant. All errors are mine.

http://scholarship.law.berkeley.edu/bjil/vol33/iss1/1
agreements since the creation of the World Trade Organization. The Transatlantic Trade and Investment Partnership and the Trans-Pacific Partnership negotiations raise important questions about the design of international governance as well as the future of research in the field of international economic law.

TABLE OF CONTENTS

INTRODUCTION ..................................................................................................... 2
I. UPSTREAM LAW PRODUCTION ........................................................................... 8
   A. Origin .............................................................................................................. 8
   B. Transformation ............................................................................................ 11
   C. Effectiveness ............................................................................................... 15
II. DOWNSTREAM LAW PRODUCTION ................................................................. 19
   A. Enforcement ................................................................................................ 19
      1. United States—Trucking Services Restrictions ........................................ 19
      2. Mexico—Soft-Drinks Tax........................................................................ 23
      3. Argentina—Economic Emergency Measures .......................................... 27
      4. Australia—Tobacco-Packaging Legislation ............................................ 31
   B. Repurposing ................................................................................................. 36
      1. Intra-Regime Shifting ............................................................................. 36
      2. Inter-Regime Shifting ............................................................................. 38
      3. Transplantations ..................................................................................... 41
III. ASSESSING AND CONTROLLING THE MERGING ............................................. 45
   A. Adjudicatory Lawmaking and Policy ......................................................... 45
   B. Norm-Generating and Control ................................................................. 48
      1. Coherence ................................................................................................ 50
      2. Expertise .................................................................................................. 53
      3. Legitimacy ................................................................................................. 56
CONCLUSION ....................................................................................................... 58

INTRODUCTION

In June 2013, President Obama announced the start of negotiations for a “far-reaching” Transatlantic Trade and Investment Partnership: “The U.S.-E.U. relationship is the largest in the world—it makes up almost half of global G.D.P.,” Obama said regarding this potential deal with the current twenty-eight
European Union members.\(^1\) In addition, the United States and eleven other countries bordering the Pacific Ocean are engaged in another monumental commercial negotiation.\(^2\) The Trans-Pacific Partnership will set rules to regulate about one-third of global trade and investment. Combined, the two transoceanic deals promise to push minilateralism—or the rise of regional trade agreements (RTAs) as an alternative to global negotiations—further than ever before, undermining the World Trade Organization (WTO), the cornerstone of trade governance.\(^3\)

The rise of minilateralism raises important questions about the relevance of the WTO and the design of international economic governance. With their limited number of participants, RTAs are easier to negotiate than advancing new agreements at the WTO—a quasi-universal organization that works on a consensus basis. RTAs also serve political goals and may better fit the new realities of global business, with its multifaceted supply chains and the growing importance of trade in services. Albeit permitted under the WTO, RTAs are by nature exclusionary, leaving countries outside their purview. RTAs lead to trade and regulatory divergence, resulting in the segmentation of markets and different rules across regions. Further, they increase jurisdictional conflicts between the bodies in charge of the interpretation of rules.

Consider these examples: Brazil recently filed a complaint before the WTO after an adverse ruling from a tribunal under MERCOSUR, a South American RTA, in relation to antidumping measures by Argentina on imports of poultry. The WTO exercised jurisdiction, despite both a prior ruling on the same matter and Argentina’s objections.\(^4\) In another case, Mexico maintained, fruitlessly,


that the WTO should not exercise jurisdiction over a dispute with the United States concerning sweeteners, arguing that the North American Free Trade Agreement (NAFTA) was the more appropriate forum. More recently, the Dominican Republic was accused of relying on WTO agreements to increase tariffs on imports of bags and fabrics and circumvent its commitments under the Dominican-Republic-Central-America Free Trade Agreement (DR-CAFTA). In all these cases, the panels formed to decide the disputes under the WTO faced a similar question: Who should decide, the WTO or the dispute settlement body under the RTA?

To add another layer of complexity, regulatory structures dealing with commerce have not kept pace with the new realities of global business. Traditional international trade meant selling goods made in one nation to another nation; now trade is mostly about making things internationally and selling them everywhere. Traditional international investment meant establishing a factory abroad to supply a market or acquiring the rights of a concession to extract, exploit, and export raw materials. Today, corporations develop products in multiple countries and invest and trade globally to supply their subsidiaries. Yet the two legal components of today’s global business—trade regulation and foreign direct investment (FDI) protection—continue to be addressed by different regimes.

The increasingly evident inseparability or, as referred by some legal scholars, convergence of trade and investment has specific effects on the relationship between different bodies of law. It may increase situations of concurrent or simultaneous jurisdiction between trade and investment tribunals when States and private interests attempt to enforce rules; pressure parties


8. See generally R. Z. Lawrence, Regionalism, Multilateralism and Deeper Integration: Changing Paradigms for Developing Countries, in TRADE RULES IN THE MAKING: CHALLENGES IN REGIONAL AND MULTILATERAL NEGOTIATIONS 23 (Mendoza et al. eds., 1999).


affected by government regulation to seek relief in different, often parallel fora; or provide more venues for parties to subsequently influence the development of law.11 These consequences are evident in recent efforts on the part of five nations mobilized by tobacco producers to bring down Australia’s restrictions of trademarks on tobacco products. In the ongoing cases before the WTO, these governments argue that an act adopted to decrease smoking limits the use of trademarks and thereby constitutes a breach of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).12 At the same time, a subsidiary of one of the companies behind the claims before the WTO is using the arbitration mechanism under the Hong Kong-Australia bilateral investment treaty (BIT) to seek compensation for the same alleged violation of TRIPS.13

To ensure the goals of the two transoceanic deals, the negotiators of the treaties will need to resolve the matter of who will decide potential disputes. The authority will be entrusted to international dispute-settlement bodies, a sort of semipermanent or ad hoc authority with powers to decide specific legal issues and interpret treaty rules. These tribunals, often unsupervised by any superior entity, and whose decisions bind States and affect their citizens, will have the task of deciding important matters on a range of potential topics: are regulations requiring certain labeling on some products and not on others justified; do internet-use restrictions violate commitments regarding the free trade of services; or, are subsidies to clean technologies permissible under trade rules—just to list some examples.

The question is how should States respond to the rise of minilateralism and the intensification of trade and investment “convergence”? Will careful drafting of jurisdictional mandates or the inclusion of forum-selection clauses in new treaties suffice? Should the enforcement of trade and investment law be lumped together, within a single system? Should negotiators use “underride” clauses—treaty provisions establishing a hierarchy between adjudicatory bodies—giving prevalence to trade panels over investment tribunals or the other way around? Or should we get used to more conflicts when difficult issues interact across systems? The answers to these questions are not clear and promise to be a source of debate in current as well as future commercial negotiations.


This Article is an effort to inform this debate. It describes how minilateralism and the convergence of trade and investment relate to each other and explores two major consequences of this evolving relation: First, how these two dynamics expand the interplay between economic treaties during the process of the enforcement of its rules. And, second, what the impact of these dynamics is on the effectiveness and long-term development of international law.

This Article makes two separate, but interrelated claims: First, it argues that among other consequences of the interplay identified, trade and investment law agreements look in practice more like what it is often described as a regime complex, or "an array of partially overlapping institutions governing a particular issue-area . . . among which there is no agreed upon hierarchy."14 In this conglomerate of coupled elements, enforcement mechanisms can be used in traditional ways to force violators to comply with trade rules and compensate foreign investors for damages suffered as a result of excessive government interventions.15 However, enforcement mechanisms can also be used more broadly to destabilize the regulatory activity of governments, to shape the interpretation of rules outside ordinary processes, and to relitigate issues settled in one regime through the venues of another.

Second, it argues that the merging at issue creates specific, yet not insuperable challenges for the appropriate development of international law. In fact, as I discuss in the last section, the main challenges are starting to be addressed by international agreements that include legal and institutional arrangements that help coordinate the increasingly intricate shared space between trade and investment provisions.

The Article proceeds as follows. After this introduction, Part I is about "upstream law production," or the creation of rules before disputes arise.16 Here, I explain the relationship between the proliferation of RTAs or minilateralism and the convergence between trade and investment and how these distinct but related dynamics result in different treaties playing similar roles in constraining government regulation of transnational business. While scholars have not ignored the growth of nested, overlapping, and parallel systems, a constant blind spot is the impact on the effectiveness and long-term development of international law.17

Part II, in contrast, concerns “downstream law production” or the creation of rules in the process of adjudication. Here, I present four case studies that evidence how nested, overlapping, and parallel systems are actually used. I also illustrate and conceptualize the myriad ways trade and FDI regulation can be combined by private interests seeking to enforce rules, awards, and decisions as well as by governments defending laws and regulations. I do so by categorizing the dynamics evident in the case studies into a framework of six strategies: two types of intra-regime shifts, two types of inter-regime shifts, and two forms of transplantation of concepts in the process of rule interpretation. While other scholars have noted the growing issues resulting from the expansion of international tribunals addressing economic disputes, none have offered a conceptual analysis of the strategic appropriation of legal rules or systems for new purposes, or “law repurposing.”

Part III discusses how legal complexity impacts different attributes considered by scholars when evaluating dense international systems. Without dismissing the importance of functional legal remedies, I show how the merging of regimes results in particular challenges for the successful enforcement, as well as appropriate development of, international law. However, as I explain, these challenges are not insurmountable and can be addressed in two different but complementary ways: first, with ex ante specification, or better, clearer drafting of international rules; and, second, with ex post control mechanisms that enhance coordination while leveraging the positive aspects of the shared regulatory space between trade and investment agreements. Finally, the conclusion provides thoughts on the implications of this work for ongoing transoceanic negotiations and the future of international economic governance.

---

19. Laurence R. Helfer, Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking, 29 YALE INT’L L.J. 1, 16 (2004) (describing international law as a product of strategic use of venues situated within the same regime (intra-regime shift), and/or venues located in different regimes (inter-regime shift)).
I. UPSTREAM LAW PRODUCTION

A. Origin

The regulation and enforcement of the two main pillars of international economic law, investment protection law and international trade regulation, has been assigned to separate systems with specific characteristics.\(^{22}\) A web of BITs establishing broad rules of government conduct, enforced by investor-State arbitration, has made private right of action by investors for damages routine. By contrast, trade rules are enforceable mainly through State-to-State dispute settlement where provisions for damages are absent but suspension of inter-State benefits serve as a remedy of last resort against violations.\(^{23}\)

The origin of the two separate systems is largely a response to the bargains that followed World War II (WWII) and a function of the nature of international business at the time. The prevention of protectionist policies that led to WWII and the idea that international institutions could assist governments to liberalize trade guided the General Agreement on Tariffs and Trade (GATT) of 1947.\(^{24}\) This multilateral institution created to negotiate import and export taxes (tariffs) and quantities (quotas) succeeded in bringing about dramatic reductions in trade barriers, at least as to manufactured products imported into advanced industrial countries. This was achieved by a simple exchange system: any reduction in a State’s own barriers and the resulting reduction in the price of imports would be made available in return for equivalent concessions by a trading partner (a swap). If one country reneged on commitments, retaliation could mean suspending any of the benefits reciprocally granted. This system has proven effective for liberalizing what is often referred to as “traditional trade” (i.e., trade in goods).\(^{25}\)

The GATT evolved from a reciprocal tariffs-and-quotas-reduction arrangement between twenty-three nations, focused almost exclusively on goods, into the WTO, which was brought about by the Uruguay Round of negotiations implemented in 1995.\(^{26}\) Notably, the WTO introduced technical regulation, intellectual property rules, and services into the world trade system. This evolution reflected not only the growing importance of trade in services,
but also that nontariff measures—administrative procedures, health and sanitary regulations, licenses, etc.—were becoming a significant source of economic distortion. Today, this quasi-universal organization has 160 members (counting Yemen, its most recent member) and multiple agreements addressing both tariff and nontariff barriers to trade, including technical standards, sanitary and phytosanitary regulation and intellectual property rules.\textsuperscript{27}

To some extent the WTO adapted the GATT to a more globalized environment, albeit in limited fashion. Whether the result of political agendas or of the structure of the organization, these limitations have engendered polarizing negotiations under the WTO.\textsuperscript{28} As a result, many countries have found in RTAs an alternative that better fits their liberalization needs and is more adaptable to current realities of global business, often called “supply-chain trade” (i.e., trade linked to “international production networks”).\textsuperscript{29}

International investment law, on the other hand, developed differently. The law of nations, including customary international law has been implicated in protecting the property of foreigners abroad since at least the eighteenth century, but a greater desire to formalize this field only emerged well into the postcolonial era.\textsuperscript{30} Decolonization slowly brought calls for a system of protection that could limit the repossessing of the property of former colonial powers and their nationals, including oil, gas, mineral, and other concessions. However, attempts at creating a multilateral treaty or other global instruments were met by the global South’s increasing efforts to pioneer what eventually came to be known as a New International Economic Order (NIEO). This movement defended, among other positions, the application of a limited view of customary international law and championed domestic courts as the locale for disputes involving foreign investors.\textsuperscript{31}

Foreseeing the collapse of the International Convention of Investments Abroad (at that time the most important attempt to create a multilateral

\textsuperscript{27} Members and Observers, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 20, 2015). While the GATT included language relating to investment, it never found its way into binding rules until the WTO.


\textsuperscript{29} See Baldwin, supra note 25, at 1 (terming new trade as supply-chain trade).

\textsuperscript{30} Kenneth J. Vandevelde, A Brief History of International Investment Agreements, 12 U.C. DAVIS J. INT’L L. & POL’Y 157, 168–70 (2005) (providing a detailed history of investment agreements and discussing their emergence a response of developed countries to the threat of uncompensated expropriations of investments in developing countries).

framework on investment or “property of nationals” abroad), some nations took a different approach.\textsuperscript{32} Within the World Bank, the industrialized countries endorsed the negotiation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).\textsuperscript{33} Instead of addressing the specific rights and obligations due to foreigners investing abroad—a highly contested matter—the Convention simply enabled a system of “private” enforcement of commitments via investor-State arbitration. ICSID, one of the five organizations of the World Bank, was born in 1967 and became a centralizing force for the adjudication of conflicts involving FDI, as well as the promoter of liberal investment policies.\textsuperscript{34}

As a means of promoting FDI, ICSID initially supported the inclusion of arbitration clauses in investment contracts and legislations. A more favorable climate towards FDI supported, in part, by the Soviet collapse, led to a surge in BITs in the eighties and nineties.\textsuperscript{35} Similar in content to one another, BITs often establish consent to investor-State arbitration, and regularly include obligations to compensate in case of expropriation, unfair treatment, or discrimination based on nationality. BITs with investor-State dispute-settlement provisions obviate the need for investors to negotiate arbitration clauses with host States on an individual basis and, in many instances, adjudicate disputes in local courts. Developing States, in turn, sign such treaties in hopes of attracting more and sustained fluxes of FDI as well as depoliticizing investment disputes.\textsuperscript{36} BITs’ practical utility to stimulate the flux of foreign investment continues to be fiercely debated.\textsuperscript{37}

\textsuperscript{32} The Proposed Convention to Protect Foreign Investment: A Round Table, 9 J. OF PUB. L. 115, 119–24 (1960).
\textsuperscript{36} U.N. Conference On Trade & Dev., Dispute Settlement: Investor-State, 13, U.N. Doc. UNCTAD/ITE/IT/30 (2003) (“The willingness to accept internationalized dispute settlement on the part of the host country may well be motivated by a desire to show commitment to the creation of a good investment climate.”); Ibrahim F.I. Shihata, Toward a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA, in INVESTING WITH CONFIDENCE: UNDERSTANDING POLITICAL RISK MANAGEMENT IN THE 21ST CENTURY 2, 23 (Kevin W. Lu, Gero Verheyen & Srilal M. Perera eds., 2009) (arguing that ICSID “provide[s] developing countries with a response which, compared to the Calvo Doctrine, is . . . more adequate in the depoliticization of disputes . . . without inviting the abuses of diplomatic protection”). See also Andrew T. Guzman, Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, 38 VA. J. INT’L L 639, 667–86 (1998).
These historical factors, as well as the legacy of the original functions each regime was designed to serve, have had a long-lasting impact on the formal characteristics of the separate frameworks regulating trade and investment. Concerned mostly with inducing compliance with reciprocally negotiated benefits, international trade law is enforced at an inter-State level with suspension of benefits as a mechanism of last resort. Conversely, in an investor-State arbitration, investors can directly enforce their rights. While the main focus of investor-State arbitration is monetary compensation for affected investors and avoiding excessive reprisals by the home State of investors, compliance is often assumed to result from its deterrent effects. Although not the focus of this Article, the separation has implications for the expression, application, and interpretation of legal rules.38

B. Transformation

In spite of a formal separation and many differences, international trade and investment agreements have several common characteristics. Both regimes are concerned with global governance, economic integration and specialization of production, as well as managing the costs imposed by virtue of protectionism, opportunism, and capture.39 Both seek to create economic benefits and opportunities as well as to limit disparate and unfair treatment by governments. Both share key legal concepts such as national treatment and most-favored-nation treatment. Overall, international trade and investment rules seek to promote transnational business and to facilitate globalization through economic interdependence—goals widely shared in the abstract but often criticized as insufficiently attentive to other policies, values, and interests.40

While the shared space between trade and investment frameworks was less apparent when trade and investment first emerged as separate systems, today’s reality of modern business illuminates complementarities and overlaps as companies trade to supply their subsidiaries and invest globally to facilitate

http://scholarship.law.berkeley.edu/bjil/vol33/iss1/1

38. DiMascio & Pauwelyn, supra note 9, at 58–79 (explaining reasons to interpret investment standards with deference in contrast to trade rules).

39. The comparative advantage and specialization are not only theories of international trade (the international mobility of goods and services) but also theories of investment (the international mobility of capital and technology). See generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776). See also DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (Electric Book Company ed., 2001). For an insightful explanation of the different political economy functions, see Sykes, supra note 23, at 648–54.

40. Public-interest lawyers and civil society organizations also view trade and investment law as closely tied. Both fields have raised similar anxieties regarding their linkages, effects, and overlaps with noneconomic interests and legal regimes such as human rights, labor rights, and environmental laws, just to mention a few. See, e.g., International Worker Rights, U.S. Foreign Policy and the International Economy, Before the Subcomm. on Terrorism, Nonproliferation and Trade and Subcomm. on Int’l Orgs, Human Rights and Oversight, 111th Cong. (2009) (statement of Lori Wallach).
trade. That shared space is evident as transnational corporations invest abroad and rely on global supply chains built through networks of foreign suppliers. That relationship is central to the current international character of business, where establishing the nationality of corporations becomes more difficult and services (where origin tends to be harder to determine) increase as a proportion of world trade. And that shared space is manifest as internal taxes and domestic regulations are increasingly used by government as distorting mechanisms equally affecting traders and investors as tariffs barriers fall to record lows.  

The legal frameworks have adapted—albeit slowly—to the “convergence” between trade and investment and the needs of supply-chain trade. In the WTO context, the agreements on Trade-Related Investment Measures (TRIMS), on intellectual property rules under TRIPS, and on services under the General Agreement on Trade in Services (GATS) are good examples of arrangements explicitly bringing FDI into the trade fold. For instance, TRIMS prohibits trade-related investment measures, such as local content requirements that are inconsistent with basic provisions of GATT. Under TRIPS, intellectual property issues are no less relevant to investment than trade. In addition, “Mode Three” and “Mode Four” of GATS address the establishment of service providers abroad, and in essence constitute mild obligations to liberalize FDI.

Despite its efforts the WTO has (understandably) struggled to serve both as a quasi-universal framework for traditional trade and, at the same time, to evolve to regulate the modern business landscape in a politically charged environment. Minilateralism has stepped into this vacuum, adding a new layer

41 FDI “has become more important than trade for delivering goods and services.” See Karl P. Sauvant, New Sources of FDI: The BRICs—Outward FDI from Brazil, Russia, India and China, 6 J. WORLD INV. & TRADE 639, 639 (2005).

42 Baldwin, supra note 25, at 7–9. With international economic integration, the restriction and regulation of economic activity broadened to matters of general policy. As trade became more entangled with general areas of regulation, domestic reform and FDI regulation became more relevant to support liberalization, but also to limit competition or, for that matter, many socially worthy policies. For an insightful discussion, see Roger G. Noll, The International Dimension of Regulatory Reform with Applications to Egypt (1998), available at http://www.siepr.stanford.edu/workp/swp97041.pdf.


46 The WTO has long recognized that trade and investment are “two sides of the same coin.” Press Release, WTO, Foreign Direct Investment Seen as Primary Motor of Globalization, Says WTO
to the complex regulatory environment of businesses. Enshrined in GATT Article XXIV (or, in some cases, the Enabling Clause),47 RTAs have served at some points as alternatives to sluggish multilateral negotiations, and, at others, as ways of achieving deeper or more suitable integration, a difficult balance in the plural context of the WTO. Today almost all members of the WTO are parties to at least one of the more than 375 RTAs.48

As evidenced by the proliferation of RTAs, minilateralism and convergence are mutually reinforcing. A central reinforcing mechanism is grounded in modern RTAs’ use of investment protection chapters, which make the relationship between trade and investment more explicit.49 In many of these treaties, the protection of FDI has shifted in focus from solely postentry protection to trade style liberalization, or pre-establishment obligations.50 RTAs frequently include obligations to limit “performance requirements,” government-mandated activities, thresholds, or approvals that investors must undertake to trigger investment opportunities, usually connected with exports and use of local content or suppliers.51 Consequently, under RTAs, both trade


47. Article XXIV of GATT lists the conditions under which the formation of a customs union or of a free-trade area are valid under the WTO. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT]. On the other hand, the Enabling Clause allows for “preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences”; “[d]ifferential and more favourable treatment . . . concerning non-tariff measures”; “[r]egional or global arrangements . . . amongst less-developed contracting parties for the mutual reduction or elimination of tariffs . . . [and] non-tariff measures, on products imported from one another”; and “[s]pecial treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.” Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903 (Nov. 28 1979).


and investment rules may end up covering the same economic activity and regulatory actions with more frequency. In short, though minilateralism has been partly a response to the need for regulating a business environment where trade and investment are more interconnected, minilateralism has also propelled further convergence of the two fields.

The two dynamics have inevitably affected national lines and blurred the political economies that justified different regimes. These two dynamics also partly explain why disputes that cross the boundary between the two regimes are also increasing. Not only is enforcement of trade-related investment measures in inter-State formats becoming more common, but investors (or their counsels) have realized they can convert trade matters into investment disputes, with the potential of winning hefty damage awards, often appointing arbitrators with trade-law backgrounds. As in other fields, the battleground of enforcement is testing traditional actors, institutional forms, and legal processes. The

52. Broude, supra note 10, at 15. Broude gives the following example: a Finnish corporation (Nokia) invested in New York can ask the U.S. government to impose import restrictions against foreign goods imported by a U.S. corporation (Apple). U.S. labor unions can petition for safeguards to be imposed against imports from China produced by subsidiaries of their own American employers.


54. See for example Request for Consultations, European Union—Certain Measures Affecting the Renewable Energy Generation Sector, WT/DS452/1 (Nov. 7, 2012), a complaint brought by China against the EU for the effects that the renewable-energy generation policy is having on competition and market access. See also Appellate Body Reports, Canada—Certain Measures Affecting the Renewable Energy Generation Sector, WT/DS412/AB/R, WT/DS426/AB/R (May 6, 2013). In that case, the Panel found that “mere participation” in that program requiring compliance with domestic content requirements was sufficient to confer an “advantage” on domestic beneficiary enterprise.


56. In some countries there has been the institutional consolidation of decision making within national governments and regional institutions. For example, bureaucracies like the Mexican, Canadian, and the Costa Rican International Trade Offices are involved in both trade and investment negotiations and litigation. For the European Union, see European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy (July 7, 2010), http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf.

feedback loops between trade and investment have resulted in claims that make the analytical bifurcation “difficult to justify.”

FIGURE 1: EVOLUTION OF UPSTREAM LAW PRODUCTION

C. Effectiveness

Debating the effects of the proliferation of international treaties is not new. For one, scholars agree that this expansion has resulted in an increase in

58. Broude, supra note 10, at 19. Some economists argue that thanks to multilocation production the traditional divide between trade in goods and services becomes blurred. See, e.g., Anthony. J. Venables, Economic Integration and the Location of Firms, 85 AM. ECON. REV. 296, 296–300 (1995).


http://scholarship.law.berkeley.edu/bjil/vol33/iss1/1
potentially applicable rules, in more venues to adjudicate disputes, and in more conflicts between different decision-making bodies. However, the resulting overlaps and conflicts within discrete systems, or *intra-regime* relations, have stimulated more interest than understanding the interactions between different systems. In fact, in 2006, Martti Koskenniemi, acting as the Chairperson of the United Nations study group analyzing the difficulties arising from the diversification and expansion of international law, argued that the analysis of “the whole complex of *inter-regime* relations is a legal black hole.”

Whatever is inside this legal black hole upsets some international-economic-law scholars. It is often associated with redundancy, chaos, and the fragmentation of international law. The weaknesses are cast in terms of efficiency (i.e., costs of multiple proceedings) and suboptimal compliance (i.e., the need to use multiple fora to be made whole), lack of coherence (i.e., rules suggesting different ways of dealing with a problem), or equality (i.e., gaining “multiple bites at the cherry”). Scholars adopting a negative viewpoint of this

---


expansion frequently understate the benefits of the proliferation of international institutions.\textsuperscript{64}

What is chaos for some is a virtue to those who “love” fragmentation.\textsuperscript{65} Some scholars cast the benefits in terms of expertise (i.e., improving epistemic quality and decision making), predictability (i.e., precision on what law prohibits), accountability (“flexibility” to apply different political consensus) and sustainability (i.e., enhancing opportunities for conformance with unpopular decisions).\textsuperscript{66} This view, in turn, may easily overlook some of the main problems resulting from this expansion, including how complexity can be unevenly advantageous. A welcomed exception to this trend is Professor Pauwelyn who has noted that the complexity of economic agreements “may end up costing dearly” to countries with fewer resources or turn into an “advantage” for countries with plenty of them.\textsuperscript{67}

At the crux of this debate is whether the presence of nested, partially overlapping, and parallel international regimes of trade and investment law are a positive or negative development in international law. While insightful, the debate is not sufficiently productive from a policy perspective. Most issues raised cannot be answered in the abstract; the impact may be both positive and negative. It depends on multiple factors such as the interests, capacity, and resources of the parties involved, the specific point of time assessed, or the context and conditions of the conflict or legal dispute. Moreover, most scholars have overlooked the insights of political science and interdisciplinary legal scholarship that address “international regime complexity.”\textsuperscript{68} The State-centric bias of legal scholars, combined with a focus on the origin rather than the


\textsuperscript{65} Ratner, \textit{supra} note 17, at 475. See also Paul S. Berman, \textit{Global Legal Pluralism}, 80 S. CALIF. L. REV. 1155 (2007).


\textsuperscript{67} Pauwelyn, \textit{Dealing with Increasing Complexity}, supra note 11, at 6. See also Karen J. Alter & Sophie Meunier, \textit{The Politics of International Regime Complexity Symposium, 7 PERSP. ON POL.} 33 (2009) (arguing that complexity in some respects may advantage the most well endowed actors who have the resources).

\textsuperscript{68} Alter & Meunier, \textit{supra} note 67, at 13 (referring to international regime complexity to describe the presence of nested, partially overlapping, and parallel international regimes that are not hierarchically ordered).
application of rules by political scientists, has led to few useful policy prescriptions.  

In this project, my general interest is in understanding both the causes as well as the consequences of the proliferation of international economic agreements. It is increasingly necessary to provide a more nuanced description of how exactly the disaggregated nature of the international legal system (as evidenced by convergence and minilateralism) impacts its effectiveness. While this analysis could be done from a range of vantage points, I limit the analysis to the impacts in the adjudicatory and the “norm-generating” functions of the bodies in charge of resolving disputes. In doing so, it is not enough to review, for instance, the quality of the legal reasoning of decisions or cross-reference between tribunals. Instead, first it is necessary to understand the extent to which this expansion alters the enforcement processes or, in other words, how the complexity resulting from the expansion opens spaces for strategic considerations by litigants, judges, and lawyers. This could be followed by an assessment of the impact on specific indicators of effectiveness, such as coherence, determinacy of rule and epistemic quality (expertise), and sustainability (or legitimacy), a number of criteria that scholars often consider when evaluating dense international systems.

Exploring how different strategies enabled by this proliferation make international law more functional or more dysfunctional is a fertile ground for research, both empirical and conceptual. The answers to the questions posed may be most relevant for policymakers, as well as treaty drafters and negotiators, because they have the task of investing in initiatives that score well on effectiveness and, more relevantly, they can test treaty design features that reduce the negative consequences of such strategies. Moreover, these questions may help to provide a more concrete picture of what happens inside Koskenniemi’s inter-regime “black hole.”

---

71. Id. at 465–67, 476–68.
72. Martinez, supra note 21, at 523 (discussing “structural issues” of coherence, compliance, expertise, and legitimacy). See also Keohane & Victor, supra note 21, at 8 (noting the following criteria: compliance, coherence, determinacy of rule and epistemic quality (expertise), and sustainability (or legitimacy)).
73. Keohane & Victor, supra note 21, at 18.
74. ILC STUDY, supra note 61, at 18.
II. DOWNSTREAM LAW PRODUCTION

This section is divided into two parts. First, it presents four case studies, each illustrating the varied ways private interests affected by legal and regulatory activity and governments defending their policies or espousing claims of private interests combine treaty elements within and across regimes. Collectively, the four cases speak volumes about the strategic use, growing tensions, and reinforcing dynamics affecting the expansion of international trade and investment agreements. Second, before assessing the consequences of convergence and minilateralism on the adjudicatory and norm-generating functions of international courts and tribunals, it is useful in both a descriptive and normative sense to classify the strategies employed to experiment with and combine different sources of law.75 The topology presented consists of six strategies in which parties leverage aspects of different agreements such as rules, forms of relief, and litigation parties: two allow parties to choose among treaties within the same regime, or intra-regime shifting; two allow parties to experiment with different treaty features across regimes, or inter-regime shifting; and two strategies allow parties to import rules or legal concepts in the process of interpretation both within and across regimes.

A. Enforcement

1. United States—Trucking Services Restrictions

Prior to 1994, Mexican trucks were restricted to operating within specified “commercial zones” in the U.S.-Mexico border, preventing them from carrying shipments to final destinations in the United States.76 Unlike Canadian trucks, which could carry shipments freely upon reaching the edge of a commercial zone (generally extending three to twenty miles from the border), Mexican trucks were required to transfer their cargo to a U.S. truck. The U.S. truck would then complete the delivery to the product’s final destination, resulting in substantial transportation and warehousing costs.77 When NAFTA became fully effective in 1994, allowing trucks of the three countries to cross freely from


Alaska to Chiapas and back to Labrador became a binding obligation for the relevant governments. The United States and Mexico also agreed to phase out all restrictions on cross-border passenger and cargo services by 2000.78

In 1995, however, the U.S. government announced it would not lift the restrictions on Mexican trucks, citing safety and environmental concerns.79 It also refused to permit Mexican investment in U.S. companies that transport international cargo. In response, Mexico requested the formation of a NAFTA panel to decide whether the United States was in breach of the provisions of the agreement’s chapters on investment and trade in services. Chiefly, Mexico argued that U.S. inaction was discriminatory and motivated not by safety and environmental concerns, but by political considerations relating to opposition by U.S. organized labor.80 In defense, the United States argued that because Mexico did not maintain the same regulatory standards as the United States and Canada, service providers, trucks, and investors from Mexico could be treated differently.81

Early in 2001, the panel found the United States’ actions to be in breach of NAFTA’s commitments.82 According to the tribunal, the United States was permitted to impose different regulatory requirements on Mexican truckers, but the United States failed to make such a decision in good faith with respect to the cited concerns, to rely on objective evidence, or to implement the decision in a way that fully conformed with NAFTA objectives.83 The panel cited precedents from GATT to hold that Mexico could challenge the measures even if Mexico

78. NAFTA Annex I sets forth a two-step schedule: The first step required the United States to provide Mexican trucks with complete access to its roadways in the four border States by December 18, 1995. The second step called for Mexican trucks to be able to travel freely throughout the United States by January 1, 2000. NAFTA Annex I Schedule of the United States. See also U.S.-Mexico Border: Issues and Challenges Confronting the United States and Mexico (GAO/NSIAD-99-190, July 1, 1999).


82. U.S.-Mexico Panel Decision, supra note 80, ¶¶ 295–98.

83. Id. ¶ 301 (“[T]o the extent that the inspection and licensing requirements for Mexican trucks and drivers wishing to operate in the U.S. may not be ‘like’ those in place in the U.S., different methods of ensuring compliance with the U.S. regulatory regime may be justifiable.”).
could not identify any nationals rejected from investing in the services sector.84 The tribunal distinguished between trade in services and trade in goods, but treated the rules applicable to trade in services and FDI as analogous.85

While the U.S. government initially said it would comply with the decision, with time it became obvious that the executive branch was facing domestic opposition against compliance.86 After years of negotiations, in the Fall of 2007 both countries agreed to cooperate on a pilot or “demonstration” program as a step towards full NAFTA implementation, allowing up to one hundred trucking firms from Mexico to transport international cargo beyond the commercial zones.87 The report assessing the program showed that Mexican carriers participating in the program had no reportable crashes and collectively had safety and environmental-performance scores comparable to or better than American drivers.88 In spite of such results, in March of 2009 Congress and the Obama administration cut off funding for this program,89 largely in response to pressure from domestic interest groups, promising a plan to create a new program that would meet “legitimate concerns” of Congress and commitments under NAFTA.90

84. Id. ¶¶ 289–91 (citing Japan—Taxes on Alcoholic Beverages, and United States—Taxes on Petroleum and Certain Imported Substances). It may be worth noting that both Mexico and the United States cited various GATT and WTO decisions and provisions as being relevant to interpreting different provision of NAFTA. Id. ¶¶ 220–60.

85. Id. ¶ 292:

A blanket refusal to permit a person of Mexico to establish an enterprise in the United States to provide truck services for the transportation of international cargo between points in the United States is, on its face . . . contrary to Article 1102. Where there have been direct violations of NAFTA, as in this case, there is no requirement for the Panel to make a finding that benefits have been nullified or impaired; it is sufficient to find that the U.S. measures are inconsistent with NAFTA.

86. In addition to the delays caused by Congress, a group of environmentalists and labor groups filed a lawsuit claiming that the DOT regulations were “arbitrary and capricious.” See Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752, 773 (2004). The U.S. Supreme Court ruled that the Federal Motor Carrier Safety Administration (FMCSA) did not have to perform a detailed environmental impact study because it was not a legally relevant cause of the environmental effect.


88. Federal Motor Carrier Safety Administration, Status Report on NAFTA Cross-Border Trucking Demonstration Project. Report No. MH-2009-034, 15 (2009), available at https://www.oig.dot.gov/sites/default/files/NAFTA_final_report_signed.pdf (“The panel also concluded, and we agree, that during the first year, project participants had safety performance measures comparable to or better than United States carriers.”). The report also concluded that project participation was too low to make statistical inferences given the fact that other Mexican carriers are likely to seek long-haul authority in the future. Id. at 3.


Infuriated by the cancellation of the pilot program by the United States, Mexican President Felipe Calderon ordered retaliatory measures against its main NAFTA partner for the violation of trade and investment commitments. The typical sanctions approach under trade agreements, including NAFTA, is to impose suspension of trade concessions on a limited number of products or services in the sector in which the harm has occurred. Mexico, however, imposed rotating sanctions across different sectors, applying pressure on several industry groups other than trucking services, focusing on commodities in key U.S. states facing contested elections. Specifically citing the United States’ breach of obligations under both the investment and trade-in-services NAFTA chapters of NAFTA, Mexico raised tariffs on eighty-nine different U.S. exports from forty states, ranging from agriculture to jewelry, valued at a total of $2.4 billion.

In April 2009, one month after the sanctions were implemented, the Camara Nacional del Autotransporte de Carga (CANACAR), representing the independent trucking companies of Mexico, submitted a notice of arbitration against the United States for violation of NAFTA’s investment commitments. The companies sought $6 billion in compensation for direct losses they

---

91. For a list of the eighty-nine products and the applicable tariff on each, see Ley de Comercio Exterior [Law of Foreign Trade], as amended, Diario Oficial de la Federación [D.O.], Mar. 18, 2009 (Mex.). Symbolically, Mexico chose to retaliate on March 18, the anniversary of Mexico’s oil industry expropriation. See also Chad MacDonald, NAFTA Cross-Border Trucking: Mexico Retaliates After Congress Stops Mexican Trucks at the Border, 42 VAND. J. TRANS’L. 1631, 1632–38 (2010); Ioan Grillo, Obama’s “Trade War”: No Truck with Mexico, TIME, Mar. 25, 2009, http://www.time.com/time/world/article/0,8599,1887494,00.html (quoting Mexican Secretary of Economy as promising to “eliminate all the tariffs” if “the United States returns to its commitments”).

92. Mark Drajem, Mexico Imposes Tariffs on U.S. Amid Trucking Dispute, BLOOMBERG, Mar. 17, 2009, http://www.bloomberg.com/apps/news?pid=20601086&sid=anFlZqfyNPgE. In the context of the WTO, Ecuador was the first test case for cross-sector retaliation. In an unprecedented decision, the arbitrators granted Ecuador the right to cross-retaliate against $201.6 million in EU goods, services, and intellectual property per year. Decision by the Arbitrators, Recourse to Arbitration by the European Communities, European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/ARB/ECU (Mar. 24, 2000) [hereinafter EC—Bananas III].


allegedly suffered since the U.S. government first imposed restrictions on Mexican trucks in 1995, arguing that the United States’ actions breached national treatment and most-favored-nation treatment investment provisions. CANACAR ended up not pursuing the investor-State claim, mainly because Mexico’s countermeasures under NAFTA had already generated pressure on the White House to finally comply with the panel’s decision.

In response to these pressures, in March 2011, Mexico and the United States agreed on a framework for settlement of the dispute. In October 2011, the first Mexican truck entered the United States in “partial” (according to CANACAR’s counsel) compliance with NAFTA, and Mexico restored the previously suspended trade benefits. To date, there have been no further disputes over this matter and the two countries appear to view such partial compliance as an adequate resolution of the dispute.

2. Mexico—Soft-Drinks Tax

Protectionist agro-business policies in both Mexico and the United States, combined with a long-standing disagreement regarding the specific meaning of NAFTA’s provisions, made the issue of market access for sweeteners one of the most contentious under this RTA. In the adversarial context of competition between high-fructose corn syrup (HFCS) and sugar, which itself would require a separate article to flesh out, the Mexican Congress approved an excise tax on the use of HFCS in soft drinks. By targeting the sale of soft drinks made with HFCS while exempting those made with sugar, the tax—which generated little to no revenue—indirectly forced soft-drink producers to use national sugar. The tax also discriminated against HFCS producers in Mexico, which at the time were almost exclusively owned or controlled by U.S. investors.

95. See CANACAR Notice of Arbitration, supra note 94, at 12–13 (claiming “discrimination”).
96. According to Mr. Ojeda, the counsel for CANACAR, the claim is “on hold.” Interview with Pedro Ojeda (July 2, 2013).
97. See Alexander & Soukup, supra note 90.
102. Id. arts. 2, 3, 8. The 20% tax on the soft drink translated into an estimated tax burden for
The soft-drink tax gave rise to three classes of enforcement actions, all triggered by HFCS producers with roots in the United States. First, foreign-controlled but locally incorporated subsidiaries of HFCS-producing companies challenged the measure before Mexican courts for violations of Mexican law.103 These claims were initially dismissed by a Mexican court on a strict reading of standing rules that allow only persons legally and directly affected by the tax to pursue a claim, meaning companies involved in soft-drink production and distribution.104 In a separate but related case, the Supreme Court of Mexico confirmed the legality of the tax, holding that its “extra-fiscal” objectives (i.e., protecting the domestic sugar industry from competition) were sufficient to justify its discriminatory character, evaporating any hope of success that HFCS producers had before Mexican courts.105

Second, the U.S. government brought a successful enforcement action before the WTO (by virtue of NAFTA’s choice-of-forum clause), wherein the U.S. government argued that the tax, along with an import-permit requirement, discriminated against its nationals and was a violation of GATT and GATS’s national-treatment provisions.106 Mexico responded that the United States breached its own obligations by failing to cooperate with the establishment of a NAFTA panel to resolve the original disagreement over the NAFTA terms.107 According to Mexico, the measures therefore fell within the scope of exceptions using HFCS of more than 400%, because the sweetener only amounts to 5% of the final cost of the soft drink.


107. Soft Drink Tax Appellate Body Report, supra note 106, ¶ 2; Soft Drink Tax Panel Report, supra note 106, ¶¶ 4.72, 4.96, 4.11. Mexico argued that by delaying the appointment of its panelists, the United States had prevented Mexico from submitting the dispute over sugar access to the United States under Chapter 20 of NAFTA.
permitted under Article XX(d) of the GATT as “necessary” to secure compliance with other “laws or regulations”—in this case NAFTA, a self-executing treaty in Mexico.  

The WTO panel found that the tax was a breach of Mexico’s national-treatment obligations under the WTO but unsurprisingly had no jurisdiction to address obligations under NAFTA. On appeal, the Appellate Body upheld the Panel’s conclusions, holding that the term “laws or regulations” refers to the rules that form the domestic legal order of WTO Members and not an “international obligation of another WTO member.” As a result of this ruling, Mexico and the United States agreed on a framework for settlement of the longstanding dispute of market access for sweeteners, and Mexico removed the HFCS tax.

Third, four U.S. companies started three separate investor-State proceedings for damages on behalf of their controlled and locally incorporated subsidiaries. After Mexico’s efforts to consolidate these claims in a single proceeding failed, the cases were addressed in three separate proceedings. The claimants argued that the measure was, among other things, inconsistent

108. Soft Drink Tax Panel Report, supra note 106, ¶ IV(4)(e). See also General Exceptions, art. XX(d), GATT B.I.S.D. (1994) (allowing WTO members to take ten types of measures (listed in subparagraphs a-j) that would otherwise conflict with their WTO obligations, provided that specified conditions are met). Subparagraph (d) covers measures “necessary” to secure compliance with laws or regulations that are themselves consistent with the WTO.

109. Soft Drink Tax Appellate Body Report, supra note 106, ¶ 75; see also Soft Drink Tax Panel Report, supra note 106, ¶ 4.96. The Appellate Body, unlike the Panel, did not assume arguendo that “laws and regulations” could include international rules.


111. Cargill Inc. v. United Mexican States (U.S. v. Mex.), ICSID Case No. ARB(AF)/05/2 (Sept. 18 2009), available at http://www.italaw.com/sites/default/files/case-documents/ita0133_0.pdf [hereinafter Cargill Award]; Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (U.S. v. Mex.), ICSID Case No. ARB(AF)/04/5, Award (Nov. 21, 2007), available at http://icsid.worldbank.org/ICSID/InstrServlet?requestType=CasesRH&actionVal=showDoc&docId=DC782_End&casedId=C43 [hereinafter ADM/TIA Award]; Corn Products International, Inc. v. Mexican States, ICSID Case No. ARB(AF)/04/1, 21 ICSID Rev. 364 (2006). The four different claimants argued that the tax was inconsistent with Articles 1102 (National Treatment), 1106 (Performance Requirements), and 1110 (Expropriation) of NAFTA. In addition, Cargill also claimed a violation to Articles 1103 (Most-Favored Nation Treatment) and 1105 (Minimum Standard of Treatment) for a series of measures prior to the tax.

with Mexico’s national-treatment obligation under the investment provisions of NAFTA. In total, they sought damages for almost $550 million.113

In these proceedings, Mexico conceded the discriminatory nature of the tax but argued that it was innocent of any wrongdoing because it constituted a “legitimate countermeasure” in response to a prior violation of the United States’ trade obligations under NAFTA.114 Neither of the panels found this line of argument convincing, the three decisions concluding that the tax was discriminatory, in violation of NAFTA’s national-treatment obligation, and that Mexico’s actions entailed liability, citing as relevant but not determinative the WTO’s analysis of the tax.115 Moreover, the tribunals faced the question of whether a countermeasure for alleged U.S. violations of intra-State trade commitments could be directly applicable to investors. While the three tribunals reached the same practical outcome and found Mexico’s defense inapplicable, each tribunal decided the case differently.116 The first tribunal found that countermeasures could affect foreign investors117 but that the tax did not meet the requirements for a valid countermeasure.118 Conversely, the other two tribunals found that under NAFTA investment provisions, investors are shielded from the doctrine of countermeasures.119 Among the three decisions, Mexico was condemned to pay more than $170 million in damages.120 After years of


114. See e.g., ADM/TLIA Award, supra note 111, ¶ 110–80. The Mexican affirmative defense argued that the U.S. had breached NAFTA provisions: (i) Chapter Three and the Side-Letters on Sugar by denying market access for Mexico’s sugar surplus to the U.S. market; and (ii) Chapter Twenty by frustrating the dispute settlement mechanism under such chapter by refusing to appoint an arbitrator in the State-to-State dispute. Mexico also responded individually to each of the claims made by the different investors.

115. ADM/TLIA Award, supra note 111, ¶ 304; Corn Products International, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/04/01 (NAFTA): Decision on Responsibility (redacted version), available at www.itu.org (last accessed June 6, 2009) [hereinafter CPI Decision on Responsibility], ¶ 193; and Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2 (NAFTA), Award, Sept. 18, 2009 [hereinafter Cargill Award], ¶ 554.


117. Id. ¶¶ 178–79 (explaining that NAFTA granted substantive rights to the treaty parties only, even if it granted procedural rights and substantive benefits to their investors).

118. CPI Decision on Responsibility, supra note 115, ¶¶ 165, 167, 169; Cargill Award, supra note 115, ¶¶ 420–28 (explaining that NAFTA granted investors substantive and procedural rights akin to the rights enjoyed by third states under public international law).

120. In Cargill, $77.3 million, see Cargill Award, supra note 115, ¶ 559; in CPI, $58.4 million, see Corn Products Int’l, Inc., Current Report, (form 8-K) (Jan. 24, 2011), available at...
litigation and adverse findings by the different tribunals, Mexico settled the three claims and compensated the affected investors.

The decision in Cargill v. Mexico to compensate for the additional losses “relate[d] to” the investor in its capacity as producer and exporter of its product into Mexico raises an additional crossover between trade and investment law.121 According to the tribunal, the tax (and regulatory scheme) “also constituted a legal impediment to carrying on the business of Cargill de Mexico in sourcing HFCS in the United States and re-selling it in Mexico.”122 For Mexico, Cargill’s decision sets a very bad precedent: it allows investors to convert losses suffered by production facilities in one NAFTA country into losses suffered in another, and goes beyond the jurisdictional authority of investor-State tribunals on investment into trade.123

3. Argentina—Economic Emergency Measures

In the fallout of Argentina’s severe economic crisis of 2001, which resulted in widespread discontent and fatal public demonstrations, the Argentine government defaulted on its debts and adopted a series of emergency fiscal and monetary policy measures.124 These measures included the corralito limiting cash withdrawals from bank accounts and prohibitions on transfers of funds out of the country, as well as pesification abolishing the preexisting convertibility regime (pegging Argentina’s peso to the U.S. dollar) and forcing the conversion

http://www.sec.gov/Archives/edgar/data/1046257/000110465911003108/a11-4663_18k.htm; and in ADM/TLIA $33.5 million, see ADM/TLIA Final Award, supra note 111, ¶ 304(4).

121. Mexico v. Cargill, Inc., 2011 O.A.C.622. According to Mexico’s brief in the set-aside proceedings, the tribunal could only award damages to Cargill as an ‘investor’ (Article 1139) to compensate for losses suffered in connection with its ‘investment’ (Article 1139) in Mexico, which was Cargill de Mexico, and had no jurisdiction to award damages for losses suffered by the investor in another capacity, here as producer and exporter of its product into Mexico.

122. Id. ¶¶ 519–26:

Claimant’s intent was to enter the Mexican HFCS market and attain a significant share of that market. . . . Viewed holistically, Claimant was prevented from operating an investment that involved the sale into and distribution of HFCS within the Mexican market. The inability of the parent to export product to its investment is just the other side of the coin of the inability of the investment, Cargill de Mexico, to operate as it was intended to import HFCS into Mexico.

Cf. ADM/TLIA Final Award, supra note 111, ¶ 270 (addressing this issue and deciding that jurisdiction to award damages only included the loss of profits incurred by the subsidiary in Mexico).


of all U.S. dollar–denominated financial instruments, debt, and contracts into pesos. With the exchange rate stabilized around three pesos to one U.S. dollar (as compared to one-to-one prior to the crisis), the government also prohibited utility companies from increasing rates and required the renegotiation of private and public agreements.  

From the perspective of foreign investors, these measures had grave impacts on the value, expectations, and legal security of their investments in Argentina. In fact, the measures resulted in the greatest number of investor-State claims against a single State, including the first ever investment mass claim (brought by 180,000 Italian holders of Argentine bonds). In this context, at least forty-four corporations (plus the bondholders) have argued a breach of obligations under BITs or contracts before ICSID tribunals, including the obligation to provide fair and equitable treatment and full protection and security, and failure to compensate for indirect or creeping expropriations.  

In its defense, Argentina has raised jurisdictional (e.g., investments not covered) and admissibility (e.g., abuse of process) challenges because the


127. For example, CMS Gas Transmission Company and Azurix confirmed that ICSID tribunals had jurisdiction to hear the claim even if there had been or there currently was recourse to the local courts in case of treaty/contract breach. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 800 (July 17, 2003), http://www.italaw.com/sites/default/files/case-documents/ita0183.pdf; Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 48 (Dec. 8, 2003), http://italaw.com/documents/Azurix-Jurisdiction.pdf.  

128. Tribunals like Siemens and Camuzzi agreed that the beneficiary of the most-favored nation clause could be dispensed with the use of local remedies for a period of time. See Siemens A.G. v. Arg. Republic (Ger. v. Arg.), ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶¶ 137–42 (Aug. 3, 2004), http://www.italaw.com/sites/default/files/case-documents/ita0788.pdf [hereinafter Siemens A.G. Decision on Jurisdiction]. Siemens was awarded over $200 million. However, it voluntarily abandoned the award in response to post-award revelations that Siemens had procured the investment through the systematic bribery of Argentine officials. See also Camuzzi International S.A. v. Argentine Republic (Lux. v. Arg.), ICSID Case No. ARB/03/7, Decisión del Tribunal de Arbitraje sobre Excepciones a la Jurisdicción [Decision of the Tribunal on Objections to Jurisdiction], ¶¶ 16–17, 28 (Jun. 10, 2005), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC643_Sp&caseId=C227 [hereinafter Camuzzi International S.A. Decision on Jurisdiction]. Cf. Wintershall Aktiengesellschaft v. Argentine Republic (Ger. v. Arg.), ICSID Case No. ARB/04/14, Award, ¶¶ 130–32 (Dec. 8, 2008),

In early cases, tribunals took a rather critical view of Argentina’s defenses and either fully or partially denied the necessity of Argentina’s actions in response to the financial crisis.\footnote{CMS Gas Transmission Co. v. Arg. Republic (U.S. v. Arg.), ICSID Case No. ARB/01/8, Award, 44 I.L.M. 1205, 1211 (2005).} In doing so, these early tribunals conflated the customary-international- and treaty-law defenses raised by Argentina, as well as the definition of “necessary” entailed in both. However, subsequent reviews by ICSID annulment committees refuted such analysis by arbitral tribunals. In particular, the CMS Gas Transmission Company annulment committee—the first to issue an annulment decision in this context—criticized the lower tribunals’ treatment of Argentina’s defenses, and suggested that the arbitrators should have considered treaty and customary-international-law defenses as distinct from each other.\footnote{CMS Gas Transmission Co. v. Arg. Republic (U.S. v. Arg.)}, ICSID Case No. ARB/01/8, Decision on Application for Annulment, ¶ 69 (Sept. 25, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0187.pdf. James Crawford, a member of the Ad Hoc Committee pointed out that such body “should have not wounded [the award] so severely.” James Crawford, Ten Investment Arbitration Awards That Shook the World: Introduction and Overview, 4 Dispute Res. Int’l L 71, 78 (2010).}

Subsequently, the investor-State tribunal in Continental Casualty v. Argentina, confronted with the need to analyze each defense separately, accepted Argentina’s contention that the term “necessary” in the U.S.-Argentina BIT should be interpreted in line with WTO jurisprudence. The tribunal provided little explanation, and simply set out the WTO approach and applied it to the facts of the case. In other words, the tribunal considered whether Argentina’s measures made a “material or decisive” contribution to protect the essential security interests of Argentina.\footnote{Continental Casualty Co. v. Argentine Republic (U.S. v. Arg.), ICSID Case No. ARB/03/9, Award, 87 (Sept. 5, 2008), http://italaw.com/sites/default/files/case-documents/ita0228.pdf [hereinafter Continental Award]. Continental solely interpreted and applied Article XI of the U.S.-Argentina BIT and chose not to interpret the customary defense of necessity.} This approach has been defended by supporters as a wise balancing act\footnote{See Alec Stone Sweet, Investor-State Arbitration: Proportionality’s New Frontier, 4 L.R.} but also denounced by critics as an inappropriate transplantation of WTO law into investment law.\footnote{http://scholarship.law.berkeley.edu/bjil/vol33/iss1/1}
As a result of the multiple arbitration proceedings, Argentina has been ordered to pay millions in compensation to affected investors. For several years, however, Argentina has used various tactics to delay, to reduce, or possibly to renege on the payment of its pecuniary obligations resulting from the arbitral awards. In this process, Argentina has departed from the mainstream understanding of enforcement of ICSID awards by arguing that investors must solicit payments before Argentine courts. For Argentina—absent any violation of the minimum standard of treatment under general international law—foreign investors seeking payment of ICSID awards should expect to be treated as creditors of final local judgments, even if this entails complying with local procedures. While the doctrinal validity of Argentina’s interpretation of the Convention is debatable, the argument is not unreasonable.

Argentina’s bravado has led the United States (the State of nationality of investors affected by Argentina’s position) to take unilateral reprisals. It has

---


136. Andreas F. Lowenfeld, The ICSID Convention: Origins and Transformation, 28 GA. J. IT’L & COMP. L. 47, 53 (2009) (arguing “no more would home states of the investors be able to ‘espouse’ claims of their nationals” provided that the host abides and complies with the pecuniary obligations of the award as if it were a final judgment of a court in that state).


138. Siemens A.G. v. The Argentine Republic (Ger. v. Arg.), ICSID Case No. ARB/02/8, Submission by the United States of America to the ad hoc Annulment Committee regarding Articles 53 and 54 (May 1, 2008), http://www.itlaw.com/sites/default/files/case-documents/ita0792.pdf (“Article 54 does not supersede or condition a Contracting State party’s obligation under Article 53 in any way. Rather, Article 54 only applies after the losing State fails to pay an award pursuant to Article 53.”).


140. The suspension was in response to Argentina’s purported failure to comply with the awards in Azurix and CMS Gas. Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006), 14 ICSID Rep. 374 (2009) [hereinafter Azurix Award] (awarding $165.2 million) and CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005), 14 ICSID Rep. 158 (2009) (awarding $133.2 million). Arguably the dispute shall be referred to the International Court of Justice, see ICSID Convention supra note 33, art. 64 (“A
used its veto power with institutions such as the Inter-American Development Bank to block certain low-interest loans to Argentina. More importantly, in May of 2012 the United States used trade measures to support U.S. investors’ efforts to recover awards rendered against Argentina. By suspending Argentina’s designation as a beneficiary developing country under the U.S. Generalized System of Preferences (GSP), the United States assesses duties on about eleven percent of total imports from Argentina that previously had entered duty free. In short, the investment remedy has been complemented by an inter-State trade sanction. For the ICSID protection system, Argentina’s case shows that the “automatic enforcement” of awards, considered an important advantage for foreign investors, “is [now] hard to gauge.”

4. Australia—Tobacco-Packaging Legislation

The final case takes place in the context of increasing efforts to decrease smoking, chief amongst them the Framework Convention on Tobacco Control (FCTC), a widely ratified treaty negotiated at the World Health Organization, the most important transnational regulatory effort to reduce tobacco consumption. Invoking the FCTC’s goals, Australia adopted the

dispute . . . concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice.”).


142. See Proclamation No. 8788, 77 Fed. Reg. 18, 899 (Mar. 29, 2012). The suspension, which was made pursuant to 19 U.S.C. § 2462(b)(2)(E) and (d)(2), took place on May 28, 2012, sixty days after the presidential proclamation was published in the Federal Register. See also Charles B. Rosenberg, The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards, 44 GEORGETOWN J. INT’L L. 503, 504 (2013).

143. See generally Piero Bernardini, ICSID Versus Non-ICSID Investment Treaty Arbitration, Sept. 15, 2009, available at www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf. According to Professor Bernardini, the limited review and full compliance of the awards, in the past considered an advantage of the system, are no longer so evident. Thus, compared to system of enforcement of non-ICSID awards, ICSID awards are losing their attractiveness.

144. For a summary of the major tobacco control measures taken by the U.S. government during the second half of the twentieth century and the impact of lawyers in the antitobacco movement, see ROBERT L. RABIN & STEPHEN D. SUGARMAN, REGULATING TOBACCO 15–16 (2001). For more recent efforts, see Robert L. Rabin, Tobacco Control Strategies: Past Efficacy and Future Promise, 41 LOY. L.A. L. REV. 1721 (2008).

145. See WHO Framework Convention on Tobacco Control, May 21, 2003, 2302 U.N.T.S. 166 [hereinafter FCTC]. The FCTC contains tobacco control measures such as implementing pictorial health warnings (fifty percent minimum) on tobacco products packs; adopting a total ban on tobacco advertising, promotion and sponsorship; enforcing a complete ban on tobacco use in public places;
Tobacco Plain Packaging Act of 2011 (the Act), restricting the use of trademarks on tobacco products and imposing “plain packaging” requirements. A novel approach, the Act prohibits companies from printing logos, symbols, and other bright images on cigarette packets. It requires “generic packaging,” a particular shade of drab dark brown for all tobacco products. Marks and trademarks may continue to appear on packaging, but only in specified locations, and in a standard color, position, font, and size.

Important tobacco companies have brought three widely publicized types of enforcement actions against the Act. At the domestic level, two of them challenged the Act before the High Court of Australia. The plaintiffs argued that the provisions were invalid because they constituted a taking on “[un]just terms” of intellectual property (i.e., their trademark). The Court denied their claim, finding that the Act only controls the way tobacco is marketed and does not constitute a taking of the trademark.

In the international trade arena, Ukraine, Honduras, the Dominican Republic, Cuba, and Indonesia filed five separate WTO cases against Australia. While all countries are producers or manufacturers of tobacco products, with the exception of Cuba and Indonesia none are large exporters of such products, and general trade flows between these countries and Australia have been low or nonexistent. Some of these countries’ espousal of claims can be partially explained by the reluctance of the United States, traditionally a large tobacco exporter and the country of origin of important tobacco interests, increasing tobacco prices to control access by young people; and continuing to monitor the epidemic and introduce tobacco dependence treatments.

146. See Tobacco Plain Packaging Act 2011 (Act No. 148) (Aus.).
147. See id. § 20(1), (2), (3). No marks and trademarks may appear anywhere on a tobacco product, other than as permitted by the regulations. In addition, the implementing regulations do not permit any trademark to be put on the tobacco product.
149. Id. ¶ 2 (noting that plaintiffs argue the “Act effected an acquisition of their intellectual property rights and goodwill on other than just terms, contrary to [section] 51(XXXI) of the Constitution”).
150. Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS434 (Ukraine), WT/DS435 (Honduras), WT/DS441 (Dominican Republic), WT/DS458 (Cuba), WT/DS467 (Indonesia) [hereinafter Tobacco Packaging Legislation]. Consultations were held in the four cases but no settlement was reached. Hence, at request of plaintiffs, the DSB agreed to establish a panel to study the complaint furthering the procedures.
152. In fact, in 2011 Dominican Republic ranked 26th on tobacco exports totaling $407 million, Ukraine was 36th with $232 million in exports and Honduras 58th with a value of $74 million in tobacco exports. According to data found in the International Trade Center, Dominican Republic only exported $78,000 to Australia in 2011 and $23,000 to Honduras, while Ukraine, which was the first country to file the claim does not register trade flows with Australia. Id. (select Product: 24 and Country: United States of America).
to directly engage in the case despite the industry’s lobbying efforts. Under an unsympathetic Democratic administration with its hands full defending its restrictions on the sale of clove-flavored cigarettes at the WTO (a measure aimed at discouraging minors from smoking), the United States chose to participate as a third party in these WTO cases. Not surprisingly, the tobacco industry openly admitted that it is paying the complaining States’ legal fees, arguably a standard practice in WTO disputes.

The WTO complainants claim that the Act negatively impacts their domestic activities in the tobacco value chain and that it infringes TRIPS because it upsets their right to use trademarks and differentiate themselves from competition. Some experts have responded with concern and argue that the right to use trademarks is not expressly granted by the TRIPS Agreement. Trademark owners only have the exclusive right to prevent third parties from using their trademarks without their consent, or what is often referred as a negative right of “exclusion” of use. Additionally, the complainants argue that the Act violates the WTO’s Agreement on Technical Barriers to Trade (TBT) as the measures are more trade restrictive than necessary to achieve the stated objectives. In

---

153. In the case Measures Affecting the Production and Sale of Clove Cigarettes, brought by Indonesia against the United States, the Panel found that the measure was inconsistent with the national treatment obligation of Article 2.1 of the TBT Agreement because it prohibited imported clove cigarettes from Indonesia, but did not prohibit “like” domestic menthol cigarettes. The Panel also found that the transitional period to implement the bill was too short, violating Article 12.2 of the TBT Agreement. Appellate Body Report, United States—Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406 (Dec. 12, 2012).

154. The United States joined other WTO members in doing so, including countries with interests in the industry and others that lean towards enact strict regulation. For a detailed list of third parties in these cases, see Tobacco Packaging Legislation, supra note 150.


response, Australia also asserts that the measure is designed to achieve a legitimate objective, the protection of public health justified under the TBT and the general exceptions (Article XX) of GATT.  

The tobacco industry has also availed itself of investment-law mechanisms, as Philip Morris Asia Limited (PM Asia), a Hong Kong company and owner of Australian affiliate Philip Morris Limited (PM Australia), has filed a claim against Australia under the Hong-Kong-Australia BIT. Interestingly, PM Asia only acquired its shares in PM Australia four months prior to filing this claim and just after Australia’s announcement of a legislative proposal that later became the Act. This creative solution circumvented Australia’s decision to avoid including investor-State arbitration in the 2005 Australia-U.S. Free Trade Agreement, and Australia disputes the move as an “abuse of right.” This case is also atypical because it was filed against a prospective action—the Act was enacted six months after the notice of arbitration—and because it asked the tribunal to order the suspension of the measure (a remedy typically reserved for inter-State adjudication) or alternatively, to pay PM Asia compensatory damages.

Plain Packaging Regulations 2011, the Trademark Amendment Act 2011, and other related measures, acts, policies, or practices adopted by Australia. The plaintiffs alleged violations to Articles 1.1, 2.1, 3.1, 15, 15.1, 15.4, 16, 16.1, 16.3, 20, 1, 27 of the TRIPS Agreement; Articles 2.1, 2.2 of the TBT Agreement; and Articles I, III and IV of the GATT. See Tobacco Packaging Legislation.


159. Agreement Between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments, H.K.-Austl., Sep. 15, 1993, 1748 U.N.T.S. 385; PM Asia Notice of Arbitration, supra note 13, at 1.1–1.3. Other current cases with analogous facts may have important implications in the tobacco plain packaging disputes, such as an investment case filed against Uruguay for a similar measure also based on the FCTC. The Uruguayan case is expected to be decided earlier than the Australian case. See Philip Morris Brands Sârl et al v. Oriental Republic of Uruguay (Switz.-Uru.), ICSID Case No. ARB/10/7, http://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf.


161. Response to PM Asia Notice of Arbitration, supra note 160, ¶ 31 (“[T]here could be no ‘investment’ for the purposes of Article 10 of the BIT and any reliance on Article 10 of the BIT would constitute an abuse of right.”). Historically, Australia has sought the inclusion of investor-State dispute resolution procedures only in trade agreements negotiated with developing countries, as well as Bilateral Investment Treaties. As a result of this policy, important treaties, such as the 2005 Australia-United States FTA, do not include investor-State dispute mechanisms. See William Dodge, Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement, 39 VAND. J. TRANSNAT’L L. 1, 22–26 (2006).

162. PM Asia Notice of Arbitration, supra note 13, ¶ 8.2–8.3. See also Ankita Ritwik, Tobacco
Before the investor-State tribunal, PM Asia argues that the prohibition on the use of tobacco trademarks infringes PM Asia’s rights under the BIT and destroys its intellectual property given its inability to differentiate PM products from others, including illicit products. PM Asia also argues that the broad BIT provisions (specifically, the “umbrella clause” and fair-and-equitable-treatment provisions) can be used to import Australia’s other international obligations into the claim, including those enshrined in the WTO’s TRIPS and TBT Agreements. Australia strongly contests this jurisdictional contention and maintains that the measures’ implementation constitute a legitimate exercise of the government’s regulatory powers to protect the health of its citizens based on scientific evidence.

The Australian government has publicly announced that it will no longer include investor-State arbitration in future treaties, adding a final note of intrigue to the saga. According to some specialists, this purported policy shift was directly connected to the lawsuit brought by PM Asia. Moreover, a “safe harbor” provision protecting nations that have adopted regulations on tobacco was reportedly included in a draft of the Trans-Pacific Partnership Agreement, raising the opposition of business interest groups. At the time of the writing of this Article, neither the WTO panel nor the investor-State tribunal had issued a final decision.


163. PM Asia Notice of Arbitration, supra note 13, ¶ 7.3–7.5.

164. Id. ¶ 7.6–7.8, 7.15–7.17. According to Philip Morris Asia, Article 2(2), which provides that each Contracting Party to the BIT has an obligation to “observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party” serves to invoke breaches of other treaties. This argument links the WTO agreements with the BIT protections. See id. para. 7.15.


168. USTR Informally Floats ISDS Tobacco Carveout with Some TPP Countries. INSIDE U.S. TRADE, Oct. 10, 2014 (“U.S. trade officials have reached out to some other Trans-Pacific Partnership (TPP) countries to informally float the idea of excluding tobacco-related challenges from being brought under the deal’s investor-State dispute settlement (ISDS) mechanism, according to informed sources.”). But see Michael R. Bloomberg, Op-Ed: Why Is Obama Caving on Tobacco?, N.Y. TIMES, Aug. 22, 2013, http://www.nytimes.com/2013/08/23/opinion/why-is-obama-caving-on-tobacco.html (“The tobacco industry was joined by other business interest groups that were fearful that the safe harbor provision would lead to other products’ being singled out in future trade accords.”).
B. Repurposing

1. Intra-Regime Shifting

Within each regime—trade or investment—two types of strategies allow parties to choose among different treaties. The first, forum shopping, describes strategies to move the enforcement action between fora. In the trade context, since levels of commitment and flexibility vary across treaties, a move to another forum may expand the scope of the obligations or reduce the cross-referencing to carve outs and thereby increase the prospects of success. For instance, in the Soft-Drinks Tax case, the United States successfully moved the enforcement action from NAFTA’s regional dispute forum to the WTO’s multilateral forum by relying on NAFTA’s choice-of-forum clause. In investment, forum shopping takes place in a different modality. Most BITs contain “fork-in-the-road” clauses, which generally permit investors to choose between domestic and international enforcement options, not between different treaties. In the economic emergency measures context, for instance, many affected investors concerned with having impartial justice before Argentine courts chose to avail themselves of investor-State arbitration even though they had the option to use Argentina’s courts.

Party shopping, on the other hand, describes when private parties strategically select the State party of an enforcement action in order to take advantage of a different, often more beneficial, rule. Within trade, private parties engage in party shopping when they approach different States, seeking a State willing to bring a case to the WTO dispute settlement process. In most trade agreements, including the WTO, any State party to the treaty may initiate an enforcement action as the right to bring a claim is “largely self-


172. Under international law, parties should exhaust their domestic remedies before bringing an international claim. See generally Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, at 41–42. BITs provide different exceptions to the rule. See also Christoph Schreuer, Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 J. WORLD INV. & TRADE 231 (2004); William S. Dodge, National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA, 23 HASTINGS INT’L & COMP. L. REV. 357, 373–76 (2000).

173. See, e.g., Compañía de Aguas del Aconquija S.A. v. Argentine Republic (Vivendi Annulment), ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 113 (July 3, 2002) (discussing fork-in-the-road clause); Azurix Award, supra note 140, ¶¶ 87–90 (stating that the identity of parties, object, and cause of action were required to trigger the fork-in-the-road provision).

174. Some scholars term this conduct “diplomatic espousal shopping.” Alford, supra note 10, at 50.
regulating." States tend to exercise restraint in the initiation of proceedings and bring actions that advance the complainant’s immediate or systemic interest. This calculation includes a careful balance between the likely benefits, including market access or a potentially good precedent, and the costs of bringing an action, including financial and possible damage to diplomatic relations. The espousal by some countries with no particular interest in the Australian domestic market of the Tobacco Packaging Legislation case, however, is an example of an arguably more opportunistic behavior where some States are willing to capitalize on the benefits provided by private interests searching for a proxy.

Party shopping is more common in the investment context as a result of the private right of standing. A subsidiary incorporated in a country that is party to a BIT with an allegedly offending State may help an investor gain the nationality requirement to access investor-State arbitration. As corporations become more versatile, with subsidiaries in many locations, investor party shopping is becoming more common because BITs’ properties often grant greater control over remedy and have permissive nationality requirements. If private interests anticipate policy changes the way Philip Morris did in the Tobacco Packaging Legislation context, we may see more investors attempting to open enforcement possibilities by strategically incorporating business entities during political deliberation (but prior to the formal enactment) of a measure.

In short, private economic interests are able to choose among treaties due to choice-of-forum clauses and the way their corporate structures and supply chains are established in different locations for economic benefit and/or political

   Given the ‘largely self-regulating’ nature of the requirement in the first sentence of Article 3.7, panels and the Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith, having duly exercised its judgment as to whether recourse to that panel would be ‘fruitful.’


177. It may also be true, as the Appellate Body has asserted, “with the increased interdependence of the global economy,… Members have a greater stake in enforcing [trade rules].” See EC—Bananas III, supra note 92, ¶¶ 136–38. In this case, the United States was the lead complainant even though it did not export bananas; however, Chiquita, in particular, had large investments in Latin America. The bilateral(izable) and reciprocal obligations in international economic law generate a scope of possibilities for transitional moves. See generally Joost Pauwelyn, A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?, 14 EUR. J. INT’L L. 907 (2003).


179. Outside of the general distrust towards claims by nationals against their home States, there is a trend among investor-State tribunals to permit forum shopping. See generally Gus Van Harten & Martin Loughlin, Investment Treaty Arbitration as a Species of Global Administrative Law, 17 EUR. J. INT’L L. 121, 131 (2009).
advantage. At the same time, the relaxation of rules of international law regarding diplomatic protection or “injury” tests reduces the importance of the State bringing the action, placing more emphasis on stakeholders such as the transnational interests affected by a government intervention or the domestic interests affect by its reversal. These strategies are encouraged by the embedded flexibility in treaties and buoyed by the general desire on the part of private interests to maintain autonomy.

2. Inter-Regime Shifting

Two types of inter-regime strategies allow parties to experiment with features of enforcement systems across trade and investment legal frameworks.180 Usually, States are the complainants trying to enforce trade agreements, while in BITs private interests generally have the right to bring claims on their own behalf.181 Recent years, however, have seen increased attempts by States to directly enforce investment-law breaches and conversely, attempts by private actors to enforce trade-related investment breaches. Hence, I term this strategy party shifting as the experimentation is with the entity bringing the enforcement action. This strategy has become more prevalent because under many recent trade agreements, provisions aimed at protecting FDI can be enforced by States, at an inter-State level as part of larger liberalization commitments.182 In addition, as more trade-related obligations such as performance requirements have been included in RTAs, ostensible trade breaches may be enforced by private parties in investment arbitration.183

In the Trucking Services Restrictions case, Mexico enforced investment rules in a State-to-State context, demonstrating that this format may offer more precision towards achieving one of the main objectives of the treaty, in this case, liberalizing a particular economic sector.184 The other side of the coin is even

180. Helfer, supra note 19, at 16 (stating that an inter-regime shift moves “to a venue located in an entirely different regime”).
181. Sykes, supra note 23, at 636.
182. See, e.g., Panel Report, India—Measures Affecting the Automotive Sector, ¶ 7.57–7.65, WT/DS146/R, WT/DS175/R (Dec. 21, 2001) (concerning the indigenization requirement or “local-content” requirement, a paradigmatic example of measures covered by the TRIMs agreement). See also Panel Reports, Canada—Certain Measures Affecting the Renewable Energy Generation Sector / Canada—Measures Relating to the Feed in Tariff Program, WT/DS412/R /WT/DS426/R (Dec. 19, 2012) (finding that “mere participation” in that program requiring compliance with domestic content requirements was sufficient to confer an “advantage” on domestic beneficiary enterprise.); Request for Consultations by China, European Union—Certain Measures Affecting the Renewable Energy Generation Sector, WT/DS452/1 (Nov. 7, 2012) (complaining of the effects that the EU renewable energy generation policy is having on competition and market access).
184. U.S.-Mexico Panel Decision, supra note 80, ¶ 294 (“[T]he deprivation of the right to obtain operating authority to U.S. companies owned or controlled by Mexican nationals . . . violates
more common, namely the challenging of trade restrictions that affect FDI by relying on investment-law procedures. As government measures increasingly affect both trade and investment, lawyers have become better at characterizing trade matters as investment-law violations. Tribunals have found most of these crossovers to be unmeritorious for lack of jurisdiction when no clear investment exists in the territory of the offending party. However, the tribunal in Cargill—in the soft-drinks tax context—found that a series of actions, including an import-permit requirement directly breached the investment provisions of NAFTA.

A second inter-regime strategy is relief shifting. Typically, trade panels have jurisdiction to determine whether a State has violated its legal obligations and if the failure to comply can lead to the suspension of trade benefits. Investor-State tribunals, on the other hand, do not have the authority to order compliance (with some exceptions) but can order the payment of retrospective compensation when governments breach international law. Failure to comply with an arbitral award may result in private efforts to seize that government’s assets or potentially a diplomatic clash between the home and the host State of the investor. In relief shifting, however, parties experiment with enforcement across trade and investment regimes.

---


186. Arwel Davies, Scoping the Boundary between the Trade Law and Investment Law Regimes: When Does a Measure Relate to Investment?, 15 J. INT’L ECO. L. 793, 795 (2012). See also, e.g., CCFT, supra note 185, ¶ 112 (“[I]nvestors do not exist . . . in isolation, but are explicitly linked to their investments.”).

187. Cargill Award, supra note 115, ¶ 175.

188. Money damages are always an additional option to settle trade disputes, see, e.g., Framework for a Mutually Agreed Solution to the Cotton Dispute in the World Trade Organization Between the United States and Brazil, United States—Subsidies on Upland Cotton, WT/DS267 (June 25, 2010). See also Joost Pauwelyn, Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward a More Collective Approach, 94 AM. J. INT’L L. 335, 343–44 (2000).

189. In some cases, arbitration tribunals can order the restitution of property. See generally NAFTA, supra note 5, art. 1135.

For instance, States can suspend trade benefits at the inter-State level to induce compliance with investment rules or awards resulting from investor-State arbitration. The increased trade tariffs by Mexico in the trucking services restrictions case was specifically aimed at inducing the United States to comply with investment rules. Conversely, in the economic emergency measures context, the United States’ suspension of GSP benefits against Argentina was aimed at inducing the South-American country to pay investor-State arbitration awards.

This strategy can also take the opposite form: the suspension of investment obligations to force States to comply with trade obligations. In the soft-drinks tax context, Mexico argued that the tax at issue was aimed at American investors as a countermeasure for a prior breach of inter-State trade obligations. One tribunal held that such a reprisal targeting investors was potentially permissible. This may open the door to attempts by States to suspend investment provisions or even access investor-State arbitration in order to enforce trade violations.

Even when the remedies operate primarily as mechanisms of dispute settlement, the types of relief available under each regime (i.e., prospective relief for trade, retrospective for investment) have interacting functions and complementary goals (i.e., compliance for trade, compensation for investment). These relationships may be maximized by actors and, in the event of noncompliance, used to send a message that recalcitrant respondents, or their nationals, will suffer uncertainty until they decide to comply with their international obligations or tribunal rulings.

191. Here I use the same distinction applied by Rachel Brewster:

[A] breach refers to a deviation from the substantive terms of a treaty: an action contrary to the first-order rules of an agreement is a breach . . . . [A] violation of a treaty is a deviation from the dispute resolution rules: an action that is contrary to the treaty’s second-order rules.

Rachel Brewster, Reputation in International Relations and International Law Theory, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 524, 538–89 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

192. For the authority to designate a country a beneficiary of GSP benefits, see 19 U.S.C. § 2462(b)(2) (2013) (“The President shall not designate any country a beneficiary developing country under this subchapter if any of the following applies . . . .”). For the goals of the suspension, see Matthew Pountney, Obama Tells Argentina to Pay Up, GLOBAL ARBITRATION REV., Nov. 16, 2011, http://globalarbitrationreview.com/news/article/29956/obama-tells-argentina-pay-up%3B. See also Rosenberg, supra note 142.

193. See supra note 114 (including accompanying text).

194. ADM Consolidated Order, supra note 112, ¶¶ 110–50.

195. As Roger Alford concludes, ironically, “the most effective tool to secure compliance with WTO obligations may trigger investment arbitration.” Alford, supra note 10, at 48.

3. Transplantations

In theory, the applicable law in trade and investment is distinct. Trade panels decide if a government measure is consistent with the trade agreement rules that grant them jurisdiction. In an investor-State arbitration, the applicable rules are those of the investment instrument. Nonetheless the cases reveal at least two strategies to apply rules across systems or adopt legal concepts that approach the normative content of a different treaty: the former I term **importations** and the latter has been referred to as **cross-fertilization**.\(^\text{197}\)

To advance their litigation interests, parties may import a rule from one trade treaty to another trade treaty, from one investment treaty to another investment treaty or, more audaciously, across trade and investment treaties. These strategies often relate to the scope of a rule and raise the issue of how broadly to read an obligation.\(^\text{198}\) For one, parties have used most-favored-nation clauses of BITs for some time to import rules from other BITs their host State has entered into with a third State. In the economic emergency measures context, for example, several investors relied on this strategy to dispense with the obligation to use local remedies prior to submitting a claim for arbitration.\(^\text{199}\)

In the tobacco-packaging legislation context, Phillip Morris is using this strategy to argue that provisions in the BIT between Hong Kong and Australia can be used to import obligations formalized in the WTO’s TRIPS and TBT agreements.\(^\text{200}\) While seemingly aggressive, from a doctrinal standpoint it is true that broad and expansive BIT clauses may serve as a vehicle for attempts to enforce rules adopted in the trade (or other) context via investor-State arbitration, especially when the clause at issue makes reference to the enforceability of other general commitments under international law.\(^\text{201}\)

---

\(^\text{197}\) Helfer & Slaughter, *supra* note 66, at 323 (arguing that judicial bodies, through “cross-fertilization,” “enhance each other’s authority by referring to one another’s decisions”).

\(^\text{198}\) Soft Drink Tax Appellate Body Report, *supra* note 106, ¶ 45 (“Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction.”). See also *Río Grande Irrigation & Land Co., Ltd. (Gr. Brit. v. U.S.)*, 6 R. INT’L ARB. AWARDS 131, 135–36 (1923).

\(^\text{199}\) See *Siemens A.G. Decision on Jurisdiction*, *supra* note 128, ¶¶ 135–44 (awarding Siemens over $200 million). However, the company voluntarily abandoned the award in response to post-award revelations that Siemens had procured the investment through the systematic bribery of Argentine officials. See also *Michael A. Losco, Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction*, 63 DUKE L. J. 1201, 1202–24 (2013); *Camuzzi International S.A. Decision on Jurisdiction*, *supra* note 128, ¶¶ 16, 17, 28; cf. *Wintershall Award*, *supra* note 128, ¶¶ 130–32.

\(^\text{200}\) *PM Asia Notice of Arbitration*, *supra* note 13, ¶ 7.1–7.7 (stating that Article 2(2), which provides that each Contracting Party to the BIT has an obligation to “observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party,” serves to invoke breaches of other treaties).

\(^\text{201}\) *Metalclad Corp. v. Mexico*, Award, 40 I.L.M. 36, 70–99 (NAFTA Ch. 11 Arb. Trib. 2000) (allowing the import of other obligations on “transparency” under NAFTA through the “international law” gateway). Importations are in fact a bigger possibility in *intra* BITs but not in trade thanks to the exception for RTAs.
A final strategy, common to many legal practice areas, results from the cross-pollination of legal concepts and analogical interpretations between treaties, or cross-fertilization. BITs, like trade agreements, include similarly worded prohibitions against discrimination. Hence, in interpreting BIT provisions to determine whether foreign investors were given no less favorable treatment than other investors, parties have used, and tribunals have often considered, WTO jurisprudence. Conversely, while some examples exist, there is less reliance on BIT case law at the WTO, or for that matter at other inter-State dispute-settlement bodies dealing with trade cases.

What the Soft-Drinks Tax and Trucking-Services Restrictions case studies show is that cross-fertilization commonly occurs when tribunals interpret treaty language that requires the use of comparisons such as “like products” or “like circumstances,” terms associated with the scope of application such as “affects” or “relate to,” and terms establishing the conditions of competition such as “less favorable treatment.” Some argue that this type of transplantation has a legal

202. Domestic and foreign goods, services, investments, and intellectual property rights should be treated equally under the National-Treatment Principle encompassed in different international treaties. For instance, Article 2 of Chapter 11 of NAFTA contains a standard provision of national treatment in the investment context. See NAFTA, supra note 5. Similarly, the three main agreements of the WTO (Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS) also comprise the national-treatment principle. Even though the main principle is similar, some elements differ in these agreements. See DiMascio & Pauwelyn, supra note 9, at 58 (“National treatment provisions take various forms, but their basic requirement is that nations treat foreign individuals, enterprises, products, or services no less favorably than they treat their domestic counterparts.”).


205. See e.g., Cross-Border Trucking Services Final Decision, supra note 81, at 260 (transposing “like circumstances” language from GATT/WTO). See also Methanex Final Award, supra note 203, pt. IV, ch. E, ¶ 22 (analyzing the term “relate to” under NAFTA); Corn Products Notice of Arbitration, supra note 103, ¶¶ 121–25 (referencing WTO decision for analyzing “like circumstances”). For “like products,” see also Occidental Exploration & Prod. Co. v. Republic of Ecuador, Award, ¶ 173 (London Ct. Int’l Arb. 2004). For “like circumstances” see also Parkers-
basis. The Vienna Convention on the Law of Treaties gives tribunals authority to rely on “a relevant rule of international law applicable in the relation between the parties.” Another, more sociological explanation is, of course, the growing overlap between trade and investment lawyers, treaty negotiators, and arbitrators and panelists, who are often trained in international business and commercial law.

It is worth noting that private interests can rely on importations and cross-fertilization without worrying too much about the long-term consequences for resulting case law. States, on the other hand, may advance opportunistic defenses as Argentina did in cross-referencing the WTO carve outs through the state-of-necessity standard of a BIT to expand its policy space. For States, however, such approaches may come with more consequences as a litigation position may be used by future tribunals to construe the meaning of a treaty in future cases, by litigants as a form of collateral estoppel, or by tribunals based on general principles of law such as good faith or abuse of process.

In any event, rule transplantations may become more common as trade and investment law continue to converge, especially since private interests engaging in international economic law use every tool available, regardless of how it is labeled. Such strategies are facilitated by the overlapping potential of trade and investment rules. As shown in these cases, downstream law production is not simply a declaration of rights in a vacuum separate from efforts to actualize


206. Alford, supra note 10, at 42; see generally Verhoosel, supra note 185, at 503–04.


208. See Roberts, supra note 57, at 17–42.

209. Continental Award, supra note 132, at 172–75.

them in specific circumstances. Ambiguities are exploited; rule importations and rule cross-fertilization are just two ways of doing so that result in the repurposing of law.

TABLE 1: TAXONOMY OF REPURPOSING STRATEGIES IN INTERNATIONAL ECONOMIC LAW

<table>
<thead>
<tr>
<th>Basis</th>
<th>Intra-Regime</th>
<th>Inter-Regime</th>
</tr>
</thead>
<tbody>
<tr>
<td>PARTY</td>
<td>Party-shopping (Litigation parties strategically select the party of an enforcement action in order to avail themselves of a more favorable rule)</td>
<td>Party-shifting (States directly enforce investment-law breaches or, conversely, private actors enforce trade-related investment breaches)</td>
</tr>
<tr>
<td>RULE</td>
<td>Forum-shopping (Litigation parties move the enforcement action from a multilateral to a regional or domestic forum or vice-versa by relying on “choice-of-forum” or “fork-in-the-road” clauses)</td>
<td>Transplantations: Importations &amp; Cross-fertilization (Litigation parties use, and judges apply, rules across trade and investment or adopt legal concepts that approach the normative content of a different treaty or bodies of law)</td>
</tr>
<tr>
<td>RELIEF</td>
<td>Relief-shifting (States suspend trade benefits at the inter-State level to induce compliance with investment rules or awards, or States suspend investment rights to induce another State to comply with inter-State trade obligations)</td>
<td></td>
</tr>
</tbody>
</table>

211. This positivistic view ignores the practical dimension of international adjudication and how a remedy arises from a reflective effort to give meaning to broad international obligations. See, e.g., Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 HARV. L. REV. 1015 (2004).
III. ASSESSING AND CONTROLLING THE MERGING

Before concluding, I explore the main effects of the merging of trade and investment law and how, if at all, governments should respond to the challenges posed.

A. Adjudicatory Lawmaking and Policy

The four cases illustrate that for States, private interests, or even adjudicators trying to resolve concrete problems, the initial conditions and bargains of treaties are of only limited importance. While conserving distinct attributes, actors, and constituencies, trade and investment agreements are often experienced as a conglomerate of related agreements with functional relations but without a clear hierarchy.212 Not surprisingly, the complementarities are exploited, leading to more strategic behavior including the repurposing strategies summarized in the previous section.213

The interplay between economic agreements has as much to do with the complementariness of the legal fields that deal with two inseparable sides (trade and investment) of the process of globalization as with the recent growth and success of international economic governance.214 The incorporation of regulatory issues into trade negotiations was inevitable once “border barriers” fell. As international regulation became more entangled with domestic regulation, internal “behind-the-border” barriers increased in importance to frustrate competition and economic liberalization.215 Moreover, with the increase in WTO membership, competing RTAs harmonizing regulation became an alternative for economic integration. Many of these RTAs included FDI protection and liberalization provisions.

The strategic linkage, however, also heralds the rise of an increasingly pluralistic international legal environment; an ecology in which private interests have been granted a bigger role in “public” law enforcement and international lawmaking more generally. Specifically, the new trends in enforcement evidence how treaty bargains are challenged and contested more often, in

212. Keohane & Victor, supra note 21, at 18.
213. See also Busch, supra note 60, at 735 (describing the phenomena of “moving a regulatory agenda from one organization to another; abandoning an organization; or pursuing the same agenda in more than one organization”).
214. As put by a former Director-General of the WTO, “trade and investment are not merely increasingly complementary, but also increasingly inseparable as two sides of the coin of the process of globalization.” Press Release, WTO, Foreign Direct Investment Seen as Primary Motor of Globalization, Says WTO Director-General, Press Release No. PRESS/42 (Feb. 13, 1996).
215. For an excellent discussion, see generally Noll, supra note 42.
different ways, and by globally diversified interests. The trends illustrate how the available legal remedies serve larger, more common goals than seeking compliance with rules and compensation for treaty violations. These goals include the promotion and protection of transnational economic affairs by allowing commercial interests to liberalize areas that may be insulated from ordinary domestic legal or political challenges. Hence, the strategic use of the enforcement actions may have effects beyond an individual case that destabilize government regulatory activity, shape the interpretation of rules outside ordinary processes, or to relitigate issues settled in one system through the venue of another.

This strategic use of remedies is best illustrated with the Australian tobacco case. While private interests like tobacco companies do not have direct access to the WTO, some firms may see the stakes of a government’s measure as high enough to expend effort lobbying political representatives across the globe, with interests as divergent as those of Ukraine or Honduras. Considering that the commercial interests who seek compliance actions supply legal assistance in developing analysis and drafting briefs, it is conceivable that such interests could influence legal interpretations about the limits imposed by the WTO agreements.216 Moreover, a component of these commercial interests, Phillip Morris, relies on its network of subsidiaries (e.g., PM Asia) to stimulate litigation under a more favorable framework (Hong-Kong-Australia BIT) before an investor-State tribunal—a setting where some arbitrators have interpreted treaties as severely constraining the regulatory actions of governments. In addition to seeking compensation, such interests request to have the TRIPS and TBT agreements interpreted, the very same treaties at issue under the WTO. These strategies afford the industry, or at least Phillip Morris, an opportunity to shape the interpretation of rules and relitigate limits on the regulation of tobacco marketing, and perhaps even chill the effects of the World Health Organization framework on tobacco under the somewhat-questionable argument that the WTO universally protects something along the lines of “commercial speech.”217

This strategic use of legal remedies may have some negative consequences. It can subject governments to constant pressure, particularly given the destabilizing strain that accompanies parallel, sequential or combined legal actions. The need to defend “policy space” more frequently, often in strategically staged proceedings, may result in risk aversion, rights accretion or regulatory chill.218 Other negative effects of these crossovers are far-reaching

217. See supra Part II-A(iv).
218. See, e.g., James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 YALE L.J. 882 (2007). In addition, the destabilizing pressures resulting from linking and sequencing domestic and international remedies may also have had a disruptive effects and backlashes. For instance, as a result of the Tobacco Act litigation the government of Australia has pledged to stop signing BITs with investor-State arbitration clauses. See GILLARD TRADE POLICY STATEMENT, supra note 139.
rulings with potential policy consequences. At least three examples are evident in the case studies surveyed.

First, in the Mexican Soft-Drink Tax case, the decision of the Cargill tribunal to allow damages resulting from intercompany trade in investor-State proceedings may expose NAFTA governments to large compensatory damages disconnected from the policy goal of promoting and protecting FDI. It implies that any investment in the territory of a member State may be sufficient to protect the integrity of a supply chain, even when the component parts of the chain are located in different territorial jurisdictions and are subjected to different regulatory regimes. In the Argentinian context, the decision of the Continental tribunal to import the analysis of necessity without the requirements of the introductory clause of Article XX of GATT (the Chapeau), which emphasizes the manner in which the measure in question is applied, “may well be both an invitation to abuse and imprudent as international policy.”219 This lack of contextual sensitivity may disrupt the balance between the right of a State to invoke reasonable public policy and the economic rights of investors.220 Finally, the decision of the panel in the American trucking-services restrictions case perhaps rightly decided that a violation of the national-treatment obligation might be “harder” to establish with respect to services than to goods, but made no effort to distinguish between services and investment.221 This may confuse the conditions-of-competition test necessary to find a breach by applying the national-treatment test to a group of like service providers instead of comparing such conditions to a single, similarly situated foreign investor. These are only some examples disrupting important bargains in international economic law, but they represent a sample of issues resulting from the crossovers of trade and investment that will probably arise in the future with more frequency.

What is more relevant, however, is that by looking at international law enforcement in these terms, we can also appreciate how international courts and tribunals make law and affect important policies in the context of adjudicating discrete disputes.222 Viewed through this lens, the merger of trade and investment law is revealed to be more than simply a “problem” of inefficient competing authorities, but rather as part of an intricate and more organic law-production process.223 Law enforcement is, in some ways, a downstream

219. Robert Sloane, On the Use and Abuse of Necessity in the Law of State Responsibility, 106 Am. J. Int’l L. 447, 505 (2012). Sloane also argues “the focus of any necessity plea . . . should be on human beings as the fundamental unit of normative analysis, not on the states as such or for their own sake.” Id. at 504.
220. Id. But see Sweet, supra note 133, at 51.
221. U.S.-Mexico Panel Decision, supra note 80, ¶ 249.
222. Laurence R. Helfer & Anne-Marie Slaughter, Why States Create International Tribunals: A Response to Professors Posner and Yoo, 93 Calif. L. Rev. 899, 942, 948–52 (2005) (contending that because States are keenly aware of the effect of the outcomes they “fine-tune their influence over the tribunal and its jurisprudential output using a diverse array of structural, political, and discursive controls”).
223. Stephan, supra note 16, at 1589 (“Law can be seen as a form of information about the
extension of the upstream treaty-negotiation process and is also affected by strategies to actualize rules to specific circumstances (repurposing).

B. Norm-Generating and Control

As the boundaries between issue areas have become less rigid and international governance has expanded, a new legal environment has arguably emerged with a different political terrain where the norm-generating function is more difficult to control.224

While difficult to assess with the limited evidence presented here, one can speculate about the distributional effects of this new, more complex legal environment.225 Of course most commercial interests do, in theory, benefit from more rules and venues, the relaxation of nationality requirements, and diplomatic protection. In the past, strict nationality and standing requirements resulted in arbitrariness on the part of States, who had the exclusive ability to control access to international justice by choosing to represent more influential parties and declining to represent others. Today, political access and influence may be less important in accessing international enforcement than institutional capacity, coalition building and, of course, legal and economic resources. Guatemalan coffee growers and U.S.-based tobacco distributors may be similarly positioned, from a legal perspective, to contest protectionist government interventions, questionable regulation or subsidies, or even good-faith efforts to add transparency or limit the damaging externalities of their products or production methods. But in reality their capacity to achieve their goals is drastically different because of, among other reasons, differential economic and institutional resources. Moreover, the ability to ensure compliance with the resulting decisions of adjudicatory bodies may be limited if their respective governments have limited flexibly or leverage to implement reprisals.

Controlling the norm-generating function is arguably also more challenging. Not only is the flow of relevant information between adjudicatory bodies difficult to guarantee, exposing tribunals to inaccuracies and conflicts, but also less rigid boundaries allow more opportunities for the transformation of law. As in evolution, where not all mutations are predictable or harmful, not all these transformations can be anticipated nor do they necessarily merit equal concern. What can be understood, however, are the main mechanisms that propel these transformations and their potential on the broader goals of international law, such as coherence, expertise, and legitimacy.

probabilistic outcomes of contemplated future states. The significance of law... turns on the quality of the information provided.”).


225. As Pauwelyn has argued, the resulting fluidity may support the power positions of already empowered interests. See Pauwelyn, supra note 11.
Whatever the distributional effects, or the impact on the norm-generating function, some may question the wisdom of trying to roll back the process that has granted private interests a bigger role in international law enforcements or international law making more generally. For good or for bad, a thinner, “softer,” and decentralized lawmaking is here to stay. Governments can adapt by giving better guidance to those who have the extraordinary task of maintaining the balance between stakeholders.

For sure, the use of judicial techniques can relieve some of the resulting pressures. However, States can rely on a variety of other different actions to control international adjudication. Here, I focus on two groups: the first involves actions to clarify treaty rules and the relationships between mandates, in the upstream process. This “ex ante,” or specification, approach has its limits, however, as treaties are based on consent and reciprocity and thus often produce rules articulated with a very high level of generality. Moreover, the reticence of governments to surrender authority and flexibility to international bodies often translates into strategic ambiguity or general “standards.” The second is through design features rooted in signaling, deliberation, and reputational considerations, or “ex post” control structures. Such features help to control the tribunals’ ability to make and apply its decisions. They can serve to calibrate the adjudicatory authority and lawmaking process from the pressures exerted by repurposing strategies. This approach enables adaptation to changing conditions while averting the limitations of ex ante specification.

In this context, one can analogize ex post control structures with mechanisms used in administrative law practice to coordinate the regulatory space among agencies, such as interaction requirements, joint decision making, and special delegation arrangements. Such control mechanisms are important

---


227. See Jacob Katz Cogan, Competition and Control in International Adjudication, 48 Va. J. Int’l L. 411, 420 (2008) (providing a taxonomy for controlling international courts (internal and external) and five categories of external controls over court’s: 1) mandates; 2) rules it can apply; 3) staffing; 4) budget; and 5) ability to make and apply decisions). See also W. Michael Reisman, Systems of Control in International Adjudication and Arbitration: Breakdown and Repair (1992).


231. See Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 Harv. L. Rev. 1131, 1155 (2012) (identifying a topology of mechanisms to deal with similar problems in agency practice: interaction requirements, informal or special arrangements, centralized review, and joint policymaking). Increasingly, proposals to improve international law effectiveness
not only because adjudicators deciding matters have limited opportunities to evaluate the analysis of similar issues by other tribunals, but also because justiciability in the international scene is often “quite far-reaching,” creating practical “policy” consequences as a result of limited political revision. This is commonly referred to as international law’s “missing legislator” problem. Hence, I finish by sketching some of the main ex ante and ex post tools available to address the particular challenges imposed by each of the six strategies on the development of international law. My aim is to provide insight into the specific impacts of strategic choices and how the impact in the norm-generating function can be moderated with more targeted actions.

1. Coherence

Party-shopping and party-shifting strategies are relevant in creating enforcement opportunities and, more generally, improving compliance. On the other hand, excessive litigation before decentralized, uncoordinated tribunals may result in conflicting rulings that undermine coherence which can affect the long-term sustainability of international adjudication.

From a structural point of view, the main problem with party-based strategies is that they affect and sometimes even preclude coherence. Coherence in this context is not convergence of opinion but a “certain degree of connection and engagement”; it is important because decisions “become part of a greater whole” of international law. This is more problematic in investment-law enforcement since—unlike the WTO—no appeal mechanisms exercise this sort of control. It is fair to say, however, that governments are becoming better at clarifying the meaning of broad standards and anticipating or limiting excessive litigation, as well as at establishing treaty provisions aimed at coordinating tribunals when claims arise out of the same events or circumstances. For instance, States are increasingly aware of how broad jurisdictional clauses may expose them to the risks of large compensatory damages disconnected from the


233. See Ian Brownlie, The Justiciability of Disputes and Issues in International Relations, 42 BRIT. Y.B. INT’L L. 123, 142 (1967) (“Ultimately justiciability is a matter of policy and this may be measured, but is not necessarily limited, by the standard assumptions of the legal persons most closely affected.”). See also Jason Yackee, Controlling the International Investment Law Agency, 53 HARV. INT’L L. J. 391, 397 (2012) (comparing international investment arbitration to an “agency” that “legislates, administers, and adjudicates the rules of the international investment game”).


235. Martinez, supra note 21, at 482.
policy goals of promoting FDI. To address this matter, jurisdictional and admissibility requirements (e.g., “substantial” business activities, “continuous-nationality,” “covered investments,” or “relate to” clauses) have been included in newer investment agreements.236 Some terms could use further clarification to prevent the use of these strategies for the sole purpose of stimulating litigation or collecting damages in spite of limited roots to the host State.237 Moreover, procedures mandating the consolidation of claims of related parties or determining if the consolidation of common claims of unrelated parties is in the interest of “fair and efficient” resolution have proven helpful and accordingly are becoming routine in BITs and investment chapters of RTAs.238

Party-based strategies in the trade context are less of an issue. The lack of a private right of standing and the availability of an appeal mechanism under the WTO makes coordination less of a concern. De facto consolidation allows tribunals to hear disputes that arise out of the same events or circumstances in multilateral forums.239 While “diplomatic-espousal shopping,” used in the Australian case, does not seem to be a systemic problem, any limiting of this strategy should consider an important trade-off: demanding a stronger connection between standing and a direct economic injury for initiating proceedings may diminish the value of trade obligations as credible promoters of long-term commitments and general welfare enhancers when violations are enforced only by directly injured parties.240


238. See NAFTA, supra note 5, art. 1126 (allowing the consolidation of proceedings with “a question of law or fact in common . . . in the interests of fair and efficient resolution of the claims”). So far, two tribunals have decided consolidation claims. The Corn Products/ADM-TTLIA consolidation tribunal, on the one hand, focused on the unfairness to investors of a consolidation that the investors did not agree to and which would have negatively affected their procedural interests. ADM Consolidation Order, supra note 112. The Softwood consolidation tribunal, on the other hand, focused on efficiency to the resolution of the claims in terms of procedural economy. See generally Canfor Corp. v. United States, Tembec et al. v. United States, and Terminal Forest Prod., Ltd. v. United States, Order of the Consolidation Tribunal (NAFTA Arb. Trib. 2005), http://www.italaw.com/sites/default/files/case-documents/ita0115.pdf.

239. There is a de facto consolidation process in the WTO. Article 9 of the DSU, which states that a single panel should examine complaints related to the “same matter.” See Dispute Settlement Rules: Understanding on Rules art. 9.1, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 1869 U.N.T.S. 401.

240. Claus D. Zimmermann, Rethinking the Right To Initiate WTO Dispute Settlement Proceedings, 45 J. WORLD TRADE 1057, 1063–66 (2011) (arguing against the idea that the fact
In future agreements, governments could envision the consolidation of proceedings that join trade and investment claims. Unless governments are ready to grant more participation or private standing for trade violations or dispose of this feature in investment, which, in my view, are unsatisfactory solutions, as I explain below, the consolidation of these proceedings would involve incommensurable technical and political challenges. A simpler and more plausible option to improve control over the adjudicatory process of related or parallel proceedings is the inclusion of provisions that would stay proceedings for a reasonable period of time if a State party to the dispute showed that another proceeding could impact such proceeding, even if such proceeding arose under a different agreement. An alternative is to include these provisions within an investor-State arbitration mechanism. While substantiating the procedure may affect the speedy disposition of the investment claim, the retroactive relief of investment plus including protections against indefinite suspension could help balance systemic interests with those of the claimant in the dispute. In fact, procedures to give more time to another international decision are not so rare. Even without direct provisions, tribunals could decide to do so under their inherent powers. However, given the growing overlap, a “stay and underride” process can give more clarity to the standard, normalize the process, and help guide the interaction of tribunals in such cases.

WTO members may renounce on bringing claims that are politically unprofitable in a short-term perspective is contrary to several long-term interests of the global trading system).


244. See, e.g., Corn Products Notice of Arbitration, supra note 115 (rejecting a stay request by Mexico); MOX Plant Case (no. 3) (Ir. v. U.K.), Suspension of Proceedings on Jurisdiction and Merits, 42 I.L.M. 1187 (Perm. Ct. Arb. 2003) (opting for a stay until further clarification of the issue).
2. Expertise

For the merging of international trade and investment law, relying on clauses that allow for alternative venues, as well as strategies that rely on the ambiguities embedded in rules (“importations” or “cross-fertilization”) have a greater impact on expertise. That is, these strategies may affect the consistency between rules and scientific knowledge or result in rules with less ascertainable normative content. For example, the use of fork-in-the-road provisions included in BITs may limit domestic courts from adjudicating difficult, politically charged disputes in ways that support the development of domestic institutions. On the other hand, contextual sensitivity may be lost if choice-of-forum clauses result in the adjudication of a regional trade dispute before the WTO. Also, States may rely on conflict clauses to use the carve-outs, or exceptions in overlapping treaties “to avoid or limit responsibility or minimize damages or other remedies.”

These strategies may result in lower levels of effectiveness and affect rule bindingness as nations may avoid substantive commitments and tribunals interpret rules outside of their purview.

Much has been written on how to solve conflicts between rules of international law. Obvious ways to do so are to improve precision in treaties and mandate the use by tribunals of judicial techniques or general principles such as res judicata, lis pendens, or forum non conveniens (useful to accommodate related procedures). However, in addition to the explained difficulties with ex ante specification, there are other reasons why these solutions yield only limited potential. Conflict cases are about deciding boundaries between different entities’ lawmaking authority. In international law, questions of hierarchy are not well settled and conflict rules, which emphasize connections, interests, and expectations rather than bright lines, tend to be difficult to apply. Even if a tribunal is prepared to yield and exercise restraint, there is no guarantee that the parties will raise objections to

245. Pauwelyn, supra note 11, at 6.

246. Sloane, supra note 219, at 505 (concluding that the expansive interpretation of exceptions under economic treaties “may well be both an invitation to abuse and imprudent as international policy”).


248. Vienna Convention, supra note 207, arts. 30–41. See, e.g., Norway Draft Model BIT, supra note 236, art. 16 (“The Tribunal shall, as appropriate, take into account the principles of res judicata and lis pendens . . . .”).

249. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 177 (Nov. 6) (“Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.”). See also Panevezys-Saldutiskis Railway (Est. v. Lith.), 1939 P.I.C.J. (ser. A/B) No. 76, at 16 (Feb. 28).
admissibility (a necessary condition for their operation), or that tribunals will apply rules outside of the treaty that gives them jurisdiction (as evidenced in the WTO Soft-Drink dispute). Moreover, the conditions for the application of principles is often strict, especially the requirement that the “cause of action” be the same.

To improve and harness the relative substantive expertise of more technical, specialized bodies, ex post mechanisms, such as requirements to consult with stakeholders throughout the lifespan of the dispute, can limit the effects of rule-based strategies. Such mechanisms include processes for soliciting input from stakeholders who may not have a full right to participate. For instance, allowing State parties to make submissions to a tribunal “on a question of interpretation” of the agreement has been widely successful in guiding investment tribunals under NAFTA investor-State practice. The same can be said about provisions that allow third-party governments with a “substantial” or “systemic” interest to deliver written and oral testimony before the panels or the Appellate Body in the WTO. More


253. NAFTA, supra note 5, art. 1131(2). See also U.S. Model BIT (2012), supra note 236, arts. 28–29 (allowing access by nondisputing State to proceedings, including a right to commentary on draft awards); U.S. Model Bilateral Investment Treaty arts. 28–29 (2004) (allowing access by nondisputing State to proceedings, including a right to commentary on draft awards); Christina Knahr, Transparency, Third Party Participation and Access to Documents in International Investment Arbitration, 23 ARB. INT’L 327, 328 (2007) (explaining the lack of a codified process for amicus curiae participation in NAFTA tribunals under UNCITRAL Arbitration Rules); Loukas A. Mistelis, Confidentiality and Third Party Participation, 21 ARB. INT’L 211, 221–23 (2005) (observing that “amicus curiae briefs” are not always welcome by tribunals).

robust mechanisms include requiring tribunals to circulate a draft copy of the tribunal’s decisions and allowing for written comments to review precise aspects of the proposed decision. The 2004 U.S. Model BIT, for example, established such a process, characterized by some authors as a species of notice-and-comment. This practice, useful as a way to roll back interpretations that result in suboptimal policy outcomes, is also used at the WTO.

Other “soft” policymaking instruments, including jointly issued binding statements, or annexes with substantive guidelines and a directive to tribunals to interpret provisions in accordance to such directives, may serve as mechanisms for controlling expertise. These instruments can help tribunals as they reduce the ambiguity of key treaty terms. Negotiators can even envision a more robust regime in which tribunals are directed to give special consideration to evolving State views or the work produced by specialized bodies such as the United Nations Commission on International Trade Law. While the use of this latter process is limited, governments can rely on bureaucratic or political discretion to identify rule interpretations that are more consistent with the policy goals of the agreement in extraordinary situations. In fact, in some investment agreements, governments are now reserving the right to unilaterally determine certain sensitive issues or give bureaucracies the authority to decide important policy issues prior to international adjudication.


255. U.S. Model BIT (2004), supra note 236, arts. 28–29 (allowing access by non-disputing State to proceedings, including a right to commentary on draft awards); Yackee, supra note 233, at 434–40 (describing this process as a notice and comment type of requirement).

256. Under Article 15 of the DSU rules and procedures, a panel shall issue an interim report to the parties. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report. NAFTA also provides for a similar proceeding. NAFTA, supra note 5, art. 2016(2).


258. For instance, Articles 5 and 6, on minimum standard of treatment and expropriation, respectively, shall be interpreted in light of the Annexes. U.S. Model BIT (2012), supra note 236.

Yackee, supra note 233, at 437.

260. See, e.g., ASEAN Comprehensive Investment Agreement art. 36(7), Jul. 24, 1998; Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union art. 19(3), May 13, 2008, 2008 O.J. (C 115) 47 (“The Court of Justice of the European Union shall, in accordance with the Treaties . . . give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions.”).

261. For instance, some States are specifying in international economic agreements that exceptions clauses to protect their essential security interests are self-judging. See, e.g., U.S. Model BIT (2012), supra note 236, art. 18; Canada Model BIT, supra note 252, art. 10(4); ASEAN Comprehensive Investment Agreement (ACIA), art. 18, Feb. 26, 2009, available at http://www.asean.org/images/2012/Economic/AIA/Agreement/ASEAN%20Comprehensive%20
3. Legitimacy

Although helpful and at times even necessary to induce compliance, relief shifts may be suboptimal with respect to promoting the legitimacy of international law. One reason to include dispute-settlement mechanisms in economic agreements is to manage conflicts and to constrain excessive responses to prior breaches of law. In other words, dispute-settlement mechanisms ensure the proportionality of measures taken when another State breaches an international obligation.\textsuperscript{263} However, relief shifts may open the door to arbitrariness and abuses in the application of reprisals against investors, disrupting an important equilibrium. They can also be used to coerce, cajole, fine, bully, etc. to produce results against States facing political difficulties to comply with arbitral awards or WTO decisions.

The easiest and most plausible way to limit the effects of these strategies is to clarify the nature of rights of investors in economic agreements. Even though the host State may in principle apply reprisals by suspending investment obligations, their effect and limits depend on the nature of the investors’ rights. If investors are granted direct rights, reprisals are opposable only against the home State, not investors.\textsuperscript{264} This solution is not as simple as it sounds as it has vast political and economic implications. If reprisals were unavailable, investors and their investments would be insulated from the politics inherent in dealings between States and even protected from sanctioned countermeasures.\textsuperscript{265} Not all nations would agree to treat investors as entities with this important carve-out from inter-State politics for economic gains. For instance, some nations with limited import markets, and therefore reduced ability to impose a countermeasure that “causes pain” on other parties, may remain interested in imposing reprisals, such as suspending investment obligations directly against investors.\textsuperscript{266}

\textsuperscript{263} Case Concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, 18 R.I.A.A., 417, 431 (1978) (“Counter-measures . . . [are] a wager on the wisdom, not on the weakness of the other Party.”).

\textsuperscript{264} Paparinskis, supra note 116, at 29.

\textsuperscript{265} Id.

\textsuperscript{266} See e.g., CPI Decision on Responsibility, supra note 115, ¶ 137 (citing Professor James Crawford, now ICJ Judge, arguing on behalf of Mexico: “the model countermeasure is one that causes pain”).
The changing landscape resulting from minilateralism and the inseparability of international trade and investment will continue to call into doubt the appropriateness of the separate structure of their legal remedies. However, this work shows important reasons for maintaining public enforcement in trade and private enforcement in investment. With the former, governments can have better control over the development of international trade law. Alan Sykes has persuasively argued that States, by limiting standing in trade dispute to themselves, can prevent interpretations that may return to “haunt” them.\textsuperscript{267} In this sense, public enforcement in trade allows States to filter the excessive uses of trade adjudication and assess which actions are in the public interest.

On the other hand, despite the recent concern about socially excessive litigation in international investment law, a rollback of the process that has granted private interests a bigger role in enforcement is also questionable. Especially at a time when international economic institutions are fighting to remain relevant, limiting investment-law enforcement to States by reintroducing the rules of diplomatic protection seems to be deeply inconvenient. It may result in arbitrariness in the exercise of diplomatic protection, in the application of reprisals against a State (and its nationals) found in violation, and in the allocation of eventual retaliation benefits to compensate an investor for its losses.\textsuperscript{268} The ability to use international institutions to keep governments accountable continues to be a key legitimizing factor of international law. Before a dramatic change of this nature, we should consider the benefits of decentralized enforcement as holding potential for improving problems derived from global economic interdependence.

Recognizing the appropriateness of separate enforcement does not mean denying that trade and investment remedies are often used simultaneously or in combination for “public law” type of litigation.\textsuperscript{269} It means, instead, a tacit acknowledgment that today the forces behind enforcement are often globally diversified and use trade and investment agreements to pursue traditional goals like compliance with obligations and compensation for violations, as well as other, more strategic ends. Hence, there is a need to enhance dispute-settlement systems that respond to this growing phenomenon. For example, future agreements could include special delegation arrangements to provide flexibility


\textsuperscript{268} Sykes, supra note 15, at 648–54. To be sure, the moves by, among others, Australia, South Africa and in some ways Germany in the context of Transatlantic Trade and Investment Partnership negotiations to reject investor-State arbitrations are at least a sign that some States are worried about socially excessive litigation in international investment law.

to adjudicators to recommend the succession of different proceedings when the interpretation of both trade and investment obligations are at stake. Perhaps limiting this process to the issuance of nonbinding proposals would permit States to discard the recommendation if it fundamentally undermines an interest or right.\textsuperscript{270} If treaty parties wish to maintain the “direct rights” of investors formulation, this type of special delegation arrangements could also explicitly release States from obtaining the consent of claimants in investor-State proceedings to overcome potential vetoes. Such measures could create a more orderly dispute-resolution process and allow for the hearing of trade and investment procedures under the same agreement in a more organized fashion.

\textbf{CONCLUSION}

International trade and investment law are merging. This has resulted, in part, from the inseparability of the two fields and a constantly adapting global business environment (\textit{convergence}), and from alternative approaches to pursuing economic integration (\textit{minilateralism}). The merger is further propelled by the strategies used by litigants to take advantage of different bodies during the application and enforcement of treaty rules. This article has identified the basic strategies used for that purpose (i.e., party and forum shopping, rule importation and cross-fertilization, and party and relief shifting) and what States might want to do about them. With a more nuanced picture of the specific effects of such strategies, negotiators of future commercial agreements may be better equipped to respond to the challenges posed with targeted actions (i.e., ex ante and ex post controls).

The challenges are not inconsequential. From health regulations in the tobacco case to safety regulations in the trucking-services case and from taxation in the Soft-Drinks Tax case to monetary policy in the emergency-measures case, international economic agreements can affect important regulatory domains. Hence, like other areas of public-law litigation, the strategic parallel, sequential, or combined use of legal remedies may be used to destabilize governments’ regulatory activity, to shape the interpretation of rules outside an ordinary process, or to relitigate issues settled in one regime through the venue of another.

The exploration of the evolving shared space between international trade and FDI regulation helps to move the debate beyond the traditional focus on investigating how individual regimes function, to an understanding of how the interactions between different fields shape international adjudication. In this sense, institutions and policy makers who wish to maintain control over the evolution of legal regimes should consider not only clarifying rules and jurisdictional mandates, but also instituting mechanisms that can work to

accomplish coordination and collaboration among different adjudicatory bodies by institutionalizing participation and collaborative communication.

Finally, this Article presents a more general statement about international law. By addressing international regime complexity in action, this Article shows how ambiguity is exploited to shape the evolution of legal systems. The pressures that shape the development of international law are both slow and iterative; top-down and bottom-up. These pressures, in turn, produce feedbacks loops that shape creativity and risk taking among different actors and stakeholders and can result in the mutation and recombination of different bodies of laws.
State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities

Bruce W. Klaw*

This Article explores how bribery and extortion in international business transactions and foreign direct investment may be prevented by holding States accountable under international law for the demand-side causes of corruption, improving the viability of investor-State arbitration for corruption claims, and making appropriate use of State-to-State dispute resolution mechanisms like diplomatic protection. It examines the content of States’ obligations to prevent and eradicate corruption and considers the conditions and circumstances under which a State may be held responsible under international law for the solicitation and extortion of bribes from foreign investors, and the denial of justice to foreign investors subjected to such corruption. It then assesses the opportunities and obstacles currently associated with invoking State responsibility through investor-State arbitration and State-to-State dispute resolution mechanisms such as diplomatic protection. Based on this analysis, it offers a series of suggested improvements that should better enable these international dispute-resolution mechanisms to help prevent corruption by encouraging its disclosure, securing redress for foreign investors subjected to it, and holding States accountable for it.

TABLE OF CONTENTS

INTRODUCTION ........................................................................................................ 62

I. STATE RESPONSIBILITY FOR CORRUPTION INVOLVING FOREIGNERS

* Assistant Professor, University of Denver, Daniels College of Business, Department of Business Ethics and Legal Studies. Harvard Law School (JD), Binghamton University (BA).
STATE RESPONSIBILITY FOR BRIBE SOLICITATION

UNDER INTERNATIONAL LAW................................................................. 66

A. Attributing Corrupt Conduct to the State........................................... 67

1. Organs of Government................................................................. 70

2. Persons or Entities Exercising Elements of Governmental Authority ..................................................... 72

3. De Facto Agents of the State .......................................................... 75

B. Bribe Solicitation, Extortion, and Denial of Justice as Breaches of the Host State’s International Obligations .......... 76

1. Obligations Under Multilateral Corruption Suppression Treaties .............................................................. 77

2. Obligations Under Bilateral Investment Treaties and Free Trade Agreements .......................................................... 79

i. Obligation to Provide Fair and Equitable Treatment........... 80

ii. Obligation to Provide Full Protection and Security .......... 81

iii. Obligation to Refrain from Arbitrary or Discriminatory Action ................................................................. 82

iv. Obligation to Refrain from Takings Without a Public Purpose ............................................................................. 83

3. Obligations Under Human Rights Treaties ......................... 84

4. Obligations Under Customary International Law................. 84

i. State Practice........................................................................ 85

ii. Opinio Juris Sive Necessitatis ............................................. 86

II. INVOKING STATE RESPONSIBILITY FOR CORRUPTION ........................................ 87

A. Investor-State Dispute Resolution Through International Arbitration.................................................. 88

1. Obstacles to Initiating Arbitration of Corruption Claims ....... 89

i. Fears of “Poisoning the Well” and Having Contracts Rescinded................................................................. 89

ii. High Cost of International Arbitration ............................... 90

iii. Risks of Exposure to Criminal Liability ........................... 90

2. Obstacles to Succeeding in Arbitration of Corruption Claims ................................................................................. 91

i. Heightened Burden of Proof ................................................. 91

ii. Failure to Properly Attribute Acts of Corruption to the State ............................................................................. 91

a. World Duty Free v. Kenya .................................................. 91

b. EDF (Services) Ltd. v. Romania ........................................ 93

iii. The “Corruption Defense” to Claims................................. 94

3. Opportunities To Remove Obstacles to Arbitration of
Bribery and extortion remain persistent and disturbing realities in international business and foreign direct investment. In a survey by Transparency International of more than 2700 business executives in twenty-six countries, almost forty percent reported being requested to pay a bribe in the previous year.1 The percentage of survey respondents reporting bribe solicitation increased to as much as sixty percent when the results were focused solely on high-risk sectors, such as telecommunications and energy, or limited to certain high-risk developing countries.2 There is also reason to think that such alarmingly high percentages may actually understate the scope of the problem, as available evidence indicates that many people are solicited for payments multiple times per year, often by the same person or segment of government.3

2. Id. at 4–5.
3. See, e.g., TRACE INTERNATIONAL, BUSINESS REGISTRY FOR INTERNATIONAL BRIbery AND EXTORTION (BRIBELINE), 2010 BRAZIL REPORT 1 (“Nearly half of all respondents reported being solicited for a bribe by the same source more than onetime in a given year. Of these respondents, over 75% indicated that they were solicited for a bribe by the same source between two and twenty times in a given year and 15% reported being approached by the same source more than 100 times in a given year.”); TRACE INTERNATIONAL BRIBELINE, 2010 MEXICO REPORT 1 (“Over
Thus, while the vast majority of governments around the globe proclaimed a decade ago in the United Nations (UN) Convention Against Corruption (2003) that “the prevention and eradication of corruption is a responsibility of all States,” it remains evident that corruption is far from gone, and it is doubtful States are effectively fulfilling their international responsibilities.

Part of the reason that corruption has continued to persist notwithstanding the acknowledged State responsibility to eradicate it appears to lie in the fact that many States have seemingly viewed their concrete and actionable international anti-corruption obligations as largely limited to addressing the supply-side of bribery transactions, that is, the bribe givers. Over the last two decades, for example, a number of States have taken steps to enact statutes like the United States’ Foreign Corrupt Practices Act (FCPA) that prohibit corrupt payments to foreign officials and remove the tax deductibility of such payments. Yet, while States have focused attention on disrupting and prosecuting bribe payers, they have largely ignored or been reluctant to robustly address the demand side of bribery, that is, the corrupt officials who solicit or demand bribes.

Unsurprisingly, much of the corruption literature in the legal academy also tends to concentrate on supply-side bribery issues, the bulk of it demanding more regulatory guidance and judicial oversight over enforcement of the FCPA and United Kingdom Bribery Act, or seeking specific reforms to such domestic supply-side legislation.

There is, however, also a growing literature seeking to direct attention to the demand-side aspects of global corruption. Aided by data provided by organizations such as Transparency International and TRACE International, scholars, such as Professor Beets, have helped us better understand the political, economic, cultural, and geographic factors associated with levels of corruption.

55% of survey respondents reported that a bribe demand was recurring.”; TRACE INTERNATIONAL BRIBELINE, 2009 RUSSIA REPORT 4–5 (“In Russia, just over half of reporters were solicited more than once; in India, slightly less than half of reporters were solicited more than once. In China, on the other hand, 73% of reporters said they had been solicited more than once, and of those reports, nearly 20% indicated they had received more than 100 requests.”)


in foreign countries. Likewise, researchers at the World Bank and scholars, including Professor Rose-Ackerman, have highlighted the social and economic costs associated with secret and pervasive bribe solicitation and extortion. In recognition of these ills, and seeking demand-side solutions to help curtail the problem, scholars, including Kaushik Basu (currently Chief Economist at the World Bank) and I, have separately urged rethinking of one of the current approaches to preventing such corruption—which involves criminalizing virtually all payments made in response to solicitation and extortion by foreign officials—to focus instead on the disclosure and prevention gains likely to be made if reluctant payers were unafraid of prosecution and instead felt free to come forward to report corrupt officials. In that same vein, Professor Yockey, others, and I have separately called for increased legal accountability of corrupt foreign officials, echoing similar pleas by members of the business community and media. To date, however, research into legal remedies aimed at the demand side of corruption has largely focused at the level of the individual corrupt foreign official—that is, strengthening transparency and reporting regimes, augmenting forfeiture mechanisms, and/or utilizing other available extraterritorial criminal laws (like anti-money laundering laws) in order to hold corrupt foreign officials accountable for bribe solicitation and

11. See Yockey, supra note 9, at 834–38; Klaw, supra note 10, at 361–68.
extortion under U.S. domestic laws. But even with the increase in mutual legal assistance and civil society pressure that has been wisely suggested by some, solutions to address the demand side of corruption that involve prosecuting foreign officials in U.S. courts will necessarily face practical, if not jurisdictional, impediments and remain largely reliant on cooperation by foreign States. Currently, however, many foreign States lack the political will to assist in the investigation and prosecution of their own officials. Part of the reason for this, I submit, is because such foreign States do not regularly face real consequences when they do not cooperate in the battle against corruption.

Scholars have recently recognized that “State responsibility [can] assist in the speedy criminal prosecution of corrupt public officials by imposing real consequences for the failure of a State to take corruption seriously,” and by providing upside incentives for investor victims of solicitation and extortion to report their experiences. To date, however, “relatively little attention has been paid to the international law on State responsibility, particularly the degree to which host States can, if at all, be held responsible for the corrupt acts of their public officials.”

The goal of this Article is therefore to elucidate States’ international obligations with respect to preventing corruption by focusing on the demand side of bribery, and exploring the mechanisms by which States may be held accountable under international law for failing to do so.

15. See Yockey, supra note 9, at 834–38; Klaw, supra note 10, at 361–68.
16. See Yockey, supra note 9, at 836–38.
17. See, e.g., Jon S. T. Quah, Curbing Asian Corruption: An Impossible Dream?, 105 CURRENT HIST. 176, 176, (2006) (noting that “curbing corruption in most Asian nations is difficult, mainly because of a lack of political will”).
20. Id. at 1.
Part I of this Article summarizes the general framework under which responsibility is attributed to States under international law and applies that framework to the persons and/or entities typically involved in international business transactions and foreign direct investment, including foreign public officials in executive, legislative, and administrative roles; State-owned or government-affiliated corporate entities; and local agents, consultants, and “fixers.”

Part II considers whether and how a State may breach its international obligations under existing multilateral anticorruption treaties, bilateral investment treaties (BITs), human rights treaties, and customary international law by engaging in, failing to prevent, and failing to provide redress for bribe solicitation and extortion of foreign nationals.

Part III applies these principles of State responsibility to two principal mechanisms for invoking such responsibility in international transactions and investment disputes. Part III.A analyzes the obstacles that currently inhibit the initiation and ultimate success of corruption claims by foreign investors against States in international arbitration. It suggests certain changes to make international arbitration more attractive and viable for foreign nationals subjected to corruption, including augmenting nonretaliation protections, shielding persons who unwillingly acquiesce to extortion from domestic prosecution, appropriately lowering the heightened burden of proof for corruption claims, reiterating within BITs established legal principles for the proper attribution to States of their agents’ ultra vires acts, and clarifying the well-intentioned but insufficiently refined notion that claims relating to or involving corruption are either nonarbitrable or necessarily unenforceable. Part III.B analyzes the prospect of using State-to-State dispute resolution mechanisms, such as diplomatic protection, to address and resolve international corruption claims. After considering various legal obstacles and practical objections to State-to-State resolution of corruption claims, it argues that elevating foreign corruption to the level of a State-to-State disputes can create incentives for additional disclosure of bribery and extortion, assist victims of bribe solicitation and extortion in obtaining redress, pressure foreign States to remove their own corrupt officials, and further strengthen international norms against bribery and extortion in international business transactions and foreign direct investment.

I.
STATE RESPONSIBILITY FOR CORRUPTION INVOLVING FOREIGNERS UNDER INTERNATIONAL LAW

Although the concept of using principles of State responsibility to help prevent corruption remains largely untested, the practice of holding States responsible under international law for unlawful actions affecting the property
and financial interests of foreigners is not new. As early as 1929, scholars of international law prepared a Draft Convention on the Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners. The United Nations’ International Law Commission (ILC) further developed this work. During its very first session in 1948, the ILC included State responsibility within its provisional list of topics to be codified. By 1953, the UN General Assembly formally requested the ILC to undertake codification of the principles of State responsibility under international law. After nearly a half century of work gathering evidence of State practice and opinio juris, the ILC adopted Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles) in August 2001. The Draft Articles have since been commented upon extensively and, except for a few articles that probably constitute progressive development of the law, currently enjoy widespread support as a reflection of customary international law.

Accordingly, the Draft Articles provide a sound basis for analyzing whether corruption that affects foreign investors may give rise to State responsibility under international law.

The first two Draft Articles offer a starting point for analyzing whether corruption may entail State responsibility. Draft Article 1 makes clear that “[e]very internationally wrongful act of a State entails the international responsibility of that State,” while Draft Article 2 provides that “[t]here is an internationally wrongful act of a State when conduct consisting of an act or omission: (a) is attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State.”

A. Attributing Corrupt Conduct to the State

In the first instance, the question of whether a State may be responsible for acts of corruption involving foreign nationals involves consideration of whether the act or omission at issue is attributable to the State. If the conduct or omission at issue is not attributable to the State, then there generally can be no State responsibility. Since “the conduct of private persons is not as such attributable

26. Id. art. 2.
27. Draft Articles on Responsibility, supra note 23, ch. II, cmt. 2 (“The general rule [under
to the State,“28 the corrupt person’s identity and function is critical in determining whether the conduct of such persons may be attributable to the State under international law.29

In the context of international business transactions, an investor may have dealings with many different individuals and entities in the foreign country during the lifetime of a transaction or investment. Recent experience shows that no person or position involved in such international transactions is wholly immune to corruption, as each of the following persons has recently been implicated in solicitation, bribery, or extortion schemes:

- Foreign executive officers of central and local governments, including presidents,30 prime ministers,31 and mayors, in order to obtain permission to engage in the foreign investment;32
- Foreign legislators, who may be responsible for key legislative committees with oversight over applicable business sectors such as telecommunications;33

Customary international law] is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State . . . .”].

28. Id. ch. II, cmt. 3.

29. It should be noted at the outset that while “the internal law and practice of each State are of prime importance” in ascertaining who or what is an organ of a State for the purposes of State responsibility, the legal characterization of such persons or entities as “organs” or as “independent” under the domestic law of the foreign State is not dispositive of the issue of attribution under international law. Nor is a State relieved of responsibility under international law simply because the foreign person may have been acting outside of his or her powers or competence, as set forth in the applicable foreign law. The same is true for the domestic law of the foreign investors’ State. The characterization of a person as a “foreign official” under the law of the investors’ State—while it may be decisive on matters involving criminal liability under laws like the U.S. Foreign Corrupt Practices Act (FCPA) and U.K. Bribery Act—does not necessarily resolve the issue of whether a State may be held responsible for that “foreign official’s” acts. Accordingly, the fact that the FCPA defines a “foreign official” as an “officer or employee of a foreign government or any department, agency, or instrumentality thereof” and U.S. law enforcement officials at the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) currently interpret “instrumentality” to include “State-owned enterprises” does not resolve the question of whether a State may be held responsible for the actions of such entities under international law.


31. See EDF (Servs.) Ltd. v. Republic of Romania, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0267.pdf (alleging bribe solicitation involving the Romanian Prime Minister).


33. See SEC v. BellSouth Corporation, Civil Action No. 1:02-CV-0113 (N.D. Ga., filed Jan. 15, 2002) (alleging bribery involving the wife of the Nicaraguan legislator who was the chairman of
Foreign regulatory officials of national or local governments, who may be responsible for authorizing, administering, and/or enforcing applicable regulatory requirements, such as environmental impact statements, customs inspections, and land permits;

Quasi-governmental foreign professionals, who are licensed and required (and, in some cases paid) pursuant to foreign law to conduct examinations of the investor’s business, products or services;

Foreign officers, directors, and employees of wholly or partially State-owned or State-controlled enterprises or joint-ventures partially owned by State-owned enterprises;

Foreign police officers, prosecutors, and judges charged with protecting, investigating, and determining the legal interests of the foreign investor; and

the Nicaraguan legislative committee with oversight of Nicaraguan telecommunications).


35. United States v. Kay, 513 F.3d 432 (5th Cir. 2007) (alleging bribery involving Haitian customs officials).


• Unofficial local “agents,” and “consultants” purporting to work on behalf of the above foreign governmental organs, entities, and officials.40

For purposes of analysis, each of these persons and entities can generally be categorized into one of three different groups: (1) organs of government; (2) persons working for entities exercising elements of governmental authority; and (3) in, some cases, de facto agents of the State, State employees or State organs. The ability of each of these groups to trigger attribution to the State is considered below.

1. Organs of Government

The clearest case for State attribution occurs when the organs of a State’s government undertake acts. Article 4 of the Draft Articles provides that “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions;41 whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”42 It adds that “[a]n organ includes any person or entity which has that status in accordance with the internal law of the State,” and the Commentary explains that “person or entity” includes “any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority.”43 As one international tribunal aptly explained, this means “a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.”44

Yet the actions of such organs of government when performed in an “official capacity” are not the only ones that are attributed to the State under

40. See Press Release, SEC, SEC Sues the Titan Corporation for Payments to Election Campaign of Benin President (Mar. 1, 2005), http://www.sec.gov/news/press/2005-23.htm [hereinafter SEC Sues The Titan Corporation] (announcing that Titan Corporation settled an SEC action for $23.5 million and pled guilty to a three-count criminal information charging it with FCPA violations in connection with Titans payments to an agent who claimed to have close ties to the then-President of Benin).

41. The fact that a State may be engaging in commercial activity as opposed to more classical aspects of governance does not diminish or discount its State responsibility. Cf. 28 U.S.C. § 1605(a)(2) (2013) (stating that a foreign State may be held accountable in U.S. courts, notwithstanding the Foreign Sovereign Immunities Act, when it takes “an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States”).

42. Draft Articles on Responsibility, supra note 23, art. 4(1).

43. Id. art. 4(2).

44. Cf. id. art. 4, cmt. 6 (quoting Salvador Commercial Company, 15 R.I.A.A. 455, 477 (1902)).
international law; so too are certain unlawful acts that are enabled by an official’s position yet exceed the scope of the official’s authority.

It is important not to confuse ultra vires acts (like soliciting a self-enriching bribe in exchange for official action) with purely private acts (like when a president cheats on his personal tax returns). In the former case, the organ is purporting to exercise an official function or acting in the name of the State (albeit wrongly), and in the latter case he is not. Accordingly, the Commentary to Article 4 of the Draft Articles makes clear that it is “irrelevant for [purposes of attribution] that the person concerned may have had ulterior or improper motives or may be abusing public power.”\footnote{\textit{Id.} art. 4, cmt. 13.} It adds that “[w]here such a person acts in an apparently official capacity, or under color of authority, the actions in question will be attributable to the State.”\footnote{\textit{Id.}} This rule makes particular sense in the context of bribery and extortion, as it is the person’s official position of authority or apparent authority that makes the solicitation and/or extortion possible.

To that end, Article 7 of the Draft Articles explains that “[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”\footnote{\textit{Id.} art. 7 (emphasis added).} This rule was established in international matters such as the \textit{Caire} case, in which two Mexican officers, after failing to extort money from a French citizen, took him to the local barracks and shot him. In that case, the French-Mexican Claims Commission held that the two officers, even if they are deemed to have acted outside their competence . . . and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.\footnote{\textit{Id.} art. 7, cmt. 5 (quoting Estate of Jean-Baptiste Caire v. United Mexican States, 5 R.I.A.A. 516, 531 (1929)).}

Based on Draft Articles 4 and 7, when a bribe is solicited and/or extorted by a foreign official from an investor belonging to another State, it is a classic case of ultra vires action for which a State may be held internationally responsible. The Commentary to Draft Article 7 specifically explains that “[o]ne form of ultra vires conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction.”\footnote{\textit{Id.} art. 7, cmt. 8 n.150.} Thus, for example, where a president, prime minister, mayor, legislator, or administrative
official of a foreign State solicits or extorts a private payment in exchange for official action, her conduct is clearly attributable to the State. Likewise, the acts of local police, prosecutors, or city council members who solicit or demand private payment in exchange for protection or to grant building permits, for example, are also attributable to the State, as Article 4 makes clear that State responsibility “is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State.”

Rather, “it extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level.”

2. Persons or Entities Exercising Elements of Governmental Authority

Article 5 of the Draft Articles is instructive on the issue of whether the conduct of directors, officers, and employees of State-owned enterprises or other government-affiliated enterprises may be attributable to the State. It provides that “[t]he conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

Reflecting the understanding that “a State will not necessarily escape responsibility for wrongful acts or omissions by hiding behind a private corporate veil,” the Commentary to Article 5 explains that the State may be

50.  *Id.* art. 4, cmt. 6 (citing Salvador Commercial Company, 5 R.I.A.A. 477 (1902)) ("[A] State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.").


53.  *Id.*; see also *id.* art. 4, cmt. 7 and n.113 (collecting cases of mixed commissions after World War II holding that the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers were attributable to the State).

54.  This language is consistent with the 2012 U.S. Model BIT, which provides that “[a] [State] Party’s obligations . . . shall apply: (a) to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party” and specifically adds that “government authority that has been delegated includes a legislative grant, and a government order, directive or other action transferring to the state enterprise or other person, or authorizing the exercise by the state enterprise or other person of, governmental authority.” U.S. Model Bilateral Investment Treaty art. 2(2)(a) n.8 (2012), available at http://www.italaw.com/investment-treaties [hereinafter 2012 U.S. Model BIT].

55.  Maffezini v. Spain, ICSID Case No. ARB/97/7, Objections to Jurisdiction ¶ 78 (Jan. 25, 2000), 40 I.L.M. 1129 (2001) (determining whether the acts of a private corporation, with which the claimant had contractual dealings, were imputable to Spain).
held accountable for the actions of “parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.”

56 This may include:

public corporations, semipublic entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.

57

So what does it mean to be empowered by the law of the State to exercise elements of “governmental authority” or “functions of a public character”? The Commentary does not attempt to precisely define these terms. Rather, since “what is regarded as ‘governmental’ depends on the particular society, its history and traditions,”

58 the Commentary commands that attention be paid to the “content of the powers” held by the entity, as well as “the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise.”

59

To aid in interpretation of when the actions of non-State organs exercising governmental power may be attributable to the State, the Commentary to the Draft Articles also provides certain exemplars, including private security firms charged with guarding prisons, State-owned airlines authorized to conduct certain immigration responsibilities, and foundations established and controlled by a State to identify, seize, and hold State property for charitable purposes.

60 By highlighting examples of entities that carry out functions classically belonging to the State (like crime control and border security) and entities that perform services ostensibly on behalf of the public (like gathering and holding property for public charitable purposes), the Commentary guides us toward a functional approach to determining the circumstances under which the conduct of private entities and their personnel may be attributable to the State.

61

This functional approach mirrors the approach taken by a number of U.S. federal courts when deciding whether payments to employees of a government-affiliated entity for the purpose of obtaining or retaining business comes within the purview of the FCPA’s prohibition against corrupt payments made to an

56. Draft Articles on Responsibility, supra note 23, art. 5, cmt. 1.
57. Id. art. 5, cmt. 2.
58. Id. art. 5, cmt. 6.
59. Id.
60. Id. art. 5, cmt. 2.
61. Other commentators have argued that the assessment of whether the acts of an entity exercising governmental authority should be attributable to a State should be based upon a comparative standard, and whether the act is normally regarded as governmental in a contemporary setting should be determined from an objective point of view. See Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 200 (2d ed. 2008).
instrumentality of a foreign government, department, or agency. In United States v. Esquenazi, for example, the Eleventh Circuit Court of Appeals recently held that “[a]n ‘instrumentality’ under . . . the FCPA is an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”62 While recognizing that what constitutes control and what constitutes a government function are fact-bound questions, the court provided additional guidance, explaining that

[t]o decide if the government “controls” an entity, courts and juries should look to the foreign government’s formal designation of that entity; whether the government has a majority interest in the entity; the government’s ability to hire and fire the entity’s principals; the extent to which the entity’s profits, if any, go directly into the governmental accounts, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed.63

Similarly, in United States v. Carson, the U.S. District Court for the Central District of California explained that

[s]everal factors bear on the question of whether a business entity constitutes a government instrumentality, including:

• The foreign state’s characterization of the entity and its employees;
• The foreign state’s degree of control over the entity;
• The purpose of the entity’s activities;
• The entity’s obligations and privileges under the foreign state’s law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
• The circumstances surrounding the entity’s creation; and
• The foreign state’s extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).64

Using such a functional approach, it may be possible to identify, ex ante, a number of general types of government-affiliated entities commonly involved in international business transactions and foreign direct investment whose actions would be attributable to the State. These include entities that are wholly-owned, controlled, or financed by the government as well as certain entities that, while not wholly-owned, controlled, or financed by the government, are authorized by the government to “conduct [the government’s] business,”65 such as carrying

63. Id.
64. United States v. Carson, Case No. SACR 09-000777-JVS, 2011 U.S. Dist. LEXIS 88853, at *11–12 (C.D. Cal. May 18, 2011); see also United States v. Aguilar, 783 F. Supp. 2d 1108, 1113, 1115 (C.D. Cal. 2011) (finding the Comisión Federal de Electricidad (CFE) could be an instrumentality of the Mexican government and its employees deemed “foreign officials” under the FCPA where CFE provided the “quintessential government function” of providing electricity to the populace).
out quintessential government functions or providing essential public services. And indeed, if the international law of State responsibility were to mirror emerging U.S. law on this issue, even State-controlled entities that do not just perform “core government functions” would be attributable to the State, as in the case of entities that supply telephone services. For the elimination of doubt on this issue, investors and States could also agree in advance on whether a particular entity with which the investor seeks to do business may trigger State responsibility. Indeed, to a limited extent, the 2012 U.S. Model Bilateral Investment Treaty (BIT) endeavors to do this.

3. De Facto Agents of the State

Article 8 of the Draft Articles is instructive on the issue of whether the conduct of unofficial “advisors,” “consultants,” and “fixers” may be attributed to the State.

66. One of the most quintessential government functions—inherent in the concept of sovereignty itself—is the power to regulate the exploration, exploitation, disposition and allocation of the public natural resources within its territory. See, e.g., Charter of Economic Rights and Duties of States art. 2(1), G.A. Res. 3281 (XXIX), U.N. Doc. A/RES/3281(XXIX) (Dec. 12, 1974) (“Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.”); U.N. Convention on the Law of the Sea art. 56(a), Dec. 10, 1982, 1833 U.N.T.S. 397 (affirming that a coastal State within its exclusive economic zone has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds”); id. art. 81 (“The coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.”). Thus, Article 5 should at a minimum cover entities in the following sectors (whether they are wholly or partially State-owned): (1) land management, including logging, agriculture and exploitation of land-based energy resources such as oil, natural gas, coal, and geothermal; (2) water management, including fishing and exploitation of sea-based energy resources (e.g., off-shore drilling, hydroelectric); and (3) air management, including broadcasting and exploitation of wind-based energy resources. See Phillips Petroleum Co. v. Iran, Iran-U.S. Cl. Trib. Rep. 425-39-2, ¶ 89 n.22 (1989) (holding the State of Iran responsible for the National Iranian Oil Company’s taking of American owned property where 1974 Iranian Petroleum law had vested “the exercise and ownership right of the Iranian nation on the Iranian Petroleum Resources”); see also Aguilar, 783 F. Supp. 2d 1108.

67. The determination of which services are “essential” should, at a minimum, include those that are commonly provided by, at the direction of, using the public resources of, or with the substantial assistance of, the majority of governments, such as the provision of electricity to the citizenry.

68. United States v. Esquenazi, 752 F.3d 912, 922–24 (11th Cir. 2014) (affirming FCPA conviction for payments made to employee of State-controlled Haitian telecommunications company after finding provision of telephone service to be a governmental function).

69. See 2012 U.S. Model BIT, supra note 54, art. 2(2) n.8 (clarifying that State-owned or State-controlled enterprises must comply with the treaties’ requirements when exercising governmental authority, regardless of whether such authority was delegated by legislative grant, directive or other action).
and State actors for whom they work. Since the conduct of purely private parties may not be attributed to the State without some additional involvement of the State itself, Article 8 provides that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” 70 This is a fact-bound issue that requires analysis of whether the “advisor,” “consultant,” or “fixer” is taking orders from a government official or is getting paid by such an official.

In a number of well-publicized bribery cases under the FCPA, a “business advisor,” working for an official of the country in which the investor wishes to do business, has approached an investor and solicited a bribe on behalf of his governmental principal. 71 In such situations, the conduct of such individuals is attributable to the State itself under international law.

B. Bribe Solicitation, Extortion, and Denial of Justice as Breaches of the Host State’s International Obligations

Having considered the circumstances and conditions under which the acts of certain persons and entities commonly involved in international business transactions and foreign direct investment may be attributable to the State, the question of whether States may be held internationally responsible for corruption affecting such foreign persons turns on whether the alleged corruption at issue “constitutes a breach of an international obligation of the State.” 72

Under international law, an act or omission that is attributable to the State will give rise to State responsibility when it is “not in conformity with what is required” of the State under its international legal obligations. 73 “International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order.” 74 It is irrelevant under international law whether the State’s obligation—and consequential breach—is in the nature of a contract, tort, or crime. 75 All may give rise to State responsibility. This is particularly important because one could envision a range of different legal theories that could be alleged against a State,
including (1) liability for the solicitation and extortion of bribes,\textsuperscript{76} (2) liability for the receipt of bribes,\textsuperscript{77} (3) liability for the failure to prevent bribery,\textsuperscript{78} and (4) liability for failing to provide redress to victims of solicitation and extortion.\textsuperscript{79}

1. Obligations Under Multilateral Corruption Suppression Treaties

Over the last two decades, several multilateral treaties have been concluded on the issue of corruption.\textsuperscript{80} One driver for these treaties is aptly recognized in

76. Under this theory of liability, the State would be held liable for the solicitation or extortion of bribes by its organs and de jure or de facto agents. To differentiate bribery (for which no State liability would exist because it is the payer’s own corrupt intention and acts that gave rise to the payer’s harm, if any) and extortion (for which State liability would exist, because it is the State agent’s corrupt intention and acts that gave rise to the investor’s harm), Professor Lindgren’s proposed distinction between bribery and extortion could be used, under which extortion is “a corrupt benefit paid under an implicit or explicit threat to give the payor worse than fair treatment or to make the payor worse off than he is now.” James Lindgren, The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act, 35 UCLA L. REV. 815, 825 (1988) (emphasis added).

77. Under this theory of liability, the alleged harm would consist of a foreign State agent’s acceptance of a bribe willingly paid, and indeed, perhaps suggested by the foreign investors. In such cases, it should be understandably difficult for the investor who paid the bribe to have legal standing. Even though a State may have agreed by treaty to criminalize the receipt of bribes, neither the investor who willingly paid the bribe nor the investor’s State should be able to make a claim regarding the breach of this obligation. Arguably, only those third-party investors and their States who have suffered nonspeculative losses as a result of the State agent’s receipt of such bribes from another investor should be in a position to make a claim against the State under this theory.

78. Under this theory of liability, the alleged harm consists in a State’s failure to take measures to stop the occurrence of bribery and extortion. By its very nature, this theory of liability does not center upon corrupt actions taken by an official or agent of the State, but rather of omissions attributable to the machinery of the State. In theory, such a “failure to prevent” claim could sound in strict liability or in negligence. Standing should not present a significant obstacle under this theory, as harm would be suffered by the unwilling giver of a bribe as well as third parties who have suffered nonspeculative losses as a direct result of such corruption.

79. Under this theory of liability, the alleged harm consists of a State’s failure to rectify the harms suffered when a bribe is extorted from a foreign investor by an agent of the State or a foreign investor is punished for its failure to make such a payment. Claims of this sort resemble those alleging a denial of justice.

the Preamble to the UN Convention Against Corruption which explains that “the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another.”

However, because mere aspirational statements in preambles to treaties are insufficient to create binding and actionable international obligations, it is valuable to flesh out the precise obligations to which States have agreed to be bound.

Perhaps unsurprisingly, none of the existing multilateral corruption suppression treaties contains an express commitment on behalf of States that the State and its organs and agents will refrain from soliciting or extorting bribes from foreign investors. For this reason, a claim of State responsibility based on one single act of solicitation or extortion is likely to fail, if based on a multilateral corruption-suppression treaty like the UN Convention Against Corruption.

Instead of imposing an absolute obligation to prevent bribery and extortion, these multilateral treaties typically impose upon States the following related obligations:

- the obligation to criminalize under domestic law the request or receipt of a bribe by its public officials;
- the obligation to prosecute or extradite a State’s domestic officials engaging in such corruption;
- the obligation to “develop and implement or maintain effective, coordinated anti-corruption policies,” including codes of conduct and anticorruption training for public officials; and
- the obligation to “take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.”

While these treaty provisions are important and positive steps in the battle against international bribery and extortion, their carefully crafted language likely

---


82.  See, e.g., U.N. Convention Against Corruption, supra note 4, arts. 15(b), 18, 19; COE Criminal Law Convention, supra note 79, art. 3; EU Convention Against Corruption, supra note 80, art. 2; Inter-American Convention, supra note 80, arts. 6–7.
83.  See, e.g., Inter-American Convention, supra note 80, art. 13; EU Convention Against Corruption, supra note 80, art. 8; COE Criminal Law Convention, supra note 80, art. 27.
84.  See Inter-American Convention, supra note 80, art. 3.
85.  U.N. Convention Against Corruption, supra note 4, art. 35.
falls short of creating a clearly accepted international obligation by the State that would be actionable against it if one of its agents solicited, demanded, or received a bribe.86 Rather, the only potentially viable claims of State responsibility that could be based on an alleged breach of multilateral corruption-suppression treaties are ones alleging a breach of the obligation to criminalize the corrupt behavior, develop anticorruption policies and training programs, or provide avenues of redress for victims of corruption. And, of course, such claims would require proof of additional State omissions beyond the mere act of solicitation or extortion itself.

2. Obligations Under Bilateral Investment Treaties and Free Trade Agreements

The most promising treaties on which to found an international obligation for the State to refrain from, or prevent, bribe solicitation and extortion are BITs and regional trade agreements, including free trade agreements (FTAs). These agreements generally provide for the reciprocal encouragement, promotion, and protection of trade and investments in each other’s territories by persons or companies based in either country.87 According to the United Nations Conference on Trade and Development (UNCTAD), there were some 2265 BITs in force as of 2003, involving 176 different countries.88 According to the World Trade Organization (WTO), there were some 398 regional trade agreements in force globally in 2015.89

Although the exact terms of BITs and FTAs vary, they are frequently based on models such as the 2012 U.S. Model BIT and thus include common clauses. These common clauses typically require compensation in the event of expropriation and mandate that covered investments from the persons and entities of one State party in the territory of the other State party be afforded “national treatment,”90 “most-favored-nation treatment,”91 and a “minimum standard” of treatment in line with customary international law92 that

86. But see Llamzon, supra note 19, at 63 (contending that “[w]hatever vagaries there may be in the content of international anti-corruption law, it is almost inconceivable that an arbitral tribunal would sanction the idea that international anti-corruption norms would not extend to a prohibition of public official corruption”).
90. 2012 U.S. Model BIT, supra note 54, art. 3.
91. Id. art. 4.
92. There is some debate whether the minimum standard of “fair and equitable” treatment, as set forth in BITs, is (a) simply synonymous with the customary-international-law standard or (b) is
specifically includes “fair and equitable treatment” as well as “full protection and security.”

Many also include general provisions aiming to safeguard foreign investments from arbitrary or discriminatory measures.

Several of these common investment treaty provisions provide a basis to conclude that the solicitation, demand, and/or extortion of a bribe from a foreign investor by a person or entity attributable to a State would violate the State’s international legal obligations, and could thus give rise to a valid claim of State responsibility.

i. Obligation to Provide Fair and Equitable Treatment

Under the 2012 U.S. Model BIT, for example, the “minimum standard of treatment” clause provides, in pertinent part, that “[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment . . . .” The primary aim of such a provision is to promote a stable and predictable investment environment in a host State.

Commentators have recognized that “[i]t is difficult to reduce the words ‘fair and equitable treatment’ to a precise statement of a legal obligation,” and international arbitral tribunals have generally “proved unwilling to provide a specific definition of the content of this provision.” Most agree, however, that the “fair and equitable treatment” standard includes obligations of (i) transparency and treatment in accordance with the investor’s legitimate expectations, (ii) a State’s compliance with contractual obligations, (iii) independent and requires treatment that is above or beyond customary international law. In line with the binding interpretative statement of the NAFTA commission, the United States takes the former view. Id. art. 5(2) (“The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.”).

93. Id. art. 5.


95. 2012 U.S. Model BIT, supra note 54, art. 5.


97. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 581 (4th ed. 2009); see also EDF (Servs.) Ltd. v. Republic of Romania, ICSID Case No. ARB/05/13, Award, ¶ 215 (Oct. 8, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0267.pdf (recognizing that there is not “a general consensus on the meaning of this phrase by ICSID tribunals”).
procedural propriety and due process, (iv) good faith, and (v) freedom from coercion and harassment.98

Because the “fair and equitable treatment” standard includes obligations of “transparency,” “treatment in accordance with an investor’s legitimate expectations,” and, most notably, “freedom from coercion,” the “fair and equitable treatment” standard would be breached if a person or entity attributable to the State were to solicit, demand, or extort a bribe from a foreign investor, or were to threaten or impose disadvantageous treatment against a foreign investor in the event a bribe is not paid. Accordingly, in EDF v. Romania, for example, an ICSID tribunal was asked to consider whether an alleged demand for a $2.5 million bribe by the Chief of Cabinet to the Prime Minister of Romania—and the State’s subsequent refusal to extend an investment contract allegedly because the bribe was not paid—amounted to a violation of the fair and equitable treatment standard. It explained:

[A] request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that exercising a State’s discretion on the basis of corruption is a . . . fundamental breach of transparency and legitimate expectations.99

ii. Obligation to Provide Full Protection and Security

The “full protection and security” obligation within a BIT might also be violated by the solicitation, demand, or extortion of a bribe from a foreign investor by a person attributable to the State. Such a violation would likely occur only under circumstances where the State failed to take reasonable measures to avoid the corruption, such as failing to provide adequate training or oversight of the officials, police, or other agents involved in the corrupt acts.

Although the “full protection and security” requirement suffers from the same vagueness as “fair and equitable treatment,” it is commonly understood to “[impose] an obligation upon the host state to actively protect the investment from adverse actions by the host state itself, by its authorities or by third parties.”100 The State’s obligation is one of due diligence.101 And while there is

98. Haugeneder & Liebscher, supra note 96.
99. EDF (Servs.) Ltd. v. Republic of Romania, ICSID Case No. ARB/05/13, Award, ¶ 221 (internal quotation marks omitted).
100. Haugeneder & Liebscher, supra note 96, at 560.
101. REDFERN & HUNTER, supra note 97, ¶¶ 11–28; see also e.g., Mahnaz Malik, The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration, The International Institute For Sustainable Development, INT’L INST. FOR SUSTAINABLE DEV. BEST PRACTICES SERIES, Nov. 2011, at 1, 10, available at http://www.iisd.org/pdf/2011/full_protection.pdf (noting that “tribunals have emphasized that there is no need to prove negligence or bad faith for a state to be liable”); Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, ¶ 77 (June 27, 1990),
a divergence of opinions as to the extent of such a treaty provision, a substantial and growing number of modern arbitral tribunals have recognized that this obligation includes providing protection from physical violence against the assets and individuals connected with an investment as well as protection of investors’ commercial and legal rights. Accordingly, a claim of State responsibility for corruption could arguably be based on the obligation to provide full protection and security under a bilateral investment treaty, but presumably only under relatively limited circumstances demonstrating a lack of appropriate due diligence.

iii. Obligation to Refrain from Arbitrary or Discriminatory Action

A State may also violate its international obligation, under most BITs, to refrain from “arbitrary” or “discriminatory” action by taking (or threatening to take) adverse action against a person who fails to pay a bribe.

Although the terms “arbitrary” and “discriminatory” are generally not defined within BITs, international tribunals have fleshed out the meaning of these terms under international law. The International Court of Justice has explained that “arbitrary” actions are those that fly in the face of the rule of law: an action may be deemed “arbitrary” when it is a “wilful disregard of

http://www.italaw.com/sites/default/files/case-documents/ita1034.pdf ("According to modern doctrine, the violation of international law entailing the State’s responsibility has to be considered constituted by ‘the mere lack or want of diligence,’ without any need to establish malice or negligence.").

102. Asian Agricultural Products Ltd., ICSID Case No. ARB/87/3, Award (June 27, 1990), http://www.italaw.com/sites/default/files/case-documents/ita1034.pdf; see also, e.g., Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 408 (Jul. 14, 2006), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC507_E&caseId=C5 (noting that full protection and security is “not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view” and holding that “[w]hen the terms ‘protection and security’ are qualified by ‘full’ and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security”); National Grid P.L.C. v. Argentine Republic, Award, ¶ 189 (UNCITRAL Trib. 2008) http://www.italaw.com/documents/NationalGrid-Jurisdiction-En.pdf ("[T]he phrase ‘protection and constant security’ as related to the subject matter of the Treaty does not carry with it the implication that this protection is inherently limited to protection and security of physical assets."); Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 729 (Jul. 24, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0095.pdf ("[W]hen the terms ‘protection’ and ‘security’ are qualified by ‘full’, the content of the standard may extend to matters other than physical security” [and] ‘implies a State’s guarantee of stability in a secure environment, both physical, commercial and legal.’). But see, e.g., Saluka Investments B.V. v. The Czech Republic, Partial Award, ¶ 484 (UNCITRAL Trib. 2006), http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf ("[T]he ‘full security and protection’ clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.")

103. Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), 1989 I.C.J. 15, ¶ 128 (July 20) ("Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule
due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”104 And an act is “discriminatory” when it results “in a treatment of an investor different from that accorded to other investors in a similar or comparable situation.”105

Where a public official solicits or demands a bribe—or punishes or privileges an investor based on their willingness to pay a solicited bribe—such action should be considered both “arbitrary” and “discriminatory” within the meaning of BITs, and thus violate a State’s international obligations.106

iv. Obligation To Refrain from Takings Without a Public Purpose

Lastly, by extorting a bribe from a foreign investor, a State may violate its international obligation to refrain from uncompensated takings that are not for a public purpose. The 2012 U.S. Model BIT provides that “[n]either Party may expropriate . . . a covered investment either directly or indirectly . . . except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law.”107 These provisions are most commonly used to guard against uncompensated nationalization of foreign investments or host government regulation that unduly impairs an investor’s property rights. They are seldom litigated. However, these provisions could arguably provide an additional legal basis for a claim that extortion of a bribe from a foreign investor by a State agent for personal gain entails State responsibility.108 After all, assuming the payment itself were a part of a covered investment, extortion of a private payment necessarily would involve the taking of covered property that was certainly not for a public purpose.
3. Obligations Under Human Rights Treaties

The “denial of justice” to a foreigner that has been extorted and has sought legal recourse in a host State would also give rise to State responsibility as a breach of a State’s obligations under human rights treaties. Section 711 of the Restatement (Third) of the Foreign Relations Law of the United States provides, inter alia, that “[a] state is responsible under international law for injury to a national of another state caused by an official act or omission that violates (a) a human right that . . . a state is obligated to respect for all persons subject to its authority.”

With this in mind, an argument could be made that a State’s failure to investigate and compensate a foreigner victimized by extortion violates the equal justice provisions of the International Covenant on Civil and Political Rights (ICCPR). Such a violation would thereby constitute a breach of the international treaty obligations of any State that has become signatory to the ICCPR.

4. Obligations Under Customary International Law

In addition to violating international obligations under existing treaties, the solicitation or extortion of an illicit payment from a foreign investor, or the denial of justice to a foreign investor who has been solicited or extorted, would likely also violate the State’s obligations under customary international law.

As discussed above in Section I.B.2(a), the minimum standard of “fair and equitable” treatment required by most current BITs largely captures the customary-international-law standard of treatment with respect to foreign investors, and international case law makes clear that that requirement of


110. See International Covenant on Civil and Political Rights art. 14(1), Nov. 16, 1996, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR] (“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”); id. art 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”).


112. Cf. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES §711 (1987) (“[A] State is responsible under international law for injury to a national of another state caused by an official act or omission that violates (a) a human right that . . . a state is obligated to respect for all persons subject to its authority; (b) a personal right that, under international law, a state is obligated to respect for individuals of foreign nationality; or (c) a right to property or another economic interest that, under international law, a state is obligated to respect for persons, natural or juridical, of a foreign nationality . . . .”)

113. Article 5(2) of the 2012 U.S. Model BIT explains that the obligations to provide “fair and
“fair and equitable treatment” would be violated by solicitation and extortion of a bribe.114 Likewise, the obligation of States under the ICCPR to provide equal justice to a foreigner also substantially includes the obligations of States under customary international law not to deny justice to those subjected to solicitation or extortion, at least insofar as natural persons are concerned.115 However, a few additional comments are in order regarding the requirements of customary international law in respect of solicitation, bribery, and extortion.

i. State Practice

Notwithstanding that bribe solicitation and extortion remain distressingly commonplace, there is growing State practice publicly condemning such acts. Most notable in this respect is the fact that virtually every country in the world criminalizes the solicitation, demand, or receipt of a bribe by its public officials.116 Indeed, such criminalization was expressly mandated by the United Nations Convention Against Transnational Organized Crime, which has 171 parties,117 and by the United Nations Convention Against Corruption, which has 161 parties.118 Likewise, the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948 without dissent and accepted by many as a codification of customary international law,119 provides that “[n]o one shall be arbitrarily deprived of his property.”120 In addition, in September 2013, members of the G20 agreed to establish an information-sharing network to deny corrupt foreign officials entry into their countries.121

equitable treatment” and “full protection and security” as outlined in Article 5(1) “prescribe[] the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.” 2012 U.S. Model BIT, supra note 54.
114. See EDF (Servs.) Ltd. v. Republic of Romania, ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0267.pdf.
115. Notably, the obligations set forth in the ICCPR apply only to natural persons, not juridical persons. Thus, a corporation or other entity seeking to enforce its “human rights” not to be solicited, extorted or denied justice following such crimes would be required to develop an argument based on customary international law, rather than treaties. See ICCPR, supra note 110.
116. Cf. Yockey, supra note 9, at 789 (“[N]o country currently has laws expressly permitting bribery.”).
117. U.N. Convention Against Transnational Organized Crime, supra note 80, art. 8(1)(b).
118. U.N. Convention Against Corruption, supra note 4, art. 15(2).
119. See, e.g., Filártiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980) (noting that “several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law”).
121. G20 Leaders To Share Info To Reject Entry by Corrupt Officials, GLOBAL TIMES (Sept. 7, 2013), http://www.globaltimes.cn/content/809264.shtml#.UjyOw2TXgVk.

http://scholarship.law.berkeley.edu/bjil/vol33/iss1/1
ii. Opinio Juris Sive Necessitatis

There is also ample and growing evidence that (a) preventing solicitation, bribery, and extortion, (b) punishing and removing the corrupt officials responsible for such corrupt acts, and (c) providing redress to victims of such solicitation and extortion are required by, and are perceived by States to be required by, international law.

Evidence that preventing solicitation, bribery, and extortion is an international legal obligation of States may be found in the numerous anticorruption declarations and resolutions passed by an overwhelming majority of the State members of the UN General Assembly, including but not limited to the UN Declaration Against Corruption and Bribery in International Commercial Transactions,\textsuperscript{122} the UN Declaration on Crime and Public Security,\textsuperscript{123} and the UN Declaration on International Cooperation Against Corruption and Bribery in International Commercial Transactions.\textsuperscript{124} Likewise, the Preamble to the UN Convention on Corruption expressly recognizes a shared understanding that “corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential,” that corruption jeopardizes “the rule of law,” and that “the prevention and eradication of corruption is a responsibility of all States.”\textsuperscript{125}

As to the belief that punishing and removing corrupt officials who solicit or extort illicit payments is an international legal obligation, evidence of opinio juris may be found in the various multilateral anticorruption conventions that invoke (and obligate State parties to follow) the jurisdictional principle of “prosecute or extradite.”\textsuperscript{126}

And, as to a legal obligation to provide redress to foreign investors affected by corruption, evidence of opinio juris may be found in the widely accepted and

\textsuperscript{125} See TRACE INTERNATIONAL, supra note 3.
\textsuperscript{126} See African Union Convention on Corruption, supra note 80, arts. 4(1)(a), (c), and art. 13(1)(c).
exalted Universal Declaration of Human Rights pursuant to which States have declared that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”127 and “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations . . . .”128

Commenting more than a decade ago, at least one scholar has argued that these declarations and others like them in the numerous regional organizations around the world provide evidence of the gradual formation of customary international law against corruption:

The discourse on corruption within the United Nations, and the various regional organizations, has generated shared understandings of the negative impacts of corruption on the economic and development objectives of nations and people. It also illustrates the emergence of an international normative consensus against corruption. This consensus represents the emerging opinio juris sive necessitatis of the international community, thus, the beginning of the process of formation of a customary international law on corruption.129

Since that time, the evidence of State practice and opinio juris has only grown and is likely to continue doing so. Accordingly, an increasingly strong argument could be made that the solicitation and/or extortion of a bribe from a foreign investor by a person whose actions are attributable to the State, or the denial of justice to a foreigner harmed by such corrupt acts, constitute violations of the State’s international obligations under customary international law.

II. INVOKING STATE RESPONSIBILITY FOR CORRUPTION

Having determined that certain acts of corruption may be legally attributable to the State and constitute a breach of the State’s international obligations, the following sections examine the obstacles and opportunities associated with invoking such State responsibility.

In the context of investment disputes, there are two primary methods of invoking State responsibility under international law. The first method involves the foreign investor invoking State responsibility in international arbitration. The second method involves the home State of the affected investor invoking State

128. Id. art. 10.
129. Alhaji B.M. Marong, Toward a Normative Consensus Against Corruption: Legal Effects of the Principles To Combat Corruption in Africa, 30 Den. J. Int’l L. & Pol’y 99, 101 (2003); see also Ilias Bantekas, Corruption as an International Crime and Crime Against Humanity: An Outline of Supplementary Criminal Justice Policies, 4 J. Int’l Crim. Justice 466, 470 (2006) (“From an international law point of view it is important to comprehend that the recognition by the 1997 Convention of bribery as a transnational offence means that the offender incurs criminal responsibility not only under national law but also international law.”).
responsibility through State-to-State dispute resolution, including under the doctrine of diplomatic protection.\footnote{See, e.g., Daniel Bodansky et al., Invoking State Responsibility in the Twenty-First Century, 96 AM. J. INT’L L. 798, 812 (2002) (noting that, historically, “foreign investor claims were viewed largely in terms of diplomatic protection, as claims brought by a state for injury to its nationals” and “within the last decade or two, however, investors have increasingly resorted directly to international dispute settlement procedures for breaches”).}

To a large extent, and in almost all cases, these avenues of State responsibility are mutually exclusive. Under Article 27 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), States are prohibited from giving diplomatic protection, or bring[ing] an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.\footnote{Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 27(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].}

Likewise, “[a]lthough Article 27 is directed to Contracting States, investors have a corresponding obligation under Article 26 not to pursue diplomatic protection,”\footnote{Id.} in cases that they have submitted to ICSID arbitration.

The only potential loopholes for sidestepping this choice of method are (1) when a State has not become a party to the ICSID Convention,\footnote{Id.} (2) when a State fails to respect an award that has been issued,\footnote{Tokios Tokelės v. Ukraine, ICSID Case No. ARB/02/18, Order No. 3 (Jan. 18, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0865.pdf.} or (3) when the assistance given by the investor’s State does not qualify as “diplomatic protection” within the meaning of the ICSID Convention, as Article 27(2) explains that “diplomatic protection” shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.”

In nearly all other cases and situations, an aggrieved foreign investor must usually choose which method of State responsibility they wish to invoke.

\textit{A. Investor-State Dispute Resolution Through International Arbitration}

If a foreign investor wishes to directly seek damages from the State of a corrupt foreign official that has solicited, demanded, or extorted a bribe, or
failed to provide appropriate redress for such acts, she often may initiate international arbitration pursuant to an investment contract and/or a BIT/FTA.

The dominant forum for the arbitration of such investor-State disputes is the International Centre for the Settlement of Investor State Disputes, which was established by the ICSID Convention and operates under the aegis of the World Bank. Under the ICSID Convention, investors may pursue arbitration when a State breaches its obligations towards investors under applicable treaties and/or investment contracts.

Although bribe solicitation and extortion of a foreign investor by a State’s de jure or de facto agents should, as set forth above, constitute a clear breach of the State’s international obligations under these treaties, investors have rarely used ICSID arbitration to hold States responsible for such corruption. This appears to be due to the obstacles that currently impede successful claims and to the factors that must be considered in deciding whether to bring an arbitration claim in the first place.

1. Obstacles to Initiating Arbitration of Corruption Claims

The following section identifies some of the major obstacles to pursuing a successful claim of State responsibility through arbitration.

i. Fears of “Poisoning the Well” and Having Contracts Rescinded

The dearth of international arbitration by foreign investors seeking to hold States responsible for corruption is undoubtedly due in part to the fact that investors who wish to continue investment in a country may not want to “poison the well” by taking a contentious posture against their host State, let alone making overt corruption allegations against the State or the officials currently responsible for its investment. This recognition may make arbitration an undesirable avenue for all except those whose investment has already terminated or who have lost substantial business to another person that has paid a bribe.  

135. Typically, international arbitration involving allegations of corruption arises when a new government modifies an existing contractual arrangement with a foreign investor. The investor may institute arbitration on the basis of the obligations accepted in the contract with the prior regime, while the new foreign government regime may claim that the agreement was tainted by corruption. See Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 152 (3d ed. 1999).

136. See Gryenberg v. Grenada, ICSID Case No. ARB/10/6, Award, ¶ 5.1.4 (Dec. 10, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0726.pdf (alleging a breach by Grenada of the 1986 Treaty Between the United States and Grenada Concerning the Reciprocal Encouragement and Protection of Investment by, inter alia, replacing RSM Production Corp. with another investor that was willing to pay a bribe).
ii. High Cost of International Arbitration

The tremendous cost of arbitration may also be partly responsible for the dearth of corruption-related investor-State arbitration. In a recent international arbitration concerning corruption, the costs and fees associated with the arbitration totaled more than $6 million for the claimant and $18 million for the respondent State.137 Although the traditional rule in investment arbitration, under which the costs of the arbitration are split between the parties regardless of which party ultimately prevails, is less strict than the loser-pays rule traditionally adopted in commercial arbitration, this nonetheless meant that the claimant in that case was required to pay a total of $12 million in connection with the arbitration.138 In light of the hefty costs of arbitration, the only parties likely to take advantage of this avenue of State responsibility are those whose probable outcome is likely to exceed the costs. This requires consideration not only of the amount at issue, but also the likelihood of success on the merits.

iii. Risks of Exposure to Criminal Liability

Another substantial obstacle to bringing a corruption claim is the fear of exposure to liability under the law of the sending State. Indeed, investors who acknowledge paying a bribe—even unwillingly—are likely to face civil and criminal charges under the law of the sending State, if not the host State as well. Under the FCPA, for example, any issuer, domestic concern or other person, who uses interstate commerce to corruptly offer, promise or pay, anything of value to a foreign official for purposes of influencing official decisions in order to obtain or retain business, is subject to severe penalties and/or imprisonment.139 Moreover, since domestic criminal enforcement officials in the United States (and other countries that follow the OECD framework) currently make little distinction between those who make payments willingly (in the absence of coercive pressure or extortion) or unwillingly (in the presence of implied or express coercive pressure or extortion),140 arbitration may make little sense for any who have paid a bribe. Under current U.S. law, only those who have been solicited to pay a bribe but not paid it or those who have lost business due to a competitor’s payment of a bribe may be willing to pursue this avenue.141

138. Id.
140. See Klaw, supra note 10, at 320–34 (noting that under the FCPA, only victims of “true extortion,” i.e., threats of physical violence to person or property, and not economic extortion, are likely to evade enforcement action).
141. See EDF v. Romania, ICSID Case No. ARB/05/13 (instituting arbitration at an investor’s request following allegedly adverse official action for nonpayment of bribe); Grynberg v. Grenada,
2. Obstacles to Succeeding in Arbitration of Corruption Claims

Even assuming that foreign investors—such as those whose relationships with the host State are sufficiently soured—are willing to initiate arbitration against a host State for the allegedly corrupt acts of its officials and agents, there remain significant obstacles to success on such claims. The following section highlights three such obstacles.

i. Heightened Burden of Proof

One significant barrier is the high burden of proof frequently imposed on those alleging instances of corruption. In EDF v. Romania, for example, the tribunal determined that there is "general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption," and that allegations of corruption require "clear and convincing" evidence, as opposed to a mere preponderance. This heightened standard proved too difficult to satisfy for EDF, particularly since the tribunal refused to credit the testimony of various witnesses, to afford weight to an email memorializing the solicitation written contemporaneously with the alleged bribe solicitation, or to admit into evidence an audio recording of the verbal solicitation.

ii. Failure to Properly Attribute Acts of Corruption to the State

A second barrier to successful investor-State arbitration of corruption claims stems from the fact that arbitrators sometimes fail to attribute the corrupt actions of State agents to the State itself. Indeed, "there has simply never been a case in international investment arbitration where public official corruption has been attributed to the host state." Two cases are illustrative in this regard.

a. World Duty Free v. Kenya

In World Duty Free v. Kenya, World Duty Free (WDF) requested ICSID arbitration against the Republic of Kenya under an investment contract, governed by English and Kenyan law, relating to the construction, maintenance,
and operation of duty free stores in Nairobi and Mombasa airports.147 WDF was initially incorporated in the United Arab Emirates, was placed in receivership, and was subsequently represented by its former general manager.

Among the claims asserted by WDF was that Kenya, through its executive, judiciary, and de facto agents, had improperly used WDF in campaign finance fraud, illegally expropriated the company, wrongfully placed it in receivership, damaged it through mismanagement during the receivership, refused to protect it from crime, and unlawfully deported its CEO in retaliation for his failure to acquiesce to the misconduct.148

In its defense, Kenya denied responsibility for the actions against WDF. It petitioned for dismissal of the claim because the investment contract “was procured by paying a bribe of US $2 million to the then President of Kenya, Daniel arap Moi” and was thus allegedly unenforceable as a matter of English law, Kenyan law, and international public policy.149

In its reply, WDF did not deny that it made a $2 million payment to the Kenyan President. Instead, its former general manager explained that while attempting to secure the investment contract with Kenya he was informed by a well-connected middleman that “[p]rotocol in Kenya required” him to make a personal donation to the Kenyan President.150 He was allegedly told that $2 million in cash was an appropriate amount and was “given to understand that it was lawful and that [he] didn’t have a choice if [he] wanted the investment contract.”151 Accordingly, during the director’s first meeting with the Kenyan president, the middleman arranged for a briefcase containing approximately $500,000 to be left for the President.152 The former manager further asserted that, at the time the payment was made, he understood the payment to be a lawful a gift of protocol or a personal donation made to the President to be used for public purposes within the framework of the Kenyan system of harambee (a traditional system of public collections).153 He added that he paid the money on behalf of the investment entity, documenting it fully, and treating it as part of the consideration for the agreement.154

147. While World Duty Free alleged the breach of an investment contract that chose English and Kenyan law to govern, rather than a BIT governed expressly by principles of international law, the case is instructive on how arbitrators tend to resolve issues of State attribution and claims enforceability under international public policy.
148. Id. ¶¶ 62–79.
149. Id. ¶ 105.
150. Id. ¶ 130.
151. Id.
152. Id.
153. Id.
154. Id.
While the Tribunal ultimately concluded that “the bribe was apparently solicited by the Kenyan President,” it rejected the director’s assertion that the payment was legal. Rather, the Tribunal determined that the $500,000 payment was in fact a bribe made in order to obtain the conclusion of the 1989 Agreement, in violation of the English and Kenyan laws that governed the contract.

Although the Tribunal’s characterization of the nature and purpose of payment likely was correct, one of the conclusions that the Tribunal drew from this determination is more troubling: that the bribe could not be attributed to Kenya. While WDF contended that “the actions of President Moi and his colleagues were the action of the Government of Kenya,” the Tribunal instead concluded that the “payment was received corruptly by the Kenyan head of state; it was a covert bribe; and accordingly its receipt is not legally to be imputed to Kenya itself.” This conclusion, based in part on the distinction between the Government of Kenya (the party to the investment contract) and the Republic of Kenya (the party to the ICSID Convention that was being sued), flies in the face of Article 4 and Article 7 of the Draft Articles on State Responsibility, which hold that the actions of an organ of the State (here, its chief executive) are attributable to the State, even if they are ultra vires.

b. EDF (Services) Ltd. v. Romania

The case of EDF v. Romania similarly highlights the troubling tendency of arbitral tribunals to fail to appropriately attribute acts of corruption to the State.

EDF was a U.K. company that formed a joint venture with Romanian State-owned companies to operate a business selling duty-free goods in Romanian airports. EDF brought a claim against Romania, under the U.K.-Romania BIT, which authorized ICSID arbitration for claims arising from a breach of the obligations under the BIT, including the customary-international-law obligation

155. Id. ¶ 180.
156. Id. ¶¶ 169, 170.
157. Id. ¶ 114.
158. Id. ¶ 169. The tribunal also found that Kenya could not have waived the illegality and/or otherwise affirmed the contract as a result of the Kenyan President’s knowledge of the illegality because, under Kenyan and English law, the President’s knowledge could not be attributed to the State. Id.
159. See Draft Articles on Responsibility, supra note 23, § II.A.1. See also id. ch. II, cmt. 2 (“The general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.”).
161. Id. ¶¶ 1, 46, 51–55, 60.
of affording “fair and equitable treatment.” As the basis for its claim, EDF alleged that its contractual arrangements at the Bucharest airport were not extended beyond their ten-year term because it refused to pay a $2.5 million bribe allegedly solicited by staff members of the Romanian Prime Minister.

Addressing the allegations, the majority of the tribunal recognized that Romania’s conduct, if proven, could give rise to State responsibility. It determined that “a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation as well as a violation of international public policy, and that exercising a State’s discretion on the basis of corruption is a fundamental breach of transparency and legitimate expectations.”

Nevertheless, the panel unanimously decided:

[C]lear and convincing evidence should have been produced by the Claimant showing not only that a bribe had been requested . . . but also that such request had been made not in the personal interest of the person soliciting the bribe, but on behalf and for the account of the Government authorities in Romania, so as to make the State liable in that respect.

By requiring proof that the solicitation was not made in the personal interest of the individual soliciting the bribe, but “on behalf of and for the account of the foreign official’s government,” the tribunal in EDF v. Romania appears to have ignored the customary international law of State responsibility for the ultra vires acts of organs of the State under Articles 4 and 7 of the Draft Articles.

Moreover, under the troubled reasoning of the EDF arbitral award, it is difficult to see how a State could ever be held responsible for bribery or extortion since, by their very nature, those crimes are always designed for personal benefit. Indeed, as the World Duty Free tribunal recognized, if the payment were solicited or made on behalf of the State itself, “the payment would not be a bribe.”

### iii. The “Corruption Defense” to Claims

The third potential obstacle to a successful investor-State arbitration of corruption claims lies in the fact that some tribunals deem issues of corruption to be nonarbitrable. Even the growing number of tribunals willing to decide such matters in arbitration generally hold that the existence of corruption renders any

---

162. *Id.* ¶¶ 64, 103.
163. *See id.* ¶ 221.
164. *Id.* (internal quotations omitted.)
165. *Id.* ¶ 232 (emphasis added).
166. *Id.*
167. *See Draft Articles, supra* note 23, § II.A.1
contractual claims at issue unenforceable, whether as a matter of the domestic law chosen by the parties to govern their contract or pursuant to international public policy. Although there is unquestionably a significant difference between an investor seeking to enforce a contract that he procured by bribery and an investor seeking to bring a claim based on the State’s solicitation or extortion of an illicit payment, the tendency of arbitral tribunals to provide States with what effectively amounts to a “very potent defense” could pose substantial difficulties for those who have acquiesced to a State agent’s solicitation and/or extortionate demand for the payment of a bribe.169

Judge Lagergren’s 1963 Award in ICC Case No. 1110 is one of the most famous examples of arbitrators refusing to enforce claims tainted by bribery.170 In that case, the claimant, who purported to have a significant degree of influence with Argentine officials responsible for awarding energy contracts, sought to enforce his contractual right to ten-percent commission payments for all Argentine energy contracts awarded to the respondent.171 Recognizing that the commission payments, if awarded, would be used to bribe Argentine officials and reasoning, sua sponte, that “[p]arties who ally themselves in an enterprise [tainted by bribery] must realise that they have forfeited any right to ask for assistance of the machinery of justice,” Judge Lagergren concluded that he did not have jurisdiction over the dispute.172

Since Judge Lagergren’s seminal decision, many arbitrators have shifted their view on the arbitrability of disputes involving bribery.173 Yet, although it is now generally recognized that cases involving allegations of bribery are arbitrable,174 the end result remains the same, as claims based on contracts tainted by bribery or extortion are commonly held unenforceable.

In World Duty Free, for example, the tribunal explained that, while the matter was arbitrable, the claimant was “not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of ordre public international

169. Llamzon, supra note 19, at 38 (surveying arbitral decisions and noting that corruption is a “very potent defense” for states because the “case law thus recognizes corruption as a complete defense when invoked by the host State”).


171. Argentine Engineer, Case No. 1110 of 1963.

172. Id. ¶ 23.

173. Born, supra note 170.

174. See id. (citing National Power Corp v. Westinghouse, 949 F.2d 653 (3rd Cir. 1991) and Westacre Investments Inc. v. Jugoinport SPDR Holding Co. [1999] Q.B. 740 (Eng.)). Notably, some tribunals nonetheless deny jurisdiction in cases where the investment contract was procured by illegality due to “legality clauses.” See Llamzon, supra note 19, at 5.
and public policy under the contract’s applicable laws.”  

This meant that, even though “the bribe was apparently solicited by the Kenyan President,” the existence of an illicit payment provided a complete defense to all claims against the Kenyan State. Indeed, there is no contributory-fault doctrine in international arbitration of corruption claims.  

Thus, as has been recognized by some scholars, the result is an “attribution asymmetry” in terms of responsibility for corruption, whereby “a public official’s actions in soliciting or extorting bribes from foreign investors is [in theory] attributable to the host State; but when solicitation meets acceptance . . . consummated corruption binds the investor to the acts of its agent, but the corruption of the public official is not attributable to the host State.”  

As one commentator has noted, this legal asymmetry may provide a perverse incentive for some States to strategically engage in or tolerate corruption (including by soliciting bribes) “in order to automatically acquire this defense in the event of future ICSID arbitration.”  

And while there was some language in World Duty Free suggesting that the case could be different had there already been an investment in Kenya or some other “hostage factor” at the time of the improper solicitation, it is by no means guaranteed that future arbitral tribunals will enforce investor claims involving corruption. Indeed, the doctrine originally designed to deter corruption by denying those who engage in it access to legal process may actually now incentivize corruption.  

3. Opportunities To Remove Obstacles to Arbitration of Corruption Claims  

Having considered various obstacles that may currently inhibit investors from initiating or succeeding in international arbitration against States in


177.  Llamzon, supra note 19, at 76.  

178.  Torres-Fowler, supra note 176, at 1018, 1021–23.  

179.  Recognizing the apparent windfall this would give Kenya, the tribunal added: Albeit that the balance of illegality may not be factually identical between [the foreign investors] and the Kenyan President, this remains a case, legally, of par delictum. The bribe was not procured by coercion or oppression or force by the Kenyan President nor by ‘undue influence’; and as regards any investment, there was at the material time no ‘hostage factor’ because there was then no investment or other commitment in Kenya by [the foreign investors]. Prior to paying the bribe, [the investors] retained a free choice whether or not to invest in Kenya and whether or not to conclude the Agreement; but [the investors] chose, freely, to pay the bribe. [It] would be ‘an affront to public conscience’ to grant to the Claimant the relief which it seeks because this Tribunal ‘would thereby appear to assist and encourage the plaintiff in his illegal conduct. World Duty Free, ICSID Case No. ARB/00/7, Award, ¶ 178.  

180.  See Torres-Fowler, supra note 176, at 1000 (“[W]hile the corruption defense’s original intent is to deter and punish acts of bribery, its effect may be the exact opposite.”).
response to acts of corruption that are attributable to such States under international law, this section discusses certain steps States could take to reduce or eliminate such barriers.

i. Eliminating Barriers to the Initiation of Corruption Arbitration

As previously explained, foreign investors who are deciding whether to pursue to arbitration against a host State for allegedly corrupt acts appear to face at least three major obstacles: (1) fears of “poisoning the well” when it comes to the investment relationship with a foreign State, including having existing contracts rescinded, (2) the often prohibitively high cost of international arbitration, and (3) the significant risk of exposure to criminal liability upon admitting that one has acquiesced to the payment of a bribe.

Unfortunately, there is little that can be done to meaningfully address the high cost of complex arbitration. It also seems wise for States to retain the flexibility to modify contracts and projects that misallocate resources due to the improper influence of bribery at the time of their formation. There are, however, other concrete steps that can be taken that would tip the balance of what is largely a risk-management decision in favor of reporting and arbitrating corruption claims.

To assuage a foreign investor’s fears of “poisoning the well,” States could and should strengthen nonretaliation provisions in multilateral corruption-suppression treaties in order to protect the persons and property of those who make nonfrivolous allegations of official corruption. Existing provisions providing for nonretaliation are generally weak. For example, while the United Nations Convention on Corruption requires signatory States “to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation,” it does not require States to ensure the ability of investors to safely initiate legal proceedings against States and, indeed, it only requires each State to “consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.”

Likewise, for example, while the African Union Convention on Preventing and Combating Corruption obliges States to “[a]dopt measures that ensure citizens report instances of corruption without fear of consequent reprisals,” it would appear to offer little protection for noncitizen foreign investors. Changes to these nonretaliation provisions could

181. U.N. Convention Against Corruption, supra note 4, art. 33 (emphasis added).
182. Id. art. 5(6) (emphasis added).
provide substantial assurances against the risk of “poisoning the well” that may concern foreign investors who are deciding whether to initiate arbitration.

Another meaningful step toward reducing barriers to the initiation of arbitration of corruption claims against a host State would be to make changes to current domestic laws, such as the FCPA, that currently create significant exposure to criminal liability for those who report making payments to foreign officials, even where such payments were made unwillingly. For example, by decriminalizing foreign bribery and replacing it with a robust mandatory disclosure regime, more solicited and extorted persons would be likely to come forward, and the incidence of bribery and extortion would be likely to decrease in the long run as foreign officials become afraid of being reported.183 Adopting such measures would have a profound effect upon investors’ decisions to initiate arbitration against States in response to corruption. In turn, more arbitration would mean more disclosure of corruption, and a greater likelihood of reducing or eliminating solicitations and extortions in the long run, as rational foreign officials and their States take steps to avoid arbitration.

ii. Eliminating Barriers to Successful Corruption Arbitration

In addition to reducing the barriers to the initiation of corruption claims, there are also at least three actions that States can and should undertake to address the above-referenced problems of burden of proof, improper State attribution, and the corruption defense, thereby making international arbitration of corruption-related claims more successful.184

First, because most of the international arbitration rules, national arbitration laws, and international arbitration conventions do not contain provisions on the burden and standard of proof to be applied,185 investment treaties or the ICSID Arbitration Rules should be amended to make clear that the level of proof required for corruption claims is merely a preponderance of the evidence, rather than “clear and convincing” evidence. By reducing the threshold of proof often required for corruption claims, more foreign investors would be likely to pursue arbitration.

183. See Klaw, supra note 10, at 344–61.
184. It should be noted that certain modifications to the 2004 U.S. Model BIT that were made in the 2012 U.S. Model BIT were laudable, albeit minor, improvements from the perspective of preventing and addressing corruption. For example, the 2012 Model BIT clarified in a footnote that State-owned or State-controlled enterprises must comply with the treaties’ requirements when exercising governmental authority, regardless of whether such authority was delegated by legislative grant, directive or other action. See 2012 U.S. Model BIT, supra note 107; see also Lise Johnson, The 2012 US Model BIT and What the Changes (or Lack Thereof) Suggest About Future Investment Treaties, POLITICAL RISK INSURANCE NEWSLETTER, Nov. 2012, at 2, available at http://www.robertwraypllc.com/wp-content/uploads/2012/11/RWPLLC-POLITICAL-RISK-INSURANCE-NEWSLETTER-VOLUME-VIII-ISSUE-2-2.pdf (discussing augmented transparency requirements).
185. See Haugeneder & Liebscher, supra note 96.
such claims, and corrupt officials would be on notice that successful arbitration is more likely. Not only would this make redress more readily available to victims of extortion, but it would also make rational public officials less likely to solicit or demand bribes in the first place.

Second, States could seek to correct and prevent erroneous applications of law regarding attribution, such as that made in EDF v. Romania,186 by expressly reiterating that solicitation and extortion by a foreign official is attributable to a State, even if the official had a personal profit motive.187 While it is somewhat doubtful that all States will be willing to take active steps to further expose themselves to legal liability, those that are serious about preventing corruption will recognize that such a correction would follow international precedent,188 adhere to the Council of Europe Civil Law Convention on Corruption,189 and be consistent with Article 7 of the Draft Articles on State Responsibility, which expressly provides that “[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”190

Third, States should consider concluding an express agreement that makes it clear that the solicitation or extortion of a bribe is intended to be actionable by certain foreign investors that have suffered nonspeculative losses as a consequence of State-attributable bribe solicitation or extortion. While it is undoubtedly true that persons ought not to benefit from their corruption, it is equally important to recognize that a claim based on the harm caused by solicitation and extortion is different from a claim brought to enforce a contract procured by willing bribery. Moreover, where there exists some “hostage factor” at the time of a bribe solicitation, such implicit coercion ought to render

186. See Draft Articles, supra note 23, § III.A.2(b)(2).

187. See, e.g., Draft Articles on Responsibility, supra note 23, art. 4, cmt. 13 (noting that it is “irrelevant for [purposes of attribution] that the person concerned may have had ulterior or improper motives or may be abusing public power”); id. art. 7 (“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”) (emphasis added).

188. See Estate of Jean-Baptiste Caire v. United Mexican States, 5 R.I.A.A. 516, 531 (1929) (as reported in Draft Articles, supra note 23, n.125).

189. COE Civil Law Convention, supra note 80, art. 5 (“Each Party shall provide in its internal law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-state Party, from that Party’s appropriate authorities.”). The United States has not signed the Civil Law Convention on Corruption and does not anticipate becoming a signatory or party because the Civil Law Convention is viewed as being incompatible with U.S. civil law practice and procedure.

190. Draft Articles on Responsibility, supra note 23, art. 7.
the foreign investor not morally or legally culpable. Solicited and extorted foreign investors ought to be permitted to recover their losses, provided the payment was made in order to protect an existing investment. International consensus on those points would not only facilitate successful litigation by aggrieved investors, but also serve to further deter rational foreign officials from extorting improper payments from foreign investors in the first place.

B. State-to-State Dispute Resolution

Notwithstanding these proposed modifications to current international law and practice, pursuing international arbitration against a foreign State for acts of corruption is likely to remain a difficult, expensive, and risky endeavor for investors, at least in the short term. Accordingly, the invocation of State responsibility for the solicitation and/or extortion of a foreign investor through State-to-State dispute resolution mechanisms must also be strongly considered, whether as a claim for direct injury to the State of the aggrieved investor or on behalf of the injured investor through diplomatic protection.

By treaty and under customary international law, injured natural and legal persons generally may request from the State of their nationality, and their State may give, diplomatic protection against an act or omission by a foreign State. This rule stems from the Vattelian fiction that an injury to the national of a State is an injury to the State itself.

Diplomatic protection has long been used as a means of obtaining redress for violations of international law, including for economic injuries to nationals.
of the home State, although it has fallen out of favor since the advent of direct arbitral claims by investors.\footnote{195} The Permanent Court of International Justice explained the concept of diplomatic protection in the Mavromattis case:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on its behalf, a State is in reality asserting its own rights—its rights to ensure, in the person of its subjects, respect for the rules of international law.\footnote{196}

Under the doctrine of diplomatic protection, and “within the limits prescribed by international law,” the home nation of the natural or legal person may exercise diplomatic protection “by whatever way and to whatever extent it thinks fit.”\footnote{197} While a simple objection from the Secretary of State may suffice to redress the problem, the home State may also institute formal legal proceedings to obtain redress from an international court, if necessary.

The idea of raising corruption claims to the international level is not a novel one. On September 25, 1975, U.S. Senator Abraham Ribicoff introduced Senate Resolution 265, which called for international corruption to be included within the discussions on the General Agreement on Tariffs and Trade (GATT).\footnote{198} The Business and Industry Advisory Committee to the OECD (BIAC) has also repeatedly called for the establishment of internationally mandated mechanisms to facilitate diplomatic protection on behalf of persons subjected to bribe solicitation and extortion. To this end, BIAC has proposed the following amendment on Solicitation and Extortion to the OECD Anti-bribery Convention:

> The Party or Parties to which such a report [of extortion] is made shall promptly and thoroughly investigate such report using all sources of information at their


\footnote{198. S. Res. 265 called upon the President’s Special Representative for Trade Negotiations, officials of the Departments of State, Commerce, Treasury, and Justice as well as congressional delegates for trade agreements, to “initiate at once negotiations within the framework of the current multilateral trade negotiations in Geneva, and in other negotiations of trade agreements pursuant to the Trade Act of 1974, with the intent of developing an appropriate code of conduct and specific trading obligations among governments, together with suitable procedures for dispute settlement, which would result in elimination of [bribery] practices on an international, multilateral basis, including suitable sanctions to cope with problems posed by nonparticipating nations, such codes and written obligations to become part of the international system of rules and obligations within the framework of the General Agreement on Tariffs and Trade, and other appropriate international trade agreements pursuant to the provisions and intent of the Trade Act of 1974.” Unfortunately, S. Res. 265 was referred to the Senate Committee on Finance and never was passed into law. See Decl. of Prof. Michael J. Koeler ¶ 56, U.S. v. Carson, No. SA CR 09-00077-JVS (C.D. Cal. Nov. 4, 1999).}
disposal and, if the report shall appear to such Party or Parties to be substantiated, then the Party of which the person making the report is a national shall immediately extend comprehensive and effective diplomatic protection and support to such person with the objective of securing all the rights to which such person is entitled in respect of the matter reported and of preserving, forwarding and protecting the commercial position of such person in the market or territory concerned; all other Parties shall co-operate in the discharge of such obligation.199

Given the longstanding history of diplomatic protection in cases involving injuries to foreign nationals, and the numerous issues that currently stymie investor-State dispute resolution in the context of corruption, the potential advantages and disadvantages of using State-to-State dispute resolution to help address and prevent corruption will be assessed in the following section.

1. Opportunities and Advantages of State-to-State Resolution of Corruption Claims

The use of State-to-State dispute resolution to resolve corruption claims affecting foreign investors carries numerous potential benefits, both to the persons specifically victimized by bribe solicitation and extortion and to the larger international community seeking to prevent the occurrence of such corruption.

One obvious benefit of using diplomatic protection to combat bribe solicitation and extortion would be that the payer might be able to recover the bribe money it was forced to pay. This is an appropriate goal because extortion is a crime and, as the U.S. Supreme Court has recognized, “[t]he victim of an extortion . . . has a right to restitution.”200

By incentivizing investors to raise such claims to the State-to-State level, disclosure of solicitation, extortion, and bribery should rise, and the incidence of such transactions should fall. If the investors forced to pay bribes by foreign officials knew that their States would help vindicate their claims against the foreign State rather than punish them for paying the bribe (as the United States currently does under the FCPA, for example), they would be more likely to divulge improper demands for payments.201 Increased disclosure of corruption, in turn, might prompt the governments of corrupt foreign officials to replace them, whether through shame, diplomatic pressure or otherwise. Finally, if foreign officials knew that their corrupt activities would become the subject of international scrutiny—and might realistically lead to their dismissal as host

199.  OECD’s Role, supra note 12, at 4; see also Assistance Against Solicitation, supra note 12, at 3.
States took steps to avoid conflicts with investors—States—they would be less likely to request or accept bribes in the first place.\textsuperscript{202}

2. Overcoming Legal Obstacles to State-to-State Dispute Resolution

As with investor-State arbitration of corruption claims, there are also certain potential legal obstacles associated with State-to-State resolution of corruption claims. This section considers such obstacles and provides suggestions for overcoming them.

\textit{i. Exhaustion of Local Remedies}

One potential legal obstacle to the use of diplomatic protection to resolve instances of bribe solicitation and extortion relates to the fact that, generally, under customary international law, a foreign national must exhaust local remedies in the receiving State prior to the assertion of a formal claim of diplomatic protection.\textsuperscript{203}

Requiring exhaustion in certain investment disputes makes good sense in principle, as States ought to be given first opportunity to vindicate the rule of law within their jurisdiction,\textsuperscript{204} and thereby reassure foreign investors.

In certain corruption cases, however—such as those where the level of corruption within a country is sufficiently pervasive, where the official charged with such corruption is sufficiently influential, or where corruption affects the local justice system—the requirement of local exhaustion might be inappropriate because it is “obviously futile.”\textsuperscript{205} To the extent States could reach consensus on the fact that there are certain categories of corruption claims (such as those just enumerated) for which the requirement of exhaustion would be clearly inappropriate, States could agree, within future BITs or FTAs, to dispense with the exhaustion requirement with respect to such claims.\textsuperscript{206}

\begin{thebibliography}{9}
\bibitem{202} Cf. Klaw, supra note 10, at 347.
\bibitem{203} See Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 6, 27 (Mar. 21) (“The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law.”); see also Eletronica Sicula S.P.A. (ELSI) (U.S. v. It.), 1989 I.C.J. 15, ¶ 51 (Jul. 20) (noting that the exhaustion of local remedies “is a rule of customary international law developed in the context of the espousal by a State of the claim of one of its nationals”).
\bibitem{204} Cf. Klaw, supra note 10, at 361–68 (arguing that U.S. law enforcement officials can and should prosecute corrupt foreign officials, if the official’s own government is unwilling or unable genuinely to carry out the investigation or prosecution).
\bibitem{205} Claim of Finnish Shipowners Against Great Britain in Respect of the Use of Certain Finnish Vessels During the War, 3 R.I.A.A. 1479, 1494 (1934) (Bagge, Single Arbitrator) [hereinafter Finish Shipowners Arbitration] (recognizing that “the parties in the present case, however, agree—and rightly—that the local remedies rule does not apply where there is no effective remedy”).
\bibitem{206} See ELSI, 1989 I.C.J. 15, ¶ 50 (noting that there is “no doubt that the parties to a treaty

\end{thebibliography}
Moreover, even if an agreement to waive the exhaustion requirement could not be reached in advance, it is appropriate to remember, as ICJ Judge Hersch Lauterpacht noted in the *Norwegian Loans Case*, that the requirement of exhaustion of local remedies is a rule that should be applied “with a considerable degree of elasticity.” In cases where there are, as a practical matter, “no effective [local] remedies owing to the law of the State concerned or the conditions prevailing in it,” exhaustion is not required.207

It should also be noted that the requirement of exhaustion would be inapplicable, and indeed inappropriate, if the corruption were to give rise to a direct injury to the investor’s State (such as harm to the investor’s State’s economy, for example) as opposed to an indirect-injury claim (for harm solely to the investor).208

**ii. “Calvo Clauses” and Other Waivers by Foreign Investors**

Another potential legal obstacle to the use of State-to-State dispute resolution of corruption claims involving foreign investors could stem from efforts by certain States to require foreign investors to expressly waive their rights to diplomatic protection as a condition of direct investment pursuant to “Calvo clauses” inserted within investment contracts.209 An example of such a

---

207. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 39 (July 6) (separate opinion of Judge Lauterpacht) (emphasis added).

208. See, e.g., Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) (Mexico was not required to exhaust local remedies in the United States in respect of its direct claim for alleged violations of the Vienna Convention on Consular Relations); see also ELSI, 1989 I.C.J. 15, ¶ 51 (reiterating without objection the United States’ contention that “to such a direct injury the local remedies rule . . . would not apply”). Although the ICJ in the *ELSI* case required the United States to prove that its direct-injury claim was “distinct from, and independent of” the claim of its national, *ELSI*, 1989 I.C.J. 15, ¶ 51, the ICJ in *Avena* recognized that the exhaustion of local remedies is not required where there is an “interdependence of the rights of the State and of individual rights,” *Avena*, 2004 I.C.J. 12, ¶ 40.

209. Such waivers are often known as “Calvo clauses,” after an Argentine jurist named Carlos Calvo, who popularized the Calvo doctrine, which states:

First, that sovereign states, being free and independent, enjoy the right, on the basis of equality, to freedom from “interference of any sort” . . . by other states, whether it be by force or diplomacy, and second, that aliens are not entitled to rights and privileges not accorded to nationals, and that therefore they may seek redress for grievances only before the local authorities.


[1] In any case where the question of compensation [due to a foreign national after an expropriation] gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed

Published by Berkeley Law Scholarship Repository, 2015
waiver is the following: “Disputes and controversies which may arise with regard to the interpretation or execution of this contract shall be resolved by the tribunals of the Republic in accordance with the laws of the nation, and shall not in any case be considered as a motive for international reclaims.”

Although States have markedly relaxed their efforts to extract waivers from investors and increasingly accept international arbitration, these shifts may be related not only to the trends of globalization and economic liberalization of the 1980s and 1990s. They may also be a function of the reluctance of investor’s States over the past two decades to provide diplomatic protection in conjunction with the ICSID Convention requirement that investors choose between international arbitration and the seemingly illusory option of diplomatic protection. If investors’ States were to once again extend a viable option for diplomatic protection in cases relating to corruption, and investors were to begin opting for State-to-State dispute resolution of such corruption claims, one might reasonably expect to witness a resurgence in the number of Calvo clauses.

by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

G.A. Res. 3281(XXIX), U.N. Doc. A/RES/29/3281 (Dec. 12, 1974) (adopted by a vote of 104-16-6); see also, e.g., G.A. Res. 3171 (XXVIII), U.N. Doc.A/RES/3171(XXVIII), pmbl. (Dec. 17, 1973) ("[E]ach State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures . . . ."); Trade and Dev. Board, Res. 88(XII), Rep. of the Trade and Development Board, 12th Sess., Sept. 22, 1971–Oct. 25, 1972, U.N. GAOR 27th Sess., Supp. No.15, A/8715/Rev.1, art. 2 (Oct. 19, 1972) ("[M]easures of nationalization as States may adopt in order to recover their natural resources are the expression of a sovereign power . . . . and any dispute which may arise in that connexion falls within the sole jurisdiction of its courts . . . ."). The United States has long disputed the validity of the Calvo Doctrine on the theory that the right of diplomatic protection—which is ultimately a State’s right—cannot be waived by an injured national. See LORI DAMROSCH ET AL., INTERNATIONAL LAW, CASES AND MATERIALS 762 (2000).


211. See, e.g., Wenhua Shan, Is Calvo Dead?, 55 AM. J. COMP. L. 123, 135 (2007) (noting that “recent BITs have generally accepted non-local remedies and general international law as the governing norms, departing significantly from the Calvo principle” and adding that “a ‘silent revolution’ has taken place, particularly in the sense that some BITs accept international arbitration for state-investor disputes”).

212. Id. at 130.

213. Although it is difficult to obtain precise figures on the frequency of informal diplomatic efforts by States on behalf of investors, it is clear that the frequency of diplomatic protection cases has substantially declined in the ICJ over the last several decades.

214. See ICSID Convention, supra note 131, arts. 26–27.
iii. Nationality of Claims

A final potential legal obstacle to the use of diplomatic protection to redress foreign investor solicitation and extortion relates to the nationality of the investor affected by the corruption. Under international law, a State may only assert diplomatic protection when the injured party is a national of the claimant State because it is “the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.”215

In the case of natural persons, the issue of nationality should present an easy prerequisite to be satisfied, except possibly in cases where the genuineness of the bond of nationality is dubious,216 or where the nationality of the person concerned changes between the time the claim arises and the time it is presented.217

In respect of legal persons such as multinational investment vehicles, however, the situation is more complex. The International Court of Justice noted in Barcelona Traction that “the traditional rule [of international law] attributes the right of diplomatic protection of a corporate entity to the State under the law of which it is incorporated and in whose territory it has its registered office.”218 It added that “where it is a question of an unlawful act committed against a

216. The bond of nationality might be dubious where the individual concerned holds dual nationality and the more dominant or effective nationality is not of the State espousing diplomatic protection. See, e.g., Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6) (denying as inadmissible Liechtenstein’s diplomatic protection claim against Guatemala where the national concerned lived in Guatemala for thirty-four years and only changed nationality to Liechtenstein in 1939 to avoid association with wartime Germany); see also Mergé Case, 14 R.I.A.A. 236 (Italian-U.S. Conciliation Comm’n 1955) (rejecting petition of the United States to present diplomatic protection claim on behalf of dual national whose dominant nationality was not that of the United States).
217. See, e.g., Statement of Assistant Legal Advisor to the U.S. Department of State, 8 Whitman 1243 (“Under generally accepted principles of international law and practice, a claim may properly be espoused on behalf of a national of the government espousing the claim, who had that status at the time the claim arose and continuously thereafter to the date of the presentation of the claim.”). This general rule regarding continuity of nationality has also been extended to corporate entities. See Int’l Law Comm’n, Draft Articles on Diplomatic Protection, Rep. of the Int’l Law Comm’n, 58th Sess., May 1–Jun. 9 and Jul. 3–Aug 11, 2006, U.N. GAOR, 61st Sess., Supp. No. 10, A/61/10 art. 10 (1) [hereinafter Draft Articles on Diplomatic Protection] (“A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim.”).
218. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, ¶ 70 (Feb. 5). Article 9 of the Draft Articles on Diplomatic Protection, supra note 217, further adds that, although corporate nationality generally derives from the State of incorporation, “when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.”
company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim,“219 not the national State of its shareholders.220

In view of this general rule, the admissibility of a diplomatic protection claim might be jeopardized if an entity harmed by a corrupt act is incorporated in the host State, particularly if the entity was not required to be incorporated there by the host State. This might be a particular concern for participants in a joint venture in the host State. Accordingly, investors hoping to preserve an option for diplomatic protection in the event of corruption would be wise to ensure they are truly foreign investors.

3. Practical Objections to State-to-State Dispute Resolution and Responses

Aside from the legal obstacles to State-to-State resolution of corruption claims affecting foreign investors, there are likely to be a series of practical objections to using such mechanisms. The following section outlines and responds to these anticipated objections.

First, it may be argued that States are already doing enough to prevent corruption by enacting extraterritorial statutes like the FCPA and United Kingdom Bribery Act such that they ought not to be expected or required to engage in State-to-State dispute resolution of cases involving bribe solicitation and/or extortion. This argument, however, fails to appreciate that the goal of preventing and eradicating corruption involves more than just punishing those who pay bribes. It involves taking active steps to encourage the disclosure of corrupt acts, to facilitate the identification and removal of corrupt officials, and to provide effective mechanisms of redress for those affected by corruption.221

Second, some might object to the use of a State-to-State dispute resolution mechanism such as diplomatic protection to address claims of corruption

219. Barcelona Traction, 1970 I.C.J. Reports 4, ¶ 88; see also Draft Articles on Diplomatic Protection, supra note 217, art. 11 (“A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of injury to the corporation unless: (a) the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or (b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation was required by it as a precondition for doing business there.”).

220. In some circumstances, the State of the shareholder’s nationality may be entitled to bring a claim of diplomatic protection on behalf of the shareholders such as when the host State injures the shareholder’s right to dividends, to attend and vote at general meetings, and share in the assets of the company after liquidation. See Phobe Okowa, Issues of Admissibility and the Law of International Responsibility, in INTERNATIONAL LAW 472 (Malcolm D. Evans ed., 2003); see also Draft Articles on Diplomatic Protection, supra note 217, art. 12 (“To the extent that an internationally wrongful act of a State causes direct injury to the rights of the shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.”).

221. See Klaw, supra note 10.
involving a foreign investor by justifiably asking: “Why should States help investors that have become involved in corruption? These are investors that have paid bribes, aren’t they?” This objection has some merit, but it is only partially correct. To be sure, these State-to-State dispute resolution mechanisms are designed to assist some investors who do make private payments to foreign officials, but not all. To understand who should be assisted and why it would be appropriate to do so, it is important to recognize the distinction between payments made “willingly” and payments made “unwillingly.” The distinction rests in the presence or absence of implied or express coercion or extortion by a public official.222 If an investor has paid a bribe in order to receive more than fair treatment or an advantage, the bribe should be deemed “willing” and diplomatic protection should not be provided.223 By contrast, if an investor has made a payment to an official in order to avoid receiving less than fair treatment, the payment ought to be considered “unwilling.”224 From a moral perspective, the difference matters.225 Willing bribe payers should not be entitled to the assistance of their State.

Only those who suffer retaliation after refraining from making illicit payments or who make such payments “unwillingly” in response to solicitation or extortion should be permitted to receive State assistance. With respect to assisting those who have been harmed after declining to pay a bribe, surveys by Transparency International suggest that there are many investors who have been solicited for bribes, refused to pay them, and then lost business to a competitor that was less scrupulous or less fearful of criminal prosecution under statutes like the FCPA.226 These victims of corruption deserve State assistance. With respect to those who seek State assistance after acquiescing to coercive solicitation or extortion, this Article proposes the following additional prerequisites to avoid rewarding those who have engaged in culpable wrongdoing or already received the benefit of their bargain by gaining access to a foreign country in which they had no initial right to invest.227 First, only unwilling payers who promptly report such payments to the State of their nationality so their claims of extortion may be verified through sworn statements and government investigation should be entitled to receive State assistance. Second, the unwilling payment must have been made in order to protect an

---

222. See id. at 320–23.
223. Id. at 320–23, 368–70.
224. Id. at 320–23.
225. See Carson, supra note 10, at 83–89.
226. See TRACE INTERNATIONAL, supra note 3 (referencing survey of 1000 executives in which nearly twenty percent of respondents claimed to have lost business to a competitor who paid a bribe).
227. See id.; see also M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 128 (2000) (“Aliens fall under the sovereignty of the state they enter. The state has a right to control their entry and subject it to conditions.”).
existing investment, rather than secure a new business opportunity. Limiting State assistance to these categories of investors will not only ensure that “bad” behavior is not rewarded, but will also facilitate the disclosure of corruption, as such persons would see an “upside” to voluntary disclosure that arguably does not currently exist.

Third, it might be argued that investors’ States ought not to care about corruption that occurs abroad. While issues of domestic corruption are sufficiently plentiful to lead many reasonable people to conclude that a State’s focus ought to be national before it is global, this objection nonetheless appears shortsighted. There is ample empirical evidence from the IMF and World Bank that more corruption necessarily means less investment. If that is true, then by taking this argument one step further, one ought to see that less foreign investment may mean, among other things, fewer jobs in the investors’ State that are related to foreign investment, and fewer revenues flowing to and within the investors’ home State. Accordingly, sending States would be wise to care about corruption abroad.

Fourth, some might be skeptical about how the system might work and express concern over whether elevating corruption claims into State-to-State disputes might trigger a return to the era of “gun-boat diplomacy” that marred international relationships in decades past. To address this concern, the exercise of diplomatic protection over corruption claims should begin— as it typically does— with nonpublic diplomatic dialogue, consultation, negotiation, conciliation or mediation in the first instance. Not only are these informal means likely to be the least expensive, but they may also suffice to prompt the host State to provide compensation or at least replace its corrupt personnel, the latter of which should be the primary goal from the perspective of the investors’ State. Moreover, if handled judiciously and sparingly, there is little reason to

228. For an in-depth discussion of the mechanics and rationales for these additional prerequisites, see Klaw, supra note 10, at 368–70.
229. Id. at 337–40.
231. See SORNARAJAH, supra note 227, at 140.
232. See id. at 129 (“Where two states have a dispute of any type, the logical first step is to settle it themselves though negotiations. Such diplomatic means of settlement of disputes are among the oldest forms of dispute settlement in international relations. The large majority of disputes are settled in this manner.”) (internal citations omitted).
think that such diplomatic efforts would seriously harm international relationships.

Fifth, another likely practical objection is that by raising investor-State disputes concerning bribe solicitation and corruption to the level of State-to-State disputes, one might be “making mountains out of molehills.” After all, do we really want to turn every $500 bribe into international litigation that could take years and cost millions of dollars? This understandable fear can be assuaged by recognizing that, as a preliminary matter, the State whose national was extorted is in control of the decision of whether, when and how to raise such claims with foreign governments. The sending State could choose to overlook, delay or aggregate minor claims until the timing is right or the appropriate threshold for State intercession has been reached.

Sixth, if the nonjudicial avenues explained above fail to produce meaningful results, and the claims at issue are sufficiently meritorious and consequential, this Article argues that the claim could and should then be brought as an international legal claim of State responsibility in an international body. This would have the advantage of bringing the misconduct to light and prompting formal adjudication from a neutral finder of fact. However, if formal adjudication of such a diplomatic protection claim were to be sought, the choice of fora is likely to become an issue, and it would be necessary to consider what sort of body has the expertise and jurisdiction to resolve such claims. Listed below are a few such options:

- **Ad-Hoc Arbitral Tribunal or Inquiry Commission.** Ad-hoc arbitral panels or inquiry commissions could be established by agreement between the two States concerned to address allegations of corruption. Indeed, Article 37 of the current U.S. Model BIT expressly provides for State-to-State resolution of matters “concerning the interpretation and application” of the treaty through State-to-State arbitration under the UNCITRAL Arbitration Rules.234

- **International Court of Justice.** To resolve disputes arising under diplomatic protection and resulting from bribe solicitation, extortion or the denial of justice to a foreign national, the ICJ could also be used, much in the way that States have previously used it to address other economically

---

233. See Draft Articles on Diplomatic Protection, supra note 217, art. 2, cmt. 2 (“A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so.”).

234. See 2012 U.S. Model BIT, supra note 54, art. 37(1) (“Subject to paragraph 5, any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law.”)
oriented diplomatic protection claims. One benefit of using the ICJ as a dispute-resolution forum for diplomatic protection claims of this nature is that the ICJ has jurisdiction over States that have: (1) recognized the compulsory jurisdiction of the Court under Article 36(2) of the Statute of the ICJ; (2) agreed to ICJ jurisdiction for disputes arising out of the interpretation or application of certain existing bilateral treaties; or (3) ratified without reservation Article 66(2) of the UN Convention Against Corruption. While the ICJ’s relative lack of experience on such criminal-related claims could present initial difficulties, the increased use of that forum should lend itself quickly to additional expertise.

- Permanent Multilateral Tribunal on Bribery and Extortion in Internal Investment. Although no permanent tribunal for investment claims or State corruption claims currently exists, the existence of such a tribunal was contemplated under the draft Multilateral Agreement on Investment, which called for an OECD dispute resolution body to resolve State-to-State and investor-State disputes. States ought to consider revisiting the creation of such a tribunal.

Seventh, some might question whether such a mechanism would actually help the victims aggrieved by the solicitation or extortion. After all, there is no obligation under international law for States to make a claim on behalf of their national, and no obligation for States to remit any compensation received to the nationals on whose behalf the State’s claim was made. While retaining
States’ flexibility on whether to make a claim of diplomatic protection would appear to be wise for the “mountains out of molehills” reasons discussed above, States’ current flexibility on whether to remit any compensation ultimately received for a harm caused to a national is, indeed, a problem for any system that aims to prevent or eradicate corruption. Without the prospect of compensation, many people are unlikely to disclose their experiences with foreign corruption. Accordingly, both fairness and practicality would appear to dictate that States ought to remit payment to victims (less expenses) in cases where compensation is obtained from another State.239

Finally, it might well be argued that it is inappropriate for host States to be held responsible for their corrupt foreign officials because the citizens of such States would in effect be victimized twice—first, by having corrupt officials abuse their position of public trust, and second, by having their public coffers drained to compensate (usually wealthier) foreigners and their sending States for such wrongdoing. Although this objection has substantial force, the perceived inequity can be blunted somewhat by remembering that any such States made to pay for their officials’ corruption always have the ability to seek forfeiture and restitution from the wrongdoing official, hopefully accompanied by a successful criminal prosecution. Moreover, by engaging in this process, host States and their citizenry will have the knowledge and incentive to finally rid themselves of their corrupt officials, ultimately attracting additional investment and prosperity in the long run.

an international award, or in settlement, belongs to the United States and is placed in the Miscellaneous Receipts account of the Treasury, but Congress has usually provided for payment to private claimants, especially to those whose claims are settled in accordance with decisions of a special United States claims commission dividing a lump-sum settlement.”).

239. A similar suggestion for progressive development of the international law of diplomatic protection was proposed by Professor John Dugard, the U.N. Special Rapporteur on Diplomatic Protection. His proposal stated, “When a State receives compensation in full or partial fulfillment of a claim arising out of diplomatic protection it shall [should] transfer that sum to the national in respect of whom it has brought the claim [after deduction of the costs incurred in bringing the claim].” Seventh Report on Diplomatic Protection, supra note 239, ¶103 (brackets in original). The Drafting Committee of the ILC subsequently adopted Draft Article 19 on Diplomatic Protection, entitled “Recommended Practice,” which states:

A State entitled to exercise diplomatic protection according to the present draft articles should: (a) give due consideration to the possibility of exercising diplomatic protection especially when a significant injury has occurred; (b) take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and (c) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

Int’l Law Comm’n, Titles and Texts of the Draft Articles on Diplomatic Protection Adopted by the Drafting Committee on Second Reading, U.N. Doc. A/CN.4/L.684 (May 19, 2006). Draft Article 19 was subsequently adopted by the full ILC, with the recognition that it was “an exercise in progressive development” of the law “supported by [growing] State practice and equity.” Draft Articles on Diplomatic Protection, supra note 217, at 100.
CONCLUSION

This Article has aimed to elucidate how bribery and extortion in international business transactions and foreign direct investment may be prevented by expanding the current scope of State responsibility to address the demand side of bribery, by improving the viability of investor-State arbitration for corruption claims, and by using State-to-State dispute mechanisms like diplomatic protection. It has sought to identify the content of States’ international obligations regarding bribery, solicitation, and extortion, and it considered the conditions and circumstances under which a State may be held responsible under international law for any such corrupt acts. It then proceeded to address the opportunities and obstacles currently associated with seeking to hold States responsible for such acts through the mechanisms of investor-State arbitration and State-to-State diplomatic protection.

Based on this analysis, it suggested certain changes that could make international arbitration more attractive and viable for victimized foreign nationals, including (1) augmenting nonretaliation protections, (2) shielding persons who unwillingly acquiesce to extortion from domestic prosecution, (3) lowering the heightened burden of proof for corruption claims, (4) reiterating within foreign investment agreements principles of proper State attribution, and (5) clarifying the well-intentioned but perhaps insufficiently refined notion that any claims involving corruption are either nonarbitrable or necessarily unenforceable against a State.

This Article also considered the prospect of using long-established but underutilized State-to-State dispute-resolution mechanisms, such as diplomatic protection, to address and resolve international corruption claims. After considering various legal obstacles and practical objections to State-to-State resolution of occupation claims, it argued that elevating foreign-investor corruption claims to the level of a State-to-State disputes can create incentives for additional disclosure of bribery and extortion, assist victims of solicitation and extortion in obtaining redress, pressure foreign States to remove their corrupt officials, and further strengthen international norms against bribery and extortion.

In these ways, and through additional development of international law, it is hoped that States can and will fulfill their stated responsibility to “prevent and eradicate” corruption in international business transactions and foreign direct investment.
Forced Sterilization and Mandatory Divorce: How a Majority of Council of Europe Member States’ Laws Regarding Gender Identity Violate the Internationally and Regionally Established Human Rights of Trans* People

Rebecca Lee*

Government identification is a ubiquitous aspect of modern life, something most adults the world over take for granted. For many, the presence of gender markers on their official identification is something entirely unremarkable. ‘Unfortunately for many trans* people, many countries make it extraordinarily difficult or even impossible to obtain official identification that correctly reflects their gender identity. Most countries still have no legal mechanism for trans* people to change their legal gender categorization. Others allow trans* people to update their official legal gender, but only after proving that they have undergone certain surgeries, up to and including irreversible sterilization, whether they want to or not. Still others only allow trans* people to update their legal gender after they have shown that they have dissolved their marriages, regardless whether they and their partner wish to remain married. As a result, many trans* people the world over may be literally risking their lives when they seek to do something as mundane as ordering a beer.

This Note examines why compulsory sterilization and mandatory divorce laws violate international and regional

* Law Clerk, United States Court of Appeals for the Ninth Circuit; J.D., University of California, Berkeley, School of Law, 2014; B.A., Yale University, 2007. With thanks to Kathleen Kelly Janus for her support and insightful comments on initial drafts, and to the staff of the Berkeley Journal of International Law for their editorial suggestions.
human rights norms, and proposes how the European Court of Human Rights and individual COE Member States can redress the situation to protect one of Europe’s most vulnerable populations. It also examines these failures as bellwethers of an ongoing tension within the international human rights community: whether the specificity of human rights treaties is overall a positive or a negative development, and whether the current international legal regime is equipped to protect the rights of sexual minorities generally. This Note proposes that a novel LGBTQ-specific human rights treaty should ultimately be proposed and promulgated to ensure that these minorities are protected.

TABLE OF CONTENTS

INTRODUCTION ........................................................................................................ 115
I. BACKGROUND AND CONTEXT: THE TRANS* RIGHTS MOVEMENT AND
NOTES ON TERMINOLOGY ....................................................................................... 120
II. THE STATUS OF THE INTERNATIONAL AND REGIONAL RECOGNITION OF
THE HUMAN RIGHTS OF TRANS* PEOPLE ......................................................... 126
   A. International Context: The Development of Trans* Rights in
the International System ...................................................................................... 126
   B. Regional Context: The Development of Trans* Rights in
the European System ............................................................................................ 133
III. COE EXAMPLES: RECENT DEVELOPMENTS IN SWEDEN AND THE
UNITED KINGDOM ................................................................................................. 139
   A. Sweden: Applying Domestic Law Principles and International
and Regional Human Rights Norms To Strike Down Discriminatory
Sterilization and Divorce Requirements ............................................................... 139
   B. The United Kingdom: From Mandatory Divorce to Spousal
Consent .................................................................................................................. 143
CONCLUSION: FORCED STERILIZATION AND MANDATORY DIVORCE LAWS
CONSTITUTE VIOLATIONS OF SEVERAL INTERNATIONAL AND
REGIONAL HUMAN RIGHTS NORMS AND SHOULD BE RECOGNIZED AS SUCH; DOING SO MAY REQUIRE DEVELOPING LGBTQ-SPECIFIC INTERNATIONAL AND REGIONAL HUMAN RIGHTS TREATIES ................. 148

INTRODUCTION

“It is of great concern that transgender people appear to be the only group in Europe subject to legally prescribed, state-enforced sterilisation.”
“[C]itizens [do] not want their government to mess around in their underwear. You would assume all hell would break loose if the government would tell them: you won’t get a new passport or other identification document unless you have become irreversibly infertile.”

– Boris Dittrich, Advocacy Director, Human Rights Watch Lesbian, Gay, Bisexual and Transgender Program

Government identification is a ubiquitous aspect of modern life, something many adults the world over take for granted. Most people (in countries with established government bureaucracies at least) would not think twice if asked to show an identification card when applying for a job, going to the doctor, opening a bank account, or traveling both within and outside of their country of residence; most people are privileged to be able to do these activities without consequence. Imagine, however, if instead, every time you produced your government-issued identification, you were exposing yourself to a serious risk of ridicule, verbal harassment, and violence, up to and including murder? For trans* people in many parts of the world, this is unfortunately not a hypothetical: because they cannot obtain governmental identification that correctly reflects their gender identity, many trans* people literally risk their lives when they seek to do something as mundane as ordering a drink at a bar.

As one Dutch trans* man recounted:

I once had a bad experience in a pub in the UK. I ordered a beer and was asked for identification to prove my age. . . . I showed him my passport. When he saw the F in my passport, he waved the passport above his head and called his colleagues and the other customers around the bar and shouted, “Look, it’s a girl!” There were a lot of people who had quite a bit to drink, and I was afraid that there might be some idiot who would start beating me up. So I asked for my passport and I left. Ever since then, I’m very hesitant about showing my passport.
in these kinds of situations.5

Unfortunately, this is not an anomaly: this is the lived experience of trans* people in dozens of countries throughout the world, including the twenty-one Council of Europe (COE) Member States that currently require proof of sterilization to change one’s legal sex categorization.6 Several other COE member countries require that married trans* persons divorce their spouses or convert their marriages to civil unions or domestic partnerships before they can update their legal sex categorization.7 And despite the fact that some COE Member States do not permit trans* people to change their legal sex at all,8 compulsory sterilization of trans* people is still a widespread practice in many of these countries.9 Though some COE Member States have recently updated their laws to remove these sterilization and divorce requirements, even in those countries, trans* people continue to be subject to discriminatory State action and given lesser legal rights than cisgender10 people.11


6. As of the time of writing, the twenty-one COE Member States that currently require sterilization as a prerequisite to legal gender change are: Azerbaijan, Belgium, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Greece, Italy, Latvia, Luxembourg, Malta, Montenegro, Norway, Romania, Russia, Slovakia, Switzerland, Turkey, and Ukraine. TRANSGENDER EUROPE, TRANS RIGHTS EUROPE MAP 2014 (2014), available at http://www.tgeu.org/sites/default/files/Trans_Rights_Map_2014.pdf (indicating which European countries require sterilization to process legal gender change); see also 47 Member States, COUNCIL OF EUROPE, http://www.coe.int/en/web/portal/47-members-states (last visited February 13, 2015); the eleven COE Member States do not require sterilization to change legal gender are Austria, Croatia, Estonia, Germany, Iceland, the Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom. See TRANSGENDER EUROPE, TRANS RIGHTS EUROPE MAP, 2014.

7. See Divorce Requirement Is Interference in Private Life Says European Court for Human Rights, TRANSGENDER EUROPE (Nov. 13, 2012), http://www.tgeu.org/book/export/html/57 [hereinafter Divorce Requirement Is Interference in Private Life] (noting at the time of writing that, in addition to Finland, the “Czech Republic, France, Hungary, [the] UK and some cantons in Switzerland have registered partnerships while requiring couples to divorce for an official recognition of a trans person’s gender”; though note, the United Kingdom has since repealed its divorce requirement. See infra Part III.B.).

8. There are fifteen COE Member States that do not permit persons to change their legal sex categorization: Albania, Andorra, Armenia, Bosnia & Herzegovina, Bulgaria, Hungary, Ireland, Liechtenstein, Lithuania, Macedonia, Moldova, Monaco, San Marino, Serbia, and Slovenia.. See TRANSGENDER EUROPE, TRANS RIGHTS EUROPE MAP, supra note 6.


10. Tomchin, supra note 4, at 816 n.12:

Cisgender is a term describing individuals whose gender corresponds with the legal sex that they were assigned at birth. Cisgender people are not trans*. Cis is the Latin prefix which is the antonym of trans. This term has been gaining favor in activist circles since its introduction in the 1990s, including in legal scholarship.

11. See infra Part III.
Forced sterilization and divorce are of particular concern both because these practices are common through COE Member States, and because they represent official State discrimination and violence against trans* people. These requirements officially stigmatize and denigrate trans* people, and this State disapprobation encourages private parties to subject members of this vulnerable group to harassment and violence as well. In addition, the countries that impose these requirements also often subject trans* people to further forms of discrimination and abuse, for example by making it difficult for them to obtain appropriate medical care.

These practices should also be particularly troubling to human rights legal scholars because the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or European Convention), to which all COE members are signatories, establishes broad rights to respect for private and family life, "to marry and to found a family," to nondiscrimination, and "to the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or..."
and to be free of inhuman or degrading treatment. All of these recognized rights are in potential conflict with the COE Member States’ discriminatory laws, although, as this Note will examine, to date the European Court of Human Rights (ECHR) has been hesitant to interpret the ECHR in a way that protects trans* people from sterilization and mandatory divorce requirements. Moreover, most COE countries are also signatories to several United Nations (UN) conventions and treaties that many human rights experts agree should be deemed incompatible with such requirements.

Because the COE was the first regional system to protect lesbian, gay, and bisexual rights, “the discriminatory requirements imposed on trans* people today by many COE Member States is both troubling and surprising. It is particularly disappointing given that several COE countries have declared an intention to lead on human rights and LGBTQ equality issues.”

The widespread nature of these human rights violations in COE Member States speaks to the failure of regional and international human rights standards to introduce meaningful social and legal change amongst signatories. It also demonstrates the need for further progressive interpretation of preexisting international and regional human rights norms, in combination with domestic legal reform. Perhaps most importantly, it may signal that trans* rights advocates should push for the development of LGBTQ-specific human rights treaties on international and regional levels.

This Note makes several contributions to the field. It is the first to analyze the current status of and several recent developments in the treatment of trans* people within the COE in the context of human rights norms, with a focus on Sweden and the United Kingdom as example bellwethers of the evolving protection of trans* people in Europe. This Note concludes that, although significant strides have been made on important fronts in these countries and in several others, the majority of COE Member States must continue to update their laws regarding gender identity to achieve compliance with international and regional human rights norms. Moreover, those ECHR decisions that have not interpreted compulsory sterilization and divorce requirements to violate the

19. *Id.* art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment . . . “).

20. See infra Part I.A.

21. See, e.g., PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 222 (2012) (noting that “[t]he European Court of Human Rights was the first international institution to recognize LG* rights”); *id.* at 224 (noting that, in the 1990s, “European institutions succeeded in establishing the most protective laws and policies concerning LGB rights” as compared to other regional systems).

22. See, e.g., United Kingdom Dep’t for Culture, Media & Sport and United Kingdom Gov’t Equal Office, *Policy: Creating a Fairer and More Equal Society*, GOV.UK (Dec. 13, 2013), https://www.gov.uk/government/policies/creating-a-fairer-and-more-equal-society (“We want the UK to be a leader in equality and human rights. At our best, we are defined by our tolerance, freedom and fairness.”) [hereinafter UK Policy].

http://scholarship.law.berkeley.edu/bjil/vol33/iss1/1
ECHR should be revisited when these issues arise again and be overruled as wrongly decided. This Note also concludes that the fact that these cases were so decided reveals the current inability of extant regional and international standards to robustly protect the rights of sexual minorities. As a normative matter, courts should hold that the discriminatory requirements do violate the human rights of trans* people. But because these rights have not been protected successfully by existing treaties thus far, this Note proposes that international and regional human rights standards should be updated to extend expressly to trans* persons, by promulgating new LGBTQ-specific human rights treaties.

This Note proceeds in three parts. The first Part provides background and context on the trans* rights movement generally. The second Part identifies the relevant international and regional human rights norms that should be interpreted and applied to protect trans* people’s fundamental human rights. The third Part analyzes whether recent developments in the example countries (Sweden and the United Kingdom) have assisted those States in complying with international and regional norms. The conclusion will examine the broader implications of this analysis on the protection of vulnerable populations through international and regional human rights systems.

I. BACKGROUND AND CONTEXT: THE TRANS* RIGHTS MOVEMENT AND NOTES ON TERMINOLOGY

Transgender and transsexual people face a lifetime of inequalities and discrimination . . . . As children, they can be bullied and abused for being gender different. As adults their families, friends, and [neighbors] can reject them once their trans status is known, and they are very likely to experience assault and abuse at home, in the workplace and out on the streets . . . .

This section will attempt to summarize some of the common interests of the trans* community that are implicated in the context of international and regional human rights. It will also address concerns with the terminology of “gender” and “sex,” and it will explore how social constructions indicate the ways in which “gender” and “sex” are far from settled factual or medical/scientific terms but, rather, are deeply inflected by social constructions and conventions, which may

23. Although trans* interests and LGBTQ interests are not always or necessarily aligned, many transgender people consider the gay community to be their only viable social and political home. In part, this is because a sizable percentage of transgender people also identify as lesbian, gay, or bisexual. More fundamentally, it is because homophobia and transphobia are tightly intertwined, and because antigay bias so often takes the form of violence and discrimination against those who are seen as transgressing gender norms.


have implications for the ways in which human rights law defines rights to nondiscrimination on the basis of "sex."

The term "transgender" is "generally used to refer to individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth."\(^\text{25}\) By contrast, people whose gender identity corresponds with the sex they were assigned at birth are referred to as "cisgender."\(^\text{26}\) The trans* community represents a small but meaningful proportion of the population: one recent study, for example, suggests that as many as 1 in every 250 people in the United States (or 0.4% of the population) may be trans*.\(^\text{27}\) Although statistics regarding the prevalence of trans* people in COE countries are limited, existing data suggest that the United States estimate of 1 in every 250 persons is likely an accurate reflection of the prevalence of trans* people in other communities.\(^\text{28}\)

Queer scholars use the term "gender identity" "to reflect each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech, and mannerisms."\(^\text{29}\) By contrast, queer theorists have described the term "sex," which is "commonly used to denote one’s status as a man or woman based upon biological factors,"\(^\text{30}\) as "the legal fiction that occurs when the appearance of an infant’s genitals at birth (as formalized by an ‘M’ or ‘F’ on a birth certificate) results in each person’s placement into a legal category of ‘male’ or ‘female.’"\(^\text{31}\)

Though the term "sex" is often perceived as a neutral term that merely reflects medical and scientific fact, in reality, it is far from such: there is no

\(^{25}\) Paisley Currah et al., \textit{Introduction} to \textit{TRANSGENDER RIGHTS} xiii, xiv (Paisley Currah et al. eds., 2006).

\(^{26}\) See Tomchin, supra note 4, at 816 n.12:

Cisgender is a term describing individuals whose gender corresponds with the legal sex that they were assigned at birth. Cisgender people are not trans*. Cis is the Latin prefix which is the antonym of trans. This term has been gaining favor in activist circles since its introduction in the 1990s, including in legal scholarship.

\(^{27}\) HOWELL, supra note 24, at 10.

\(^{28}\) See, e.g., BERNARD REED ET AL., \textit{GENDER VARIANCE IN THE UK: PREVALENCE, INCIDENCE, GROWTH AND DISTRIBUTION} (2009), available at http://www.gires.org.uk/assets/Medpro-Assets/GenderVarianceUK-report.pdf (estimating that 6 in every 1000 British people or 0.6% of the population may identify as trans*).


consensus view as to what aspects of biology or physiology conclusively
determine a person’s sex. Factors including chromosomes, the appearance of
eexternal genitalia, phenotype, and morphology may determine a person’s sex at
birth or later in life. Thus, scholars have urged that the legal categorization of
people into the sex categories of “male” and “female” is a socially contingent
act that reflects society’s normative assumption of the truth and naturalness of
the gender binary. Such a rigid and arbitrary classification of people into
gender categories often harms trans* people and others: “[w]e live in a binary
society; one must be either female or male . . . [but] not everyone fits into a neat
little male or female box.”

Trans* people may choose to “transition” from the gender that corresponds
to the sex they were assigned at birth to another gender identity or multiple
gender identities, though not all do. Some trans* people decide to transition
because they experience “gender dysphoria,” which is the medically accepted
term for the psychological distress that may arise “from not being recognized as
one’s gender or from not having one’s body appear in a way that aligns with
one’s gendered understanding of oneself.”

The transition process usually includes a social transition, which primarily
involves altering one’s external gender expression to conform to one’s gender
identity, including changing one’s hairstyle, makeup, accessories, and
clothing. Transition may or may not also include taking hormones and/or
undergoing gender-confirming surgery, either on one’s secondary sex
characteristics or on one’s external and/or internal genitalia.

Despite society’s misconceptions about the subject, “there is no such thing
as a ‘sex change’ surgery or a ‘sex reassignment surgery’ that . . . [can convert]
a woman into a man or a man into a woman.” In reality, there are a series of
potential surgical interventions that trans* people may elect to undergo so that
their external appearance conforms more closely to their gender identity.

32. Greenberg, supra note 30, at 271.
33. Id.
34. See generally, e.g., MARTINE ROTHBLATT, THE APARTHEID OF SEX: MANIFESTO ON THE
FREEDOM OF GENDER (1995) (arguing that “male” and “female” are socially constructed fictions
based in patriarchal views rather than reflections of biological reality).
35. HOWELL, supra note 24, at 31.
36. JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT ON THE NATIONAL
TRANSGENDER DISCRIMINATION SURVEY 26 (2011).
37. Tomchin, supra note 4, at 821.
38. Id. at 843; see also Dean Spade, Documenting Gender, 59 HASTINGS L.J. 731, 754 (2008)
(“For those who wish to enhance the masculinization or feminization of their appearance, changing
external gender expressions such as hairstyle, clothing, and accessories is often an effective,
affordable, non-invasive way to alter how they are perceived in day-to-day life.”).
39. Tomchin, supra note 4, at 843.
40. Id. at 820–21.
41. Cisgender people also seek out gender-confirming surgery (for example, some cisgender
men with gynecomastia, a condition that causes development of what doctors consider an excessive
Though a significant number of trans* people do undergo or hope to undergo such surgeries, many trans* people do not wish to have surgery. Other trans* individuals are unable to access gender-confirming surgeries due to a lack of resources or because of medical conditions that contraindicate such surgeries. In fact, “the vast majority of trans people do not undergo surgery” at all. Moreover, even those trans* people who do desire some gender-confirming surgery may not wish to or are not able to undergo the complicated, expensive, and potentially dangerous procedures that would be required to leave them irreversibly sterilized. Indeed, even those trans* people who do desire some form of genital gender-confirming surgery may still wish to preserve their ability to procreate biologically, or they may prefer to make the decision on their own terms, rather than at the insistence of the government.

For trans* people, “administrative gender classification and the problems it creates for those who are difficult to classify or are misclassified is a major vector of violence and diminished life chances and life spans.” As one trans* man explained to Human Rights Watch, having to present his official identification, which incorrectly categorized him as a woman (the sex he was assigned at birth), meant that, “[y]ou have no option, you’re forced, always, to provide an explanation . . . . You feel diminished as a man whenever you need to explain that you are in fact a man. Sex registration is like administrative violence that is condoned by the state.”

Administrative gender classification without recourse to legal gender change actively harms trans* people on a daily basis: “as a direct result of amount of breast tissue in a man, may choose to have such tissue surgically removed to reduce the size of their breasts). See DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF THE LAW 148 (2011).

42. Tomchin, supra note 4, at 821 n.40.
43. See id. at 844; see also GRANT, supra note 36, at 26 (“For some [trans* people], the journey traveled from birth sex to current gender may involve primarily a social change but no medical component; for others, medical procedures are an essential step toward embodying their gender.”); HUMAN RIGHTS WATCH, CONTROLLING BODIES, supra note 5, at 25 (noting that many trans* people are content with gender-confirming hormone therapy alone, and that some do not wish to have any medical treatment at all).
44. Tomchin, supra note 4, at 844–45.
45. Id.
46. SPADE, NORMAL LIFE, supra note 41, at 145; see also GRANT, supra note 36, at 79 (finding less than a quarter of transwomen respondents to a recent, large-scale survey had undergone gender-confirming surgery, and less than half or transmen respondents had undergone gender-confirming surgery).
47. Compare HUMAN RIGHTS WATCH, CONTROLLING BODIES, supra note 5, at 17 (“In practice what is required [by the legal sterilization requirement] is the removal of the ovaries (trans men) or testes (trans women).”), with GRANT, supra note 36, at 79 (finding that twenty-one percent of transmen respondents did not desire hysterectomy and that fourteen percent of transwomen respondents did not desire removal of the testes).
48. SPADE, NORMAL LIFE, supra note 41, at 142.
49. HUMAN RIGHTS WATCH, CONTROLLING BODIES, supra note 5, at 4.
having a wrong gender marker in their identity documents, trans people have no option but to reveal to perfect strangers, often within earshot of a larger audience of yet more strangers, details of one of the most intimate aspects of their private lives—that they are transgender.” In addition to being both humiliating and degrading, the process also exposes trans* people to the risk of harassment and violence at the hands of State and non-State actors alike. For example, one recent study found that trans* people in New York City were 3.3 times more likely to be subjected to police violence than cisgender people. When considering the fact that trans* people are more likely to become victims of police brutality, it is no wonder that private actors feel emboldened to subject trans* people to violence as well. As a result, “[g]ender nonconforming people consistently have been among the most visible and vulnerable members of gay communities—the most likely to be beaten, raped, and killed; among the most likely to be criminalized and labeled deviant; among the most likely to be denied housing, employment, and medical care; and among the most likely to be separated from their own children.”

Other studies confirm that being “outed” as trans* by your identity documents is distinctly dangerous for trans* people: “Forty percent (40%) of respondents [to a recent U.S. survey of American trans* people] who presented gender incongruent identification reported harassment and 3% reported being assaulted or attacked”; trans* people of color reported even more frequent physical assault when presenting gender-incongruent identification (between 6% and 9%).

The trans* community’s experience of humiliation and violence documented in this study is hardly limited to the United States. Unfortunately, as the advocacy group Transgender Europe has documented, violence against trans* people appears to be on the rise globally, with more than 1100 reported killings of trans* people worldwide between 2008 and 2012. And since many countries do not systematically produce the relevant data, these figures are likely an underestimate. Though this violence is not solely attributable to the lack of access to gender-appropriate governmental identification, lack of access is a

50. Id.
51. GRANT, supra note 36, at 154.
53. Minter, supra note 23, at 141–142.
54. GRANT, supra note 36, at 153.
55. See id. at 154.
contributing factor that many trans* people wish to see changed: “73% of trans respondents to an EU-wide survey expressed that easier gender recognition procedures would allow them to live more comfortably [and safely] as a transgender person.”

Without the ability to change their legal gender categorization, “trans people are revealed as trans in all aspects of life. This is . . . true for official documents such as ID cards, passports, social security card[s] or driving licenses. But . . . other certificates such as school and university degrees, job references, credit and bank cards, student cards etc. can also become a source for daily trouble.” As a result, trans* people’s official “stigmatization is engrained in every aspect of life, often resulting in [their] exclusion from meaningful participation in social and economic life.” The cumulative toll of these experiences, unsurprisingly, results in serious mental health consequences for the trans* community: “41% of respondents [to the U.S. study of American trans* people] reported attempting suicide, compared to [only] 1.6% of the general population.”

Though the trans* community is not a monolith but rather a diverse population with different priorities and interests, at a minimum trans* people want to be treated with the same dignity and respect that is afforded cisgender people. For many trans* people, this means changing relevant laws to allow them to update their legal sex categorization to comport with their gender identity. For many trans* people, this would also include being able to do so without having to prove that they have undergone specific and often unwanted

---


58. KÖHLER ET AL., supra note 58, at 10.

59. Id.

60. GRANT, supra note 36, at 2.

61. Tomchin, supra note 61, at 819; see also Dylan Vade, Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People, 11 MICH. J. GENDER & L. 253, 271 (2005) (“There is no one way to be transgender . . . . [T]here is no prototypical transgender experience.”).

62. See, e.g., Mission Statement, TRANSGENDER EUROPE, http://www.tgeu.org/missionstatement (last updated Oct. 2, 2010) (“Transgender Europe envisions a Europe free from all discrimination—especially including discrimination on grounds of gender identity and gender expression; a Europe where transgender people are respected and valued, a Europe where each and every person can freely choose to live in whichever gender they prefer, without interference.”).

63. COMMISSIONER FOR HUMAN RIGHTS, supra note 1, at 17 (“Access to procedures to change one’s sex and one’s first name in identity documents is vital for a transgender person to live in accordance with one’s preferred gender identity.”); see also KÖHLER ET AL., supra note 58, at 8 (noting that a significant majority of respondents to a recent survey of trans* Europeans want the gender recognition procedures in their countries to be made easier). A growing number of trans* activists and their allies instead advocate that the State stop classifying people on the basis of sex/gender entirely. See generally, e.g., Tomchin, supra note 4 (concluding that the only way to prevent ongoing harms to trans* people is for the legal fiction of sex to be completely abolished).
or inaccessible medical procedures. As the nongovernmental organization World Professional Association for Transgender Health (WPATH) explains:

No person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker [should] recognize the person’s lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures.

Or, as one trans* person succinctly put it, “[t]he state should stay out of our underwear.”

II. THE STATUS OF THE INTERNATIONAL AND REGIONAL RECOGNITION OF THE HUMAN RIGHTS OF TRANS* PEOPLE

A. International Context: The Development of Trans* Rights in the International System

Some say that sexual orientation and gender identity are sensitive issues. I understand. Like many of my generation, I did not grow up talking about these issues. But I learned to speak out because lives are at stake, and because it is our duty under the United Nations Charter and the Universal Declaration of Human Rights to protect the rights of everyone, everywhere.

– UN Secretary-General Ban Ki-moon to the Human Rights Council, 7 March 2012

This section will present a brief (and necessarily selective) survey of the United Nations human rights conventions and reports that assist in defining rights to bodily integrity and personal autonomy, and that may be used to support trans* rights specifically.

Several UN conventions and declarations incorporate human rights norms that either could be or have been interpreted to protect the interests of trans* people in seeking to change their legal gender categorization without proof of sterilization or singleness (though of course these documents were not drafted with trans* people specifically in mind). Indeed, the foundational principles of international human rights law reflect this potential: “[t]he international community attempted indirectly to protect [future categories of] minorities.

64. COMMISSIONER FOR HUMAN RIGHTS, supra note 1, at 19 (“[M]edical treatment must always be administered in the best interests of the individual and adjusted to her/his specific needs and situation.”).


66. HUMAN RIGHTS WATCH, CONTROLLING BODIES, supra note 5, at 26.

through the principle of nondiscrimination,” which “are included in the Charter, the Universal Declaration, the International Covenant on Civil and Political Rights [ICCPR], and the International Covenant on Economic, Social and Cultural Rights [ICESCR].”\textsuperscript{68} As evidenced by a growing consensus amongst UN human rights treaty bodies, “[t]he principle of nondiscrimination prohibits distinctions based on group characteristics such as race, religion, language, or nationality”\textsuperscript{69} and requires that the foundational universal human rights treaties should be interpreted to bar State discrimination on the basis of sexual orientation and gender identity.\textsuperscript{70}

The recognition of LGBTQ rights by international authorities is a comparatively recent phenomenon. Although the LGBTQ rights movement began in earnest in the United Kingdom and United States in the 1950s and 1960s, picking up speed in the United States after the Stonewall Riots of 1969,\textsuperscript{71} international authorities did not begin to formally recognize LGBTQ rights until the 1980s.\textsuperscript{72} As noted above, “[t]he European Court of Human Rights was the first international institution to recognize [LGBTQ] rights” in its 1981 decision \textit{Dudgeon v. United Kingdom}.\textsuperscript{73} \textit{Dudgeon} held that criminalizing consensual, adult same-sex sexual activity was a breach of ECHR-protected the right to respect for private life.\textsuperscript{74} Though certainly a watershed moment for the recognition of LGBTQ rights, \textit{Dudgeon} did not inspire immediate followers amongst other regional or international human rights authorities, and it was not until 1994 that an international authority, the UN Human Rights Committee, determined that “discrimination on the basis of sexual orientation was regulated by the right to equality under the [International Covenant on Civil and Political Rights].”\textsuperscript{75} In the time since, many other UN human rights treaties “have been interpreted by their supervisory organs to cover sexual orientation [and gender identity] discrimination,”\textsuperscript{76} but it was not until 2011 that the UN adopted a resolution specific to sexual orientation and gender identity, after a decade of unsuccessful attempts to do so.\textsuperscript{77}


\textsuperscript{69} \textit{Id.}

\textsuperscript{70} See \textsc{Alston & Goodman, supra} note 21, at 223 (noting that, as of 2012, five of the universal human rights treaties had been interpreted by their respective supervisory organs to cover sexual orientation discrimination (ICCPR in 1994, CEDAW in 1999, CESC\textsuperscript{R} in 2000, CRC in 2000 and CAT in 2001)).

\textsuperscript{71} \textit{Id.} at 220–21.

\textsuperscript{72} \textit{Id.} at 220.

\textsuperscript{73} See \textit{id.} at 222.


\textsuperscript{75} \textit{Id.} at 223.

\textsuperscript{76} \textit{Id.}

As the International Committee of Jurists has recognized, although “the international system has seen great strides toward gender equality and protections against violence in society, community and in the family . . . the international response to human rights violations based on sexual orientation and gender identity has been fragmented and inconsistent.” It is surprising that international authorities have been slow and disjointed in their efforts to recognize LGBTQ rights, particularly when considering the likelihood that the drafters of the foundational universal human rights instruments chose an individual-rights-focused nondiscrimination framework to protect a broad range of potential vulnerable groups in the future.

The foundational international human rights document, the Universal Declaration of Human Rights (UDHR), contains several provisions that could easily be interpreted to protect the interests of the trans* community (though, of course, it should be noted that the UDHR is a declaration, not a treaty, and was therefore not considered legally binding on UN Member States when it was passed, though it is now widely acknowledged to be customary law). First, the equality and nondiscrimination principles in Articles 1, 2, and 7 indicate that all persons are entitled to equal treatment and equal respect for their human dignity and to be free from State discrimination on the basis of “sex . . . or other status.” The Preamble to the UDHR also broadly sets forth that “the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” Further, Articles 12 and 16 establish universal rights to marriage and family integrity and noninterference with private and family life. And,

78. YOGYAKARTA PRINCIPLES, supra note 29, at 6.
81. UDHR, supra note 79, art. 1 (“All human beings are born free and equal in dignity and rights.”).
82. Id. art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).
83. Id. art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”).
84. Id. art. 2.
85. Id. preamble.
86. Id. art. 12 (“No one shall be subjected to arbitrary interference with his privacy, [or] family . . . ”); art. 16.
Article 5 states that “[n]o one shall be subjected . . . to cruel, inhuman or degrading treatment.”\(^\text{87}\)

The ICCPR\(^\text{88}\), which intended to bring the aspirational norms of the UDHR into being through binding international law,\(^\text{89}\) contains many similar principles to the UDHR, including a recognition in the preamble that the rights contained in the Covenant spring from “the inherent dignity of the human person.”\(^\text{90}\) Following the UDHR, the ICCPR also contains a broad nondiscrimination principle:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\(^\text{91}\)

Moreover, ICCPR Article 16 states “[e]veryone shall have the right to recognition everywhere as a person before the law.”\(^\text{92}\) And in terms similar to those used in the UDHR, the ICCPR creates broad rights to family integrity: Article 23 states “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State,” and it exhorts that “States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”\(^\text{93}\) And in language identical to Article 5 of the UDHR, ICCPR Article 7 states “[n]o one shall be subjected . . . to cruel, inhuman or degrading treatment.”\(^\text{94}\)

---

87. Id. art. 5.
89. See id. preamble; see also Elkins et al., supra note 80, at 66 (“[T]he normative consensus embodied in the UDHR took legal form only later through the two international covenants promulgated in 1966: the ICCPR and the International Covenant on Economic, Social and Cultural Rights . . . .”).
90. ICCPR, supra note 88, preamble.
91. Id. art. 26; see also id. art. 2:
   Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
92. Id. art. 16.
93. Id. art. 23.
94. Id. art. 7.
Like the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) also begins by broadly recognizing the inherent dignity of all persons. Article 1 specifically prohibits “torture,” which the instrument defines as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

In addition to the basic interpretation of the plain language of international treaties, UN officials have also applied these principles specifically to trans* people in the course of their work. For example, in 2013 the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment published a report to the UN Human Rights Council, which concluded in part by:

call[ing] upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery[,] [and] involuntary sterilization . . . , when enforced or administered without the free and informed consent of the person concerned . . . . [and] to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups.

Specifically, the report noted with disapproval that “[i]n many countries transgender persons are required to undergo often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender,” particularly in Europe. The report implies that such practices constitute “abuses in health-care settings . . . [that] cross a threshold of mistreatment that is tantamount to torture or cruel, inhuman or degrading treatment or punishment,” and the report recommends abolishing “the policies that promote these practices.” These practices impliedly “run afoul of the prohibition on torture and ill-treatment,” and thus implicate “State’s obligations to regulate, control and supervise health-care practices with a view to preventing mistreatment under any pretext.” Following similar reasoning, Human Rights Watch and other NGO human rights groups have similarly urged that the ICCPR-protected “rights to personal autonomy and physical integrity” are prima facie violated by COE countries’ sterilization requirement for trans* people. As one group of NGOs agreed in its response to the Special Rapporteur report, “[r]equiring an

95. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].
96. Id., preamble.
97. Id. art. 1.
98. Report on Torture, supra note 9, ¶ 88.
99. Id. ¶ 78.
100. Id. summary.
102. HUMAN RIGHTS WATCH, CONTROLLING BODIES, supra note 5, at 55.
individual to be sterilized in order to secure gender affirming documentation necessary to interact safely and productively in his or her daily life cannot reasonably be classified as a voluntary or non-coercive condition.\textsuperscript{103}

Like the Special Rapporteur, other UN bodies have concluded that international human rights norms apply to the specific context of trans* people. For example, the UN Human Rights Council has urged signatories to the ICCPR to “recognize the right of transgender persons to a change of gender.”\textsuperscript{104} In so doing, the UN Human Rights Council cited ICCPR Article 2 (States’ obligation not to discriminate in affording rights protected by the ICCPR), Article 16 (right to recognition as persons under the law), Article 17 (right to noninterference with privacy and family), Article 23 (right to found a family), and Article 26 (equality and nondiscrimination).\textsuperscript{105}

The United Nations High Commissioner for Human Rights also issued a report in 2011 recommending that Member States “[f]acilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights.”\textsuperscript{106} The report noted with concern that “[r]egulations in countries that recognize changes in gender often require, implicitly or explicitly, that applicants undergo sterilization surgery as a condition of recognition,” and that “[s]ome States also require that those seeking legal recognition of a change in gender be unmarried, implying mandatory divorce in cases where the individual is married.”\textsuperscript{107} This report was the result of the first ever LGBTQ-specific resolution passed by the UN in 2011, a Human Rights Council resolution that specifically urged “the United Nations High Commissioner for Human Rights to commission a study . . . documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity.”\textsuperscript{108}

Similarly, a recent United Nations Development Programme’ Discussion Paper noted that “many trans people are required to undergo forced sterilization

\begin{itemize}
\item \textsuperscript{104} Human Rights Comm., Concluding Observations (Ireland), ¶ 8, U.N. Doc. CCPR/C/IRL/CO/3 (30 July 2008).
\item \textsuperscript{105} Id.
\item \textsuperscript{107} Id. ¶ 72; see also id. ¶ 73 (noting Human Rights Committee’s “concern”).
\item \textsuperscript{108} H.R.C. Res. 17/19, \textit{supra} note 77, ¶ 1.
\end{itemize}
in order to gain legal recognition of their gender identity,” and that “[t]his has a profound impact on their bodily autonomy and right to found a family” as protected by international human rights conventions. 109 The Discussion Paper also suggested that mandatory divorce requirements contravene “[t]he right to recognition before the law . . . set out in core human rights treaties” and “create a conflict between a person’s right to marry and their privacy, which includes their self-determined sexual and gender identity.” 110

Most recently, the Office of the High Commissioner for Human Rights, in combination with several other UN bodies and NGOs including the World Health Organization issued an interagency statement that condemned forced sterilization as a violation of human rights and a derogation of “States parties’ obligation . . . to respect the rights of . . . [among others] transgender . . . .persons.” 111 The statement explained: “these sterilization requirements run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender and intersex persons.” 112

Many international NGOs have long advocated for broadly interpreting existing international human rights norms to set implied standards for the respectful treatment of LGBTQ persons. Perhaps most notably, the influential International Commission of Jurists (ICJ) produced the extensive 2006 Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles). 113 While the Yogyakarta Principles are not binding interpretations of international law because the ICJ is merely an advisory NGO, they are nevertheless influential, and the ICJ’s impartial interpretation of law is often accorded respect in the international sphere and amongst domestic actors. 114 The Yogyakarta Principles’ firm basis in extant international law is further bolstered by “extensive citations to existing legal authority supporting each of the provisions in the final text.” 115


110. Id. at 24.


112. Id. at 7.

113. YOGYAKARTA PRINCIPLES, supra note 29.


115. ALSTON & GOODMAN, supra note 21, at 231.
The most relevant Yogyakarta Principle for trans* rights is Principle 3, “The Right to Recognition Before the Law.” Principle 3 explains:

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.116

The text of Principle 3 further explains that to comply with this Principle, States must “take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex—including birth certificates, passports, electoral records and other documents—reflect the person’s profound self-defined gender identity.”117 States must also “ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned,” and “that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy.”118

In sum, though extant international human rights conventions have only recently begun to be interpreted by official UN entities in a manner that protects the rights of trans* people who wish to change their legal gender without forced sterilization or divorce, there are several strong arguments that such practices do impermissibly conflict with binding international human rights norms. As the next section will demonstrate, this is also true of regionally protected human rights within the COE.

B. Regional Context: The Development of Trans* Rights in the European System

This section will briefly survey the European regional human rights norms that have been interpreted generally to create individual rights to bodily integrity and decisional autonomy, and that could be applied to protect trans* people’s interests specifically. Like the international authorities covered in the prior section, the European regional human rights system has recognized several individual human rights norms that could be interpreted to protect the rights of trans* people seeking to be free from compulsory sterilization and divorce. For trans* people in COE countries, there are therefore at least two independent sources of international law that militate in favor of barring enforcement of these

117. Id.
118. Id. at Principle 3, at 12.
laws. And, given that the EcCtHR has the capacity to consider a greater volume of individual complaints against States than the international human rights treaty bodies, these regional norms are particularly important for vindicating individual persons’ rights.119 In addition, the ECtHR’s decisions interpreting the ECHR are precedential, which means that one favorable decision interpreting the treaty to protect trans* people from specific kinds of discriminatory State behavior could have large ripple effects.120

The ECHR protects many of the same rights as the international human rights documents discussed in the previous section.121 ECHR Article 14 sets forth an expansive prohibition of discrimination that applies to all other rights enumerated in the European Convention, mandating that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”122

ECHR Article 8 protects a broad right to privacy and respect for family life for all persons in the signatories’ jurisdictions: “[e]veryone has the right to respect for his private and family life.”123 Article 8 further states that “[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”124 In this way, Article 8 is even more protective of these rights than comparable provisions in the UDHR or the ICCPR, in that it limits the kinds of justifications States Parties can advance to defend their interference with individuals’ privacy and family life. ECHR Article 8 is complemented in part by Article 12, which provides that men and women of marriageable age have the right to marry and “to found a family.”125 Finally, in language identical to the antitorture provisions in the UDHR, the ICCPR, and the CAT, ECHR Article 3 states that “no one shall be subjected to torture or to inhuman or degrading treatment.”126

Precedential decisions of the European Court of Human Rights interpreting the application of the ECHR to Member States shed some light on how that

119. See Steiner et al., supra note 15, at 938.
121. See supra Part II.A.
122. ECHR, supra note 14, Art. 14.
123. Id.
124. Id.
125. Id. art. 12.
126. Id. art. 3.
Court’s jurisprudence might continue to evolve to protect the rights of trans* people. Importantly, the ECtHR held in Case of I.G and Others that the unconsented sterilization of a cisgender woman in the course of a Caesarean section was degrading treatment in violation of ECHR Article 3. The Court rested its 2012 decision in large part on the fact that the plaintiff’s tubal ligation “sterilisation was not a life-saving intervention,” and that “neither the applicant’s nor her legal guardians’ informed consent had been obtained prior to it.” Indeed, because the plaintiff was a minor at the time of her sterilization, she could not legally give consent even if she had been properly advised about the procedure, which she was not. The Court concluded:

Taking into account the nature of the intervention, its circumstances, the age of the applicant and also the fact that she belongs to a vulnerable population group . . . the Court considers that the treatment complained of attained a level of severity which justifies its qualification as degrading within the meaning of Article 3.

The I.G. court further explained that:

[A] person’s treatment is considered to be “degrading” when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority; it may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others.

The Court also held that the I.G. plaintiff’s sterilization violated her right to respect for private and family life, explaining that “the respondent State failed to comply with its positive obligation under Article 8 to secure through its legal system the rights guaranteed by that Article, by putting in place effective legal safeguards to protect the reproductive health of . . . women.”

The plaintiff’s sterilization might also have been found to be a violation of Article 12, which, again, states that men and women have the right to marry and “to found a family.” However, though the applicant did raise Article 12, the Court declined to reach its application because it had already found her

---


128. Id. ¶ 122.

129. Id.

130. See id. ¶ 16 (“The first applicant submitted that her sterilisation had been contrary to Slovakian law, as at the relevant time she was 16 years old and her legal guardians had not consented to the operation.”).

131. The procedure was carried out on the applicant during the Caesarean surgery, without her foreknowledge. See id. ¶ 9. It was only after the fact that doctors asked her to sign a sterilization consent form, and she “was [falsely] told [at the time] that she had to sign the document because she had undergone a Caesarean section and all women who had Caesarean sections had to sign it.” Id. ¶ 12.

132. Id. ¶ 123.

133. Id. ¶ 121.

134. Id. ¶ 144.

135. ECHR, supra note 14, art. 12.
sterilization was a substantive violation of other Articles, particularly Article 8.136 This suggests, perhaps, that the Court was not willing to rule that compulsory sterilization necessarily infringes on the right to marry and found a family, and preferred to ground the violation in the right to respect for private and family life. In a similar decision, Case of V.C., the Court also declined to find a violation of Article 12:

[T]he sterilisation performed on the applicant had serious repercussions on her private and family life, and the Court has found that it was in breach of Article 8 of the Convention. That finding absolves the Court from examining whether the facts of the case also give rise to a breach of the applicant’s right to marry and to found a family.137

The ECtHR has decided a small number of cases specifically applying the ECHR’s protections to trans* people. The most favorable decision to date is Goodwin v. United Kingdom in 2002.138 In that case, the applicant was a heterosexual transwoman who had undergone gender-confirming surgery and wanted to be able to marry a cisgender man. At the time, the UK did not allow trans* persons to change their legal sex and limited marriage to opposite-sex couples. Because the applicant’s legal sex was still recorded as “male,” she was unable to marry her male partner.139 The Court recognized that:

serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity. The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court’s view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.140

Accordingly, the Court held that the UK’s denial of the applicant’s ability to update her official legal gender categorization was a violation of both Article 8 and Article 12 because this prevented her from marrying.

Unfortunately, there are several other ECtHR decisions involving trans* applicants that are distinctly unfavorable to trans* persons wishing to challenge discriminatory legal gender-change requirements. In a 1997 decision, Roetzheim v. Germany, the ECtHR held that requiring a trans* person to prove sterility as a prerequisite to changing their legal gender was not a violation of Article 8 of the ECHR (respect for private and family life).141 In that case, the applicant was a transwoman German citizen who wanted to update her legal gender

139. Id. ¶¶ 21, 93, 95, 104.
140. Id. ¶ 77.
categorization but did not wish to undergo genital surgery that would leave her irreversibly sterile, as the German gender-change law then in effect required. She complained that “the requirements under the [version of the] German Transsexuals Act [then in effect] for a change of the civil status of transsexuals, [which required proving] . . . inability to procreate and gender reassignment surgery[,] amount[ed] to a violation of [her] right to respect for [her] private life under Article 8 of the Convention.” 142 In rejecting her claim, the Court reasoned that there was “remaining uncertainty as to the essential nature of transsexualism,” and that it could be “extremely complex” for a State to recognize a person’s preferred gender without such surgeries.143

Relying on a narrow, external-genitalia-focused definition of “sex,” the ECtHR agreed with the State that it was “not required to treat persons, who, according to physical factors, still belonged to the original sex and were still able to procreate as member of this sex, in every respect as members of the other sex, corresponding to their psychological situation.”144 The Court also appeared to be particularly concerned that the applicant wanted to retain her fertility, noting that “following the dissolution of [her] first marriage, the applicant married again in 1994 and had another child.”145 Impliedly, the Court disapproved of the applicant’s desire to found a family, a right that, it is worth noting, is protected elsewhere in the ECHR by Article 12.146 The Court concluded that, in allowing for recognition of a person’s legal gender change only after proving genital surgeries that resulted in infertility, “the respondent State has in principle taken appropriate legal measures in this field.”147

The ECtHR also distinguished precedent finding that States have an obligation to recognize the preferred gender identity of “post-operative transsexuals”: “In the above-mentioned cases, the Convention organs were faced with complaints brought by post-operative transsexuals, while the present case relates to a transsexual refusing gender reassignment surgery.”148 As such, despite Goodwin’s recognition of some limited rights for trans* persons who have undergone surgeries, Roetzheim’s approval of surgery as a prerequisite to obtain those rights is likely still good law.

The ECtHR also has unfavorable precedent regarding mandatory divorce requirements. In H. v. Finland, the Court considered a Finnish law requiring that applicants for a change of legal sex categorization be unmarried or that their partners consent to their marriage being converted into a civil partnership. The

142. Roetzheim, App. No. 31177/96. The text has been updated to correct for the fact that the ECtHR referred to the applicant, Dora Roetzheim, by the incorrect pronoun (the ECtHR decision uses male pronouns, though the applicant identified as a woman).
143. Id.
144. Id.
145. Id.
146. The applicant did not raise an Article 12 complaint.
148. Id.
applicant in the case, a married transwoman, complained that the law violated her rights under the ECHR: since “the applicant’s wife did not give her consent to the transformation of their marriage into a civil partnership . . . [because both wanted to remain married], the applicant’s new gender could not be introduced in the population register.”149 Essentially, the applicant urged, the law forced her to choose between remaining married to her wife or having her identity documents match her gender identity, infringing her right to respect for private and family life.150

Though the Court agreed that the law did represent an interference with the applicant’s private and family life, it nevertheless concluded that the law did not violate the ECHR. Specifically, Article 8 was not violated, the Court explained, because “the interference . . . pursued the legitimate aim of protecting the ‘health and morals’ and the ‘rights and freedoms’ of others, as argued by the Government.”151 What “health and morals” and “rights and freedoms of others” were precisely in need of protection was, however, left unsaid.152

The Court also explained that its decision was required by adverse precedent, because “according to its case-law, Articles 8 and 12 do not impose an obligation on Contracting States to grant same-sex couples access to marriage.”153 Thus, the Court opined:

[There are two competing rights which need to be balanced against each other, namely the applicant’s right to respect for her private life by obtaining a new female identity number and the State’s interest to maintain the traditional institution of marriage intact. Obtaining the former while remaining still married would imply a same-sex marriage between the applicant and her spouse, which is not allowed by the current legislation in force in Finland.154]

While the Court has elsewhere had occasion to revisit its prior determinations as to what the ECHR requires of COE Member States,155 it declined to do so in this case, again hewing to the rule that Articles 8 and 12 do not create a right to same-sex marriage.

Although the outcome of H. v. Finland was a disappointment to trans* rights activists, at least some saw a silver lining in the Court’s reasoning: “the court acknowledged that private and family life was affected. It also reiterated that member States have only narrow leeway when setting conditions for recognizing a person’s gender identity. We remain optimistic that excessive

150. Id. ¶ 13.
151. Id. ¶ 45.
152. See Divorce Requirement is Interference in Private Life, supra note 7. As Richard Köhler, TG EU Policy Officer, noted, “It remains incomprehensible how ‘health and morals’ and ‘rights and freedoms’ of others’ could be threatened by the intact family life of Ms H.”
154. Id. ¶ 48.
conditions trans people are still exposed to will eventually be banned in Europe.\footnote{Divorce Requirement Is Interference in Private Life, supra note 7.}

The next Part of this Note will consider two examples of domestic legal reform as alternatives to relying on the ECtHR to robustly protect trans* people’s ECHR rights, given that the ECtHR has been slow to reassess its precedent and so far unwilling to hold that compulsory sterilization and mandatory divorce are violations of the COE’s human rights norms.

III.
COE EXAMPLES: RECENT DEVELOPMENTS IN SWEDEN AND THE UNITED KINGDOM

The following subsections will consider recent developments regarding the rights of trans* people in two COE countries, Sweden and the United Kingdom, and analyze whether these developments have brought them into line with international and regional human rights law as a normative matter. Specifically, this section will analyze two developments: first, Sweden’s Administrative Court of Appeals 2012 decision that a statute mandating proof of sterilization to change one’s legal gender was in conflict both with the Swedish constitution and with the ECHR; and second, the UK’s 2013 amendments to its law regarding gender identity, which removed the requirement that married trans* people dissolve their marriages before proceeding with their legal change of gender categorization, and instead instituting a spousal notification and permission requirement. This section will conclude that, though these reforms are positive, more work remains to be done to ensure that these and other countries continue to afford trans* people the rights and protections to which they should be entitled under domestic, regional, and international law.

A. Sweden: Applying Domestic Law Principles and International and Regional Human Rights Norms To Strike Down Discriminatory Sterilization and Divorce Requirements

I am lucky with my body, for me it’s possible to live as a woman without surgery and without hormones. Why then should I subject myself to a surgeon’s scalpel? Why take hormones for the rest of my life, when I don’t know what the side effects might be? . . . It should be up to each individual to decide what solution they adopt. To me, it’s unacceptable that if I want to change the M in my passport into an F, the state decides for me how I must alter parts of my body.\footnote{Human Rights Watch, Controlling Bodies, supra note 5, at 6 (alteration in original).}

Sweden ratified the ECHR on April 4, 1952; it entered into force there in March 1953.\footnote{Convention for the Protection of Human Rights and Fundamental Freedoms: Chart of Signatories and Ratifications, Council of Europe, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=04/02/2013&CL=ENG (last visited Jan. 24, 2014) [hereinafter http://scholarship.law.berkeley.edu/bjil/vol33/iss1/1]}. The country also ratified the ICCPR on September 29, 1967,
and the treaty entered into force on December 6, 1971;\textsuperscript{159} the CAT was ratified on February 4, 1985 and entered into force on January 8, 1988.\textsuperscript{160} Though Sweden treats the ECHR as “an accepted source for interpretations of . . . [national] constitutional law,” it does not consider it a mandatory source of authority on Swedish law; however, Sweden does recognize the ECHR as a legally binding treaty internationally.\textsuperscript{161}

Until December 2012, the Swedish statute that controlled the ability of trans* persons to update their legal sex, Law 1972:119, required that “persons wishing to change their [legal] gender must undergo sterilization or else be lacking in the ability to reproduce in order to be eligible for the change.”\textsuperscript{162} It also required that applicants be Swedish nationals and that they be either divorced or single for their legal sex categorization to be changed.\textsuperscript{163} All three of these requirements were removed as a result of the Swedish Administrative Court of Appeal’s ruling in December 2012 that the provisions were in conflict with the Swedish Constitution and the ECHR.\textsuperscript{164} The Administrative Court of Appeal grounded its decision in part in the Swedish Constitution, but also in Articles 8 and 14 of the European Convention.\textsuperscript{165}

Under the old statutory regime, many Swedish trans* persons chose to wait to undergo the required 1972:119 sterilization procedure until after they had had children, even though this delayed their ability to legally change their gender categorization on their State identification documents and thus prolonged their exposure to potential harassment arising from the mismatch between their external gender presentation and their official identity documents.\textsuperscript{166} For those Swedish trans* persons who wished to have biological children and also suffered from the psychological condition of gender dysphoria,\textsuperscript{167} this also would mean enduring several years more of sometimes severe mental


\textsuperscript{163} Id.

\textsuperscript{164} Id.

\textsuperscript{165} Id.


\textsuperscript{167} See Grant, supra note 36 and accompanying text.
anguish. Though from a cisgender person’s perspective it might not seem especially onerous to have to wait to update one’s official documentation, as noted in section I above, the ubiquity of gender in all aspects of life means that mismatches between official documents and gender presentation subject trans* people to a serious, daily risk of ridicule and harassment, adverse employment consequences, and staggering rates of bias-based violence.

One former Council of Europe Commissioner for Human Rights explained his view that sterilization requirements such as those in former law 1972:119: clearly run counter to the respect for the physical integrity of the person. To require sterilisation or other surgery as a prerequisite to enjoy legal recognition of one’s preferred gender ignores the fact that while such operations are often desired by transgender people, this is not always the case. Moreover, surgery of this type is not always medically possible, available, or affordable without health insurance funding. Yet the legal recognition of the person’s preferred gender identity is rendered impossible without these treatments, putting the transgender person in a limbo without any apparent exit.

Happily, Sweden was able to resolve the conflict between its laws, its aspirational commitment to human rights, and binding international and regional human rights standards by applying international law in domestic courts. That the Swedish Administrative Court of Appeal’s decision was grounded both in Article 8 (respect for private and family life) and in Article 14 (prohibition of discrimination) is especially important. This fact establishes that the sterilization requirement is not merely a violation of privacy, but is also an action that involves discrimination against trans* people, thereby recognizing that these laws represent official animus against a vulnerable population. It is also notable that the Swedish court was more willing to recognize that the law violated Article 8 of the ECHR than the European Court of Human Rights was in Roetzheim. This discrepancy may be in part because Roetzheim was decided in 1997; during the intervening years, public opinion regarding the treatment of trans* people has shifted significantly. But it may also demonstrate

168. Cf. CAT, supra note 95, art. 1 (““T[ort]ure’ . . . means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind . . . .”).
169. See HUMAN RIGHTS WATCH, CONTROLLING BODIES, supra note 5, at 13, 36–50.
170. Commissioner For Human Rights, supra note 1, at 19.
171. Commentators have noted the irony that, before law 1972:119 was struck down, “one of Europe’s most progressive nations had one of the continent’s most repressive policies on transgender people.” Rebecca Nelson, Transgender People in Sweden No Longer Face Forced Sterilization, TIME (Jan. 14, 2013), http://newsfeed.time.com/2013/01/14/transgender-people-in-sweden-no-longer-face-forced-sterilization/. Indeed, Sweden appears to have been one of the drafters of the first UN resolution specific to human rights and sexual orientation and gender identity. Compare Human Rights Council Rev. Draft Res. 17/L.9/Rev.1, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 15, 2011) (drafted by Greece, Ireland, France, Norway, Slovenia, South Africa, Sweden, Switzerland); with H.R.C. Res. 17/19, supra note 77.
172. See Zeldin, supra note 162.
173. See supra notes 141–148 and accompanying text.
that domestic reform may be a faster and more promising route for the protection of trans* people’s human rights, especially when the ECtHR appears so far to be unwilling to revisit its unfavorable precedent.

The Administrative Court of Appeal’s decision to ground its holding not only in international law but also the Swedish Constitution also bolsters the legitimacy of the decision from the domestic perspective. Specifically, the court found that the law ran afoul of Chapter 2, Article 6, of the Swedish Constitution, which states in relevant part:

Everyone shall be protected in their relations with the public institutions against any physical violation . . . . [E]veryone shall be protected in their relations with the public institutions against significant invasions of their personal privacy, if these occur without their consent and involve the surveillance or systematic monitoring of the individual’s personal circumstances.

As an official press release from the Swedish court system explained, the Administrative Court of Appeal held that “the sterilization requirement can no longer be justified by . . . today’s values, that [the] requirement is not . . . voluntary . . . and that [the law] is discriminatory in relation to . . . transsexuals.”

The court’s decision was widely celebrated by the LGBTQ community. But given that the court was willing to hold that citizens’ compliance with the law’s sterilization requirement was not truly voluntary, it is perhaps surprising that the court did not find that the law also violated ECHR Article 3, which states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Following the ECtHR’s decision in Case of I.G. that the unconsented sterilization of a cisgender woman was degrading and therefore a violation of Article 3, it would seem a logical step to hold that the involuntary sterilization of trans* people is likewise a violation of Article 3. But perhaps it was more politically palatable for the court to base its decision in violations of privacy than in human dignity and bodily integrity.

It is also notable that the court did not base its ruling in the nondiscrimination and equal-protection principles of the Swedish Constitution, but rather only in the nondiscrimination principles of ECHR.

---

174. See Zeldin, supra note 162.
177. See Nelson, supra note 171.
178. See supra notes 127–136 and accompanying text.
179. See SWEDISH CONSTITUTION, supra note 175, 2:12 and 2:13 (“Art. 12. No act of law or other provision may imply the unfavourable treatment of anyone because they belong to a minority
Article 14. This was surprising, and perhaps disappointing, because it could have strengthened the ‘court’s message that such laws are not merely invasions of privacy but also represent discriminatory, unequal treatment by the State. Though the Administrative Court of Appeals could have tied its ruling to several more civil rights recognized domestically and regionally, its decision is a significant step that demonstrates the importance of a regional human rights treaty even when the ECtHR, its supervisory organ is slow to interpret its provisions in a progressive manner.

B. The United Kingdom: From Mandatory Divorce to Spousal Consent

The United Kingdom ratified the ECHR on March 8, 1951; it entered into force there on September 3, 1953. The UK also ratified the ICCPR on September 16, 1968, which entered into force on May 20, 1976; it ratified the CAT on March 15, 1985, which it entered into force on December 8, 1988. For many years, the United Kingdom recognized the ECHR and other ratified international treaties as binding, but not self-executing. However, “since coming into force on 2 October 2000, the Human Rights Act (HRA) has made rights from the ECHR (the Convention rights) [directly] enforceable in [the UK’s] own courts.”

The UK’s Gender Recognition Act of 2004 (GRA) was introduced in response to the ECtHR decision in Goodwin v. United Kingdom, which held the UK’s refusal to provide a route for trans* people to change their legal sex categorization put the State in violation of Articles 8 and 12 of the ECHR. However, though the ECtHR in Goodwin stressed that trans* people possess the same right under the ECHR to respect for private and family life and to marry and found a family as cisgender people, the original GRA contained provisions in Section 5 that required that trans* people seeking a change of legal gender

---

180. ECHR Signatories, supra note 158.
181. ICCPR Signatories, supra note 159.
182. CAT Signatories, supra note 160.
186. See supra notes 138–141 and accompanying text.
status prove that they were single (i.e. not married or in a domestic partnership).187

In practice, the requirements of Section 5 of the GRA meant that married trans* people had to undertake a series of administrative steps: (1) obtain an Interim Gender Recognition Certificate, (2) annul their marriages, (3) prove the marriage had been annulled to obtain a full Gender Recognition Certificate (GRC)—a process that could take months—and then (4) enter a civil partnership with their former spouse.188 In the interim period represented by step three, both partners would vulnerable, as they would no longer have any formal legal relationship to one another. The government’s position was that these steps were required because same-sex couples could not marry under UK law but could only enter civil partnerships.

Married trans* people who did not wish to convert their UK marriage into a civil partnership were thus forced under the original GRA to choose between remaining married and being able to update their legal sex categorization. As the advocacy group GIRES explained, the government’s position seriously disadvantaged trans* couples:

Remaining married deprives the trans spouse of the opportunity to obtain a GRC and the civil rights and protections that it affords; annulling the marriage has a range of negative impacts . . . : annulment destabilises the family unit, causing immense stress to spouses who have no legal right to have input into the process. . . . [T]here are [also] immediate financial implications that may affect tax, shared property and small businesses, inheritance and pension arrangements; the remedy of civil partnership is not an acceptable solution to all couples . . . [in

187. The Gender Recognition Act, 2004, c.7 (U.K.), section 5, states, in relevant part:
(4) An application [by a person who has been married for a Gender Recognition Certificate] must include evidence of the dissolution or annulment of the marriage and the date on which proceedings for it were instituted, or of the death of the spouse and the date on which it occurred.
(5) An application under subsection (2) is to be determined by a Gender Recognition Panel.
(6) The Panel—(a) must grant the application if satisfied that the applicant is neither married nor a civil partner, and (b) otherwise must reject it.

188. GIRES, United Kingdom Gender Recognition Act, supra note185, explains that:
The act allows the creation of civil partnerships between same sex couples, but a married couple that includes a transgender partner cannot simply re-register their new status. They must first have their marriage annulled, gain legal recognition of the new gender and then register for a civil partnership. Whilst the drafters of the legislation may have expected this to . . . be a simple paper exercise, the courts take the view this is like any divorce with the associated paperwork and costs. Once the annulment is declared final and the GRC issued, the couple then have to make arrangements with the local registrar to have the civil partnership ceremony; they have four weeks grace. There are also a number of legal traps awaiting the unwary as the marriage is ended and a completely new arrangement brought into being which does not in all circumstances (such as wills) necessarily follow on seamlessly (or even contemporaneously).

part because it cannot necessarily be achieved in a short time-frame, during which hiatus both partners, but especially the non-trans partner and children, may be financially vulnerable . . . 189

The GRA was amended by the UK Parliament as part of the Marriage (Same Sex Couples) Act of 2013 (2013 Marriage Act), which extended marriage rights to same-sex couples for the first time.190 However, instead of simply repealing singlehood or annulment/divorce requirements, the 2013 Marriage Act replaces them with new spousal consent and notice provisions:

If the applicant is married . . . an application [for a Gender Recognition Certificate] False . . must also include—(a) a statutory declaration by the applicant’s spouse that the spouse consents to the marriage continuing after the issue of a full gender recognition certificate (“a statutory declaration of consent”) (if the spouse has made such a declaration), or (b) a statutory declaration by the applicant that the applicant’s spouse has not made a statutory declaration of consent (if that is the case). . . . If an application includes a statutory declaration of consent by the applicant’s spouse, the Gender Recognition Panel must give the spouse notice that the application has been made.

The new version of the GRA, as amended by the 2013 Marriage Act, came into effect on July 17, 2013.191

So far, most commentators writing about the passage of the 2013 Marriage Act have focused only on its implications for (mostly cisgender) same-sex couples, which are primarily positive, in that same-sex couples are now no longer subject to official discrimination and exclusion from the “marriage” label.192 And in many ways, the new GRA is an improvement over the old law for trans* people as well: it no longer puts trans* people and their spouses in the untenable position of having to choose between remaining married versus having the trans* spouse’s correct gender identity reflected on their official documentation.

However, as some trans* advocates have noted, the new law’s spousal notice and consent requirements are still deeply problematic. First, there are very few, if any, other situations in which an adult individual’s relationship vis-à-vis the State is mediated through another person (here, the spouse) who retains a veto power. As one editorial explained:

Imagine: you want to set up a new company but the law requires you to have the written consent of your wife; or you’ve just got pregnant, but you haven’t got a piece of paper with your husband’s signature on it stating he’s OK with that; . . .

189. GIRES, United Kingdom Gender Recognition Act., supra note 185.
192. See, e.g., Same-Sex Weddings to Begin in March, BBC (Dec. 10, 2013), http://www.bbc.com/news/uk-25321353 (quoting a leader of a British LGBTQ-rights group referring to the new law as a “historic step” and noting “[t]he Conservative, Labour and Liberal Democrat leaderships all backed the proposals” to change the law).
Each of these actions . . . may well change the nature of your existing marriage quite considerably. . . . But the requirement that we need written consent from our spouse would be, quite rightly, treated as an outrage. Yet that is exactly what is being proposed in the UK government’s same-sex marriage bill for England and Wales for trans people in existing marriages.193

The spousal consent requirement is not only discriminatory because it is a condition that trans* people alone are subject to, but also because it makes trans* people more vulnerable to spousal abuse: “The concept of uncooperative spouses, especially when there are children involved, is not unknown amongst divorce lawyers. Many trans people have marriages which break up at the point of disclosure or transition. Some of these relationships become incredibly hostile, with the non-trans spouse actively blocking and ignoring letters.”194 As the editorial further noted, Parliament’s decision “[t]o delay a trans person’s gender recognition (which may impact them financially and emotionally) simply because an uncooperative spouse is already deliberately ignoring letters appears particularly cruel.”195

It is also troubling that the nondiscriminatory alternative (i.e. not requiring spousal consent) would be just as effective at protecting a trans* person’s spouse’s rights: if the spouse does not wish to continue their marriage after their partner transitions, they can just apply for divorce (or even annulment, if the annulment grounds are met), since the UK has no-fault divorce. When a less onerous and discriminatory position exists and the government has chosen not to use it, that should trigger especial concern about the government’s motives.

Mandating spousal notice also signals an official distrust of trans* people: it suggests that the government thinks many trans* people might submit fraudulent spousal consent affidavits, because notice must always be given even if the affidavits are submitted. The government’s official stance of suspicion may have dark roots: it likely reflects, wittingly or not, a hoary myth that has long been used to denigrate trans* people, who are still frequently stereotyped as dissemblers or deceivers.196 It also suggests the government presumes most cisgender people would not want to remain married to a trans* person: the notification provision seems to ask, “are you really sure you want to remain married to a trans* person?”

For these reasons, the spousal notice and consent requirements likely violate regional and international human rights norms. Particularly, the notice and consent requirements offend the principles of equal protection and

194. Id.
195. Id.
196. See, e.g., Dylan Vade, Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People, 11 MICH. J. GENDER & L. 253, 288 (2005) (“Transphobia is supported by a belief that doctor-assigned gender is truth and that the self-identified genders of transpeople are not truth but fraud, deception.”).
nondiscrimination. These requirements single out trans* people for different, and worse, treatment than cisgender people who are not required to obtain spousal permission under similar circumstances (e.g. adult name changes), and they represent official State disapproval of trans* people, as discussed above. These requirements arguably violate not only the ECHR’s nondiscrimination provision,\(^\text{197}\) but also the nondiscrimination principles in the ICCPR, which states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status\(^\text{198}\)

The requirements also may run afoul of ICCPR Article 16, which states that “[e]veryone shall have the right to recognition everywhere as a person before the law.”\(^\text{199}\) By allowing spouses to prevent trans* people from being recognized as their preferred identity under the law, the GRA arguably is incompatible with Article 16.

Additionally, the GRA spousal notice and consent requirements are also likely in conflict with ICCPR Article 23, which exhorts that “States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”\(^\text{200}\) This is because the GRA raises the prospect that a trans* spouse could enjoy lesser rights than a cisgender spouse at dissolution, in that the GRA enables a cisgender spouse to withhold consent to the trans* spouse’s gender change to extract a more favorable divorce settlement or custody agreement from the trans* spouse. And the GRA likely also violates ECHR Article 8’s requirement of “respect for private and family life” since the notice and consent requirements represent significant intrusions into the marriages of trans* people and signal State disrespect for those marriages.

Combining these considerations, the GRA also potentially runs afoul of ICCPR Article 7, which states that “[n]o one shall be subjected . . . to cruel, inhuman or degrading treatment.”\(^\text{201}\) The notice provision is degrading in that it signals to trans* people that the government believes they are likely to be dishonest, and the consent requirement is cruel because it means trans* people

\(^{197}\) ECHR, supra note 14, art. 14.

\(^{198}\) ICCPR, supra note 88, art. 26; see also id. art. 2:

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

\(^{199}\) Id. art. 16.

\(^{200}\) Id. art. 23.

\(^{201}\) Id. art. 7.
are placed at the mercy of their cisgender spouses, potentially in the context of a difficult divorce. When the State evinces such official mistrust of and distaste for trans* people, it signals to the general public that similar discrimination by private parties is acceptable as well. Because State disrespect can engender private discrimination and even private violence, it is particularly important for these international norms to be robustly interpreted and applied to prevent States from making trans* people more vulnerable to private abuse.

**CONCLUSION:**

**FORCED STERILIZATION AND MANDATORY DIVORCE LAWS CONSTITUTE VIOLATIONS OF SEVERAL INTERNATIONAL AND REGIONAL HUMAN RIGHTS NORMS AND SHOULD BE RECOGNIZED AS SUCH; DOING SO MAY REQUIRE DEVELOPING LGBTQ-SPECIFIC INTERNATIONAL AND REGIONAL HUMAN RIGHTS TREATIES**

The challenge of protecting the human rights of everyone is to apply a consistent human rights approach and not to exclude any group of people. It is clear that many transgender persons do not fully enjoy their fundamental rights both at the level of legal guarantees and that of everyday life.202

In 2010, the Council of Europe’s Commissioner for Human Rights critiqued forced sterilization statutes as “provisions which demand impossible choices” in describing laws under which “only . . . transgender persons who have undergone surgery and become irreversibly infertile have the right to change their entry in the birth register,” whether or not those persons independently desire to have any gender-confirming surgery at all.203 As trans* human rights advocates have argued, having to choose between being humiliated every day or being unnecessarily sterilized is really no choice at all.204 One advocacy group insists: “The legal requirement of sterility is an abuse that must be denounced in the strongest terms. It is particularly disturbing as it echoes back to the eugenics theories and practices of the late 1930s to the 1970s worldwide, but most notably in Europe.”205 For this reason, it is encouraging that Sweden has abandoned this requirement and was able to do it by applying regional human rights norms and domestic constitutional law in its own courts. This step so also brings Swedish law into line with the country’s

---

204. See GAY JAPAN NEWS, ET AL., supra note 103, at 24 (“Requiring an individual to be sterilized in order to secure gender affirming documentation necessary to interact safely and productively in his or her daily life cannot reasonably be classified as a voluntary or non-coercive condition.”).
aspirations to be a leader on LGBTQ rights at the international level. Sweden, incidentally, was one of the chief sponsors of the first-ever UN resolution on sexual orientation and gender identity in 2011.206

It is also encouraging that the United Kingdom has partially responded to the growing international consensus that mandatory divorce for trans* gender recognition is a violation of several important human rights, including nondiscrimination and the right to respect for private and family life. However, the United Kingdom’s updated GRA continues to violate the human rights of trans* people, particularly their rights to equal protection and nondiscrimination, in that it requires them to obtain spousal permission for an action that is a matter of the trans* person’s self-determination, and does not require spousal permission for similar decisions made by cisgender people. If the UK wants to continue to see itself as a leader on these issues,207 it must continue to strive to update its laws to afford trans* people the same respect and rights as other citizens, as required by international and regional treaties.

More broadly, though these two countries have made some significant progress, the UK’s remaining restrictions and Sweden’s slow recognition process may speak to the failure of extant international and regional human rights systems to institute meaningful domestic reform amongst signatories. Contrary to the International Commission of Jurists’ assumption in drafting the Yogyakarta Principles that extant international human rights treaties are sufficient to protect the rights of trans* and other LGBQ persons,208 I suggest that the country case studies above demonstrate a need to develop a new, LGBTQ-specific human rights treaty. Indeed, history also counsels in favor of adopting an LGBTQ-specific human rights treaty with stronger enumerated rights: much as feminist human rights activists in the 1960s concluded that it was necessary to enact the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to more fully protect the rights of women209 even though extant human rights treaties already laid down “a comprehensive set of rights to which all persons, including women, [were] entitled,”210 so might LGBTQ activists consider promoting a new international

207. See UK Policy, supra note 22 (“We want the UK to be a leader in equality and human rights.”).
208. See YOGYAKARTA PRINCIPLES, preamble, supra note 29, at 9 (“Observing that . . . the application of existing human rights entitlements should take account of the specific situations and experiences of people of diverse sexual orientations and gender identities.”) (emphasis added). See also ALSTON & GOODMAN, supra note 21, at 231 (“The [Yogyakarta] Principles are intended to affirm binding [extant] international legal standards pertaining to LGBT rights . . . [a]mong other things, the Principles helped to counter the argument of detractors that international law lacks any [current] basis for rights relating to sexual orientation and gender identity.”).
209. CEDAW, supra note 12.
human rights treaty to protect the community even though extant international human rights, properly interpreted, do extend to trans* people.

Before CEDAW was adopted, even amongst feminist international human rights authorities, “it was believed that . . . women’s rights were best protected and promoted by the general human rights treaties” and that additional resolutions and specific treaties aimed at, for example, ending domestic violence were helpful, but not necessary.211 Indeed some advocates felt that drafting a convention on the scale of the ICCPR or ICESCR specific to women could be counterproductive, in that it would signal that women were not entitled to the same human rights as men but needed special rights.212

Eventually, however, the drafters of CEDAW concluded that, despite the existence of these universal human rights norms, “women’s humanity [had] proved insufficient to guarantee them the enjoyment of their internationally agreed rights”: “the general human rights regime was not, in fact, working as well as it might to protect and promote the rights of women.”213 Though some critics of CEDAW point out that the treaty is flawed and possibly outdated, and though CEDAW supporters also recognize that “CEDAW is not the perfect answer to achieving gender equity . . . the ratification of CEDAW allows nations to take an important step on the path towards creating greater equality of both opportunity and outcome for women and men.”214

‘The CEDAW drafters’ decision to enumerate minority-specific rights in a new treaty rather than interpreting general human rights norms in favor of minorities reflects a trend in the scholarship on international human rights as well. “While the enumeration of rights was once thought to be detrimental to human rights, more recent scholarship has suggested that, in fact, the clear subdivision of these rights is beneficial in national governance and preservation of civil liberties.”215 The current consensus amongst academics appears to be that failure to enumerate specific rights as nonderogable has led “to significant infringements in basic rights and a large amount of national confusion as to fundamental freedoms.”216 “At this point in our international legal environment, recent constitutional developers and international policy makers have indicated that listing nonderogable rights within constitutions aids in the preservation of liberty.”217 Likewise, international human rights scholars suggest that enumerating specific rights, whether derogable or not, in international treaties

211. Id.
212. Id.
213. Id.
216. Id.
217. Id.
has been essential to ensuring that those rights are honored. This is contrary to one influential strain of American legal thought, according to which detailed enumeration of fundamental rights is counterproductive to preserving those rights. Agitating for LGBTQ-specific human rights treaties, of course, could backfire, in that individual States might vote against ratification, thereby worsening the situation for trans* people in those countries. But if international norms continue to shift towards protecting LGBTQ rights through human rights instruments, the pressure to vote for ratification might be strong enough to carry the day.

Domestic actors in the COE countries that currently erect sterilization and divorce barriers to recognition of trans* people’s preferred gender identity must continue to work to reform their countries’ laws, hopefully abolishing such requirements and ensuring trans* people are able to obtain gender-appropriate governmental identification without stigma or unnecessary delay using domestic political and judicial processes. International and regional actors can assist in this process by more progressively interpreting extant human rights treaties to protect the rights of trans* people not to be compelled to sterilization or divorce. Such interpretations would send a strong message to COE countries that they need to update their laws. It would be particularly important, if the issues are presented to it again, for the European Court of Human Rights to reassess its adverse precedents in Roetzheim v. Germany and H. v. Finland and hold instead that mandatory sterilization and divorce requirements do infringe the ECHR.

Doing so would allow trans* people in other countries to sue reluctant COE Member States in the ECtHR for compliance and possibly obtain reparations within their own countries.

Additionally, as explained above, it would be advisable for LGBTQ activists to seriously consider developing LGBTQ-specific international and regional human rights treaties. Though the UN has taken an important first step in passing the June 17, 2011 Resolution on sexual orientation and gender identity, an LGBTQ-specific treaty would likely be more effective at protecting the rights of trans* people than more resolutions and studies. Such a document could specifically enumerate a right, for example, to change one’s legal gender without undergoing any medical interventions. An LGBTQ-specific treaty would also make it more difficult for COE countries and others to

218. Id.; see also id. at 804 n.65 (noting that such groups as the International Commission of Jurists have recognized that “rights preservation during states of emergency can be aided when the rights are specifically preserved” in the text of a treaty).

219. See, e.g., Mark A. Grabe, Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791, 9 U. PA. J. CONST. L. 357, 359 (2007) (“The Framers of the original Constitution failed to specify what rights the Constitution protected because they did not believe enumeration was an effective strategy for securing fundamental freedoms.”)

220. See supra notes 141–154 and accompanying text.

221. H.R.C. Res. 17/19, supra note 77.
continue to defend such laws domestically in the face of an explicit right to the contrary, enshrined in binding international law.

Though it is certainly difficult to be optimistic about the prospect of the UN or the COE adopting such a treaty in the near future, given the glacial pace at which LGBTQ rights have heretofore been recognized in human rights systems, it is not impossible to imagine that such a treaty could be developed in time. Perhaps patience is warranted, given that the international human rights system itself has been in existence for barely fifty years. And recent strides, though still insufficient, should give hope for continued reforms, they may remind trans* activists that, while “[t]he arc of the moral universe is long, . . . it bends towards justice.”

Leniency in Chinese Criminal Law?  
Everyday Justice in Henan  

Benjamin L. Liebman*

This Article examines one year of publicly available criminal judgments from a basic-level rural county court and an intermediate court in Henan Province in order to better understand trends in routine criminal adjudication in China. I present an account of ordinary criminal justice in China that is both familiar and striking: a system that treats serious crimes, in particular those affecting State interests, harshly, while at the same time acting leniently in routine cases. Most significantly, examination of more than five hundred court decisions shows the vital role that settlement plays in criminal cases in China today. Defendants who agree to compensate their victims receive strikingly lighter sentences than those who do not. Likewise, settlement plays a role in resolving even serious crimes, at times appearing to make the difference between life and death for criminal defendants. My account of ordinary cases in China contrasts with most Western accounts of the Chinese criminal justice system, which focus on sensational cases of injustice and the prevalence of harsh punishments.

The evidence I present provides insight into the roles being played by the Chinese criminal justice system and the functions of courts in that system. This Article also provides empirical evidence that contributes to debates on a range of other issues, including the relationship of formal law to community norms in Chinese criminal justice, the roles of witnesses and lawyers, the function of appellate review, and how the system confronts and handles a range of high-profile topics. My findings also contribute to literature on courts in authoritarian regimes and the evolution of authoritarian

* Robert L. Lieff Professor of Law and Director, Center for Chinese Legal Studies, Columbia Law School. BLiebm@law.columbia.edu.
transparency. This Article provides a base for discussing the future of empirical research on Chinese court judgments, demonstrating that there is much to learn from the volume of cases that have recently become publicly available in China.

TABLE OF CONTENTS

INTRODUCTION ........................................................................................................ 154
I. BACKGROUND: HENAN’S PUSH TOWARD “JUDICIAL TRANSPARENCY” ........ 158
II. FINDINGS ............................................................................................................ 168
   A. Overview ........................................................................................................ 168
      1. County Court ............................................................................................ 168
      2. Intermediate Court .................................................................................... 170
   B. Leniency and Settlement ............................................................................. 174
   C. Overcriminalization and State Interests ...................................................... 189
   D. High-Profile Issues ....................................................................................... 190
      1. Corruption and Financial Crimes ............................................................. 191
      2. Land Disputes ............................................................................................ 192
      3. Social Stability and Protest ....................................................................... 192
      4. Female Defendants and Crimes Within the Family ................................. 193
   E. Lawyers and Legal Arguments .................................................................... 196
   F. Appeals and Rehearings .............................................................................. 204
   G. Roles of Individual Judges .......................................................................... 210
   H. Predecision Detention and Bail .................................................................... 210
III. IMPLICATIONS AND ANALYSIS ..................................................................... 211
   A. Methodology and Empirical Findings .......................................................... 211
   B. Leniency and the Roles of Chinese Criminal Law ....................................... 213
   C. The (D)evolving Roles of China’s Courts .................................................... 217
   D. Authoritarian Transparency ......................................................................... 220
CONCLUSION ........................................................................................................... 222

INTRODUCTION

English-language scholarship on the Chinese criminal justice system largely focuses on major cases and harsh punishments: “strike hard” campaigns, capital cases, torture, and sensational cases of wrongful convictions. With few exceptions, the term “leniency” rarely factors into Western accounts of criminal justice in China. When it does, it is principally in the discussion of national policies embracing the combination of leniency and harsh punishment, kuanyan xiangji, or leniency for those who confess, rather than empirical study of court
practices. In contrast, this Article shows that leniency is a key characteristic of everyday Chinese criminal justice, particularly in rural areas.

This Article examines one year of publicly available criminal judgments from a basic-level county court and an intermediate court in Henan Province in order to better understand criminal justice in rural China and in small towns and mid-sized cities of the country. I supplement my analysis of cases with interviews of judges, academics, and lawyers in Henan. I have two primary goals. The first is to develop an understanding of trends in basic-level criminal adjudication in China. I aim to paint a picture of what ordinary crime and criminal justice looks like in one county and one municipality in China. What emerges is an account of everyday criminal justice in China that is both familiar and striking: a system that treats serious crimes, in particular those affecting State interests, harshly, while at the same time practicing leniency in more routine cases. Most significantly, examination of more than five hundred court decisions shows the vital role that settlement plays in Chinese criminal cases today. Defendants who agree to compensate their victims receive strikingly lighter sentences than those who do not. Whether or not a settlement has been reached is far more important to the resolution of a case than more traditional legal factors, including legal arguments and evidence presented. Although the importance of settlement has been noted in prior Chinese language scholarship, no prior work has examined the practice through the study of court dockets or a large volume of case decisions. My dataset also allows me to examine the role of intermediate courts in trying major crimes and in reviewing appeals from lower courts. Again, the findings are surprising. Appellate courts are far more


2. In China the municipality, or shi, is the primary subprovincial governance unit. A municipality generally includes both extensive rural areas and county towns, administered by county governments, and urban areas, administered by district governments.

3. The most detailed and important prior work in English on the Chinese criminal justice system looks at a selection of cases from a range of different courts but does not examine every case from any individual jurisdiction. See Mike McConville, Criminal Justice in China: An Empirical Inquiry 40 (2011).

4. China’s court system is divided into four tiers: basic courts at the county (in rural areas) or district (in urban areas) level, intermediate courts at the municipality level, provincial high courts, and the Supreme People’s Court. The vast majority of cases are tried in basic-level courts, with a right to a single appeal to an intermediate court. But serious cases, including criminal cases in which a defendant faces a potential death sentence or life imprisonment, are tried in intermediate courts with a single appeal to the provincial high court. The State is represented by the procuratorate in criminal cases. The procuratorate may appeal verdicts in criminal cases regardless of the outcome in the first-instance court; there is no bar to the procuratorate appealing nonguilty verdicts or to arguing that a lower court was too lenient toward a defendant. Decisions become final after a decision on appeal is issued (or after the time for an appeal has expired). But courts may also decide to retry cases at a later date through retrial (zaishen) procedures. Courts also must retry a case if requested to do so by the procuratorate. Litigants may request a rehearing within two years of a final decision. There is no time limit on rehearings initiated by the courts or procuratorates. In practice this means
aggressive in policing lower-court judgments than is commonly assumed. Likewise, settlement plays a role in resolving even serious crimes, at times appearing to make the difference between life and death for criminal defendants.

My second goal is methodological. Until recently, Chinese criminal judgments were either difficult or impossible to obtain, especially for non-Chinese researchers. Those who did obtain such opinions largely relied on friends and colleagues with connections to local courts. Within the span of just a few years this situation has changed dramatically: in Henan Province alone, tens of thousands of criminal judgments are now available online. In 2013, China’s Supreme People’s Court (SPC) called on courts nationwide to follow the Henan example and place most judgments online. The reasons behind this sudden embrace of transparency are complex (and certainly do not include facilitating research by scholars, Chinese or foreign). Nevertheless, the widespread availability of large volumes of criminal judgments raises the question of what can actually be learned from reading court opinions in China. Chinese and Western scholars have generally assumed Chinese criminal judgments tell us very little about either the facts or reasoning behind a case. To be sure, much is missing from these decisions. The task of reading contemporary criminal judgments is at times akin to reading Qing Dynasty cases: readers are left to speculate about the facts of the case and behind the scenes interactions among the courts, the procuratorate, and the police. Cases are written in a standard format and generally emphasize outcomes, not analysis. Certain cases, most notably death sentences, remain unavailable and we know little about those that are not made public. Nevertheless, this Article demonstrates there is much to learn from publicly available cases, including about the role of settlement, the types of sentences imposed, the legal arguments made, and the roles of lawyers. Even relatively minor and simple case decisions generally provide information about the defendant, the crime charged, alleged facts, evidence, lawyer and procuratorate attendance and arguments, and outcome, including fines and sentences. This Article is the first step toward exploring what scholars can learn from the huge volume of material now publicly available.

The evidence I present provides insight into the roles being played by the Chinese criminal justice system, the functions courts play in that system, and the meaning of leniency in Chinese criminal practice. My findings also offer a baseline for evaluating future changes to the Chinese criminal justice system, in particular the effect of the 2012 revisions to the Criminal Procedure Law.

that after the two-year period has run litigants seeking to reopen cases protest or petition to courts or procuratorates in an attempt to convince them to initiate rehearings.


6. Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Criminal
most important development in Chinese criminal justice in two decades, as well as the effect of major personnel shifts in the wake of the 2012 leadership transition. The evidence I present also adds to debates on a range of other issues, such as the relationship of formal law to community norms in Chinese criminal justice, the role of witnesses and lawyers, and how the criminal justice system confronts and handles a range of controversial topics, including land disputes, corruption, protests, and disputes within families.

This Article also contributes to the literature on the evolution of China’s courts and courts in authoritarian regimes. The emphasis that courts, procuratorates, and police place on settling cases reflects trends in the Chinese legal system away from formal adjudication in favor of mediated outcomes. Carl Minzner has described such developments as a “turn against law.” I have written of China’s “return to populist legality.” In criminal cases, concerns about stability often lead to surprisingly lenient outcomes, at least in routine cases. As in high-profile civil disputes—most notably medical, labor, and land cases—extreme State emphasis on social stability is leading courts to innovate in routine cases. Although judges generally claim they are lenient only where formally permitted by law, some cases represent quite flexible interpretations of existing law. Courts are most concerned with defending themselves from criticism, minimizing conflicts with other State actors, and reducing the risk of petitions and protest. Such concerns explain both emphasis on settlements and deference to procuratorates. Evidence from Henan also contributes to literature on the role of transparency in the Chinese legal and political system and in authoritarian systems more generally. Henan’s experiment with judicial transparency is an example of the ways in which increased public exposure may be used primarily to serve the interests of centralized State oversight and control.


7. The leadership transition included the installation of new leaders of the courts, procuratorates, and the Communist Party’s Political Legal Committee, which oversees the entire legal system.


one county court and one intermediate court. In Part III, I discuss the methodological significance of the large amount of data only recently made available in China, the implications of my empirical findings for literature on the Chinese criminal justice system, and on courts and transparency in authoritarian regimes.

I.
BACKGROUND: HENAN’S PUSH TOWARD “JUDICIAL TRANSPARENCY”

Henan Province is home to roughly 100 million people. Located in central China and regarded as the historical birthplace of Chinese civilization, Henan has lagged behind many eastern and central provinces economically: its per capita GDP ranks twenty-first out of thirty-three provincial units in China (not including Taiwan).\(^{11}\) Henan is divided into seventeen municipalities, each administering populations that range from 1.5 to 8.5 million people. With 61 million classified as rural, Henan is home to the largest rural population in China.\(^{12}\)

Beginning in mid-2009, the Henan High People’s Court ordered all courts in the province to begin putting most decisions online.\(^{13}\) Although Chinese law provides for most court decisions to be made publicly available, in general they are not readily available to nonlitigants. The Henan High Court rule came in the wake of Supreme People’s Court (SPC) statements that courts should embrace


transparency and place cases online,\textsuperscript{14} yet Henan’s efforts to post cases went beyond what had been done in other provinces and regions up to that point.\textsuperscript{15} Other courts had placed cases online selectively, or, in some instances, had placed all cases from a specific court division online. In contrast, the presumption in Henan is that all cases are to be posted online unless they fall within specified exceptions.\textsuperscript{16}

The official Henan policy is that all court decisions formally classified as judgments or verdicts, \textit{panjue shu}, are to be posted online.\textsuperscript{17} Documents classified as rulings, \textit{caiding shu}, which are typically brief decisions, are required to be posted online only if they fit into one of eight categories, generally those involving substantive rulings.\textsuperscript{18} Exceptions to the general rule include cases involving State secrets, personal privacy issues, business secrets, crimes committed by juveniles and other cases not publicly tried, capital cases, State compensation cases, mediated cases, and withdrawn cases.\textsuperscript{19} Litigants may also request that cases not be posted online or be removed after posting.\textsuperscript{20} The rules state that a court may grant such a request only after “strict review” by a supervising judge and only if the case is deemed likely to cause emotional distress to a litigant or third party. In practice this is most often done in a broad

\textsuperscript{14} The SPC’s regulation was permissive, not mandatory. It stated in relevant part that “the people’s courts may, according to the needs of legal advocacy, law research, case guidance and unification of standards for judgment, compile, print and publish various judgment documents in a centralized way.” See Zuigao Renmin Fayuan Yingfa Guanyu Sifa Gongkai de Liuxiang Guiding He Guanyu Renmin Fayuan Jieshou Xinwen Meiti Yu lun Jiandu De Ruogan Guiding de Tongzhi (最高人民法院印发《关于司法公开的六项规定》和《关于人民法院接受新闻媒体舆论监督的若干规定》的通知) [Supreme People’s Court’s Notice on the Publication of Six Measures on Judicial Openness and Certain Provisions on People’s Court Accepting News Media Supervision] (promulgated by the Sup. People’s Ct., Dec. 8, 2009), available at http://www.law-lib.com/law/law_view.asp?id=305059.

\textsuperscript{15} Some other provinces and municipalities began to emulate the Henan example.

\textsuperscript{16} In 2013 the SPC issued new rules calling for courts nationwide to place more opinions online. See Zuigao Fa Shouci Shangwang Shai “Caipan Wenshu” (最高法首次上网“晒”裁判文书) [Supreme Law for the First Time Puts Judgment Documents Online], RENMIN RIBAO (人民日報) [PEOPLE] (Jul. 3, 2013), http://legal.people.com.cn/n/2013/0703/c42510-22054836.html.

\textsuperscript{17} Implementing Rules, supra note 13, arts. 3, 5, 6 (stating that “all first instance, appeal, and rehearing case opinions shall be posted online” with the exception of specific listed categories of cases).

\textsuperscript{18} The implementing rules list eight categories of such rulings that must be posted online: rulings affirming decisions in criminal cases, rulings refusing to accept a case, rulings reflecting differing opinions on jurisdiction, rulings directly rejecting suits or rehearing decisions, rulings remanding a case for retrial, rulings in cases involving disputes concerning enforcement, rulings regarding appeals of enforcement decisions, and rulings correcting typographical errors in opinions. Implementing Rules, supra note 13. More routine and nonsubstantive court notices and decisions are excluded. Interview 2012-24.

\textsuperscript{19} Interview 2012-13; Implementing Rules, supra note 13, art. 5.

\textsuperscript{20} Interview 2012-24; Implementing Rules, supra note 13, art. 16. The Rules state that cases may be removed if a party makes a valid request or a serious error is discovered, but only after formal review by senior officials at the court that posted the decision. The rules appear designed to prevent individual judges from removing cases that they do not want made public.

\url{http://scholarship.law.berkeley.edu/bjil/vol33/iss1/1}
range of family law disputes. By contrast, no exception is made for criminal cases; a defendant has no right to request a case not be made public or be removed after it is posted online. Certain information is redacted: victim and witness names are removed prior to publication, as are parties’ phone numbers and addresses.

The exceptions leave significant room for local court interpretation. Nevertheless, the policy is designed to require posting most cases online. Provincial high court rules state that judges who believe a case should not be placed online must seek approval from a court vice-president; otherwise, all cases must be submitted for online posting at most three days after judgment is handed to the parties. Cases submitted for online posting are reviewed by a court official responsible for the website who has an additional three days to decide whether or not to make the case publicly available.

As of early 2013, the Henan High Court reported that more than 440,000 cases had been posted online since the policy was adopted in 2009. By early 2014, that number had increased to more than 600,000. Although official

21. Interview 2012-13; Implementing Rules, supra note 13, arts. 6, 7. The regulations state that legitimate reasons for granting such a request include cases in which “there is strong antagonism” among the parties or between one party and the court or the contents of an opinion may cause “emotional pressure or negative effects” to a litigant or third party. The rules list certain categories of cases likely to have such an effect: those involving reputation rights, disputes among neighbors, divorce cases, claims concerning care for the elderly, inheritance disputes and those likely to “intensify contradictions.”

22. Interview 2012-13; Implementing Rules, supra note 13, arts. 6, 7.

23. Interview 2012-24; Implementing Rules, supra note 13, art. 22. The Implementing Rules state that victims’ names are to be excluded only in cases involving violent crimes. In practice it appears that victims’ names are redacted in all cases. The Rules state that full names, gender, and age of parties is to be included, but all other information is to be redacted. See also id. art. 21 (stating that witnesses, juveniles, and those performing meritorious conduct such as helping to arrest a defendant shall be listed only by last name).

24. Interview 2012-13; Implementing Rules, supra note 13, arts. 10, 11. The Rules state that the presiding judge has three days from receiving confirmation that the decision has been delivered to the parties, or from the end of the stipulated time for delivery, to submit the judgment for posting. If the judge responsible for posting cases decides not to place a decision online she or he must provide a specific reason for such a decision.


reports claim Henan courts now put ninety-nine percent of their cases online. This figure refers to cases outside the exceptions. In practice, a significant percentage of court rulings are not posted online: for example, court-approved mediation agreements, which represent a large portion of all first-instance civil cases.

Initially, cases posted online were not permanently made public. Court rules stated that cases should be public for one year, and in the initial years of the policy courts generally removed cases from their websites at the end of the calendar year. As judges explained, the primary goals of making cases publicly available are “to make courts transparent,” to increase public confidence in the courts, and to increase pressure on judges to decide cases correctly. These goals are achieved with the publication of cases for one year. In practice, however, many such cases remain available in commercial case databases even after they have been removed from court websites. The policy also appears to be evolving toward permanent publication of cases. In 2012, the Henan High Court began aggregating all cases province-wide onto its own website, with cases no longer being removed after one year.

The decision to place cases online came in the wake of a number of high-profile wrongful convictions in Henan. Zhang Liyong, the president of the Henan High People’s Court, stated that the policy of placing opinions online was “compelled” by the illegal conduct of some judges. Zhang stated that with online publication, errors by judges will be “immediately discovered and criticized online.”

Judges now know that any errors will directly affect their
chances of promotion. Placing cases online is not intended to facilitate use of the decisions in future cases or to serve as precedent. Nevertheless, judges acknowledge that lawyers often use prior cases in legal arguments.

Local courts in Henan vary in their implementation of the policy. Some courts have taken more restrictive approaches to access than suggested by the provincial high court, for example by not posting cases that have been appealed. Some jurisdictions appear to have liberal definitions of privacy interests, and thus keep a larger percentage of cases from being posted. Yet a number of courts also report “100 percent compliance” with the high court’s rules—meaning that they have posted all cases that do not come within a listed exception. The provincial high court has criticized courts that have lagged in compliance. High court officials report that in general most courts have complied with the policy.

Beyond the Headlines 214, 215 (Timothy B. Weston & Lionel M. Jensen eds., 2012).


34. Interview 2012-13; see also Caipan Wenshu Shangwang “Yangguang Sifa” De Zhutuiqi (裁判文书上网 “阳光司法”的助推器) [Online Publication of Opinions Promotes “Sunny Judicial Administration”], ZHONGGUO PUFU WANG (中国普法网) [CHINA LEGAL INFO] (Oct. 9, 2012), http://www.legalinfo.gov.cn/pfx/content/2012-10/09/content_3886221.htm?node=7908 (quoting lawyer noting the “reference value” of cases posted online).


36. Interview 2012-13; Luoshan Xian Fayuan Caipan Wenshu Shangwang Lü Da 100% (罗山法院裁判文书上网率达100%) [Luoshan Municipality’s Court Judgments are 100% Published Online], HENAN SHENG LUOSHAN XIAN FAYUAN WANG (河南省罗山县法院网) [LUOSHAN COURT NET] (Oct. 16, 2012), http://xylsfy.chinacourt.org/public/detail.php?id=1256; Nanyang Shi Wolong Qu Fayuan Qianghua Caipan Wenshu Shangwang Gongzuo Xiaoguo Hao (南阳市卧龙区法院强化裁判文书上网工作效果好) [Nanyang Municipal Wolong District Court Reinforced the Online Publication of Judgments and the Effect Is Positive], ZHONGXIN WANG (中新网) [CHINA NEWS NET] (Mar. 12, 2012), http://www.ha.chinanews.com/lammu/news/news/159/2011-07-01/news-159-127846.shtml (claiming one hundred percent compliance in one court).

37. Interview 2012-24; see also Notice on the Situation Concerning Placing Henan Court Judgments on the Internet, supra note 13. In 2009, fifteen basic-level courts that “lagged behind” in implementing the policy were exposed and the presidents of such courts were required to come to the provincial high court to explain why they had not compiled. The high court stated that such actions were highly effective in promoting compliance. The Implementing Rules call for the Provincial High Court to engage in regular review of implementation of the policy by each division in the high court and by all lower courts, including issuing a ranking of courts based on their level of compliance. Courts that lag in implementing the policy “are to have points deducted” when they are evaluated. Implementing Rules, supra note 13, art. 36.

The policy of putting cases online initially encountered resistance from judges who feared increased workloads and scrutiny.\(^39\) Judges and courts are now evaluated based on the percentage of cases they put online.\(^40\) Judges describe such efforts as resulting in “tremendous pressure” on them as they handle cases.\(^41\) Lawyers concur, noting that judges are under pressure to avoid mistakes and as a result are now far more careful than in the past.\(^42\)

The policy of making cases public has generally been praised by officials, lawyers, and academics.\(^43\) For example, lawyers who handle criminal cases praised the policy, arguing that judges need to be controlled—and that greater oversight and transparency are effective routes for doing so.\(^44\) Yet the policy has also received criticism. A number of lawyers and academics in Henan expressed concern in discussions that the push to place all decisions online is resulting in

\(^{39}\) Interview 2012-24; see also Notice on the Situation Concerning Placing Henan Court Judgments on the Internet, supra note 13 (acknowledging and critiquing resistance to the policy among some judges who were concerned either at the workload or the effect of publishing cases online).

\(^{40}\) Interview 2012-3; Interview 2012-13; Implementing Rules, supra note 13, art. 18. The implementing rules state that judges who fail to comply with the policy, or who delay in making cases public, shall be subject to administrative sanctions. Implementing Rules, art. 18.

\(^{41}\) Interview 2012-11; Interview 2012-19; Henan Gaoyuan Jiang Panjeshe Shangwang Gong Shimin Chuzuan (河南高院将判决书上网供市民查询) [Henan Provincial High Court Uploaded Court Opinions Online for Citizens to Examine], DAHE WANG (大河网) [DAHE NET] (Dec. 31, 2008), http://news.sina.com.cn/c/2008-12-31/072216954042.shtml (quoting judge stating that even a small error may be reported by parties); Zhang Liyong Daibiao Yu Wangyou Zaixian Jiaoliu: Zhengyi Buneng Guanzai Wuzi Li (张立勇代表与网友在线交流：正义不能关在屋子里) [Representative Zhang Liyong Communicates with Netizens Online: Justice Should Not Be Locked in a Room], ZHONGGUO FAYUAN WANG (中国法院网) [CHINA LEGAL INFO NET] (Mar. 5, 2009), http://old.chinacourt.org/public/detail.php?id=547301 (stating that judges know that their decisions will be posted online and examined by ordinary people, and thus will be careful to follow the law from the beginning).

\(^{42}\) Interview 2012-7.


\(^{44}\) Interview 2012-6; Interview 2012-28; see also Zhang Liyong, Yi Caipan Wenshu Shangwang Tuidong Sifa Gongkai (以裁判文书上网推动司法公开) [Promote Judicial Openness through Online Publication of Decisions], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Jul. 31, 2012), http://www.legaldaily.com.cn/zt/content/2012-07/31/content_3741689.htm (stating that court decisions are “a product” and that whether decisions are satisfactory is decided by litigants and the masses, not the courts themselves, and that placing decisions online will force courts to improve).
court judgments that are increasingly simple in their reasoning; these lawyers
suggest that this simplicity is the result of judges trying to avoid any possible
errors.45 As one lawyer noted, in Henan any error becomes a “big error” when it
is posted online.46 This alleged trend toward simplified reasoning is in tension
with the SPC’s efforts to encourage courts to provide more detailed explanations
of their reasoning in opinions.47 High court officials, in contrast, argue that the
policy has forced judges to pay more attention to legal analysis and thus has
improved the overall quality of court opinions.48

I selected for study one rural county court in Henan that appeared to be
putting the large majority of cases of all types online in 2010.49 The court
is situated in the county seat, an average-sized county town in China. I do not
claim that this county is representative either of basic courts in Henan or of
courts across China more generally. It is one of thousands of such courts in
China.50 I also do not claim that my study is comprehensive: in 2010, the court
placed 171 cases online. I supplemented the cases found online with an
additional 6 cases from the county court that were located on commercial
websites,51 making a total of 177 cases. The highest reported case number was

45. Interview 2012-2; Interview 2012-3; see also Liu Yuewu, Xingshi Panjueshu Ni Queng
Bu Jiangli? (刑事判决书你岂能不讲理?) [How Can You Not Give Reasons in Criminal
Adjudication], FENGHUANG BOKE (凤凰博客) [FENGHUANG BLOG] (May 17, 2012),
http://blog.ifeng.com/article/17858797.html (reporting that decisions in criminal cases have become
increasingly simple and lack reasoning); Hu Yansheng, Minshi Panjueshu Yue Xie Yue Jiandan
(民事判决书越写越简单) [Civil Opinions Are Becoming Increasingly Simple], TIANYA (天涯)
tID=15981099 (arguing that opinions in civil cases have become increasingly simple and thus
increasingly resemble criminal cases).

46. Interview 2012-3.

47. See Zuigao Renmin Fayuan Guanyu Jin yibu Jiaqiang Sifabianmin de Ruogan Yijian
(最高人民法院关于进一步加强司法便民工作的若干意见) [Some Opinions of the Sup. People’s Ct. on
Further Strengthening People’s Access to Judicial Services] (promulgated by the Sup. People’s Ct.,
(stating that court opinions should be clear, concise, and should provide sufficient reasoning to
convince the parties); see also Zuigao Renmin Fayuan Guanyu Sifa Gongkai de Liuxiang Guiding
(最高人民法院关于司法公开的六项规定) [Notice of the Supreme People’s Court on Issuing the Six
Provisions on Judicial Openness], ZHONGGUO XINGWENG WANG (中国新闻网) [CHINA NEWS]
provide reasons to support their decisions).


49. This was done after surveying a range of Henan courts in 2010 to ascertain the volume of
cases being put online. Judges and lawyers in the jurisdiction agreed to speak with me on the
understanding that their names and the name of their courts would not be identified. I identify court
decisions with a letter, indicating whether the decision came from the intermediate court (I) or basic-
level court (B), followed by a reference number. I cite interviews based on the year in which the
interview occurred.

50. The county court has forty-five persons classified as judges, thirty of whom hear cases.
Interview 2013-9.

51. It is unclear why those six cases were not posted to the court website. They do not appear
particularly sensitive or noteworthy. The cases may have been cases originally posted online and
then removed, as they are also available on the provincial high court website, which collects cases
number 221, suggesting that the court placed roughly eighty percent of cases on its website.\textsuperscript{52} Most omitted cases involve juveniles charged with crimes or rape.\textsuperscript{53} Judges state that it is rare for a party to a criminal case to object to the decision being placed online.\textsuperscript{54}

I also examined the publicly available annual criminal docket for 2010 of the intermediate court in the same jurisdiction (the court directly above the county court). The intermediate court is located in a third-tier Chinese city, with a combined rural and urban population of approximately six million. The county is home to roughly five hundred thousand people.\textsuperscript{55} The intermediate court has jurisdiction over a total of twelve county or district courts.\textsuperscript{56} The cases on review in the intermediate court thus came from a broader geographic area than those in the county court. The intermediate court posted 276 opinions in criminal cases from 2010 on its website. I located an additional 16 on commercial websites, making a total of 292 judgments.\textsuperscript{57} Of these, 37 were first-instance trials, 239 were decisions in appeals, and 16 were decisions in rehearing procedures. Intermediate court decisions were divided across three court divisions. Calculating the percentage of cases posted from the intermediate court is thus more difficult than for the county court. Nevertheless, using the highest case number as a guide and excluding decisions from the court’s third criminal division, which handles cases involving crimes committed by juveniles, it appears that the court posted just under half of its first-instance decisions not involving juvenile crimes, just over three-quarters of its appellate decisions, and just over two-thirds of its rehearing cases.\textsuperscript{58} According to intermediate court officials, as of early 2012 the court had placed nearly seven thousand decisions on its website since the online policy began in the second half of 2009.\textsuperscript{59} This was roughly half of the total number of decisional documents issued by the intermediate court during the same period. The vast majority of excluded documents were mediation agreements or decisional documents that do not discuss the merits of a case.\textsuperscript{60} The court reported just 37 instances during the

\textsuperscript{52} Court officials confirmed this rough calculation and stated that in 2012 the figure was closer to ninety percent. Interview 2013-8.

\textsuperscript{53} Interview 2013-8; 2013-9.

\textsuperscript{54} Interview 2013-8.


\textsuperscript{56} Eight lower courts were county courts and thus primarily rural. Four were district courts, meaning they were in towns or urban areas.

\textsuperscript{57} As with the county cases, the additional cases do not appear to be particularly sensitive or noteworthy, and it is unclear why they were not available on the intermediate-court website.

\textsuperscript{58} I calculated this approximate figure by dividing the total number of cases available by the combination of the highest case numbers for each criminal division.

\textsuperscript{59} Interview 2012-13.

\textsuperscript{60} Id.
same period when a case of any type was not posted online at the request of one of the parties.\footnote{Id.} In addition to reviewing the cases, I conducted interviews with approximately forty judges and lawyers in three cities in Henan.

The push to place court decisions online is one of a number of innovations adopted under the leadership of Henan High People’s Court President Zhang Liyong. Zhang, who came to the court with no legal background, has promoted new policies he said are designed to increase the quality of, and public confidence in, Henan’s courts.\footnote{Da Faguan Zhang Liyong Wunian Kao (大法官张立勇五年考) [Grand Judge Zhang Liyong’s Exam in the Fifth Year], MINZHU YU FAZHI WANG (民主与法制网) [DEMOCRACY AND LEGAL SYSTEM NET] (Nov. 12, 2012), http://www.mzyfz.com/cms/minzhuyufazhibao/fanfu/html/1248/2012-11-12/content-568478.html (discussing Henan efforts to make courts more welcoming to ordinary people and requiring judges to be more like ordinary people, strengthening courts’ obedience to Party leadership and their rejection of concepts of separation of powers, and making courts more open to comments from ordinary people). The moves were controversial, with some complaining that judges were being forced to take on inappropriate roles and would be overwhelmed by their new workload.} These have included: live broadcasts of court cases;\footnote{For a live broadcast of court cases of Henan Courts, see http://ts.hncourt.org/. As of early 2012, the High Court reported that more than 1500 cases had been broadcast online.} requiring court leaders to meet directly with aggrieved litigants; experimentation with a form of jury system;\footnote{Henan Gaoyuan Yuanzhang Jianyi Pizhun Jinxing Renmin Peishentuan Shidian (河南高院院长建议批准进行人民陪审团试点) [Chief Judge of Henan Provincial High Ct. Proposes Approving Jury Trial Experiment], DAHE BAO (大河报) [DAHE NEWS], (Mar. 13, 2012), http://news.sina.com.cn/c/2012-03-13/031424103258.shtml.} the creation of “society courts” (社会法庭) staffed by laypeople to mediate cases;\footnote{Henan Sheng Gaoji Renmin Fayuan Guanyu Dali Hongyang Ma Xiwu Shenpan Fangshi Qieshi Wei Renmin Sifa De Yijian (河南省高级人民法院关于大力弘扬马锡五审判方式切实为人民司法的意见) [Henan High People’s Court’s Notice on Energetically Carrying Forward Ma Xiwu-Style Adjudication in Order to Implement Justice for the People] (promulgated by the Henan High People’s Ct., Jul. 15, 2009), available at http://zzfy.hncourt.org/public/detail.php?id=11729.} the establishment of an annual “wrongful conviction day” on which courts examine their files for any incorrectly decided cases; and the creation of a “life responsibility system” for judges, under which judges are responsible “until the end of their lives” for any errors made in handling cases.\footnote{See “Shehui Fating”: Huajie Maodun De Henan Chuangzao ("社会法庭":化解矛盾的河南创新) ["Society Courts": A Henan Innovation That Resolves Contradictions], HENAN PINGAN WANG (河南平安网) [HENAN PINGAN NET] (Jun. 3, 2011), http://www.mzyfz.com/cms/jujiaosixiangzhonggongsheng/shehuiguanlichuangxin/shehuibaozhang/html/1037/2011-06-03/content-76470.html; see also Zhao Gang et al., Xuchang Fayuan: Dakai Shehui Fating Shenshang De Wenhao (许昌法院：打开社会法庭身上的问号) [Xuchang Court: Unfold the Question Mark on Society Courts], LUOYANG SHI XIGONG QU RENMIN FAYUAN WANG (洛阳市西工区人民法院) [LUOYANG PEOPLE’S COURT] (May 17, 2011), http://xgxqfyl.chinacourt.org/public/detail.php?id=78. Society courts, made up of ordinary people selected from the local community, are designed to further mediation in routine cases. They appear largely to be the repackaging of traditional mediation authorities under the direct supervision of the courts.}
Zhang has also welcomed increased supervision of the courts from the People’s Congress representatives. Some of these policies have drawn extensive criticism from legal academics, who warn of a return to populist justice and who argue that many of these reforms lack a legal basis. In one prominent early account of Zhang’s reforms, Southern Weekend described him as a “judge who does not play according to legal principles.” Yet others in the legal community have come to his defense, noting that he has significantly increased judicial transparency.

---

Responsibility System for Wrongly Decided Cases, RENMIN FAYUAN WANG (人民法院网) [PEOPLE’S COURT NET] (Jan. 11, 2012), http://court.gmw.cn/html/article/201201/11/83609.shtml. It appears that the lifetime responsibility system is targeted at the most egregious forms of judicial misconduct, primarily corruption.

68. Henan: Fayuan Ban’an Yao Zhudong Jieshou Renda Daibiao Jiandu [Henan: Courts Should Take Initiative To Accept People’s Congress’s Supervision over their Handling of Cases], FAZHI WANG (法制网) [LEGAL DAILY] (Sep. 15, 2011), http://www.legaldaily.com.cn/index/content/201109/15/content_2956921.htm?node=20908 (detailing requirements that each court report on its work to every local people’s congresses delegate regularly, including on its handling of major cases; that courts invite delegates to attend cases and participate in enforcement activities; and that each court establish a text-messaging system to report to People’s Congress members on their work); see also Henan Sanji Fayuan Quanbu Fengdingzhang Shangjiao Shousuo Renmin Shouyingweiyuan Jieshou Renda Daibiao [Three Levels of Courts in Henan All Opened Hotlines for People’s Congress Representatives and People’s Consultative Committee Members], ZHONGGUO FAYUAN WANG (人民法院网) [CHINA COURT] (Apr. 21, 2012), http://www.chinacourt.org/article/detail/2012/04/id/479195.shtml (discussing the creation of hotlines to be used by people’s congress delegates to contact the courts twenty-four hours a day, seven days a week, and requiring courts to respond to any enquiries within one working day).

69. See He Weifang, Sifa Gaige Bixu An Fali Chupai [司法改革必须按法理出牌] [Legal Reform Must Follow Legal Principles], 360DOC (Feb. 27, 2009), http://www.360doc.com/content/09/0227/16/142_2660965.shtml (arguing that populist justice is sometimes bad law and that some of Zhang Liyong’s reform measures may set a bad example for judicial reform); Guo Guangdong, Yuanzhang, Qing An Fali Chupai Pingdingshan [Chief Judge, Qing An Trial Court of Pingdingshan] (describing promotion of informal trials and mediation, increasing role of popular input, deemphasis on judicial professionalism, and increasing administrative oversight over lower courts).

70. See Su Yongtong, Buan “Fali” Chupai De Gaoyuan Yuanzhang [不按“法治”出牌的“高院院长”] [High Court President Does Not Play According to Legal Principles], NANFANG ZHUMO (南方周) [SOUTHERN WEEKEND] (Feb. 19, 2009), http://www.infzm.com/content/24067 (describing promotion of informal trials and mediation, increasing role of popular input, deemphasis on judicial professionalism, and increasing administrative oversight over lower courts).

71. See Zhang Yifei, Bubi Keze Henan Fayuan De “Zhang Yuanzhang Xinzheng” [The “Zhang Yuanzhang New Measures” of the Henan Court], HONG WANG (红网) [RED NET] (Mar. 6, 2009), http://hj.rednet.cn/c/2009/03/06/1720208.htm (praising Zhang Liyong’s reforms as compatible with the reality of China); Sifa Shijian
II.
FINDINGS

A. Overview

1. County Court

The 177 county court cases included criminal charges against 273 defendants. In the county court, the types of cases were largely what would be expected: the largest categories of crimes were theft, willful injury (generally relating to fights), traffic accident crimes, concealment of criminal proceeds (largely reselling stolen goods), and fraud. But the cases also included a range of crimes that provide a sense of the types of issues local police, procuratorates, and courts process—everything from dissemination of porn online, to illegal logging or cutting of trees, to abduction and sale of children or women, rape, bigamy, corruption, and gambling. A large number of cases involve fellow villagers. Table 1 sets forth the range of crimes and number of defendants prosecuted for each category of crime in the county court in 2010. In the county court, 133 cases were handled in summary procedures or simplified normal procedures; often these were tried without procurators attending. Although most were minor cases where defendants did not contest the charges against them, others involved more serious charges, including one case in which a defendant was convicted of rape.

73. Cases B45, B51, B80, and B92. Although classified as environmental crimes, these cases largely appear to be handled as theft cases.
74. Cases B32 and B94.
75. Case B166.
77. Cases B104, B169, B203, and B213.
78. Cases B90 (gambling) and B97 (operation of a gambling facility).
80. Case B166. Although the opinion stated that the court used simplified procedures, three
<table>
<thead>
<tr>
<th>Case Type</th>
<th>Defendants</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abduction and trafficking of children</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Abduction and trafficking of women</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Arson</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Bigamy</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Bribery</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Concealment of illegal gains</td>
<td>49</td>
<td>22</td>
</tr>
<tr>
<td>Contract fraud</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Corruption</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Destruction of electrical equipment</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Dissemination of obscene materials</td>
<td>14</td>
<td>4</td>
</tr>
<tr>
<td>Disturbance of the peace</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Embezzlement</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Extortion and blackmail</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Falsely issuing exclusive value-added tax invoices</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Forgery and/or sale of state authorities’ certificates</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>Fraud</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>Gambling</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>Illegal business act</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Illegal logging</td>
<td>11</td>
<td>4</td>
</tr>
<tr>
<td>Illegal occupation of farmland</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Illegal possession of guns</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Illegal sale of invoices</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Intentional destruction of property</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Intentional injury</td>
<td>37</td>
<td>35</td>
</tr>
<tr>
<td>Interference with public administration</td>
<td>4</td>
<td>4</td>
</tr>
</tbody>
</table>

judges heard the case (as opposed to most simplified cases, where generally only a single judge hears the case). The defendant contested guilt, arguing that sex had been consensual. Nevertheless, the court deemed defendant to have confessed because he admitted having sex with the mentally disabled victim.
Involuntary manslaughter (过失致人死亡罪) 1 1
Misappropriation of public funds (挪用公款罪) 1 1
Operation of gambling facility (开设赌场罪) 1 1
Organized robbery (聚众哄抢罪) 8 1
Production and/or sale of fake and substandard products (生产、销售伪劣产品罪) 5 2
Rape (强奸罪) 1 1
Refusal to execute court decision (拒不执行法院判决罪) 1 1
Robbery (抢劫罪) 2 1
Seizure by force (抢劫罪) 1 1
Theft (盗窃罪) 58 43
Traffic accident (交通肇事罪) 28 28
Total 277 187

Note: “Cases” refers to the number of cases in which a particular crime was charged. Cases with multiple charges are thus counted multiple times. The total number of unique cases is 177.

“Defendants” refers to the number of defendants charged with a particular crime. Defendants who are charged with more than one crime are counted multiple times.

2. Intermediate Court

Tables 2–4 provide an overview of cases in the intermediate court in first-instance cases, on appeal, and in rehearing cases. The intermediate court tried 37 first-instance cases involving 67 defendants. The court decided 239 cases on appeal, involving 442 defendants. The intermediate court also decided 16 criminal cases through rehearing procedures, including 21 defendants.

The intermediate court’s first-instance cases were, not surprisingly, more serious: murder and negligent homicide, illegal manufacture of explosives,81 drug trafficking,82 illegal detention of others, and robbery while impersonating a police officer.83 A number of commercial and financial crimes were also tried in the intermediate court, including defendants convicted of illegally soliciting deposits (presumably running an illegal bank), selling fake medicine, and the sale of counterfeit goods. A few of the financial fraud cases resulted in suspended death sentences (for example, for the sale of counterfeit money) or

81. Case 55b (life sentence).
82. Case 144b (life sentence for trafficking one thousand grams of opium, where one thousand grams is the threshold for a sentence of ten years to death).
83. Case 151b.
life imprisonment (for a first time offender convicted of selling counterfeit money).\textsuperscript{84}

**Table 2: First-Instance Intermediate Court Cases by Crimes Charged**

<table>
<thead>
<tr>
<th>Crime</th>
<th>Defendants</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Credit card fraud (信用卡诈骗罪)</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Selling counterfeit money (出售假币罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Bribery (受贿罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Contract fraud (合同诈骗罪)</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Robbery (抢劫罪)</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Misappropriation of public funds (挪用公款罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Concealment of stolen goods (掩饰，隐瞒犯罪所得罪)</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Willful injury (故意伤害罪)</td>
<td>22</td>
<td>12</td>
</tr>
<tr>
<td>Intentional homicide (故意杀人罪)</td>
<td>10</td>
<td>9</td>
</tr>
<tr>
<td>Theft (盗窃罪)</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Receipt fraud (票据诈骗罪)</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Harboring criminals (窝藏罪)</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Kidnapping (绑架罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Fraud (诈骗)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Drug trafficking (贩卖毒品罪)</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>Corruption (贪污罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Loan fraud (贷款诈骗罪)</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Fraudulent raising of capital (集资诈骗罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Illegal manufacturing of explosives (非法制造爆炸物罪)</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Loan swindle (骗取贷款罪)</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>78</strong></td>
<td><strong>46</strong></td>
</tr>
</tbody>
</table>

Note: “Defendants” refers to the number of defendants charged with a particular crime. Defendants who are charged with more than one crime are counted multiple times.

“Cases” refers to the number of cases in which a particular crime was charged. Cases with multiple charges are thus counted multiple times.

\textsuperscript{84}. Case 143a.
### Table 3: Appeals in the Intermediate Court by Crime Charged

<table>
<thead>
<tr>
<th>Crime</th>
<th>Defendants</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Traffic accident (交通肇事罪)</td>
<td>17</td>
<td>16</td>
</tr>
<tr>
<td>Perjury (伪造证据罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Insurance fraud (保险诈骗罪)</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Torture (刑讯逼供罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Participation in the mafia (参加黑社会罪)</td>
<td>16</td>
<td>2</td>
</tr>
<tr>
<td>Bribery (受贿罪)</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Contract fraud (合同诈骗罪)</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Obstructing testimony (妨害作证罪)</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Obstructing public law enforcement (妨害公务罪)</td>
<td>18</td>
<td>5</td>
</tr>
<tr>
<td>Provocation (寻衅滋事罪)</td>
<td>26</td>
<td>5</td>
</tr>
<tr>
<td>Aid in destroying evidence (帮助毁灭证据)</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Aid criminals to escape punishment (帮助犯罪分子逃避处罚罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Weapon theft (抢劫枪支罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Robbery (抢劫罪)</td>
<td>21</td>
<td>10</td>
</tr>
<tr>
<td>Abduction and sale of children (拐卖儿童罪)</td>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>Abduction and sale of women (拐卖妇女罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Misappropriation of public funds (挪用公款)</td>
<td>10</td>
<td>9</td>
</tr>
<tr>
<td>Misappropriation of funds (挪用资金罪)</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Concealment of stolen goods (掩饰、隐瞒犯罪所得罪)</td>
<td>15</td>
<td>5</td>
</tr>
<tr>
<td>Intentional injury (故意伤害罪)</td>
<td>96</td>
<td>68</td>
</tr>
<tr>
<td>Intentional homicide (故意杀人罪)</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>Intentional property damage (故意毁坏罪)</td>
<td>12</td>
<td>5</td>
</tr>
<tr>
<td>Extortion (敲诈勒索罪)</td>
<td>27</td>
<td>5</td>
</tr>
<tr>
<td>Crimes related to criminal syndicate (涉及黑社会性质犯罪)</td>
<td>17</td>
<td>3</td>
</tr>
<tr>
<td>Illegal logging (滥伐林木罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Abuse of power (滥用职权罪)</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Neglect of duty (玩忽职守)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Producing and selling fake and inferior goods (生产、销售伪劣产品罪)</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Excavating ancient tombs (盗掘古墓)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Theft (盗窃罪)</td>
<td>60</td>
<td>27</td>
</tr>
<tr>
<td>Sabotaging production and business operation (破坏)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Crime Description</td>
<td>Code 1</td>
<td>Code 2</td>
</tr>
<tr>
<td>-------------------</td>
<td>-------</td>
<td>-------</td>
</tr>
<tr>
<td>Kidnapping (绑架罪)</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>Embezzlement (职务侵占罪)</td>
<td>11</td>
<td>8</td>
</tr>
<tr>
<td>Assembling crowd to disturb social order (聚众扰乱社会秩序罪)</td>
<td>14</td>
<td>3</td>
</tr>
<tr>
<td>Mob gathering and brawling (聚众斗殴)</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>False reporting of company registration capital (虚报注册资本)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Fraud (诈骗罪)</td>
<td>12</td>
<td>7</td>
</tr>
<tr>
<td>False accusation (诬告陷害罪)</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Drug trafficking (贩卖毒品罪)</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>Corruption (贪污犯罪)</td>
<td>18</td>
<td>15</td>
</tr>
<tr>
<td>Buying counterfeit money (购买假币罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Gambling (赌博罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Negligent infliction of injury (过失致人重伤罪)</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Tax evasion (逃税罪)</td>
<td>11</td>
<td>2</td>
</tr>
<tr>
<td>Knowingly selling merchandise under a fake trademark (销售假冒注册商标的商品罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Selling fake medicine (销售假药罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Producing fake medicine (生产假药罪)</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>Illegal trading of explosives (非法买卖爆炸物)</td>
<td>10</td>
<td>3</td>
</tr>
<tr>
<td>Illegal production of and sale of falsified receipt (非法制造，出售非法制造发票罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Illegal manufacturing of explosives (非法制造爆炸物罪)</td>
<td>12</td>
<td>5</td>
</tr>
<tr>
<td>Illegal occupation of farming land (非法占用农用地罪)</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Illegally accepting deposits from the public (非法吸收公众存款罪)</td>
<td>10</td>
<td>3</td>
</tr>
<tr>
<td>Illegal detention (非法拘禁)</td>
<td>17</td>
<td>6</td>
</tr>
<tr>
<td>Illegal possession of guns (非法持有枪支罪)</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Unlawful business operation (非法经营)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Illegal practice of medicine (非法行医罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Illegal Mining (非法采矿罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Withdrawing public funds for investment (抽逃出资罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Falsified tax receipts (虚开抵扣税款发票罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Crime of having a large amount of undisclosed property (巨额财产来源不明罪)</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>
Crime of concealing deposits offshore (隐瞒境外存款罪)  1  1

Total  550  277

Note: “Defendants” refers to the number of defendants charged with a particular crime. Defendants who are charged with more than one crime are counted multiple times.
Cases” refers to the number of cases in which a particular crime was charged. Cases with multiple charges are thus counted multiple times.

**TABLE 4: REHEARING (ZAISHEN) CASES IN THE INTERMEDIATE COURT**

<table>
<thead>
<tr>
<th>Crime</th>
<th>Defendants</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Traffic accident crime</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Misappropriation of public funds</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Corruption</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Willful injury</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>Provocation</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Illegal detention</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Abuse of power</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Theft</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Fraud</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>30</td>
<td>19</td>
</tr>
</tbody>
</table>

Note: “Defendants” refers to the number of defendants charged with a particular crime. Defendants who are charged with more than one crime are counted multiple times.
Cases” refers to the number of cases in which a particular crime was charged. Cases with multiple charges are thus counted multiple times.

**B. Leniency and Settlement**

Scholars in China and the West have noted the national adoption of the policy of “balancing leniency and severity.”

85 See Trevaskes, *supra*; Margaret K. Lewis, *Leniency and Severity in China’s Death Penalty Debate*, 24 COLUM. J. ASIAN L. 303, 317 (2011) (discussing debate over leniency and severity in capital cases); Zuigao Renmin Fayuan Yinfa Guanyu Guanche Kuanyanxiangji Xingshi Zhengce De Ruogan Yijian De Tongzhi [最高人民法院印发《关于贯彻宽严相济刑事政策的若干意见》的通知] [Supreme People’s Court’s Notice on Printing and Distributing Some Views on Implementation of the Criminal Policy of Balancing Leniency with Severity] (promulgated by Sup. People’s Ct., Feb. 8, 2010), available at http://www.law-lib.com/law/law_view.asp?id=310425 (stating that the policy of balancing leniency with severity is “the basic criminal policy of the nation” and that it should be implemented at all stages of the criminal process). The policy calls for strict sentences and the death penalty for serious crimes, including those that involve violence or threats to society, and leniency for less serious crimes, including nonviolent offenses or those lacking malice. The policy was first announced in a 2005 document from the Communist Party’s Central Political
implemented beginning in 2007, is generally understood as a reaction to the perception that prior reliance on “strike hard” campaigns had been ineffective and generated a strong backlash. The “balancing leniency and strictness” policy encourages procurators and courts to treat serious crimes harshly but also encourages them to be lenient toward minor crimes, especially those not reflecting malice or posing significant risk of harm to society. In the courts, the emphasis on leniency is primarily manifest in reduced sentences for those who confess, as well as on the use of suspended sentences in minor criminal cases for those who agree to pay restitution or compensation to their victims.

The Chinese Criminal Law provides multiple mechanisms for a court to be lenient (or not) in its disposition of a case. The law generally stipulates a range of punishments for each crime based on whether the offending conduct was minor, serious, or extremely serious, or, for monetary crimes, whether the amount involved was small, large, or extremely large. A court must first determine the severity of the crime, placing it within a codified sentencing band for a specific crime, after which it selects a sentence within that band. A court


87. See, e.g., LIU RENWEN, XINGFA DE JIEGOU YU SHIYE [THE STRUCTURE AND SCOPE OF CRIMINAL LAW] 274–291 (2010) (arguing that the policy is primarily aimed at introducing leniency into the Chinese criminal justice system, as a reaction to the prior policy of striking hard against crime).

88. In China the term “suspended sentence” generally refers to the suspension of the defendant’s prison term. Any fines imposed as part of the sentence are not suspended. In this Article, I use the term “suspended sentence” to refer to suspension of a prison sentence, and “sentence” to refer to a prison sentence. The use of fines as a criminal sanction in China is an important possible future topic of research. Although some decisions do impose fines on defendants, fines appeared to play a relatively minor role in criminal cases in the jurisdictions I studied and rarely came up in interviews.


90. The Criminal Law provides little in the way of guidance as to what type of conduct qualifies as serious or very serious; such specifics are generally provided in subsequent judicial interpretations.
that seeks to be lenient thus can assign a sentence at the bottom of the range for the offense, referred to as congqing, or lightening the sentence.

In certain cases, a court may also issue a sentence below the minimum for a specific crime set forth in the Criminal Law, referred to as jianqing, or mitigating a sentence. A court may decide to convict a defendant but exempt the defendant from punishment, referred to as mianchuchufa. In cases of minor crimes, courts may also determine that the conduct in question did not constitute a crime. In addition, the Criminal Law states that defendants who are sentenced to terms of three years or less may be granted suspended sentences if they do not pose a threat to society. Taken together, these provisions mean that Chinese courts have a very high level of discretion in sentencing.

In addition to the Criminal Law, the SPC has provided guidance to lower courts regarding leniency and the use of suspended sentences, stipulating that defendants sentenced to three years in prison or less may receive suspended sentences or be exempt from punishment. In practice this means that defendants convicted of a crime for which the maximum sentence is three years or less are eligible for suspended sentences, as are those convicted of a more serious offense who are given only a three-year sentence. The Henan High People’s Court has issued its own sentencing guidelines, which add detail to those issued by the SPC. Generally speaking, in Henan defendants sentenced to three years or less are divided into two categories. Court rules state that suspended sentences should be given to minors, pregnant women, or persons

91. For examples of provisions discussing situations giving rise to lighter sentences or exemption from punishment, see Criminal Law, supra note 89, arts. 7, 10, 17, 18, 19, 22, 29, 65. For a more detailed discussion of how sentencing works in practice, see Li Li, Nulla Poena Sine Lege in China: Rigidity or Flexibility?, 43 SUFFOLK U. L. REV. 655, 658 (2010).

92. For example, see 2012 Criminal Procedure Law, supra note 6, arts. 20, 21, 24, 28, 68. A number of provisions in the Criminal Law give courts the discretion to lighten or to mitigate a sentence.

93. See, e.g., id. arts. 24, 67, 351.

94. 1996 Criminal Procedure Law, supra note 6, arts. 13, 15.

95. Id. art. 72. Revisions to the law in 2011—after the cases examined in this article were decided—added greater specificity to article 72. Such changes were largely consistent with the judicial interpretations discussed below, see infra note 98, that were applicable in 2010.

96. The limited scholarship on sentencing in English has generally emphasized this discretion. See, e.g., Li Li, supra 91, at 658–63.


98. Henan Sheng Gaoji Renmin Fayuan Renmin Fayuan Liangxing Zhidao Yijian (Shixing) Shishi Xize (河南省高级人民法院《人民法院量刑指导意见（试行）》实施细则) [Implementation Provisions of the Henan High People’s Court’s Criminal Sentencing Guidelines (Provisional)] (promulgated by the Henan High People’s Ct., effective Oct. 1, 2010), available at http://www.lawtime.cn/article/lil383464038397340028122 [hereinafter Supreme People’s Ct. Guideline on Sentencing (Provisional)] (stating that defendants qualify for a suspended sentence when they are given a sentence of three years or less and meet other specified provisions).
over seventy-five. For all others, the imposition of a suspended sentence is discretionary and is determined by a range of factors relating to the defendant’s conduct. Judges say it is official policy in Henan for courts to try suspending sentences in cases where the statutory sentence is three years or less. Yet the policy grants significant discretion to local courts; as a result, actual practice at the local level varies.

Until recently formal law did not authorize courts to base sentencing determinations on whether a defendant had paid compensation to her or his victim. Nevertheless, the practice emerged and spread throughout the 2000s, in particular following a 2010 notice from the SPC concerning implementation of the Combining Severity with Leniency policy. The notice stated that reconciliation in criminal cases helped to resolve future cases and prevent petitioning. In the SPC’s 2010 annual work report to the National People’s Congress, the SPC noted the value of mediating compensation agreements in cases where defendants received suspended death sentences. China’s revised Criminal Procedure Law, which became effective on January 1, 2013, explicitly authorizes the use of criminal settlement procedures in specific circumstances. These include crimes arising out of private disputes punishable by three years imprisonment or less and crimes of negligence punishable by seven years imprisonment or less.

99. Id. ch. 2, art. 3, para. 7 (stating that defendants who are sentenced to three years or less and who meet other specified preconditions may have their sentences suspended); Interview 2012-25.


101. Interview 2012-26. Supreme People’s Ct. Guideline on Sentencing (Provisional), supra note 98, ch. 2, art. 3, para. 6. The Criminal Law provides only rough guidelines regarding when a defendant who has been sentenced to three years or less of detention may be given a suspended sentence: when the circumstances of the crime are light, when the defendant has shown remorse, when there is no risk of reoffending, and when there would be no negative effects on the local area from a suspended sentence. Criminal Law, supra note 89, arts. 72–77.


103. The SPC emphasized the importance of courts’ not immediately carrying out death sentences in order to allow for victims’ families and defendants’ to reach a settlement and thus “reduce social contradictions.” Zuigao fa: Yangzhang Wu Tonyi Sixing Shiyong Biaozhun [Supreme Court: Death Penalty Strictly Controlled and Subject to Uniform Standards], XINHUA WANG [XINHUA] (May 25, 2011), http://www.people.com.cn/GB/220005/222646/14738739.html.

104. 2012 Criminal Procedure Law, supra note 6, arts. 277–79. For an analysis of the new
however, China’s Criminal Procedure Law did not authorize courts to consider compensation agreements as factors influencing sentences.

The promotion of settlement in criminal cases followed a general renewed emphasis on mediation in China’s courts in the early 2000s. Embrace of the practice reflected the belief that mediated cases were less likely to result in escalation, protest, and petitioning from victims or defendants (or their families). The policy also reflected resource concerns in the criminal justice system resulting from increased numbers of criminal cases and the belief than many minor offenders, in particular first offenders convicted of nonviolent crimes, did not need to be incarcerated.

In this Article I use the term “leniency” to refer to two specific phenomena in China’s courts: the widespread use of suspended sentences, in some cases even for defendants facing a sentence in excess of three years, and the decision to give a suspended death sentence or life imprisonment to a defendant whose conduct made him or her eligible for the death penalty. My focus is thus on the actual sentences courts grant, not on the legal provisions concerning leniency.

My findings provide evidence of how the policy is being implemented at the local level and suggest that local courts’ embrace of leniency and settlement exceeds national policy. Judges in Henan stated that they try to be lenient where they can, in particular in cases involving minor crimes, crimes committed by youths or students, crimes committed within a family, cases involving defendants who turn themselves in, and cases in which a family member turns in a relative.105 As one judge explained, if “cases come from ordinary lives” then

provisions, including controversy leading up to their adoption, see Rosenzweig et al., supra note 102, at 21–32. The revised law also explicitly states that in such cases the procuratorate may recommend that a defendant receive a lenient sentence or be exempt from punishment. 2012 Criminal Procedure Law, supra note 6, art. 279. Prior to the revision, the 1996 Criminal Procedure Law authorized settlement only in cases involving private prosecutions. 1996 Criminal Procedure Law, supra note 6, art. 172.

105. Official reports list seven categories of cases in which courts ordinarily should issue suspended sentences in Henan: defendants who take appropriate action to minimize harm; minors; deaf, mute, blind or disabled defendants who lack the ability to harm society; those who terminate their crime; those who turn themselves in or engage in meritorious service after the crime; those who assist in cracking a case; and those who commit crimes of negligence. In an additional five categories of cases, courts in Henan have the discretion to issue suspended sentences: those who commit intentional crimes in which there is little negative intent; those who actively repay stolen goods; those who actively pay compensation to victims; those who pay fines in advance; and those who turn themselves in, confess, or otherwise engage in conduct stipulated in law as a basis for leniency. The policy also specifically excludes certain defendants from eligibility for suspended sentences: defendants who fail to confess, fail to show remorse, or cause serious harm; defendants who have “despicable motivations”; defendants who use the proceeds of crimes to engage in other illegal conduct; defendants who take part in a collective crime whose conduct is serious or who commit multiple crimes; defendants with a prior criminal record or who have been subject to administrative sanction two or more times in the past; defendants whose crime involves the use of national relief funds or materials or whose crimes otherwise have serious characteristics. Similarly, defendants whose crimes are subject to punishment of a minimum of three years or more will not be eligible for a suspended sentence unless they have surrendered or engaged in other legally stipulated basis for leniency. Defendants whose crimes are to be punished by a sentence of five years or more
courts will try to be lenient, even if there is no formal legal basis for doing so. Likewise, courts may seek to be lenient in cases where a victim was partially at fault, such as in intentional injury cases arising from fights.

Judges acknowledged some flexible adaptation of the SPC’s official policy. Henan courts often impose suspended sentences for crimes that ordinarily would result in a three-to-seven-year sentence, for example sentencing the defendant to three years and then suspending the sentence. Some observers suggested that the policy was in tension with the SPC’s intent that suspended sentences be used only for minor crimes, although technically the SPC rules do permit the use of a suspended sentence for those sentenced to three years for a crime for which the legally stipulated range is three to seven years.

The 177 county court decisions in my dataset resulted in criminal convictions for 273 individual defendants, 219 of whom were given criminal sentences. Sixty-nine percent of these sentences, 152 sentences, were suspended sentences, meaning that defendants spent no time in prison following the judgment. An additional 53 defendants received only fines or were sentenced to detention or control. Many others who received a sentence received a relatively short one. The median sentence for such defendants was three years, reflecting the fact that most county court cases concerned relatively minor crimes. Cases that resulted in suspended sentences generally involved first-time offenders charged with relatively minor crimes such as fights, traffic offenses

are only eligible for a suspended sentence if there is a legal basis for reducing their sentence to three years or below. Henan Fayuan Nitui “Huaxing Yugaoshu” Zhi (河南法院拟推“缓刑预告书” 制) [Henan Courts Plan to Apply Suspension Advance Notice Policy], HENAN PINDAO (河南频道) [HENAN CHANNEL] (Aug. 13, 2009), http://henan.people.com.cn/news/2009/08/13/411406.html. An article by a judge in the Henan provincial capital, Zhengzhou, provided some additional details as to how judges apply the policy. Qianxi “Huaxing Yugaoshu” De Sifa Jiazhi (浅析“缓刑预告书”的司法价值) [A Brief Analysis of Suspension Advance Notice’s Judicial Value], HENAN FAYUAN WANG (河南法院网) [HENAN COURT NET] (Aug. 17, 2009), http://hnfy.chinacourt.org/article/detail/2009/08/id/746727.shtml. The judge noted seven types of cases in which suspended sentences are used: traffic accidents and other crimes of negligence; minor crimes involving students at universities or other schools; minor crimes by juveniles; cases of minor harm to persons, serious harm resulting from negligence, serious harm with an “antecedent,” or cases of harm to property or other economic harm in which the defendant actively agrees to pay compensation; minor crimes to property such as theft; criminal disputes resulting from disputes among neighbors or family members; and cases involving crimes of negligence, accomplices, those who terminate their crimes, who turn themselves in, or in which the defendant engages in meritorious service or takes preventative action or action to minimize the harm. Id.

106. Interview 2012-25.
107. Id.
108. Id.
109. Detention refers to a short sentence, not to exceed one year, administered by the police in a police-run detention facility, not a prison. In theory those sentenced to detention have greater liberty than those sentenced to prison. Criminal Law, supra note 89, arts. 42–44. Control, sometimes also translated as “public surveillance,” refers to defendants who are not incarcerated but have their movements monitored by the police and who must obtain police permission for a range of activities. Id. arts. 1, 38–41; Cases B49, B184, B187, and B189 (explaining that four defendants received detention and a fine, all for theft).
resulting in personal injury, and low-value thefts. Most outcomes appear consistent with the SPC’s instructions on balancing severity and leniency.

Yet the leniency apparent in cases in the dataset appears to go beyond that announced in official policy. Numerous cases that one might expect to result in incarceration under China’s Criminal Law instead resulted in suspended sentences. Thus, for example, the dataset includes multiple traffic crime cases in which a drunk driver caused a fatality or fatalities but received only a suspended sentence, despite the Criminal Law specifying a sentence range of three to seven years.\textsuperscript{110} Other cases involved violent conflict with local authorities that nevertheless resulted in suspended sentences, including a defendant who drew a knife on local officials seeking to seize counterfeit cigarettes\textsuperscript{111} and a case in which a villager attacked a local birth planning official in his home with an axe.\textsuperscript{112} Likewise, the county court granted suspended sentences in a case involving arson\textsuperscript{113} and in four separate cases involving corruption by local officials,\textsuperscript{114} the largest of which involved the theft of 70,000 yuan.\textsuperscript{115} The practice of granting leniency in cases involving corruption by officials appears directly in conflict with an SPC notice on the policy of balancing leniency and severity, which explicitly called for strict punishment for crimes involving official malfeasance.\textsuperscript{116} In another case, defendants convicted of manufacturing and selling low-quality (presumably fake) fertilizer received suspended sentences. Although the court found that their crime had yielded 120,000 yuan in profit and caused 340,000 yuan in harm, it nevertheless gave defendants a suspended sentence in a simplified trial.\textsuperscript{117}

Settlement with the victim or victim’s family appeared to be the most significant factor that led courts to impose lenient sentences. Sixty-eight of the county court cases reported settlements with victims or their families; another fourteen cases reported payment of restitution or compensation in cases not involving personal injury; and thirty cases reported the return of stolen goods.\textsuperscript{118}

Fifty-eight of the cases in which defendants paid victims mentioned that

\begin{itemize}
  \item \textsuperscript{110} See, e.g., Case B193 (deciding that sentences be suspended, despite multiple fatalities).
  \item \textsuperscript{111} Case B153.
  \item \textsuperscript{112} Case B55 (illustrating that the defendant had argued and fought with the official earlier in the day, apparently when the official visited defendant’s home in the course of his duties as the local birth planning official).
  \item \textsuperscript{113} Case B91.
  \item \textsuperscript{114} Cases B104, B169, B199, and B213.
  \item \textsuperscript{115} Case B199. In contrast, a defendant in a credit card fraud case who was convicted of stealing 10,000 yuan received six years in prison and was fined 60,000 yuan. Case B142.
  \item \textsuperscript{116} Notice of the Supreme People’s Court on Issuing Some Advice on Implementing the Criminal Policy of Combining Leniency with Strictness, \textit{supra} note 102, art. 8.
  \item \textsuperscript{117} Case B130 (demonstrating that the defendants had surrendered and had assisted the police in locating other criminals).
  \item \textsuperscript{118} Cases B179 and B187 (mentioning restitution, specifically). See, e.g., Cases B61, B70, B144, and B156 (discussing return of goods or repayment to victim).
\end{itemize}
defendants had “obtained the forgiveness of” victims or family members, and court decisions explicitly discussed compensation to families as a basis for a suspended sentence.  

 Settlement cases were largely made up of cases resulting from traffic accidents and fights. Because compensation determinations in criminal cases come through attached civil compensation claims, compensation levels should correspond to compensation in tort cases. In practice, however, settlement values ranged widely, and it is difficult to discern whether settlement amounts correspond to amounts potentially available in tort. The largest settlement, in a case involving multiple fatalities, was 370,000 yuan. The court found the defendant to have been drunk and to have fled the scene, which would potentially have exposed the defendant to a sentence in excess of seven years. After paying the compensation to the victims’ families, the defendant received only a three-year sentence, which was suspended for five years, resulting in no prison time. Defendants received suspended sentences in virtually all county court cases involving settlements.

 Yet the number of settlements in the county I studied may actually be low compared to elsewhere in Henan: settlement rates in criminal cases at some first-instance courts in Henan reached eighty or ninety percent. One lawyer commented that the actual practice of settlements in Henan extends far beyond what is authorized in law: “the reality of practice exceeds real life.”
My dataset also includes a number of cases in which defendants convicted of relatively minor crimes did not receive a suspended sentence, apparently at least in part because the defendant did not reach a settlement with the victim. Thus, for example, defendant Wang Xisheng was sentenced to a year in prison following a fight that caused minor injury to a neighbor. The two parties were unable to reach a settlement and the court sentenced Wang to prison, in contrast with other cases involving fights in my dataset where the defendants settled and received only suspended sentences. In one of the two traffic crime cases that resulted in a prison sentence, defendant Liu Tao failed to come to the immediate assistance of his alleged victims after an accident that left two people riding an electric bicycle dead and a third injured, and also failed to compensate his victims. The court found his conduct involved “particularly bad circumstances,” thus warranting a five-year jail sentence. The court explicitly stated that the failure to compensate the victims’ families was a factor justifying a heavier sentence. The other defendant sentenced to prison in a traffic crime case was a recidivist who received an effective sentence of eight months. All other traffic crime cases involved both settlement and compensation.

Particularly unlucky were those defendants who had spent the proceeds of a crime and thus were not able to pay restitution. For example, although the dataset includes a number of cases involving motorcycle thefts where the

m (discussing emphasis on mediation in Henan courts generally and a nearly fifty percent increase in the percentage of cases mediated); Yang Tao, “Xingshi Hejie” Zhong Faguan Buneng Dang Heshilao (刑事和解“中法官不能当和事佬”) [Judges Cannot Be the Peacemakers in Criminal Settlement], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Sep. 27, 2012), http://www.legaldaily.com.cn/Frontier_of_law/content/2012-09/27/content_3872770.htm (noting that China’s new Criminal Procedure Law restricts the use of mediation in criminal cases to specific categories and discussing the risk that mediation will be overused or forced on parties by courts seeking quick resolution of even serious criminal cases); “Xingshi Hejie” Xingui: Furen Ke Jiao Fakuan Qiongren Zhineng Zuolao? (刑事和解“新规: 富人可交罚款穷人只能坐牢”) [New Rules of Criminal Settlement: The Rich Can Pay Fine, While the Poor Can Only Go to Prison?], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Sep. 27, 2012), http://www.legaldaily.com.cn/commentary/content/2012-09/27/content_3873374.htm (discussing concerns that emphasis on settlements in criminal cases will favor the rich).

124. Case B95.
125. Case B5 (illustrating that the defendant had apparently pledged to compensate a small amount, 5,400 yuan, but had defaulted on compensation payment).
126. Case B5. No provision in the criminal law authorizes the imposition of heavier sentence to defendants who fail to compensate. In Case I3, the court affirmed that a three-year sentence for a defendant in a traffic accident. Although the defendant had paid compensation, defendant had apparently not obtained forgiveness of victim’s family. Although defendant requested leniency, defendant’s lawyer contested guilt on appeal. See also Cases B5 and B98 (demonstrating the only two cases that had no suspended sentence arising from a traffic crime). Cases B1, B4, B7, B9, B12, B16, B27, B42, B71, B87, B103, B112, B120, B128, B129, B134, B154, B170, B180, B181, B193, B205, B206, B207, B216, and B220 are examples of cases resulting in suspended sentences.

127. Only Cases B5 and B98 had no suspended sentence in a case arising from a traffic crime. Cases B1, B4, B7, B9, B12, B16, B27, B42, B71, B87, B103, B112, B120, B128, B129, B134, B154, B170, B180, B181, B193, B205, B206, B207, B216 and B220 were traffic crime cases resulting in suspended sentences.
defendants returned the stolen goods and received suspended sentences, it also includes cases such as that of Hou Yunchang who stole a pig and motorcycle and wound up in prison, both because he fled after the crime and because he was apparently unable to pay restitution.128 In another case involving motorcycle thefts, two defendants were treated differently because one had sold, and thus not returned, a stolen motorcycle, while the other defendant had returned all the stolen motorcycles.129

Although somewhat less pronounced in influence, intermediate court cases suggest that settlements are likewise important both in first-instance trials in the intermediate court and in appeals. Eleven defendants who were tried in the intermediate court and convicted of murder or of intentional injury leading to death received either life sentences, suspended death sentences, or fixed terms of imprisonment after paying compensation to victims’ families. In at least one of these cases the court explicitly stated that it was imposing a life sentence, presumably instead of death, because the defendant had compensated the victim’s family and had “obtained the understanding” of the family.130 In another case, a defendant who killed someone in a fight but confessed and paid compensation received a fifteen-year sentence, while a defendant in another case who contested the allegations and failed to pay compensation received life in prison.131 In a third case, a defendant convicted of the kidnapping and killing of a child was sentenced to life in prison despite the Criminal Law specifying the death penalty for a killing in the course of a kidnapping. The court noted that the defendant had settled and had surrendered.132

Settlement was also an important factor in cases in which sentences were revised on appeal to the intermediate court. As discussed below, 27 defendants (out of a total of 442 defendants in the cases on appeal to the intermediate court) had their sentences reduced by the intermediate court, mostly because of settlements subsequent to the initial trial. Judges confirm that settlements may result in reduced punishment in some serious cases and that settlements of cases subsequent to first-instance verdicts may lead the intermediate court to revise sentences on appeal.133

128.  Case B62.
129.  Case B19.
130.  See Case I14a (explaining that a codefendant received a fixed term sentence because he paid compensation and assisted in capturing the primary defendant).
131.  Cases I27b, I28b.
132.  Case I5a. Article 239 of China’s Criminal Law states that a defendant who kills another person in the course of a kidnapping shall be sentenced to death. Criminal Law, supra note 89, art. 239. As Margaret Lewis has noted, a surge in suspended death sentences has in recent years also resulted in public questioning of whether corruption is playing a significant role in courts’ decisions to grant suspended death sentence instead of the death penalty. Lewis, supra note 85, at 325–26. One commentator at a presentation of this Article in China noted that victim’s families in murder cases often have the choice of accepting compensation or having the defendant executed.
133.  Interview 2012-19.

http://scholarship.law.berkeley.edu/bjil/vol33/iss1/1
In interviews, judges confirm that compensation is an important factor determining outcomes, in particular in relatively minor cases, such as traffic crimes leading to injury, theft, and assault. Compensation claims may be resolved privately or through the resolution of civil claims attached to criminal cases. For example, intermediate court judges reported that, in general, roughly half of their first-instance cases have civil cases attached to them and that half of these are resolved through settlement. Other cases may be resolved though settlements outside of court. Cases can be settled at any point in the criminal process, including after courts have issued their decisions, although in practice it appears that courts often wait to see if cases are resolved via reconciliation before issuing their judgments.

Compensation also affects outcomes in capital cases. Lawyers state that in capital cases, settlement agreements can make the difference between death and a suspended death sentence: to avoid the death penalty, a defendant must pay compensation. One lawyer directly linked the recent decline in executions in China and the emphasis on mediating outcomes in criminal cases.

Judges (and procurators and police) at times play active roles in settlement negotiations, reflecting their strong interest in having cases resolved through payment of compensation. As one judge noted, "we work very hard to try to resolve cases via settlement." Court efforts to settle will often be guided by the amounts potentially available in civil cases, and courts explain relevant standards governing compensation in order to persuade victims to accept compensation. Judges say they question victims or their family members to ensure they are satisfied with compensation agreements and in some cases add money to the agreed amount. Such efforts are guided by the belief that

134. Interview 2012-17.
135. Interview 2012-19.
136. Interview 2012-12; Interview 2012-18.
137. Interview 2012-23.
139. Id.
140. Interview 2012-6; Interview 2013-11; Chen Ruihua: Xingshi Susong De Sili Hezuo Moshi (陈瑞华:刑事诉讼的私力合作模式) [Chen Ruihua: Integration of Private Remedy into Criminal Litigation], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Nov. 1, 2010), http://www.legaldaily.com.cn/fxy/content/2010-11/01/content_2335275.htm (discussing prevalence of negotiated outcomes in criminal cases in Beijing and noting success at avoiding petitions; Xingsufa Shishi Zhong De Zhongdian Nandian Wenti (刑诉法实施中的重点难点问题) [Key Points and Difficulties in Application of Criminal Procedure Law], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Jan. 9, 2013), http://www.legaldaily.com.cn/Frontier_of_law/content/201301/09/content_4119385_2.htm (discussing preference of procurators and police for mediating criminal cases during the trial stage).
143. Interview 2013-11.
144. Id.
settlement works. As another judge noted, settlements reduce contradictions and the possibility of escalation; thus, judges “want a settlement.”

Judges describe their roles as neutral actors seeking to ensure that the rights of victims are protected. Yet, it is clear that in some cases, courts place pressure on both sides of a case to agree to a mediated outcome. Lawyers contend that defendants are sometimes under extreme pressure to pay compensation to victims, with trials delayed to encourage settlement. Judges confirm that courts sometimes pressure defendants to settle, noting that criminal trials can be delayed for up to two months in cases in which a civil claim is attached to the criminal case. A few of the cases in the dataset involved delayed trials for minor crimes while a defendant remained in detention, suggesting that the court was attempting to encourage a settlement. In one case, the defendant was sentenced to eighteen months in jail for causing an injury in a fight between neighboring families. That defendant allegedly injured the neighbor by throwing a brick on his foot. The court initially delayed the trial by two months, apparently to encourage the two sides to mediate. When they failed to reach an agreement, the court ordered a relatively modest compensation of 3834 yuan, but also imposed an eighteen-month jail sentence.

In the county court the average time from indictment by the procuracy to court decision was 32.2 days. Twenty-four cases took more than 45 days from indictment to court judgment; only eleven cases took more than 80 days. In these eleven cases, nine of the thirteen defendants eventually either paid compensation or some form of restitution, suggesting that ongoing settlement negotiations may have played a role in the delays. The court appeared to move relatively quickly to decide cases when a settlement seemed unlikely or impossible, with cases not involving a settlement being resolved more quickly.

145. Id.
146. Interview 2013-2.
149. Interview 2012-17.
150. Case B115.
151. The fastest case was decided 5 days after the filing of the indictment. The slowest case took 399 days.
than those involving a settlement. The average time from indictment to decision in cases involving crimes against identifiable victims was 29.1 days for cases not involving settlements and 37.4 days for those with settlements. In the intermediate court, the average time from indictment to judgment was longer—74 days. Yet some intermediate court cases also moved quickly from indictment to trial. For example, only 21 days elapsed from indictment to judgment for a defendant charged with fraudulently raising nearly 3 million yuan in capital. The defendant, who lacked legal representation, was sentenced to life in prison.

It is also common for cases involving multiple defendants accused of the same crime to result in different sentences depending on whether the defendants paid compensation. Defendants who compensate victims often receive suspended or reduced sentences; those who do not receive prison terms. For example, a defendant convicted of intentional homicide had his sentence reduced on appeal from five years to four years after he paid 35,000 yuan in compensation to the victim’s family. The defendant had been part of a group that went to the victim’s home to pressure her to repay a gambling debt. The victim drank pesticide, killing herself in front of the defendants. The court affirmed a finding of intentional homicide for two of the defendants, but accepted one defendant’s argument that the sentence should be reduced in light of the compensation paid and the secondary role played by the defendant in the crime. In a companion case, three others who were convicted of participating in the same crime but who failed to pay compensation had their sentences affirmed.

Judges say they consider settlement offers even in cases in which victims reject such settlements, but it is impossible to verify this from the written judgments. Judges also say they take account of defendants who cannot pay, although the cases do not provide evidence to support this claim. Judges say that, in general, defendants will borrow from friends and family in order to come up with money to pay compensation. In some cases courts may also provide funds to victims’ families from court assistance funds to encourage settlements, in particular where the defendant or defendant’s family has tried to settle but lacked adequate resources. Defendants also sometimes act strategically when

---

153. Interview 2012-6.
154. Id.
155. Case 1156.
156. Case 114b.
157. See also Case 6c (illustrating that defendants who settled received lighter sentences than codefendants who did not settle for beating corncob seller after motorcycle crashed on spilled corncobs).
158. Interview 2012-17.
159. Interview 2013-11 (noting that in cases in which a defendant lacks fund the court will seek to explain the situation to the victim or victim’s family).
161. Interview 2012-17.
it comes to organizing settlements: in one traffic accident case, the defendant fled after the accident and then waited to turn himself in until the two families had reached a settlement. He received a suspended sentence.  

Cases that were not amicably resolved sometimes resulted in defendants receiving jail sentences even when they did pay compensation. Defendant Wang Xisheng was charged with willful injury after he punched his neighbor in the chest, causing “minor harm.” Wang did so after his neighbor dug a hole outside his house into which he fell. Wang agreed to compensate his neighbor 7,000 yuan, an amount approved by the court. Nevertheless, he was sentenced to a year in prison. The court, while rejecting the victim’s demands for additional compensation, nevertheless decided that Wang deserved a prison sentence—in contrast to numerous other cases where defendants charged with crimes arising out of fights received only suspended sentences.

Surrender and confession are also important factors affecting leniency, although the county court made clear that surrender must be useful to the authorities and confession must be truthful. Confession is a prerequisite to the imposition of a suspended sentence. The overwhelming majority of defendants confessed: 202 of the 273 defendants in the county court confessed at some point in the process. A small number of cases involved multiple defendants in which one defendant was treated more harshly than codefendants because of failure to confess. Helping victims after an accident was also a factor courts considered in imposing a lenient sentence. Informing on others and providing evidence of other crimes were also useful routes for those seeking leniency. Failure to surrender or to confess, in contrast, can lead to a heavier sentence. Thus, for example, a defendant who tried to escape after being detained was sentenced to four months for a minor crime that otherwise almost certainly would have resulted in a suspended sentence.

Some apparent lenient outcomes may reflect court and procuratorate attempts to adapt to local customs and expectations. Thus, for example, a defendant who attacked another person with an axe was prosecuted for attempted murder but was sentenced at the bottom of the specified range to 144 months in the trial court. On appeal, the intermediate court reduced the sentence to 72 months. The defendant had acted in response to an attempt by the victim to “cure [the] defendant’s wife by superstitious means.” Prior to the attack, the two had argued with the victim stating that the defendant had offended the heavens.

162. Case B103.
163. Case B95.
165. Case B73. Case B73. But see Cases B139, B113, and B79 (demonstrating that in additional cases longer sentences appeared to be based both on failure to settle and on the other defendant committing additional offenses).
166. Case B154.
167. Case B62.
and was cursed. In another example of both leniency and efforts to reconcile disputes among neighbors, the intermediate court affirmed a one-year sentence for a defendant for willful injury. The defendant was apparently a traditional healer who the court said used "witchcraft" to attempt to remove a serpent that she said was inside the victim. The victim was suffocated when the defendant compressed her neck and held her nose closed during the treatment. The defendant paid more than 100,000 yuan to the victim’s family prior to trial. The one-year sentence appears low even considering the payment of compensation.

The cases provide a window into the practice of leniency in Henan that likely is over- and underinclusive. Many cases settle during the investigation phase under the guidance of the procuratorate; these cases never proceed to court and thus do not appear in the dataset. Likewise many traffic cases that could potentially lead to criminal charges are settled by the police because charges are dropped once compensation is paid. Procurators say that it is common to drop charges for minor crimes when the defendant agrees to compensate the victim. Compensation agreements can also affect the criminal charge selected by the procuratorate.

Yet suspended sentences may not reflect leniency at all: some interviewees suggested that many suspended sentences reflect cases where defendants should never have been charged with or convicted of a crime in the first place. Chinese courts in criminal cases serve almost entirely as fora for determining sentences, not guilt. Courts are under enormous pressure to convict all defendants, and suspended sentences may thus be a proxy for cases where there is insufficient evidence to convict. Although most nonpublic cases involve juveniles, it is also possible that courts choose not to make certain cases public.

Confession, surrender, and compensation are not the only factors affecting sentencing. Courts may also consider factors not stated in the opinion. For example, one judge noted that courts will often consider whether the defendant has children although the court may not put such reasoning into an opinion. Additionally, suspended sentences may also reflect direct corruption. It is impossible to know how many such cases occur, but defense lawyers acknowledge that defendants can sometimes win suspended sentences through direct payments to judges.

---

168. Case I88a.
169. Case I92a.
171. Interview 2013-12.
175. Id.
C. Overcriminalization and State Interests

Despite the official embrace of leniency, the county court decisions also show that the criminal justice system continues to criminalize a wide range of minor conduct. Thus while many criminal defendants appear to be treated leniently, the county cases suggest that the criminal justice system handles a significant number of primarily civil disputes. Many of the cases appear to reflect the criminalization of tort disputes or business disputes, perhaps reflecting the difficulty of winning and enforcing a civil judgment. Hence the dataset includes numerous cases that involve fights among neighbors resulting in minor harm—in one case a fight resulting in minor harm to a finger—that become criminal cases. Such cases largely follow statutory guidelines, which impose sentences of up to three years for intentional harm resulting in minor injury. Nevertheless, the large volume of such cases appears in tension with efforts to mediate minor criminal matters. Settlement is encouraged, but even very minor crimes remain a concern of the State. Likewise, the cases include fairly routine traffic accidents—in one case caused by a wheel falling off a car—that are treated as criminal matters. Also, property disputes—in particular illegal use of land that does not belong to the defendant—were another source of criminal cases. China is not unique in criminalizing such conduct, but the cases reflect the long reach of the criminal justice system. Procurators and lawyers say that it is common for the criminal system to be used to resolve civil cases—in particular economic cases and disputes among neighbors.

The threat of criminal charges is at times used to extract compensation from an opposing party or used to force those who refuse to comply with civil cases to do so. This was most clear in a case in which a defendant was convicted and sentenced to a suspended sentence for refusing to pay a prior civil award for 440,000 yuan resulting from a traffic accident. The court noted that the defendant had spent money decorating his house and purchasing household appliances despite claiming to lack resources to pay the judgment.

The cases also show that harsh punishments are imposed when core interests of the State are involved or where there are concerns about repeat or copycat crimes. Thus, the county court imposed long sentences for creating a tax

176. Case B159.
177. Case B134.
178. Cases B17, B47, and B63. See also Case I69a, in which a dispute about use of land led to criminal charges for destruction of property. The court in that case ordered the defendant to pay forty percent of the victim’s damages.
179. The cases also do not include defendants sentenced to reeducation through labor or other forms of administrative custodial detention.
180. See, e.g., Interview 2013-7 (stating that it is easy to use criminal cases to resolve economic or business disputes).
181. Case B195.
fraud scheme,\textsuperscript{182} stealing parts from highways,\textsuperscript{183} or stealing electrical wires or electrical installations belonging to the power grid or installations or materials belonging to telecommunications companies.\textsuperscript{184} Crimes involving threats of violence, guns, or trafficking of women and children were treated harshly.\textsuperscript{185} One of the longest sentences in the county court was in a case involving defendants who created a company for the purposes of exporting labor to Singapore. The scheme involved charging victims a fee in exchange for promising to arrange work.\textsuperscript{186} The primary defendant received an eleven-year sentence.\textsuperscript{187}

Those with prior criminal records were likewise treated harshly, virtually always receiving criminal sentences regardless of the seriousness of the crime charged. Thus, a defendant in the intermediate court who was convicted of stealing 200,000 yuan in jewelry received a life sentence despite the fact that there was no suggestion of violence, apparently because of a prior conviction for theft.\textsuperscript{188}

Courts also are careful to ensure that sentences imposed generally exceed time held in pretrial detention, thus avoiding a suggestion that the procuratorate or police had erred in ordering that a defendant be detained. All of the 169 county court defendants held in detention for a period prior to trial were found guilty, and most of them received criminal sentences that were equal to or greater than the time already served in detention. Yet 85 of these defendants had their sentences suspended, meaning they likely served no additional time in detention. Nevertheless, the imposition of a suspended sentence or fine (as opposed to a nonguilty verdict) also precluded a State compensation claim that the procuratorate or police had erred in their decisions to detain the defendants.

\textbf{D. High-Profile Issues}

The cases in this study provide insight into how the criminal justice system is being used to address a number of contentious social issues, including: corruption, land disputes, disputes related to social stability, and violent domestic disputes. They also provide details on crimes charged against women.

\begin{itemize}
\item \textsuperscript{182} Case B79 (holding that a defendant is sentenced to six years for selling fake value added tax certificates).
\item \textsuperscript{183} Case B139.
\item \textsuperscript{184} Cases B6, B14, and B157.
\item \textsuperscript{185} See, e.g., Cases B133 and B2221 (holding that a crime of troublemaking and provocation for assault in which defendant stole twenty-five yuan deserved a five-month sentence); see also Cases B90, B32, and B94.
\item \textsuperscript{186} The defendants were able to return only ten percent of the money collected.
\item \textsuperscript{187} Case B161.
\item \textsuperscript{188} Cases I29a (suspended sentence); Case I29b.
\end{itemize}
1. Corruption and Financial Crimes

Six county court cases involve financial crimes relating to corruption: bribery,\textsuperscript{189} corruption,\textsuperscript{190} embezzlement,\textsuperscript{191} and misappropriation of public funds. In all but one of the cases, defendants received a suspended sentence.\textsuperscript{192} In contrast, a number of defendants who were not State employees received significant sentences for financial crimes. Seventeen county court cases involved other forms of financial crime: fraud;\textsuperscript{193} contract fraud;\textsuperscript{194} credit card fraud;\textsuperscript{195} extortion and blackmail;\textsuperscript{196} forgery or sale of State certificates or fake tax invoices;\textsuperscript{197} and illegal business activities.\textsuperscript{198} Sentences were suspended in only eight of these cases, with some defendants receiving sentences of up to thirteen years. Differences in sentencing may reflect underlying provisions in the Criminal Law and in the amount of money involved: Chinese law links sentences to the amount involved in financial crimes. A number of the contract-fraud and financial-crime cases that resulted in criminal sentences involved large amounts of money, while the amounts involved in many of the official corruption cases were relatively small. More serious sentences were imposed in corruption and embezzlement cases tried in the intermediate court.\textsuperscript{199}

Nevertheless, the cases suggest the possibility that financial crimes involving State officials are treated more leniently than those committed by non-State employees and that the criminal justice system is being used to resolve business disputes.\textsuperscript{200} In interviews, lawyers confirm that it is common for

\textsuperscript{189} Case B70 (holding that a defendant policeman would receive a suspended sentence for accepting money in exchange for attempting to eliminate a criminal sentence).

\textsuperscript{190} Case B169 (convicting sanitation bureau head for stealing 30,000 yuan by falsifying financial statements for his department); Case B123 (defendant adjusted electricity meters to collect more money).

\textsuperscript{191} Case B104 (imposing three-year sentences, which were suspended for four years, for misappropriating 60,000 yuan in public funds); Case B203 (embezzled public funds by stealing from a rural health fund).

\textsuperscript{192} The one defendant who did not receive a suspended sentence received a twelve-year sentence for embezzling more than 100,000 yuan from a local rural health fund. Case B203. The finding is not surprising: at numerous workshops in China at which I presented this paper there was general consensus that prior to 2013, officials convicted of corruption and related offenses generally were treated leniently unless their conduct was extremely serious.

\textsuperscript{193} Cases B46, B61, B101, B144, B161, B202, B204, and B214.

\textsuperscript{194} Cases B10, B88, and B209.

\textsuperscript{195} Case B23.

\textsuperscript{196} Cases B40, and B65 (both receiving suspended sentences).

\textsuperscript{197} Cases B53, B210, and B79.

\textsuperscript{198} Case B161.

\textsuperscript{199} See, e.g., Case I6a (imposing a fifteen-year sentence for embezzling 3 million yuan intended to be used for relocation payments to villagers).

\textsuperscript{200} Case I4A is another case in which a lower court appeared lenient toward a defendant charged with corruption. A county court convicted a police officer of abuse of power for extorting money but then ordered him exempt from punishment because the consequences were slight and the defendant had been subject to Party discipline. The procuratorate successfully objected and the
officials to receive comparatively lenient sentences, in particular when funds are returned.201

Most of the cases studied involve low-ranking officials who received apparently lenient sentences. But one first-instance intermediate court case involved the prosecution of a county Party secretary, the highest ranking official at the county level, on forty-nine corruption counts, totaling more than 5 million yuan. The defendant, who argued that he acted in the public interest and that the funds were used to buy gifts for other officials, was sentenced to eighteen years.202

2. Land Disputes

A number of cases demonstrated the prevalence of land disputes in rural China in recent years, in some cases fights resulting from such disputes.203 Three other cases were brought against defendants for illegal occupation or use of farmland, generally for use of land in ways not approved by the State or for using land that did not belong to the defendant.204 For example, two defendants were prosecuted for illegally selling sand from their land,205 in one case by digging a hole eleven meters deep.206 One case involved defendants prosecuted for beating villagers who refused to cooperate with a relocation order in conjunction with a land seizure. Defendants were sentenced to thirty months, with the intermediate court affirming a decision to treat defendants leniently because they had assisted other investigations.207

3. Social Stability and Protest

A few cases touched on issues concerning social stability, hinting at local unrest. One case in the county court involved an attack on a local high school by villagers, the result of an apparent dispute between two villages.208 A county intermediate court imposed a two-year sentence.

201. Interview 2013-7.
202. Cases I21a and B190. See also Case I70a, in which defendants were prosecuted for illegal detention after a group of villagers blocked access to police seeking to arrest a fellow villager. Although the defendants prevailed on an initial appeal, on retrial they were once again convicted.
203. Case B106 (fighting arising from land dispute).
204. Cases B17, B47, and B63.
205. Cases B17 and B63.
206. Case B17 (admonishing that the defendant had caused “serious deterioration to farmland”). In another case, a defendant was convicted of illegal use of farmland after opening a dairy. Case B47. Numerous other cases resulted from conflicts relating to land disputes. See, e.g., Case I7 (convicting defendant of cutting down neighbor’s trees after neighbor cut down defendant’s trees following contract dispute over land use rights).
207. Case I83a.
208. Case B190. See also Case I70a, in which defendants were prosecuted for illegal detention after a group of villagers blocked access to police seeking to arrest a fellow villager. Although the defendants prevailed on an initial appeal, on retrial they were once again convicted.
court case resulting from a labor dispute ended in convictions for employees charged with stealing crops.\textsuperscript{209} In another case, the intermediate court convicted a defendant for abuse of power for entering into a contract that resulted in massive financial losses to a hotel.\textsuperscript{210} The court’s opinion noted the deep unhappiness of the defendant’s employees, presumably from the resulting job losses. The case suggested that the prosecution was at least in part a response to a fear of labor unrest.

In one case, the intermediate court affirmed a lower court sentence of five years for extortion. The defendant was unhappy about a separate decision in the lower court determining the amount of land assigned to the defendant and her family pursuant to a land use transfer agreement. She told the court that unless it paid her 1 million yuan, she would go to Beijing to protest. In response, the procuratorate brought criminal extortion charges.\textsuperscript{211}

Other cases showed how persistent petitioning affects the courts. In a case that began in 2002, defendants were convicted of disturbing public order after they allegedly organized a protest at local government offices. They served thirty months in prison. Upon their release, they began petitioning, seeking to have the judgment reversed. They eventually succeeded in convincing the provincial high court to order the case retried—but the county court once again found them guilty, and the intermediate court affirmed.\textsuperscript{212}

4. Female Defendants and Crimes Within the Family

Court opinions provide only limited information about individual defendants: age, gender, and in some cases, education level and employment status. In the county court, 27 of the 273 defendants were women.\textsuperscript{213} In the intermediate court, 72 of 530 defendants were women, including 9 defendants in first-instance cases. The limited sample size makes generalizations about types of crimes committed or sentencing of women difficult. Women were prosecuted for crimes ranging from organized robbery to forgery to intentional harm and trafficking or abduction of women or children. Women involved in serious crimes, such as organized robbery, received sentences along the lines of their male accomplices or counterparts given the crimes charged, although there is some evidence that women were detained for shorter periods pretrial. Women involved in trafficking cases received harsher sentences than their male accomplices, but courts found that the women were the primary culprits in these

\begin{itemize}
\item \textsuperscript{209} Case B183.
\item \textsuperscript{210} Case I26.
\item \textsuperscript{211} Case I68 (demonstrating that, as the defendant had already been to Beijing to protest three previous times, she almost certainly drew the ire of the local court).
\item \textsuperscript{212} Case B190. See also Case I70a, in which defendants were prosecuted for illegal detention after a group of villagers blocked access to police seeking to arrest a fellow villager. Although the defendants prevailed on an initial appeal, on retrial they were once again convicted.
\item \textsuperscript{213} All but one of the remaining defendants were male; one defendant was a corporation.
\end{itemize}
cases, actually selling the women and children, as opposed to their male accomplices who received only suspended sentences for introducing the defendant women to buyers.

Tables 5 and 6 list crimes with which women were charged in the county court and in first-instance intermediate court cases.

**TABLE 5: FEMALE DEFENDANTS IN THE COUNTY COURT BY CRIME SENTENCED**

<table>
<thead>
<tr>
<th>Case Type</th>
<th>Defendants</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organized robbery (聚众哄抢罪)</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Theft (盗窃罪)</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Forgery and/or sale of state authorities’ certificates (伪造、买卖国家机关证件罪)</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Intentional injury (故意伤害罪)</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Abduction and trafficking of women (拐卖妇女罪)</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Concealment of illegal gains (掩饰、隐瞒犯罪所得罪)</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Abduction and trafficking of children (拐卖儿童罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Bigamy (重婚罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Disturbance of the peace (寻衅滋事罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Fraud (诈骗罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Gambling (赌博罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Illegal sales of invoices (非法出售发票罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Misappropriation of public funds (挪用公款罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Traffic accident (交通肇事罪)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>27</strong></td>
<td><strong>21</strong></td>
</tr>
</tbody>
</table>

Note: “Defendants” refers to the number of defendants charged with a particular crime. Defendants who are charged with more than one crime are counted multiple times.

“Cases” refers to the number of cases in which a particular crime was charged. Cases with multiple charges are thus counted multiple times.

**TABLE 6: FEMALE DEFENDANTS IN FIRST-INSTANCE TRIALS IN THE INTERMEDIATE COURT**

<table>
<thead>
<tr>
<th>Crime</th>
<th>Defendants</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Credit card fraud (信用卡诈骗罪)</td>
<td>2</td>
<td>1</td>
</tr>
</tbody>
</table>
Concealment of stolen goods (掩饰，隐瞒犯罪所得)

Intentional homicide (故意杀人罪)

Receipt fraud (票据诈骗罪)

Harboring criminals (窝藏罪)

Drug trafficking (贩卖毒品罪)

Loan fraud (贷款诈骗罪)

Illegal manufacturing of explosives (非法制造爆炸物罪)

Loan swindle (骗取贷款罪)

Total

Note: “Defendants” refers to the number of defendants charged with a particular crime. Defendants who are charged with more than one crime are counted multiple times. “Cases” refers to the number of cases in which a particular crime was charged. Cases with multiple charges are thus counted multiple times.

A few cases likely reflect gender issues or potential bias. One female defendant was convicted of the crime of bigamy and sentenced to six months in prison after she began living with a man other than her husband. She argued that she had done so only after her husband had an affair with another woman. The criminalization of a routine domestic dispute strongly suggests that the criminal system was used to settle personal scores to the detriment of the female defendant.

The dataset also confirms that courts are lenient in their handling of intrafamily crimes, including spousal killings. In one county court case, the court convicted the defendant of negligently killing a woman following a domestic argument. The defendant and the victim were living together, and the victim, who was married to another man, suffered from mental illness. The court reported that the two argued after drinking. The defendant left the woman to sleep on a concrete floor in an unheated room while wearing only her underwear and a coat. When she froze to death, the defendant received a six-year sentence. The case was the only nontraffic accident case involving the death of a victim tried in the county court. All other cases involving death of the victim were treated more seriously and thus were tried in the intermediate court.

Similar trends appear in the intermediate court cases. In another case, a defendant who killed his wife received a suspended death sentence. The court’s opinion emphasized the defendant’s unhappiness in his marriage, perhaps providing a basis for avoiding a death sentence. Another defendant who

---

214. China’s Criminal Law criminalizes cohabitation with someone other than one’s spouse, but it provides that charges may only be brought by a private complaint.


216. Case I3a. The case had been decided twice previously by the intermediate court; each time
killed his wife was convicted of intentional injury, not murder, and was sentenced to just under ten years. 217 In interviews, judges and lawyers confirm that serious crimes that occur within families, most notably the killing of a spouse, are treated leniently, with the death penalty virtually never imposed. 218

Not all assailants were male. One woman was convicted of homicide in the intermediate court for killing her husband by setting fire to a building and locking him inside. The defendant argued that she had intended to burn down the home of a woman she believed was having an affair with her husband. The court imposed a suspended death sentence, stating that it was acting leniently because the defendant had surrendered. But the court also argued that further leniency was not warranted, in part because the defendant failed to provide any evidence of an actual affair 219—despite the fact that the killing had taken place in the other woman’s home.

E. Lawyers and Legal Arguments

Few of the defendants in the county court had lawyers or other legal representatives. This observation is not surprising: the lack of lawyers in criminal cases has been widely noted. Nevertheless, these cases show that it is common for defendants to be convicted with no legal representation. Also, the cases describe the types of arguments made by defendants and their lawyers at trial and on appeal.

it was remanded for retrial by the provincial high court. It appears that the defendant had settled with the victim’s family, as the family had dropped their civil case as the case proceeded.

217. Case I4c. In contrast, a defendant convicted of intentional homicide for choking his girlfriend to death received a suspended death sentence. Case I20. The fact that death-penalty cases are not made public makes comparisons difficult, but the apparent trend of avoiding death sentences in such cases is consistent with observations from local lawyers. In another case a defendant received a suspended death sentence for the intentional killing of his wife. The defendant explicitly argued that he should be treated leniently because the murder took place in a domestic dispute. Case I3a; see also Case I40 (imposing fifteen-year sentence for killing brother in a fight, after the lawyer argued for leniency because it was a family dispute, and after the victims’ family argued for leniency). Only one appeal to the intermediate court appeared to involve a domestic dispute. Case I1141. In that case, the defendant’s husband assaulted his father-in-law, who had come following a fight between the husband and wife. Id. The victims appealed, arguing that compensation was too low and that the sentence was too short. Id. The procuratorate, however, did not participate in the appeal, suggesting a reluctance to become more deeply involved in the case. Id. In another appeal that reflected the interaction of gender roles and traditional values in the countryside, the court affirmed sentences of up to three years for robbery for a woman and her two sons after they allegedly detained and demanded money from their daughter/sister’s boyfriend. Case I103. They argued that he had forced them to lose a bride price by having sex with his girlfriend—and thus should pay compensation as a result. Id. Other crimes of passion likewise appeared to receive relatively lenient treatment. See, e.g., Case I47b (imposing fifteen-year sentence for willfull injury for killing in a fight, where defendant, who had a prior record, suspected victim was having an affair with his girlfriend).

218. Interview 2012-17.

Of the 273 defendants in the county court, only 48 defendants had a legal representative of any kind. Three defendants were represented by basic-level legal workers, and an additional 3 were represented by family members. The remaining 42 defendants were represented by lawyers.

Representation rates in first-instance cases in the intermediate court were higher, reflecting the more serious charges faced by defendants in such cases. Of the 67 first-instance defendants, 50 were represented at trial; 49 of these were represented by lawyers. Rates of representation were much higher in the most serious cases. All of the 9 defendants sentenced to suspended death sentences had lawyers; 15 of the 20 defendants sentenced to life in prison had lawyers.

Cases on appeal to the intermediate court had lower rates of representation: only 123 of the 442 defendants in cases on appeal to the intermediate court had legal representation detailed in the court opinions.

Table 7 lists the cases by crime charged in which defendants in the county court were represented by lawyers. Table 8 presents similar data for the intermediate court.

### Table 7: County Court Cases with Legal Representation

<table>
<thead>
<tr>
<th>Crime</th>
<th>Defendants</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Theft (盗窃罪)</td>
<td>9</td>
<td>9</td>
</tr>
<tr>
<td>Traffic accident (交通肇事罪)</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>Concealment of illegal gains (掩饰、隐瞒犯罪所得罪)</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Dissemination of obscene materials (传播淫秽物品罪)</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Intentional injury (故意伤害罪)</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Production and sale of fake and substandard products (生产、销售伪劣产品罪)</td>
<td>3</td>
<td>2</td>
</tr>
</tbody>
</table>

220. Basic level legal workers are State-licensed paraprofessionals, generally with limited legal training. Basic-level legal workers are authorized to represent clients in civil cases; they are not permitted to represent clients in criminal cases.

221. The remaining defendant was represented by a family member.

222. See, e.g., Case 16 (imposing against a woman, who was not represented by lawyer, a sentence of life in prison for drug trafficking); Case 19 (imposing against a defendant with no lawyer a sentence of life in prison for defrauding 2.92 million yuan). The 1996 Criminal Procedure Law mandated legal representation only in cases in which a defendant faced a potential death sentence or was blind, deaf, mute, or a minor. 1996 Criminal Procedure Law, supra note 6, art. 34.

223. The cases specified that 128 defendants had legal representation, while 238 lacked representation. For an additional 86 defendants, the opinions provided no information. It is thus likely that the actual number with some form of legal representation was higher than 128—but nevertheless still significantly below half of the cases. Of 21 defendants in rehearing cases, 11 had legal representation.
<table>
<thead>
<tr>
<th>Crime</th>
<th>Defenders</th>
<th>Cases</th>
<th>Defendants with Legal Rep?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Credit card fraud (信用卡诈骗罪)</td>
<td>3</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Selling counterfeit money (出售假币罪)</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Bribery (受贿罪)</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Contract fraud (合同诈骗罪)</td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Robbery (抢劫罪)</td>
<td>5</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>Misappropriation of public funds (挪用公款罪)</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Concealment of stolen goods (掩饰隐瞒犯罪所得罪)</td>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Willful injury (故意伤害罪)</td>
<td>22</td>
<td>12</td>
<td>17</td>
</tr>
</tbody>
</table>

Note: Total number of cases with legal representation is 41. Two cases that involved multiple charges are counted twice under “cases.” Defendants are listed by the most serious crime charged.

**TABLE 8: LEGAL REPRESENTATION IN FIRST-INSTANCE INTERMEDIATE COURT CASES**

Published by Berkeley Law Scholarship Repository, 2015
The county court cases also show that defendants and, where represented, their lawyers, were rarely effective when they contested guilt.224 Lawyers represented defendants in only five of the nine cases in which defendants contested guilt.225 In only one county case did the court indicate that it was accepting a defendant’s argument regarding guilt: in that case the court accepted the defendant’s argument that the evidence provided failed to support the procurator’s claim that the defendant had participated in one of four alleged thefts (the defendant was sentenced for the three other thefts).226 The court rejected defense arguments in the other eight cases in which a defendant or a lawyer contested guilt.

Lawyers in Henan say that courts will generally, but not always, mention defense arguments in opinions.227 Thus, it is possible that some defense arguments are not reflected in the court opinions. Nevertheless, it is clear from the cases that acknowledging guilt is by far the most common strategy.

The outcomes in the cases reflect a fact that is widely known: winning a nonguilty verdict is nearly impossible. No defendants in the county court cases received nonguilty verdicts. Three out of more than four hundred defendants in the intermediate court cases (including appeals and first-instance trials) received nonguilty verdicts. In one case, the intermediate court reversed a conviction by a

224. Chinese criminal procedure does not bifurcate determinations of guilt and sentencing. Because a defendant generally must admit guilt in order to obtain leniency, defendants thus face the choice of contesting guilt and forgoing arguments for leniency or admitting guilt and arguing for leniency.

225. Cases B5, B6, B20, B61, B161, B195, and B209.

226. Case B26. A codefendant was convicted of all four of the thefts.

227. Interview 2012-4.
lower court of a local village committee for illegal occupation of farmland. On appeal, the intermediate court found that criminal liability could not be imposed on the village committee. The intermediate court affirmed criminal judgments against the farmers who actually illegally occupied the land. In a second case, the intermediate court affirmed a nonguilty decision from a lower court in a malicious accusation case. Yet the case was a claim filed by a private individual, not the procuratorate, and thus did not reflect on the work of the procuratorate. In a third case, a trial court had acquitted defendants of intentional assault; on appeal, in response to a procuratorate’s objection, the court vacated and remanded. No first-instance trials in the intermediate court resulted in nonguilty verdicts. In interviews, judges and lawyers confirm the lack of nonguilty verdicts in criminal cases in Henan.228

County court judgments almost always convicted defendants of the exact crimes charged by the procuratorate, differing from procuratorate charges in only two cases. In both cases the court convicted the defendant of an additional charge not alleged by the procuratorate.229 The intermediate court likewise convicted the defendant of the exact crime charged by the procuratorate in all sixty-four first-instance cases for which data are available. Yet contesting guilt may not be fruitless. Judges and lawyers also acknowledge that they have other strategies to deal with cases they view as incorrectly decided or lacking evidence. Judges say that they will not rule against the procuratorate because doing so would affect the career development of both procurators and police involved in the case. Instead, courts will “communicate [with the procuratorate] and work it out” if they find problems in cases.230 Courts may also impose suspended sentences or exempt defendants from punishment in order to avoid finding a defendant not guilty.231 Judges acknowledge mediating outcomes even in cases where there is insufficient evidence to convict.232 In other cases they

228. Interview 2013-2 (stating that winning a nonguilty verdict is impossible, but that in some cases lawyers nevertheless have no option but to try).
229. Case B23 (adding a charge of credit-card fraud to procuratorate charge of concealment of illegal gains); Case B80 (adding a charge of theft to procuratorate charge of illegal logging).
230. Interview 2012-11; see also Interview 2012-4 (noting that courts are generally reluctant to offend the procuratorate).
231. Interview 2012-7; Interview 2012-10.
232. Interview 2012-26. For discussion of the issue, see Liu Wei, Wuzui Panjuexl Qudi De Beimian (无罪判决率起诉的背面) [Behind Low Rate of Non-Guilty Cases], MINZHU YU FAZHI SHIBAO (民主与法制时报) [DEmOCRACY AND LEGAL SYSTEM NEWS] (Oct. 29, 2012), http://www.mzyfz.com/cms/minzhuuyufazhishibao/fanfu/html/1248/2012-10-29/content-552683.html (stating that court and procuracy evaluation standards directly overturn the presumption of innocence because they result in avoidance of nonguilty verdicts); Zhu Xiaoding, Shuai Kan Zhongguo: Basan Nian Yilai Zuigao Fayuan Baogao Zhong De Xingshi Panjue Yu Wuzui Xuangao (数字看中国:八年以来最高法院报告中的刑事判决与无罪宣告) [Look at China through Numbers: Criminal Cases and Nonguilty Cases in the SPC’s Annual Report Since 1983], SOHU BOKE (搜狐博客) [SOHU BLOG] (Mar. 20, 2012), http://yeyuduxingzhe.i.sohu.com/blog/view/208173345.htm (arguing that the nonguilty rate is a measure of courts’ independence and noting that since 2009 the Supreme People’s Court has stopped disclosing the number of people found not-guilty in its
may reduce a sentence on appeal to time served. For example, in one case the intermediate court initially remanded a conviction for illegal manufacture of explosives. On appeal from the trial court for a second time, the court reduced the sentence from seventy-two to twenty-one months, effectively the time already served.233

Some cases in which evidence against the defendant is weak are never resolved. One Henan lawyer described a case that was vacated and sent back for retrial twice. The lower court never reheard the case; instead, the defendant was released on bail and no further action was taken in the case.234 Another lawyer stated that defendants prevail with nonguilty arguments only when they are already on bail or in cases filed by private parties (as opposed to the procuratorate).235 Other concerns also impact courts’ reluctance to issue nonguilty verdicts: judges may be worried about protests from victims’ families in cases in which they issue not guilty verdicts,236 may be concerned that judges may be blamed if the procurator files an objection to the decision resulting in the verdict being changed,237 or may be concerned about potential State compensation claims from the acquitted defendant.238

Lawyers also note that it is often hard to contest guilt because many defendants have confessed prior to the intervention of lawyers.239 In such cases, lawyers who pursue a nonguilty defense risk being targeted for prosecution under Article 306 of China’s Criminal Law. Lawyers have no space to make independent assessments of the merits of a nonguilty defense because their clients have generally already been pressured into acknowledging their guilt.240 As one lawyer commented, “once you are at court it is too late.”241 Lawyers

annual Work Report); Morang “Wuzu Panjue” Qinzhouchijian Jiguan Shenpan Jiaodu (莫让“无罪判决”掣肘检察机关审判)(Don’t Let “Nonguilty Decisions” Circumvent Procuratorate Supervision), ZHONGGUO CAIXUN WANG (中国财讯网) [CAIXUN] (Jul. 10, 2012) (on file with author) (noting procuracy concerns that a nonguilty verdict will affect their evaluation and will have negative social effects); Chehui Gongsu Zai Woguo Lifa Ji Sifa Shiwu Zhong De Zhuangkuang (撤回公诉在我国立法及司法实务中的状况) [The Situation of Withdrawal of Prosecution in Legislation and Adjudication in Our Nation], FAZHI WANG (法制网) [LEGAL DAILY] (Oct. 6, 2008), http://www.legaldaily.com.cn/fxy/content/2008-06/10/content_875885.htm (stating that any case in which a court proposes to find a defendant nonguilty must be submitted to court adjudication committees, that courts will consult with procuratorates in advance of any such decision, and that procuratorates will in practice withdraw a case prior to a court issuing a nonguilty decision).

233. Case 175a. Defendants had argued that they did not know how the fertilizer they were grinding would be used. The court found they were merely accessories to the crime.

234. Interview 2012-6.


236. Id.

237. Id.

238. Interview 2012-10.

239. Interview 2012-7.

240. Id.

241. Id.
also say they need to be careful in criminal cases to avoid becoming potential targets of criminal sanctions themselves. They thus rarely present new evidence or seek out additional evidence; doing so is too dangerous. The general environment for lawyers is also widely viewed as having deteriorated in recent years, making lawyers less likely to take on difficult criminal cases. Constraints on lawyers likely also increase the pressure on defendants to agree to settlements.

Yet there were also a few cases in which lawyers appeared to mount spirited defenses. In one case, a defendant was sentenced to thirteen years for theft of 90,000 yuan from an office during a break-in. On appeal of a second trial in the case, the defendant’s lawyer argued that the defendant’s confession resulted from torture and stated that the court should follow the presumption of innocence. The court rejected the argument, affirming the sentence, arguing that the defendant showed no physical evidence of torture. In another case, a lawyer argued, unsuccessfully, that his client was denied access to counsel in the trial court.

There is substantial debate about the effectiveness of hiring lawyers, both in China generally and in Henan. Lawyers and academics note that procurators and judges will sometimes threaten defendants with longer sentences if they hire a lawyer, will pressure defendants to settle cases absent a lawyer rather than going to trial, or will offer lighter sentences if the accused do not hire a lawyer. As one lawyer noted, lawyers make procurators’ jobs harder, and procurators are likely to try to dissuade defendants from hiring lawyers in complex or problematic cases. Some judges likewise say that hiring lawyers can sometimes result in worse outcomes for defendants.

Yet lawyers also argue that they can add value by arguing for leniency and facilitating negotiations with courts and procuratorates. Lawyers state that in serious cases, pleading for leniency (rather than contesting guilt) can mean the difference between life and death. In contrast, judges argue that lawyers are not as important to courts as are institutional dynamics in affecting outcomes. As one judge explained, judges are already under enormous pressure to avoid

---

244. Interview 2012-28.
245. Case I18A.
246. See Case I41a. In that case, the intermediate court said that the defendant had clearly stated that she did want to be represented by a lawyer. The woman was convicted of threatening a victim and her parents after her son allegedly committed rape.
247. Interview 2012-1.
250. Interview 2012-11.
251. Interview 2012-5.
incorrect decisions; lawyers’ arguments thus play a marginal role in affecting how courts handle cases.\textsuperscript{253} Yet other judges noted that lawyers can be helpful in persuading their clients to settle cases. As one judge noted, parties often do not trust judges. Lawyers therefore can be useful in persuading parties to settle.\textsuperscript{254}

In Henan, as elsewhere in China, lawyers continue to find it extremely difficult to access their clients.\textsuperscript{255} It is common, say lawyers, to be denied even the limited access to their clients permitted under the 1996 Criminal Procedure Law.\textsuperscript{256} Local authorities largely ignore the provisions in the Lawyers Law that grant additional access, with some detention facilities in Henan posting signs that explicitly state that they follow the Criminal Procedure Law and not the Law on Lawyers, which prior to 2013 gave lawyers increased access to their clients compared to the Criminal Procedure Law.\textsuperscript{257} Conversations between clients and lawyers are monitored: as one lawyer noted, the most important role of lawyers “is to comfort” their clients.\textsuperscript{258} Likewise lawyers comment that it remains extremely difficult for them to access witnesses or documentary evidence.\textsuperscript{259} A nonparty witness appeared to testify in court in only one case in the dataset. All other cases that involved witness testimony in court were cases in which the witness was also a victim seeking compensation.

\textsuperscript{253} Interview 2012-19.
\textsuperscript{254} Id.
\textsuperscript{256} Interview 2012-20; Interview 2012-28.
\textsuperscript{257} Interview 2012-7. Prior to the 2012 revision of China’s Criminal Procedure Law, a conflict existed between article 33 of the Lawyers Law (adopted in 2007) and article 96 of the Criminal Procedure Law (adopted in 1996). The Criminal Procedure Law originally provided access to a client only after the procuratorate brought formal charges; in contrast the revised Lawyers Law granted access as soon as a defendant was subject to any compulsory measure. The Lawyers Law also provided that lawyers could meet defendants without being monitored; in contrast to the revised Criminal Procedure Law stated that authorities could monitor such meetings. Revisions to Criminal Procedure Law and the Lawyers Law in 2012 made the two laws consistent, largely adopting the prior provisions of the Lawyers Law. Du Feijin et al., \textsl{Wei le Gongzheng Gaixiao He Quanwei} (\textit{为了公正高效的权威}) [\textit{For Fairness, Efficiency, and Authority}]; \textsl{Renmin Fayuan Bao} (\textit{人民法院报}) [\textit{People’s Court News}] (Oct. 9, 2012), http://rmfyb.chinacourt.org/paper/html/2012-10/09/content_51765.htm (detailing the prior conflict between the Criminal Procedure Law and the Lawyers Law); Yuan Dingbo, \textsl{Lüshi Fa Yu Xingshi Susong Fa Chongtu Cheng Yixie Difang Ban} ‘an Jiguan Huxiang Tiwei Liyou (律师法与刑事诉讼法中一些地方办案机关互相推诿理由) [\textit{Conflict between Lawyers Law and Criminal Procedure Law Has Become Local Authorities’ Excuse for Shirking Responsibilities}]”, \textsl{Fazhi Ribao} (法制日报) [\textit{Legal Daily}] (May 26, 2009), http://fzzx.gansudaily.com.cn/system/2009/05/31/011115445.shtml (detailing problems in implementing provisions in the Lawyers Law governing access of lawyers to their clients while in detention).
\textsuperscript{258} Interview 2012-28.
\textsuperscript{259} Id.
Outcomes of appeals to the intermediate court suggest that the court is far more active in reviewing lower court decisions than is commonly assumed to be the case of appellate courts in China. Yet the cases also confirm many of the widely recognized problems that exist with appellate review of criminal cases. A total of 442 defendants appealed to the intermediate court in 2010 or had their cases appealed by the procuratorate or victims. Of these, 86 had their cases vacated and remanded for trial, 28 had their sentences lowered, and 3 had their sentences increased. An additional 10 defendants had no change to their sentence but had civil compensation claims either remanded or revised.260

Taken together, the cases suggest that the intermediate court is adjusting outcomes or remanding cases for retrial in nearly one-third of the cases. This figure is far higher than is commonly assumed to be the case in criminal cases in China or the estimate of ten to twenty percent given in interviews.261

Many cases involved appeals by multiple parties, including victims (plaintiffs in civil compensation cases) and the procuratorate. Table 9 lists the total number of defendants who had their cases appealed, by party filing the appeal. Table 10 sets forth outcomes on appeal.

<table>
<thead>
<tr>
<th>Party Bringing the Appeal</th>
<th>Number</th>
<th>Percent of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant</td>
<td>254</td>
<td>57.5</td>
</tr>
<tr>
<td>Plaintiff (Victim)</td>
<td>32</td>
<td>7.2</td>
</tr>
<tr>
<td>Procuratorate</td>
<td>9</td>
<td>2.0</td>
</tr>
<tr>
<td>Defendant and Plaintiff (Victim)</td>
<td>35</td>
<td>7.9</td>
</tr>
</tbody>
</table>

260. See, e.g., Case 165 (affirming sentence but increasing compensation to victim’s family).

261. Interview 2012-19; see also “Tongyi Ershen Gaipan Biaozhun” De Diaoyan Baogao [Report on Unifying the Standard for Adjusting and Remanding Appeals], GUANGDONG FAYUAN WANG [Guangdong Court Net] (Mar. 20, 2012), http://www.gdcourt.gov.cn/gdcourt/front/front/content.action?ldm=1556&gid=201203200223708591 (reporting that nationwide between 2005 and 2007 on average 14% of appeals were adjusted and 7.1% were remanded); Woguo Wunian Lai Gong 90,000 Yu Jian Xingshi Ershen Anjian Bei Yifa Gaipan Huo Fahui Chongshen [90,000 Criminal Appeal Cases Were Adjusted or Remanded During the Past Five Years], XINHUA WANG [Xinhua News Net] (Oct. 26, 2008), http://news.xinhuanet.com/newscenter/2008-10/26/content_10254795.htm (reporting that between 2003 and 2008, 90,000 out of 470,000 criminal appeal cases were adjusted or remanded in China); Guangzhou Zhongyuan Xing Erting Xingshi Ershen Anjian Gaipan, Fahui Chongshen Qingkuang Fenxi [Analysis of Remanded and Changed Cases in Guangzhou Intermediate Court Second Criminal Division], ZHONGGUO XINGSHI FALU WANG [China Criminal Law Net], http://www.lw315.com/ShowArticle.shtml?ID=201013121312166297.htm (reporting that between 2002 and 2004, Guangzhou Intermediate Court adjusted 11.48% and remanded 2.75% of 1054 criminal appeals).
Defendant and Procuratorate                  9  2.0
Plaintiff (Victim) and Procuratorate       1  0.2
Defendant, Plaintiff (Victim) and Procuratorate  1  0.2
Not applicable                             101 22.9
Total                                     442 100

Note: “Not applicable” reflect cases with multiple defendants where one or more defendants did not appeal. In cases where multiple defendants did appeal, all defendants that appealed were counted in the “ Defendant” row. In cases concerning multiple defendants where the procuratorate appealed, the “ Procuratorate” row reflects the number of defendants for whom the procuratorate launched the appeal.

### TABLE 10: OUTCOMES ON APPEAL (SECOND INSTANCE DEFENDANTS ONLY)

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Number of defendants</th>
<th>Percent of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affirmed</td>
<td>244</td>
<td>55.2</td>
</tr>
<tr>
<td>Vacated and remanded for retrial</td>
<td>87</td>
<td>19.7</td>
</tr>
<tr>
<td>Reduced the criminal sentence</td>
<td>28</td>
<td>6.3</td>
</tr>
<tr>
<td>Increased the criminal sentence</td>
<td>3</td>
<td>0.7</td>
</tr>
<tr>
<td>Changed the applied law but sentence affirmed</td>
<td>5</td>
<td>1.1</td>
</tr>
<tr>
<td>Criminal case affirmed but the attached civil compensation case vacated and remanded for retrial</td>
<td>6</td>
<td>1.4</td>
</tr>
<tr>
<td>Criminal case affirmed but attached civil compensation amount increased</td>
<td>3</td>
<td>0.7</td>
</tr>
<tr>
<td>Reversed (Defendant acquitted)</td>
<td>1</td>
<td>0.2</td>
</tr>
<tr>
<td>Not applicable</td>
<td>65</td>
<td>14.7</td>
</tr>
<tr>
<td>Total defendants</td>
<td>442</td>
<td>100</td>
</tr>
</tbody>
</table>

Note: “Not applicable” refers to circumstances where a case had multiple defendants, one or more of whom did not appeal. As a result, the trial verdict against these defendants was effectively unchanged. This number is lower than the number of defendants coded as “not applicable” in Table 9: Appeals Filed by Defendants, Victims, and Procuratorate because in certain appeal decisions, particularly those where the criminal case was vacated and remanded, defendants who did not appeal benefited from the appeal of their codefendant.

As is standard practice in appellate review in China, court decisions vacating and remanding lower court judgments never stated the specific reasons. Instead, appellate decisions indicate only whether the problem was with the evidence (generally by stating that the “evidence was unclear”), the procedure, or the application of law. The majority of the decisions remanding cases in my dataset simply stated that “the facts are unclear.” Appellate courts often, but not always, follow up such decisions with either an internal, nonpublic letter to the
lower court regarding the specific problems in the case or with a telephone call that explains the reason for reversal."262

As noted above, many of the cases in which the intermediate court changed outcomes on appeal were modest changes to civil compensation claims attached to criminal cases. Judges note that the largest category of cases that are changed on appeal arise from settlements reached after the conclusion of the first-instance trial.263 Seven appellate decisions made explicit reference to the payment of compensation as a basis for a reduction in sentence on appeal.264 Other cases changed on appeal involved defendants who paid fines or restitution subsequent to the original sentence.265

Changes on appeal are not always in favor of defendants. Indeed, appealing can in some cases be dangerous for defendants. In one intermediate court case, the defendants were charged with illegal manufacture and sale of explosives.266 Defendants appealed a county court judgment imposing sentences of ten and four years on the two primary defendants; the procuratorate did not appeal. The appellate court vacated and remanded the decision. On retrial the case was assigned to a different court, which increased the sentences to twelve and ten years. The appellate court then affirmed.267

Appellate courts may also impose longer punishments than those imposed in the trial court in response to an appeal by the procuratorate or in a retrial, or zaishen proceedings. Sixteen of the appellate cases explicitly involved kangsu, or “objections,” filed by the procuratorate either alone or alongside an appeal filed by a defendant or victim challenging a compensation award. In eight of these cases only the procuratorate appealed. The intermediate court increased

262. Interview 2012-19.
263. Interview 2012-19.
264. Cases I156, I1d, I133, I144a, I79, I83, and I13b. In Case I79 the reference was indirect: the court noted that subsequent to the original court decision, the victim forgave the defendant and withdrew her civil claim. Case I79. The lower court had ordered defendant to pay 3255 yuan in compensation, but the defendant’s family subsequently paid 14,000 yuan. Id. The victim then requested that the court treat the defendant leniently. See also Case I35 (vacating and remanding decision in traffic-accident case after lower court imposed three-year sentence despite settlement of civil compensation claim and the fact defendant took victim to the hospital following the accident). Sometimes the adjustment is minor. See Case I13b (demonstrating a minor adjustment where defendant had a prior record, reducing sentence from 210 months to 204 months on appeal following the payment of compensation).
265. See, e.g., Case I19. In that case, defendant paid a fine and returned stolen goods after a conviction in county court; the appellate court reduced the sentence from two years and three months to fifteen months, exactly the same time already served.
266. Case I49.
267. Although Article 190 of the 1996 Criminal Procedure Law stated that an appellate court could not increase a defendant’s sentence absent an appeal filed by a procuratorate, the restriction did not apply to first-instance courts retrying a defendant following a reversal and remand. The 2012 Criminal Procedure Law removes this loophole, stating that on remand a trial court may only increase a sentence where the procuratorate brings new criminal charges. 2012 Criminal Procedure Law, supra note 6, art. 226.
In all three cases in which the intermediate court increased a sentence, its reasoning was exactly in line with the procuratorate’s argument. Thus, for example, the intermediate court increased a defendant’s sentence from six to twelve months for the crime of concealing 18,000 yuan in stolen property; the court stated that the original sentence was “inappropriate.” In a child trafficking case the intermediate court imposed a five-year sentence on a defendant who had received only a suspended sentence at trial.

Judges say that many kangsu petitions come at the request of victims or their families who object to the sentence but who cannot directly appeal the sentence. Under the 1996 Criminal Procedure Law, victims could appeal a compensation award in their status as plaintiffs in an attached civil compensation case but could not appeal the actual sentence; the same is true under the 2012 Criminal Procedure Law. One of the objections filed by the procuratorate was in direct response to complaints from the victim’s family: the court increased a sentence from thirteen to fifteen years for a defendant who killed another man in a fight. The court noted that the defendant failed to compensate the victim’s family and did not “obtain the family’s forgiveness,” and thus the sentence in the lower court was too light. In an additional three cases involving four defendants, the intermediate court vacated and remanded lower court decisions following a procuratorate objection to the lower court decision. One such case was a rare lower court acquittal of a defendant in an intentional injury case. The intermediate court remanded, finding the facts unclear, following an objection to the sentence from the procuratorate and an appeal of the failure to award compensation by the victim. Although not technically an acquittal, another remand occurred in a case in which the lower court had imposed no prison sentence on a defendant convicted of fraud.

268. Case I3b.
269. Case I29. The court found that the defendant had not merely purchased trafficked children, but had actually engaged in trafficking. Another case was heard via retrial procedures at the request of the procuratorate (who apparently had failed to file an appeal on time). The court agreed to increase a sentence from thirty months to thirty-six months for a recidivist defendant convicted of stealing electric bicycles. Case I4b. The procuratorate’s successful argument noted that the sentence imposed in the lower court was below the range set forth in the criminal law.
270. In some locations procuratorates may also be required to file a certain number of kangsu each year. Lin Shiyu (林世钰), Jiancha Yewa Kaoping Jzhi Ying Fuhe Sifa Guliü (检察业务考评机制应符合司法规律) [Procuratorial Kaoping Should be Consistent with the Law], JIANCHA RIBAO (检察日报) [PROCURATORATE DAILY] (Nov. 23, 2008), http://www.spp.gov.cn/site2006/2008-11-24/0003421232.html (China).
271. Case I21. It is unclear why the procuratorate charged the defendant with willful injury rather than homicide, although the fact that the defendant attacked the victim after the victim harassed the defendant’s daughter (forcing her to urinate in front of him) likely played a role.
272. Cases I21b, I43b, and I97a (two separate defendants).
273. Case I43b.
274. Case I97a. In this case, the court imposed a fine of 50,000 yuan. A codefendant, who

http://scholarship.law.berkeley.edu/bjil/vol33/iss1/1
Yet given the widespread portrayal of Chinese courts largely complying with the procuracy in criminal cases, the four cases in which the intermediate court rejected the objection filed by the procuratorate were perhaps more noteworthy. In one case, the procuratorate objected to a lower court’s imposition of a suspended sentence for a coal company official prosecuted for misappropriating 100,000 yuan in public funds; the intermediate court affirmed without a hearing, stating that the procuratorate lacked evidence to support its argument. Other cases in which the intermediate court refused a procuratorate objection requesting a higher sentence involved the theft of a Tang Dynasty Buddha, an intentional injury case arising out of a knife fight at a mahjong game, and a complex case in which the procuratorate and defendant both appealed after a defendant was found guilty of misappropriation of public funds and tax evasion. In the final case, the procuratorate argued that the defendant should have been convicted of the more serious crime of corruption. The defendant had used public funds to start a company; he then returned the money and sold the company. The defendant also appealed, arguing that the sentence was too harsh because he had acted on the instruction of the company board. It is difficult to draw any conclusions from the cases as to why the procuratorate failed in these cases, in particular whether any of the defendants had particularly strong cases or sources of external support that might have affected court determinations.

Sixty-nine cases involved appeals by victims or their families. Although victims may only appeal compensation awards, many victims contested both compensation amounts and the sentence. In three cases victims succeeded in receiving additional compensation through an appellate court judgment.

Eight of the cases in my appellate dataset involved appellate review of a case for at least the second time. Lawyers say such cases generally are those in which courts have discovered problems with lower-court decisions but are unwilling to issue a nonguilty verdict. Some of the cases clearly represent attempts to avoid decisions being classified as incorrect. Thus, for example, the

---

275. Cases I13, I7b, I8e, and I20a.
276. Case I13. In this case, the defendant also appealed, suggesting perhaps that the procuratorate’s objection was in part an effort to prevent a reduction in sentence.
277. The defendant had already compensated the victims, thus perhaps explaining the court’s reluctance to increase the sentence.
278. Case I20A. In the original trial the defendant was sentenced to five years. The procuratorate objected, the court vacated and remanded, and the trial court retried defendant and imposed an eight year sentence. The procuratorate and defendant then both appealed. The defendant argued that he was not guilty of misappropriation because he had acted on the instruction of the company board. The procuratorate argued that that defendant had used public funds to start a company and thus should have been convicted of the more serious crime of corruption.
279. See, e.g., Case I43b (vacating and remanding compensation award, but stating that the court cannot reconsider the sentence).
280. Interview 2012-6.
intermediate court twice remanded for retrial the conviction of the boss of a State-owned hotel for abuse of power after he entered into an allegedly unauthorized contract resulting in massive losses. In the third trial in the county court the defendant was again convicted, but the court imposed no punishment. In a third appeal the intermediate court affirmed.281 Other cases reflected ongoing disputes concerning compensation; in one case in which the compensation amount was the only issue in dispute, the court remanded the same lower court decision three times.282 In another case the appellate court ordered that the lower court try a case for the fifth time, despite the fact that the defendants had already served three-year sentences.283 Other cases were reopened many years after the conviction—including one for a defendant who was convicted of fraud in 1983 and served an eight-year sentence. The defendant, who never appealed the original sentence, apparently successfully petitioned the provincial high court to order a rehearing. The intermediate court did so but, applying the law of the 1980s, affirmed.284

In one of the stranger cases in the dataset, a defendant originally arrested in 1990 on charges of intentional injury for an alleged killing in a fight fled after being detained. He was eventually arrested in 2001 and then tried and acquitted in 2002 by the trial court. The victim’s family apparently appealed the attached civil compensation case and the intermediate court ordered a retrial of both the criminal judgment and the civil case, something it was not permitted to do absent the initiation of formal rehearing procedures. By this point the defendant had been found nonguilty and had skipped town. He was located in 2008, eighteen years after the incident, and retried and sentenced to eight years. Both the defendant and the procuratorate appealed, and the appellate court again vacated and remanded. In 2010, twenty years after the alleged crime, the trial court tried the defendant for a third time (and a codefendant for a second time) and increased his sentence to nine years. On appeal for the third time the intermediate court affirmed, with the primary defendant receiving a nine-year sentence and the second defendant receiving a suspended sentence.285

Judges estimate that they hear appeals in only ten percent of cases.286 This reflects that generally hearings are held on appeal only in cases involving an objection filed by the procuratorate, where a hearing must be held, or in major

282.  The third remand was because the lower court had impermissibly assigned the case on retrial to the same three judges who initially tried it. Case I57. The reasons for the prior two remands were unclear. See id.
283.  Case I16a. The four retrials apparently came after repeated petitioning by the defendants. Three of the retrials came after successful appeals. One came after a successful petition for rehearing.
284.  Case I16b.
285.  Case I86.
286.  Interview 2012-19.
cases. The data are consistent with such estimates: only eight percent of the appeals indicated that the courts held hearings.

Defendant’s arguments on appeal largely focused on leniency. The inclusion of new evidence on appeal is rare; as one lawyer commented, “who would dare to do it?,” a reference to the risk of prosecution for fabricating evidence.287

G. Roles of Individual Judges

Participants in trials in the county court, not surprisingly, were repeat players. In the county court a relatively small number of judges presided over the overwhelming majority of cases. A total of seven judges and one people’s assessor heard all of the cases.288 A single judge, sitting alone, tried 64 defendants and three-judge panels tried 169 cases. One judge participated, either alone or as part of a panel, in the trials of 172 of the 273 defendants. Two of the three judges were the same for 145 of the defendants. A people’s assessor, who is not considered a judge, sat on panels for 40 of the 273 defendants. The same people’s assessor was involved in all of these cases. The people’s assessor participated in many of the more serious crimes, perhaps reflecting an attempt to suggest that the court was soliciting public input in such cases.

H. Predecision Detention and Bail

The county court held 169 of the 273 defendants in pretrial detention at some point, for periods ranging from 2 days to 369 days. The average detention period, prior to a decision, was 39 days. But some defendants were held for comparatively long periods prior to the decision. In four separate cases, 5 defendants were detained for 300 or more days prior to decision. All of these cases involved relatively complex cases involving large amounts of money. The issuance of false value added tax invoices and fraud or contract fraud.

Of the 273 defendants in the county court, 166 were granted bail, including 75 who were granted bail after initially being detained. Only 8 of the bailed defendants eventually received nonsuspended criminal sentences.289 This suggests that the decision to grant bail is a strong predictor of whether or not a defendant will face incarceration after trial. Of the remaining bailed defendants, 1 received no sentence or fine, but nevertheless was convicted; 39 received fines but no criminal sentence;290 51 received fines and a suspended sentence; and 67

287. Interview 2012-6.
288. People’s assessors are laypeople, often former cadres or teachers, who are selected to hear cases alongside judges in some cases.
289. Defendants in Cases B20 (two of three defendants), B62, B66 (three of eleven defendants), B67, B69, and B128 all received nonsuspended sentences. One of the defendants in Case B23 received a six-year sentence suspended for twelve months, making for an effective sentence of five years.
290. Three of the fined defendants were also sentenced to public surveillance. Another was
received a suspended sentence but no fine. Although the defendants that were granted bail were charged with a wide range of crimes, the largest categories of bailed defendants were those sentenced for traffic offenses, willful injury, concealing criminal gains, and illegal logging. Although the court judgments do not provide information regarding a defendant’s residence, in interviews judges note that only local residents receive bail.291 Likewise, generally a defendant must agree to compensate a victim as a prerequisite to being granted bail. 292

Not surprisingly, defendants in cases appealed to or tried in the intermediate court were generally detained far longer.293 Defendants in first-instance trials, for which data were available, averaged 367 days in detention prior to decision. Defendants in appeals were detained for shorter periods—215 days—but nevertheless far longer than defendants in the county court. Defendants whose cases were on review in the intermediate court for the second time, or for more than the second time, were detained for an average of 411 days.294

III.
IMPLICATIONS AND ANALYSIS

The empirical analysis presented above provides insights into criminal justice in China that was largely missing from prior scholarship. This section discusses the implications of the above analysis in four areas of empirical and theoretical literature.

A. Methodology and Empirical Findings

Many of this article’s findings will not be surprising to scholars familiar with the Chinese legal system. Scholars are widely aware of the lack of lawyers, prevalence of confessions, and near impossibility of winning a nonguilty verdict in China. Nevertheless, this study offers some of the first empirical evidence of just how widespread such phenomena continue to be. This article confirms findings that have been based on observational studies of and interviews in courts, or based on research conducted prior to the recent reemphasis on populism in China’s legal system. The lack of access to earlier cases makes it impossible to compare 2010 to prior years. Qualitative evidence from interviews, however, suggests that such problems persist even as China embarks

292.  Id.
293.  The intermediate court cases did not always include complete information on detention periods, in particular for cases on appeal. As a result, these figures may not be representative. The cases provide data on predecision detention periods for 56 of the 73 first-instance defendants, 223 of the 452 defendants on appeal, and 13 of the 21 defendants in cases heard in rehearing procedures. Defendants in rehearing procedures on average had been detained for 243 days.
294.  The cases provide information on six of the eight defendants in such cases.
on its most important criminal-justice-system reforms in more than fifteen years with the enactment and implementation of the 2012 revisions to the Criminal Procedure Law. Likewise, the lack of access to prior decisions makes it difficult to determine to what degree making opinions public affects the quality and substance of court decisions. Nevertheless, this study offers a baseline against which future developments can be measured. The data also provide a narrative of ordinary criminal justice in rural China as well as insight into institutional dynamics within the criminal justice system.

Some of the discussed data, however, are surprising. Recent literature has described the policy of balancing leniency and severity or has focused on specific cases of individuals purchasing leniency by compensating victims. Prior literature has neglected how leniency is manifest across a range of cases. Evidence from court decisions and from interviews with lawyers and judges suggests that settlement and compensation to victims are playing far greater roles in the criminal justice system than previously recognized in routine criminal matters and in serious cases. I lack access to capital cases, and thus am unable to observe the most serious cases that most often do not receive leniency. Yet, it is clear that in a wide range of cases leniency in the wake of confessions and settlement is a common incentive to efficiently resolve criminal matters. The scope of the use of suspended sentences in the county court and the apparent use of settlement to reduce sentences in cases tried in the intermediate court at the very least represent a liberal interpretation of the SPC’s guidelines.

This Article’s findings thus challenge common Western assumptions about the Chinese criminal justice system, in particular the focus on heavy punishments. The findings provide empirical support for those in China who argue that wealth is becoming a key determinant in criminal sentencing. I do not claim that the system is always lenient; the system can treat defendants extraordinarily harshly, in particular when the State considers its interests threatened. A decision that appears lenient may in fact be excessive if it results from court doubts about the guilt of the defendant. The cases also manifest a strong State interest in maintaining control by criminalizing minor disputes or those that present a threat to social stability. But my findings suggest that more attention should be paid to developments in routine cases and that leniency is used even in some serious cases.

295. Participants at workshops in China and interviewees noted that some recent legal changes are already having a significant effect, most notably amendments to the Criminal Law in 2010 that mandate a term of detention for defendants convicted of drunk driving and also heightened focus on official corruption in the wake of China’s 2012 leadership transition. Interview 2013-8; Interview 2013-9; Criminal Law, supra note 89, art. 133(a).

296. For example, McConville’s important study found that only eleven percent of defendants in basic court cases received noncustodial sentences. McConville, supra note 3, at 363–64. One earlier study found that eighty-four percent of defendants received a prison sentence and that sixty-four percent received a sentence in excess of five years. Hong Lu & Terance D. Miethe, Confessions and Criminal Case Disposition in China, 37 LAW & SOC’Y REV. 549, 571 (2003).
This Article also makes the methodological claim that there is significant value in studying the vast volume of routine cases now publicly available in China. I am well aware of the limitations of my data and of the risks of Western scholars over-relying on court opinions. Numerous cases in this Article leave one to speculate regarding likely machinations at work behind the scenes. The ability to read the entire case files would certainly add to our understanding of how courts process criminal cases. Scholars in China are now doing some work in this area.\footnote{McConville’s study also relied in part on analysis of case files conducted by members of his research team. \textit{McConville}, supra note 3, at 363–64.} But the cases available in Henan provide a new window into the practice of justice in China, one that has yet to be explored in depth by scholars in China or elsewhere. The hundreds of thousands of cases available are a massive untapped resource for scholars, both for learning what is actually going on in the Chinese legal system and for mapping out future lines of scholarly inquiry. Most prior scholarship on China’s courts, including my own, relies heavily on either what judges say they do or on cases selected for researchers by judges. The widespread availability of large numbers of opinions allows us to compare what judges say they do with what actually happens.

More can be done with the data presented in this article. Future work will include more sophisticated quantitative analysis and also more detailed analysis of particular types of cases. It is now possible to examine issues such as the effect of lawyers on outcomes in criminal cases and perhaps the role of individual judges. Related projects based on this study are likely to include a more detailed analysis of how judges interpret and adapt national laws, judicial interpretations, and policy guidelines; analysis of how courts process a wide range of financial crimes, including corruption; the use of nondeath sentences for homicide; the impact of the relationship among victims and defendants on outcomes; the role and meaning of confession; the role of appellate review and whether certain types of cases are more likely to succeed on appeal; and potentially the impact of gender and family relations on the criminal justice system.

\textbf{B. Leniency and the Roles of Chinese Criminal Law}

As noted above, the definition of leniency is contested in China. Leniency in sentencing in China can be manifest through formal law, judicial policy, and actual practice. Chinese law and court guidelines provide technical answers to when and how courts should act leniently, setting forth conditions under which a defendant may have a sentence reduced or may receive a suspended sentence. My analysis suggests another definition, focusing on when individuals are able to avoid jail time, in relatively minor cases, or avoid death, in more serious cases.
It is counterintuitive to discuss leniency when referring to a system with virtually no chance of acquittal at trial and in which wrongful convictions are common. Not everyone receives leniency, and victims play an important role in determining whether leniency is granted. Nevertheless, policy and practice in Henan suggest that many defendants are receiving sentences that are lower than what is likely or even possible under formal legal rules and might otherwise be expected. My claim that courts are surprisingly lenient should be understood narrowly to state that the data show a surprisingly large number of cases (compared to popular and scholarly expectations) in which defendants receive only suspended sentences or receive life or suspended death sentences for murder.

The practice of leniency also provides insight into the goals of the Chinese criminal justice system. The evidence presented in this Article suggests that the policy of leniency is not being used to protect defendants’ rights or to further an interest in restorative justice. In contrast to most models of restorative justice, negotiations between victims and defendants appear to influence charging decisions and court determinations regarding guilt. Courts place extreme pressure on the parties to reach negotiated outcomes, often guiding the parties to such outcomes, and reconciliation focuses overwhelmingly on financial payments. Negotiations in China take place in the context of a system that has no real mechanism for protecting the rights of defendants and in which money and stability concerns play a large role in determining outcomes.

Resource concerns are one factor leading to greater use of suspended sentences. China has seen a significant increase in the number of criminal cases in the past decade, from 656,788 in 2000 to 884,737 in 2010. The growth in cases makes continuation of “strike hard” policies both impracticable and also perhaps risky. Such policies risk alienating a widening segment of the population. Yet resource concerns do not appear to be a main factor. Instead, the primary goals in embracing leniency are to maintain State legitimacy, ensure social stability, insulate the courts from criticism, and protect individual judges from responsibility for potentially incorrect decisions. In interviews, judges

298. In discussing this project with numerous distinguished Chinese criminal justice scholars, I have been struck that virtually all have been surprised at the prevalence of suspended sentences in routine cases. Likewise, participants at presentations of this paper in China expressed surprise; one judge stated that my findings were “impossible.” Yet the findings were also confirmed with judges in county B, one of whom stated that nonpublic juvenile cases would show even more surprising levels of leniency. Interview 2013-9. It is clear there is widespread variation in the frequency with which suspended sentences are granted, both within Henan and nationwide. Data are difficult to obtain. One workshop participant estimated that suspended-sentence rates in one major city in Henan would not exceed thirty percent. There has been less surprise at my finding that compensation can make a difference between life and death in more serious cases.

repeatedly noted that mediated and settled cases are much less likely to result in petitions, protests, or appeals than are ordinary criminal matters.300

The strong emphasis on compromise in the cases also suggests that courts are focused less on the legal correctness of their decisions than on ensuring cases be resolved. Evidence from Henan suggests that courts’ jobs today focus less on determining the guilt of the defendant and more on preventing social instability. Trials determine only sentences, not guilt. The cases reviewed also demonstrate that procurators and courts have extreme discretion when it comes to bringing charges and imposing sentences.301 Although there is a technical legal basis for most lenient (and harsh) outcomes, the cases show just how wide this discretion can be in determining the crime charged, as demonstrated in the corruption and financial crime cases, and the sentences imposed.302 Efforts to make the criminal justice system more rule-based are in tension with the extensive discretion that judges and procurators possess. Yet, this discretion is an important tool for encouraging negotiated outcomes. Whether the inconsistency that results from such discretion poses a challenge to the legitimacy of the criminal justice system remains to be seen.

It is also clear from the data that the criminal justice system is not serving the interests of the State alone. In contrast with the traditional characterization of people in rural China avoiding contact with the formal legal system, my data suggest it has become routine for the criminal system to be utilized to settle disputes among strangers (traffic accidents) and among neighbors and family (fights). The large number of what appears to be primarily tort disputes reflects the weakness of the tort system. Litigants, prosecutors, and judges use criminal charges strategically to force settlements or to ensure that tort judgments are paid. There is also evidence that the criminal system is being used to settle scores, in particular in the context of financial crimes. Evidence from Henan suggests that much of the victims’ rights discourse that dominates discussions of criminal settlement in China may be glossing over the potential use of the criminal system for personal animus. This is made possible by the fostering of

300. China is certainly not the only system that treats a large range of defendants leniently; Japan’s incarceration rates are also very low. Routine cases in many U.S. jurisdictions likely would appear lenient to many outside observers. Nor is China the only place in which bargaining is a key aspect of the resolution of criminal disputes, although parallels to plea bargaining (and the resulting low number of nonguilty verdicts) in the United States should not be overstated. Negotiations in China rarely include lawyers, and victims have extraordinary power in the process. China has undergone a shift from a traditional authoritarian law-and-order approach to criminal cases; as recently as eighteen years ago it was possible for defendants to be executed for theft. Yet it also seems clear that the Chinese system is not converging toward either the Japanese model or Western liberal systems that put heavy emphasis on procedure.

301. The fact that procurators face incentives to obtain convictions, but not to achieve specific sentences, also encourages flexibility and leniency.

302. Prosecutors elsewhere, including the United States, often have extensive discretion in changing decisions. In China, however, such discretion is exercised with little or no subsequent oversight from the courts.
direct negotiations between the parties prior to a court hearing a case. One key question that the cases raise, but do not answer, is why traditional community-based institutions for dispute resolution do not function. Another is whether the desirability of a system that relies so heavily on settlement varies depending on the crime charged. For example, whether there is a difference between an emphasis on settlement in traffic and fight cases compared to corruption cases.

The emphasis on mediated outcomes may reflect both China’s legal history and also changes in contemporary Chinese society. Aspects of the practice have clear historical antecedents.\textsuperscript{303} At the same time, however, the heavy emphasis on settlement may reflect trends in contemporary Chinese society. All of Chinese society has become an exchange, in which money and personal relationships dominate outcomes.

The evidence presented in this Article represents a modest first step toward creating a theory of the practice of ordinary criminal law in China. The State continues to focus on law and order as a mechanism for maintaining legitimacy and for maintaining control. This is evidenced by the heavy punishments in cases affecting State interests and the extreme discretion placed in the hands of police and procurators. Yet the data in this Article also suggest other themes that appear to be increasingly important in criminal cases in China. Such values include repairing social ties; maintaining social harmony; and ensuring compensation to victims, in particular those who have lost a key breadwinner in a society lacking a social safety network.\textsuperscript{304} The Chinese system also provides minor criminals with a second and final chance; reinforces communal norms, even when those norms are in tension with formal law (as appears to be the case in family disputes and the one bigamy case); and introduces elements of collective punishment by ensuring that family members and neighbors bear the financial cost of crime.\textsuperscript{305}

China appears to be shifting toward a bifurcated criminal justice system. Routine cases are resolved through negotiated outcomes and suspended or result in short sentences, while more serious cases result in long sentences. A key insight from the data presented in this Article is that defendants may wind up in the second category not only because of the seriousness of their crime but also because of their inability to settle or the victims’ unwillingness to settle. The data also make clear that there is significant randomness with regards to who gets punished and how much punishment they receive. Flexibility on the part of

\textsuperscript{303}. Involving another person in the legal system was a common means of retaliation in traditional China. The use of money to reduce sentences was also common. Because China’s imperial legal system did not distinguish between civil and criminal disputes, it was also common to see disputes that today might be classified as civil disputes being resolved through the use of criminal sanctions.

\textsuperscript{304}. As one lawyers noted, the system may make sense for China given that victims generally lack resources and can be financially crippled by the loss of a breadwinner. Interview 2013-2.

\textsuperscript{305}. In rural areas it is common for family members of defendants to rely on neighbors to come up with the money necessary to pay a settlement. Interview 2013-2.
procurators and police and the apparent randomness of outcomes may further State interests in social control by sending a message that all are subject to the State’s power.

Most debate within China focuses on technical issues directly linked to specific reforms: eliminating torture, increasing access to lawyers, and forcing appellate courts to decide cases before them when they find problems (not simply engaging in repeated cycles of vacating and remanding problematic decisions). The cases described above, however, suggest that more fundamental issues, concerning the core goals of Chinese criminal law, are contested as well. Understanding the reality of every day criminal justice in China provides a first step to conceptualizing the goals of Chinese criminal justice. Evidence from Henan suggests that the focus of Chinese criminal law in China has shifted away from a focus on incarceration and control. The criminal system today mixes emphasis on legal principles with quick resolution of disputes, compensation for victims, observance of community norms, and reliance on high levels of discretion by decision makers.

C. The (D)evolving Roles of China’s Courts

This Article’s findings also contribute to literature on the role of China’s courts and the evolution of institutions in an authoritarian system in which stability is prioritized above all else. The observation that courts are innovating and adopting flexible practices not entirely consistent with formal laws in order to minimize discontent and insulate themselves from criticism is not unique to criminal cases.306 I have recently written of a similar phenomenon in medical disputes307 and other scholars have noted similar trends in other areas. Recent scholarship notes the emphasis on mediation in recent years in civil cases and the focus in the courts on anjie, shiliao—deciding the case and resolving the dispute.308 Henan’s bar to posting mediated cases online provides an additional incentive for courts to mediate cases, as judges know such cases will not be publicly scrutinized.

The trends this Article describes in Henan show how such policies have extended to criminal cases. Authorities believe that mediating or compelling settlements in criminal disputes will reduce threats to social stability, most significantly the threat of protest or petitioning.309 Specifically, mediated outcomes prevent victims (or their families) from protesting sentences they view

306. In some jurisdictions in China judges may be evaluated both on whether or not a decision is reversed or vacated and also on whether or not there is an appeal at all.
308. Liebman, supra note 9; Minzner, supra note 8.
309. For a more detailed discussion of stability concerns, see Benjamin Liebman, Legal Reform: China’s Law-Stability Paradox, DAEDALUS, Spring 2014, at 96.
as too light and prevent defendants’ families from objecting to sentences viewed as excessive.

In contrast with the social worker model of adjudication emphasized in literature in the United States, however, the primary concern of China’s courts appears to be problem elimination, not problem solving. Hence, courts appear not only to compel settlement, but also to implicitly and explicitly threaten those who do not comply with such settlements, as evidenced by cases that target repeat petitioners. The State is also taking an active role in resolving what we might otherwise think of as private, civil disputes that appear to indirectly affect State interests. Resolution of such cases appears to be based less on efforts to meet social expectations or impose community norms, and more on a functional focus on eliminating disputes.

China appears to be seeking to use courts to create a “no loser” model, where the focus on outcomes, not procedure (or law), leads all parties to accept negotiated outcomes. In this system, failure to do so is an indication that courts are not doing their job. The conflict between this approach and the adoption of a rule-based system has been widely noted in China, with many arguing that such moves undermine China’s efforts to construct a legal system.

The encouragement of State-mediated (or coerced) settlements may be particularly troubling in the criminal sphere. The promotion of negotiated outcomes marks a sharp departure from recent efforts to create a more adversarial system. The emphasis on settlement introduces a new element of coercion into the system.\(^{310}\) The focus on negotiated outcomes reinforces the fact that courts are not a forum for determining guilt.

Equity concerns are also readily apparent. Although most criticism of China’s embrace of settlement and mediation in the criminal context has focused on serious crimes—where defendants in effect purchase their life\(^{311}\)—my data suggest similar concerns in the imposition of sentences in routine cases. This Article shows not only that some defendants are receiving strikingly lenient sentences but also that defendants who either refuse or lack the ability to pay may be punished harshly. Whether negotiated outcomes actually produce stability is unclear. Criminal cases continue to be a primary source of complaints concerning the courts, in particular from victims’ families’ reported concern that defendants will avoid punishment through back-room deals.

The data also show that courts are willing to assert their authority in some cases. One of the most surprising findings is the high rate of reversal or changes to decisions on appeal to the intermediate court. This rate is much higher than generally understood to be the case within the legal community or rates reported in most prior research and in the official media. Yet this high rate of reversal is not limited to this one court or to criminal cases; I have also noted a high rate of

---

\(^{310}\) Rosenzweig et al. report similar findings and provide additional details regarding the coercive nature of criminal mediation. Rosenzweig et al., supra note 102, at 29–31.

\(^{311}\) For example, see Lewis, supra note 85, at 329, discussing equity concerns in capital cases.
reversal in medical malpractice cases in courts elsewhere in China. Some of the changes and reversals almost certainly reflect attempts to appease particular parties, or to encourage further settlement. But it also seems clear that the intermediate court is taking its role in reviewing cases seriously. In some cases, institutional relationships and the fear of a case being labeled an error result in a dynamic in which the appellate and basic-level courts are locked in a standoff. Cases are remanded only to have lower courts issue the same or a similar decision at retrial. This finding contrasts with those who have argued that appellate review in China has little effect, or that higher courts are generally unwilling to reverse lower court decisions because of the impact such decisions have on the career development of judges below. Likewise, the cases show that courts, in certain cases, will challenge and reject procuratorate determinations or arguments on appeal. Imposing lenient sentences may also allow courts to disagree with procuratorates without issuing a nonguilt verdict. Increased oversight over the courts appears to be making judges more careful and less willing to sign off on clearly incorrect cases.

Future research will provide insight into the interplay between the adoption of formal law (the revised Criminal Procedure Law) and new procedural requirements and continued concerns about stability and emphasis on settling cases. The new law should in theory result in numerous changes readily apparent in case decisions. Procurators are now required to attend all trials, something clearly not done in many cases handled via summary procedures in my dataset. Appellate courts will be required to decide more cases on appeal (as opposed to remanding them). Additionally, witnesses should begin to attend trials. Many of these provisions in the new law are based on the assumption that the system is shifting toward an adversarial model of adjudication and impartial determination of guilt by judges. The evidence presented in this Article shows how far the current reality is from this model, and thus highlights the challenges facing attempts to implement the new law.

Henan’s experiment with judicial transparency also provides insight into innovation in China’s courts. Henan’s reforms have resulted in part from attempts to address widely publicized egregious cases of injustice. They also reflect the personal goals of Zhang Liyong, the president of the Henan High People’s Court. Innovation has helped to boost Zhang’s profile. It remains to be seen to what degree his reforms will outlive his time on the court. Henan’s innovations, the most important in China’s courts in the past decade, were not designed to increase judicial power. Innovative steps were part of an attempt to make the courts function more efficiently and make fewer errors, and in so doing win greater popular support. Legitimacy for the courts does appear to be a goal, but it is legitimacy rooted in meeting popular expectations, avoiding instability, and serving the interests of the State.

312. Liebman, supra note 307, at 220.
The fact that judges in China play roles different from those played by their Western counterparts has long been observed in academic literature, as has the growing tension between judges’ own aspirations regarding their roles and the actual roles they play. I have argued elsewhere that many of the roles being played by Chinese courts today represent a continuation of revolutionary and prerevolution tradition rather than a shift against efforts to build some form of liberal rule-of-law system. This Article shows how these trends manifest themselves in the criminal justice system, where judges balance efforts to resolve disputes with their own self-interest in avoiding responsibility for mistakes. The cases studied also provide insight into the roles lawyers play in such a system, with most focusing on technical arguments for leniency and on facilitating negotiated outcomes. Substantive arguments not relating to leniency are almost entirely unsuccessful. The cases thus provide an initial window into an as yet understudied topic: the role of lawyers in a system in which compelled mediation is dominant.

D. Authoritarian Transparency

Finally, this project also adds to literature about the role of transparency in the Chinese political system and authoritarian systems more generally. In some respects, the courts in Henan today are the most transparent in China. Yet this transparency has very specific goals: controlling judges, reducing errors, and, in so doing, increasing public confidence in the courts. The fact that so much continues to go on behind the scenes makes the efficacy of such efforts at the very least questionable. Most notably, however, is the parallel to other areas in which the State has similarly embraced an instrumentalist view of transparency. Such areas include the adoption of freedom-of-information regulations and the “controlled transparency” model of media supervision of the legal system. Absent from discussion of the Henan policy of making cases available online is concern with citizens’ right to know. Likewise, discussion of the policy does not focus on the possibility that making vast amounts of information publicly available may also play a role in furthering the development of the Chinese legal system. Instead, official discussion focuses almost entirely on the need to ensure judges obey the rules.

Henan’s experiment with judicial openness highlights three characteristics of China’s emerging model of authoritarian transparency. First, transparency is targeted, and it is applied to limited areas and with specific constraints. This is

313. Publication of cases is not the only possible metric of judicial transparency: the cases tell us little about whether trials were actually open to the public.

314. For example, the Henan cases provide no insight into the rule of court adjudication committees or Party Political legal committees. For a discussion of the general functioning of the courts, see Benjamin Liebman, China’s Courts: Restricted Reform, 191 CHINA Q. 633 (2007).

evident from the limitations on publication of a range of types of cases, arguably some of which would provide the best window into courts’ performance in the most difficult cases. Second, transparency appears to be directed mainly at curbing official wrongdoing, not empowering individuals. This is true both in the courts and in media coverage of official corruption. Third, appeals to transparency are combined with appeals to populism. As Zhang Liyong noted, putting cases online is intended to subject judges to scrutiny by the online masses. Transparency is aimed at scaring judges into better performance and creating a platform for State oversight, with populism playing a functional role in supporting such goals.

Henan’s experiment is of particular relevance now, as the SPC seeks to encourage and require courts nationwide to place decisions online. Yet the SPC’s new rules also highlight some of the apparent uncertainty among court and Party-State leaders about the utility of transparency. The SPC rules will require the Henan courts to make some decisions publicly available that were not previously made available under Henan’s own rules on publication of court documents. Yet in one crucial respect the SPC rules will reduce transparency in Henan. The SPC rules state that court decisions may only be posted online when case decisions are “effective”—meaning either that the time period for filing an appeal has passed, or an appellate court has decided the case. Prior to the SPC rules, Henan required publication of first-instance decisions even when they were pending on appeal. Henan court officials note that this is no longer permitted. The ban on publication of decisions on appeal suggests discomfort with the possibility of public scrutiny of pending cases. Scrutiny is permitted only once courts have reached a definitive outcome. Transparency is being used for specific purposes, but is also being controlled.

The near-daily corruption scandals in China in the past two years show that increased transparency and public scrutiny are not easily contained. New technologies are combining with increased focus by the State on attacking corruption to provide fertile ground for individuals and activists alike to expose wrongdoing. Yet this dynamic supports, rather than undermines, this model of authoritarian transparency, in significant part because such efforts are not rule (or law) based. Those who are exposed receive little in the way of legal process, and those not exposed fear online exposure or popular reaction rather than sustained compliance with legal rules. There is value in increased transparency in the Chinese system, but there is also danger in mistaking such steps with fundamental change in how the system functions. Transparency may be a virtue, but it is also a tool of control.

316. Interview 2014-1 (stating that “less will be made public under [the] SPC rules” than had previously been the case in Henan).
317. See sections 2, 4, and 8 of Provisions of the Supreme People’s Court on the Issuance of Judgments on the Internet by the People’s Courts, supra note 5.
318. Implementing Rules, supra note 13, arts. 3, 5, 6 (stating that all first-instance cases, except for those specifically excluded, shall be placed online).
CONCLUSION

This Article is a first step in taking advantage of the vast amount of data now available to scholars of Chinese law regarding court decisions. This Article is also an initial step toward conceptualizing what such data mean for our understanding of the Chinese criminal justice system and for broader trends in the Chinese political-legal system. What remains most surprising is that such research is now possible, in large part due to Party-State interests in asserting oversight over China’s courts.
The Need for Federal Preemption and International Negotiations Regarding Liability Caps and Waivers of Liability in the U.S. Commercial Space Industry

Matthew Schaefer*

Federal preemption is often controversial and international negotiations are often difficult. Yet both are necessary in the case of liability issues surrounding the nascent U.S. commercial space industry. In 2012–2014, with the retirement of the U.S. government’s Space Shuttle, two U.S. commercial companies began ferrying cargo to the International Space Station for the U.S. government. Commercial human spaceflight will soon begin in earnest. In 2016, a company will begin suborbital space flights from the United States for tourism and research purposes. The current U.S. approach to third-party liability and space-flight-participant (or passenger) liability suffers from unnecessary uncertainty. This uncertainty is caused by federal legislation governing third-party liability issues and by a patchwork of divergent state statutes and common law rules regarding liability of commercial space operators to space-flight participants. Because the growing commercial space industry is important to U.S. national security and the U.S. economy,

* Law Alumni Professor of Law and Director, Space, Cyber, and Telecom Law Program, University of Nebraska College of Law. The author previously served as a director in the international economic affairs office of the National Security Council (White House) and as an international trade consultant to the National Governors’ Association. The author would like to thank his colleagues Frans G. von der Dunk, Harvey & Susan Perlman Alumni and Othmer Professor of Law; Steve Willborn, Judge Henry A. Spencer Professor of Law of University of Nebraska College of Law; as well as John F. Burton, Jr., Professor Emeritus in the School of Management and Labor Relations (SMLR) at Rutgers University and Professor Emeritus in the School of Industrial and Labor Relations at Cornell University; Professor Mark Sundahl, Cleveland-Marsh College of Law; and Giugi Carminati, Senior Associate at Berg & Androphy (Houston) for their comments on this Article. The author would also like to thank Sandra Teichert, LL.M. class of 2014, for her research assistance. Finally, the author would like to thank Associate Professor and Research Librarian at UNL College of Law Matt Novak for his assistance in researching difficult materials related to Part III.A.5 of this Article. All errors and omissions and views expressed are those of the author.

http://scholarship.law.berkeley.edu/bjil/vol33/iss1/1
enhanced liability protections should be afforded to the nascent industry to avoid “crushing liability” on U.S. space companies and to place them on a level playing field with foreign competitors in the case of a massive, catastrophic accident. Accordingly, the Article recommends preemptive federal legislation that would create a liability cap on third-party liability and prevent suits by space-flight participants or their heirs against space companies except in cases of willful misconduct or gross negligence. However, the Article also cautions that federal preemption should not extend to workers’ compensation claims against employers that send their employees to space, since protection of the myriad of companies that might possibly sponsor flights to space for their employees is not critical to incentivizing and maintaining commercial space activity in the United States.

TABLE OF CONTENTS

INTRODUCTION .................................................................................................................. 225
I. THIRD-PARTY LIABILITY—GOVERNMENT INDEMNIFICATION ............................... 230
   AND LIABILITY CAPS ..................................................................................................... 230
   A. U.S. Domestic Liability Regime with Respect to Third Parties ................................ 230
   B. A Liability Cap for the Commercial Space Industry Is Not
      Without Precedent ...................................................................................................... 233
   C. Maximum Probable Loss Determinations ................................................................. 241
   D. International Treaty Dimensions Under the Liability Convention ................ 242
II. LIABILITY WITH RESPECT TO SPACE FLIGHT PARTICIPANTS (SFPs)............. 244
   A. U.S. Domestic Liability Regime with Respect to SFPs ........................................ 244
      1. SFPs Under the Commercial Space Launch Amendments
         Act of 2004 ............................................................................................................. 245
      2. Contractual Waivers Under State Common Law .............................................. 248
      3. State Legislation Granting Space Operators (Partial)
         Immunity from Liability ...................................................................................... 250
      4. Choice-of-Court and Choice-of-Law Clauses and Their
         Enforcement .......................................................................................................... 255
      5. Potential for Litigation by SFPs or Their Heirs in Foreign
         Court ....................................................................................................................... 256
      6. Summary ............................................................................................................... 262
   B. International Treaty Dimensions Under the Liability Convention ................ 263
III. CORPORATE- OR UNIVERSITY-SPONSORED FLIGHTS FOR SFPs AND
     RELATIONSHIP TO STATE WORKERS’ COMPENSATION REGIMES ...... 267
CONCLUSION ...................................................................................................................... 272
INTRODUCTION

The commercial space industry is critical to U.S. national security and economic well-being. Congress has explicitly made such findings in legislation addressing commercial space activities, in particular that

[t]he development of commercial launch vehicles, reentry vehicles, and associated services would enable the United States to retain its competitive position internationally, contributing to the national interest and economic well-being of the United States; [and] providing launch services and reentry services by the private sector is consistent with [U.S.] national security and foreign policy interests.1

Further, Congress has found that “private industry has begun to develop commercial launch vehicles capable of carrying human beings into space and greater private investment in these efforts will stimulate the Nations’ commercial space transportation industry as a whole.”2

Space activities are inherently dangerous and roughly three percent of persons traveling to or in space to date have died, including the fourteen people aboard the Challenger and Columbia Space Shuttles in 1986 and 2003 accidents, respectively.3 Rockets that launch satellites and spacecraft are filled with twenty times more propellant than the weight of the rocket itself and must travel twenty-five times faster than passenger aircraft to reach earth orbit.4 Accidents, while rare, will likely always be part of space activity due to the inherent risk of such activity, and they obviously can harm those aboard spacecraft. Accidents can also potentially harm third parties on the ground not connected with the launch or flights, although, to date, no third-party human loss of life, and only minimal third-party property damage, has occurred as a result of space activities.5

Properly addressing liability issues, both with respect to third parties and with respect to space-flight participants (SFPs)—humans carried aboard commercial space vehicles that are not crew—are among the most important to ensure the continued growth of and investment in U.S. commercial space

2. Id. § 50901(a)(11).
industries. Indeed, this has been true since the creation of a commercial space flight industry in the United States. While the exact impact of liability protections on the industry is hard to quantify, actual commercial space launch contract negotiations are a strong indicator of the importance of liability regimes. In most negotiations, the party negotiating with the launch provider asks how liability issues are handled under the launch operator’s national legal framework. For example, in 2012, launch customers raised concerns over the looming expiration of U.S. government promises to indemnify launch operators and their customers, as well as their contractors and subcontractors, for third-party liability if the losses exceed required insurance coverage. Price is likely still the single largest factor in space launch purchasers’ decisions, but liability regimes can influence price through the impact on insurance costs and overall risk-management decisions.

The importance of the commercial space industry is further highlighted by its predicted growth. The Federal Aviation Administration (FAA) and its Commercial Space Transportation Advisory Committee (COMSTAC) forecast an average annual demand of 31.2 commercial space orbital launches worldwide from 2013 through 2022, up from the forecasted 29.1 launches for the same time frame in the 2012 reports. Specifically, the reports project an average of 18.2 commercial geostationary orbit (GSO) launches and 13.0 non-geostationary orbit (NGSO) launches for 2013 through 2022. Developments in the suborbital marketplace could substantially increase this number given the greater frequency of launches in suborbital business plans. FAA economic studies have found a critical link between the U.S. launch industry and overall U.S. space-industry success:

The U.S. launch industry is a critical element of the U.S. transportation infrastructure, for without it the nation is unable to send people and satellites into space. Whereas launch revenues are relatively small, the launch industry nevertheless enables other industries, and it is these industries that generate substantial revenues, profits, and employment. These results show that the launch vehicle manufacturing industry functions as an enabler of other industries rather than a significant economic activity generator. Over time, commercial launches have placed many satellites in orbit allowing operators to offer a range of satellite services and spurring the growth of ground equipment production to support these satellite services. Commercial launch is essential for maintaining existing satellite services markets and is invaluable for future emerging space

6. See Tim Hughes & Esta Rosenberg, Space Travel Law (and Politics): The Evolution of the Commercial Space Launch Amendments Act of 2004, 31 J. SPACE L. 1, 6–7 (2005) (describing that during the private industry-NASA partnered reusable launch vehicle development program in the mid-1990’s, the industry’s single largest concern was the potential for massive third-party liability but that Congress stepped in to provide third-party liability indemnification for the NASA-partnered program, allowing the activity to continue).


8. Id.
Further, the employment, earnings, and economic activity connected with the space industries are significant in terms of the overall U.S. economy. The FAA found in a 2010 study that the commercial space transportation and enhanced industries "generated a total of $208.3 billion in economic activity in the United States." Over one million people throughout the country were employed as a result of this activity, with earnings that exceeded $53 billion.

U.S. space companies are in competition with foreign companies that benefit from governmental policies seeking to attract high-tech, high-wage industries that also have significant and broader national security implications. One leading commentator summarizes the issues with global competition in high-tech industries as follows:

Throughout much of the 20th century, the U.S. economy led the world in innovation, and American companies still maintain strong positions in high-tech activities based on innovation. Learning from the U.S. experience, other nations are investing heavily in their innovation capabilities, are fostering the development of new formidable high-tech competitors, and are using incentives and restrictions to attract investment and production by U.S. high-tech companies.

Faced with this changing competitive landscape, U.S. policy makers must nurture America’s own innovation capabilities, must make the U.S. an attractive location for the high-tech activities of both homegrown and foreign companies, and must champion fair competition in trade and global investment for technology-intensive goods and services.

The U.S. commercial space launch market is under significant pressure from foreign markets. A 2012 Government Accountability Office (GAO) report found the following:

Over the past several years, Russian and French launches have generated the most revenues, followed by U.S. launches. Moreover, in 8 of the last 10 years, U.S. commercial launch companies generated less revenue than launches in either Russia or France. U.S. companies generated no commercial launch revenue in 2011 because they conducted no launches.

The U.S. commercial space industry is still maturing and evolving in the post-Shuttle retirement era. While commercial launches of satellites in the U.S.

10. Id. at 2.
11. Id.
date back to the late 1980’s, commercial transportation of cargo and crew (both orbital and suborbital) are nascent industries. Two U.S. space operators have completed successful cargo runs to the International Space Station (ISS) in the past two years.\textsuperscript{14} Several companies are receiving milestone payments under the National Aeronautics and Space Administration’s (NASA) commercial crew program to develop orbital human space-flight capsules, with two companies being awarded in September 2014 a total of $6.8 billion in commercial crew contracts from NASA to ferry astronauts to the ISS.\textsuperscript{15} No commercial suborbital or orbital flights of humans have yet to take place, save for several space tourists flying aboard Russian Soyuz craft at $20–30 million per ticket,\textsuperscript{16} although suborbital flights are expected to begin in 2016 out of Space Port America in New Mexico by another commercial company.\textsuperscript{17} Finally, it is clear the mature part of the U.S. commercial space industry, satellite launches, has been and continues to be in competition with companies that benefit from foreign governments that permanently and rigidly limit the liability exposure of those companies over many decades with no uncertainty of interruption in those protections.\textsuperscript{18}

The U.S. government will continue to rely on commercial companies for access to space and the industry is important to broader economic and national security needs. Indeed, even the suborbital launch market that many characterize as serving recreational purposes has significant and far-reaching implications. The suborbital market has potentially significant research capabilities and adapted suborbital vehicles also have the potential capability of reducing the cost of small satellite launches. Thus, while Congress will not be able to level the playing field in all respects, Congress should ensure that the liability regime for the U.S. commercial space industry allows companies to avoid “crushing liability”\textsuperscript{19} in cases of accident and also continues to incentivize the growth of the industry and new markets. Currently, the U.S. government gives minimal short-term protection through a promise of government indemnification against

\begin{thebibliography}{9}
\bibitem{note17} See Stephen Clark, Virgin Galactic Planning SpaceshipTwo’s Return to Flight, SPACEFLIGHT NOW (Jan. 14, 2015), http://spaceflightnow.com/2015/01/14/virgin-galactic-planning-spaceshiptwos-return-to-flight/ (“Virgin Galactic CEO George Whitesides said commercial service is now expected to begin in 2016.”).
\bibitem{note18} See infra notes 26–29 and accompanying text.
\bibitem{note19} Professor Shavell first introduced this term. See Steven Shavell, An Analysis of Causation and the Scope of Liability in the Law of Torts, 9 J. LEGAL STUD. 463, 465 (1980). It has been used in a variety of contexts, but the central point is that one wants to avoid using liability regimes in a manner that reduces or drives out socially useful activities.
\end{thebibliography}
catastrophic third-party damages. However, U.S. industry deserves a permanent liability cap regarding third-party damage, which companies in competitor countries maintain. In regards to any injury or death to an SFP, the U.S. government has essentially left it to state law, both statutory and common-law, to determine the circumstances under which companies can be held liable. Given the national security and national economic interests involved, and the nascent stage of commercial human space flight, suits by SFPs against commercial space companies should be barred by the federal government except in cases of willful misconduct, or alternatively, the lower standard of gross negligence. In short, federal preemption regarding the liability of space companies to third parties and SFPs is necessary to protect national security and national economic interests. Due to the international nature of the marketplace, international liability claims under the Liability Convention and potential suits in foreign courts are possible, and thus the U.S. government must also pursue international negotiations to ensure dangerous loopholes are not created. While federal preemption can be controversial and international negotiations can be arduous, U.S. national security and national economic well-being demand further liability protections for the commercial space industry.

Part II of this Article examines the issue of third-party liability. It examines the U.S. government’s current approach of extending a short-term promise of government indemnification for third-party damages exceeding the amount of insurance commercial space companies are required to obtain. It also examines other countries’ third-party liability regimes that extend a permanent liability cap to their commercial space industries. It recommends the U.S. Congress enact a permanent third-party liability cap at the current amount of required insurance. There is precedent, as liability caps have previously been enacted for other industries—including antiterrorism technology and nuclear energy—for national security and national economic reasons. As the industry matures, international negotiations on liability caps could also be considered.

Part III analyzes the issue of liability for injury or death to SFPs. Originally, in the 2004 House bill for the Commercial Space Launch Amendments Act (CSLAA), SFPs were included in the full federal cross-waiver regime that would have barred suits by SFPs against space operators except in cases of willful misconduct by the space operator. However, that provision was struck out in the final bill and thus any future negligence suits by SFPs were seemingly left to be determined under state common law. However, in the past seven years, six states with spaceports or detailed plans for a spaceport have enacted legislation that sought to immunize space operators from negligence.

20. See 51 U.S.C. § 50915; see also Part II infra discussing current U.S. policy.
suits. This Part analyzes the interplay between the states’ statutes and common law and examines the weaknesses and gaps in the statutes. It argues that the federal government should clearly preempt the state law by going back to the approach taken in the 2004 House bill, or alternatively, if that approach is viewed as politically infeasible because it would also bar gross negligence claims, federal legislation could simply preempt state tort law negligence-based suits. Any arguments against federal preemption based on states’ rights concerns should be muted because the current federal law arguably preempts any immunity state statutes purportedly afford space operators. Additionally, the federal government should pursue international negotiations to clarify that Liability Convention claims cannot be made on behalf of foreign SFPs and ensure that foreign litigation does not proceed in cases of SFP injury or death occurring in a U.S.-licensed launch.

Part IV addresses the issue of sponsored flights, namely when a corporation or university sends an employee aboard a spacecraft as part of their employment. In such cases, the employee should not have to waive rights to pursue workers’ compensation claims against their employer, the flight sponsor. Protecting flight sponsors from workers’ compensation claims is not necessary to protect the U.S. national security and economic interest, as these claims do not expose the U.S. commercial space industry to “crushing liability.” Thus, there needs to be a savings clause preventing federal preemption of state law to ensure that workers’ compensation claims can be made against flight sponsors.

Part V concludes that federal preemption regarding the liability of space companies to third parties and SFPs is necessary to protect national security and national economic interests. This Part also recommends that the federal government participate in international negotiations to clarify and enhance liability protections globally.

I. THIRD-PARTY LIABILITY—GOVERNMENT INDEMNIFICATION AND LIABILITY CAPS

A. U.S. Domestic Liability Regime with Respect to Third Parties

Currently, the U.S. third-party liability regime is broken into three tiers. First, the U.S. government requires, as one of the conditions for obtaining a launch (or reentry) license, that commercial space-flight operators obtain third-party liability insurance in the amount of the maximum probable loss (MPL), according to a calculation performed by the FAA.22 The insurance is generally required to last thirty days from the ignition of the launch vehicle in the case of a launch or thirty days after initiation of reentry.23 This calculated amount of


23. See id. §§ 440.11, 440.12. The United States does not require that third-party liability
required insurance cannot exceed $500 million; nor can it exceed the amount of insurance available on world markets at reasonable cost. The space launch operator’s contractors and subcontractors, as well as its customers (not including SFPs) and its customer’s contractors and subcontractors, are all mandatory additional insureds under the insurance policy. Second, if third-party liability claims exceed the insured amount (MPL), the government has in essence made a statutory promise to pay for the next tier, or tranche, of up to $2.8 billion dollars in any third-party liability claims faced by a space-flight entity. In the third tier, where third-party claims exceed the MPL plus the amount of promised government indemnification, liability reverts back to the operator. However, the government indemnification promised in the second-tier is just that: a promise of future action. Congress would still have to appropriate the money. While one hopes Congress would pass the necessary appropriation law, circumstances may arise where politics and other events prevent Congress from appropriating money to indemnify the operator. For example, if Congress were simultaneously forced to respond to a massive natural disaster and a space disaster, it may be

1. For the total claims related to one launch or reentry, a licensee or transferee is not required to obtain insurance or demonstrate financial responsibility of more than—
   (A)(i) $500,000,000 under paragraph (1)(A) of this subsection; or
   (ii) $100,000,000 under paragraph (1)(B) of this subsection; or
   (B) the maximum liability insurance available on the world market at reasonable cost if the amount is less than the applicable amount in clause (A)(i) or (ii) of this paragraph.

2. General Requirements.—(1) To the extent provided in advance in an appropriation law or to the extent additional legislative authority is enacted providing for paying claims in a compensation plan submitted under subsection (d) of this section, the Secretary of Transportation shall provide for the payment by the United States Government of a successful claim (including reasonable litigation or settlement expenses) of a third party against a licensee or transferee under this chapter, a contractor, subcontractor, or customer of the licensee or transferee, or a contractor or subcontractor of a customer, but not against a space flight participant, resulting from an activity carried out under the license issued or transferred under this chapter for death, bodily injury, or property damage or loss resulting from an activity carried out under the license. However, claims may be paid under this section only to the extent the total amount of successful claims related to one launch or reentry—
   (A) is more than the amount of insurance or demonstration of financial responsibility required under section 50914(a)(1)(A) of this title; and
   (B) is not more than $1,500,000,000 (plus additional amounts necessary to reflect inflation occurring after January 1, 1989) above that insurance or financial responsibility amount.
presented with, and ultimately accept, arguments that the loss of one commercial space operator is acceptable even if competition and capabilities are reduced. Additionally, federal statutes typically promise indemnification only for a limited period and must be periodically renewed; they have even expired for short periods in the past. Given that many launch contracts are entered into one to two years before the actual launch, short-term extensions of a year or even three years after lapse of the program do not provide the necessary certainty for commercial actors.

Indeed, the government’s indemnification promise risked lapsing at least five times since its inception in 1988, with extensions occurring in 1999, 2000, 2004, 2009, 2013, and 2014.26 Indeed, in the latter two cases, the indemnification promise did lapse, albeit only briefly. It was allowed to expire for one day before being extended on January 2, 2013 until the end of 2013.27 The promise of government indemnification expired for sixteen days before it was extended for three years on Jan. 16, 2014.28

Despite the fact that no third-party liability claims have been made in over 230 licensed U.S. commercial launches since 1989, Congress has, to date, been hesitant to give the U.S. launch industry the same general level of protection that other countries have given their commercial launch industry.29 Indeed, no third-party claims globally have reached a level to trigger government indemnification offered by foreign countries.30

France, a major U.S. commercial competitor launch country, has effectively given its space operators a permanent cap on third-party liability. Specifically, France limits the liability of its operators for damage to third parties to a fixed amount of approximately €60 million (roughly $78 million) except in cases of willful misconduct.31 France currently has the largest market

---

29. See GAO REPORT, supra note 13, at 6, 9.
30. See id. at 9–10.
share in commercial space launches. The country’s space program has expanded operations in French Guiana, where it now has three launch vehicles—Ariane 5, Vega, and Soyuz. Australia also appears to have established a cap. More importantly, two other major launch countries Russia and China, in practice, no one doubts, would limit their companies’ liability in a fashion that operates like a cap although their policies do not explicitly elaborate a liability cap system but rather provide unlimited government indemnification above set amounts. Russia would indemnify operators for all third-party damages over $80–$300 million depending on the rocket’s size and that China would indemnify launch operators for damages exceeding $100 million. Further, other countries’ liability regimes could operate as caps upon the actual occurrence of an accident. For example, in several other countries, including South Korea, the Netherlands, and Austria, the amount of obligatory insurance required of operators in effect sets a cap on their applicable reimbursement obligations should their government be required to pay claims at the international level under the Liability Convention. It is unclear if companies in these countries would benefit from a domestic cap.

B. A Liability Cap for the Commercial Space Industry Is Not Without Precedent

Over the past fifty years, Congress has enacted third-party liability caps for industries of importance to U.S. national security and the U.S. economy, even in industries not facing competitive pressures from foreign industry benefiting from such caps, like the commercial space industry. The establishment of a


34. See GAO REPORT, supra note 5, at 9.

35. See id.


long-term third-party liability cap would give a still-maturing industry certainty and help stimulate investment that continues U.S. leadership in commercial space activities.

In 2002, Congress passed liability caps for industries involved in antiterrorism technologies in support of U.S. national security. The Support Antiterrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act) gives liability protection to providers of antiterrorism technology, providing incentives for the “development, deployment, and commercialization” of the technologies. Some features of the regime are similar to the commercial space regime. For example, a qualified antiterrorism technology seller enters into cross-waivers of liability with its contractors, subcontractors, and customers, as well as its customers’ contractors and subcontractors. These cross-waivers of liability, or reciprocal waivers of claims, are agreements that the parties will not bring claims against each other for damage caused by negligence, sometimes even gross negligence, thus stimulating covered activities—in this case the development of anti-terrorism technologies. Further, the seller’s required insurance policy must include its contractors, subcontractors, vendors, suppliers, and customers as additional insureds.

However, other features in the risk-management system of the SAFTEY Act go beyond the features found in the commercial space third-party liability regime. For example, the SAFETY Act gives federal courts exclusive jurisdiction over suits against sellers of antiterrorism technology. Importantly, the seller’s liability is capped to the amount of liability insurance required by the Department of Homeland Security, which cannot exceed “the maximum amount of liability insurance reasonably available from private sources on the world market at prices and terms that will not unreasonably distort the sales price of Seller’s antiterrorism technologies.” Further, the SAFETY Act bars punitive damages. As of May 2013, the liability cap benefits over six-hundred

40. 6 U.S.C. § 443(b) (2012) reads:
   Reciprocal waiver of claims: The Seller shall enter into a reciprocal waiver of claims with its contractors, subcontractors, suppliers, vendors and customers, and contractors and subcontractors of the customers, involved in the manufacture, sale, use or operation of qualified anti-terrorism technologies, under which each party to the waiver agrees to be responsible for losses, including business interruption losses, that it sustains, or for losses sustained by its own employees resulting from an activity resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against or response or recovery from such act.
41.  See id. § 443(a)(3).
42.  See id. § 442(a).
43.  See id. § 443(a)(2).
44.  See id. § 442(b)(1).
products, services, and technologies designated by the Department of Homeland Security as qualified antiterrorism technologies. . .45 The ultimate purpose is to protect national security by providing liability protection to these industries, a rationale closely akin to that of the commercial space industry that Congress has found vital for U.S. national security as well. Thus, there is ample precedent to enact a third-party liability cap for the commercial space flight industry at the amount of required insurance (the MPL amount).

Congress also passed liability caps to benefit the nuclear and oil industries. The nuclear industry’s history is particularly instructive. When the nuclear industry was first developing, Congress enacted the Price-Anderson Act of 1957,46 which, in essence, capped operator liability at $60 million, the amount of insurance they could obtain on the market. In addition, the federal government promised to provide compensation for amounts over $60 million, up to an additional $500 million.47 Thus, the government combined a liability cap for the industry with a promise to provide compensation for larger third-party damage incidents.

In the leading case addressing the constitutionality of the Price-Anderson Act, the U.S. Supreme Court upheld the constitutionality of the nuclear liability cap, finding that insurance payouts within the boundaries of the cap would cover third-party claims in all but the most extreme and rare incident.48 Studies in 1975 showed there was a one in 20,000 chance per reactor year of an incident involving $100 million in third-party damages and a one in a billion chance per reactor year of an incident involving $14 billion in third-party damage.49 The original Price-Anderson Act cap of $560 million (including the government indemnification tranche) fell in between these two sets of probabilities. Since the FAA uses a one-in-ten million possibility to determine MPL, a liability cap set at the MPL would certainly survive any constitutional challenge. Significantly, the U.S. Supreme Court also rejected arguments that the Price-Anderson Act liability cap would encourage irresponsible industry behavior. The Court pointed to the federal regulatory and licensing scheme as well as the costs that would be

45. See DHS SCIENCE AND TECHNOLOGY DIRECTORATE: FACTSHEET ON SAFETY ACT (2014), https://www.safetyact.gov/pages/homepages/Home.do. Companies taking the further step of becoming certified, which requires a higher level of proven effectiveness, receive the additional benefit of the government-contractor defense in any suit even if they have sold to a private party. See id.


49. Id. at 85 n.28.
imposed on the private operator under the system.\textsuperscript{50} The Court stated that “in the event of a nuclear accident the utility itself would suffer perhaps the largest damages. While obviously not to be compared with the loss of human life and injury to health, the risk of financial loss and possible bankruptcy to the utility is in itself no small incentive to avoid the kind of irresponsible and cavalier conduct implicitly attributed to licensees by the District Court.”\textsuperscript{51} Similarly, the space launch industry for human space flight and cargo missions has incredible motivations for business reasons alone to operate safely in its nascent stages. An early accident could drive up insurance rates and reduce demand for such missions.

Early international nuclear liability treaties also allowed for caps to be created by parties to the agreement by laying out either minimum liabilities below which national liability caps could not sink or maximum liability caps that could be imposed by contracting States.\textsuperscript{52} As the commercial space industry matures, the U.S. government might also consider pursuing international negotiations that could lead to an agreement in which countries agree to enact liability caps in national law. With many countries already having de facto or de jure third-party liability caps, negotiations may be streamlined to a degree. However, international negotiation of such caps is a longer-term issue, whereas enactment of a liability cap within the United States is an issue in need of immediate consideration.

The negotiating history of the nuclear liability conventions suggests that negotiators were aware that “unlimited liability could easily lead to the ruin of the operator without affording any substantial contribution to compensation for the damage caused.”\textsuperscript{53} These early conventions were then modified to provide for public funds to be made available in cases of accident as an addition to the liability cap afforded to the operator (paralleling the evolution of the Price-Anderson Act in the U.S. system).\textsuperscript{54} While the Price-Anderson Act has evolved into a system of retroactive premiums being imposed on operators\textsuperscript{55} and additional treaties have been negotiated to eliminate requirements of utilizing public funds, this only occurred after the number of nuclear plants in the United States reached over sixty in number\textsuperscript{56} and only after the pure cap was in place.

\textsuperscript{50} Id. at 87.
\textsuperscript{51} Id.
\textsuperscript{52} See Faure & Borre, supra note 47, at 234–35.
\textsuperscript{54} See Faure & Borre, supra note 47, at 236–37.
\textsuperscript{55} See id. at 221.
\textsuperscript{56} See Duke Energy Co., 438 U.S. at 66:

In 1975, Congress again extended the Act’s coverage until 1987, and continued the $560 million limitation on liability. However a new provision was added requiring, in the event of a nuclear incident, each of the sixty or more reactor owners to contribute
for nearly two decades. Moreover, nuclear plants operate each and every day around the clock and in locations much closer to population centers than most space launches. The U.S. commercial launch industry is not nearly at the level of maturity—both in terms of frequency of operation and number of operators—that the nuclear industry was at when it transitioned to a system of retroactive premiums being placed on operators in the event of an accident. The United States has had just over 230 licensed commercial launches since 1989 (an average of roughly nine per year) and there are only a handful of significant commercial space launch operators in the United States. The U.S. commercial space industry is clearly not at the level of maturity—in terms of constancy of operation and the number of operators—at which the nuclear industry was when Price-Anderson moved away from a liability-cap system to a system that includes retroactive premiums imposed on nuclear plants upon the occurrence of an accident. Further, other countries continue to maintain liability caps for nuclear operators. Canada, with fewer nuclear operators than the United States, continues to maintain a $75 million cap on liability for its nuclear industry. Many European nations also continue to maintain liability caps for the nuclear industry. Liability caps have been supported in the nuclear industry as a way of avoiding the possibility of “crushing liability” on private actors that would have them abandon altogether a socially useful enterprise. Similarly, it is in the interest of the U.S. government to avoid the scenario of “crushing liability” because it is already reliant on commercial launch operators for cargo carriage to ISS, will soon rely on commercial launch operators for crew carriage to the ISS, and may in the future depend on modified suborbital vehicles for less expensive small satellite launches. It is in the U.S. national interest to have multiple operators for each of these services for redundancy and competition. This U.S. national interest is heightened when foreign competitors provide third-party liability caps to their operators. U.S. nuclear operators are not engaged in intense

57. See Commercial Space Data, FEDERAL AVIATION ADMINISTRATION, http://www.faa.gov/data_research/commercial_space_data/ (last visited Feb. 9, 2015); See also GAO REPORT, supra note 5, 6–7.


international competition with foreign companies, while the commercial space industry faces intense international competition from competitors benefiting from liability caps. Thus, the commercial space industry is more in need of liability caps than was the nuclear industry before it fully matured.

Another industry that benefits from liability caps passed by Congress is the offshore oil industry. Oil industry third-party liability caps in the Oil Pollution Act of 1990 (OPA 90) came under pressure after the BP Horizon accident in the Gulf.62 OPA 90 limits liability for offshore oil facilities to $75 million (plus cleanup costs) but makes exceptions for situations involving gross negligence or violations of federal regulations.63 Numerous bills were introduced in Congress to increase the cap from $75 million to $10 billion following the BP Horizon accident,64 but Congress passed no such legislation. Again, no accidents have yet occurred in commercial space launches involving third-party liability. Those seeking to raise the caps in OPA 90 put forth numerous arguments, but none of these have resonance in the context of commercial space activities. First, in the context of OPA 90, the cap’s opponents argue that it encourages risk or negligent practices.65 However, the commercial space industry, particularly those engaging in human space flight, have tremendous incentives for safe practices in the early stages of new space market activities, both orbital and suborbital, as an accident in the early stages of new activities will reduce market demand for such activities and potentially significantly harm the company’s business reputation. Moreover, insurance rates on new vehicles are often higher until a vehicle establishes a record of success, so space-flight operators have an incentive to avoid accidents to bring down insurance premiums. Second, in the context of OPA 90, some argue that the cap is a subsidy to industry.66 From an international legal perspective, a liability cap for commercial launch services is not considered a subsidy under the World Trade Organization’s General Agreement on Trade in Services (GATS), nor would a liability cap with respect to even a manufactured good likely be considered one under the WTO Agreement on Subsidies and Countervailing Measures (covering goods not services).67 Moreover, from an economic viewpoint, if an industry has


66. See id.

67. The GATS currently contains no subsidy disciplines, only foreseeing future negotiations
significant and important externalities, including advancement of national security and high-tech, high-wage jobs, and additionally faces foreign competitors that are afforded permanent liability caps, then it is not only efficient but also fair to extend a third-party liability cap to U.S. space operators. Those opposing the increase of the liability cap in OPA 90 also argued that there might not be sufficient capacity in the insurance market and that smaller actors would be placed at a significant disadvantage.  

The 2012 GAO report found that space insurers might be able to provide up to $500 million per launch in third-party liability insurance, such that insurance capacity may be available for a cap that exceeds the current average MPL in the commercial space launch sector. However, the report notes many variables that could come into play that would affect this potential capacity in the insurance industry. Finally, smaller space companies will be affected by the absence of a liability cap (or the creation of a very large cap) as they would be more impacted by the increased premiums necessary to acquire greater amounts of third-party liability insurance (if they are launch companies) or have fewer resources at their disposal to pay out third-party claims on their own as compared with larger companies if third-party damages exceed insured amounts.

Oil facilities, like nuclear facilities, are located in places where third-party damage is more likely to occur with accidents, particularly given the quick spread of oil and radiation, respectively. Space launches occur from coastal areas or from very remote spaceports, and thus third-party damage is less likely. Moreover, if the liability cap for space launches is set at the MPL this is an improvement from a flat cap because it takes into account specific risk factors such as the launch vehicle as well as the geographic location of the launch site and its proximity to population centers. Indeed, some commentators have argued that liability limits under the OPA 90 should be set taking into account specific

68. See, e.g., Matthew Glans, Research and Commentary: Oil Spill Liability Caps and the Oil Pollution Act, THE HEARTLAND INSTITUTE (Nov. 3, 2011), http://heartland.org/policy-documents/research-commentary-oil-spill-liability-caps-and-oil-pollution-act (noting that “[s]upporters of the cap, including legislators in drilling areas across the nation, say unlimited liability would make insuring for new drilling impossible for all but the biggest companies, driving out smaller competitors”).

69. GAO REPORT, supra note 13, at 14.

70. See id.
risk factors for each individual oil well, as opposed to the nationally uniform cap the United States has today.  

Foreign competitors to the U.S. space launch industry have said, when asked, that they would be in favor of the United States creating liability caps or promising long-term government indemnification for third-party liability in hopes that it would lower overall insurance rates in the space industry. However, there is no indication from the insurance industry that rates would be significantly impacted by the U.S. government agreeing to take on additional third-party liability for a prolonged period of time. The only way this might occur is if the U.S. government withdrew or let lapse promises of government indemnification beyond the MPL-insured amount, as this might force U.S. companies to buy more insurance than the MPL and thus increase insurance outlays by the industry. Moreover, foreign entities have not pushed for U.S. extension of its third-party liability government indemnification regime to any significant degree. This is some indication that foreign nations view the current U.S. system as a competitive advantage for them.

One concern raised with creating a liability cap is that innocent harmed third parties may go uncompensated in the one-in-ten million chance that such losses exceed the insured amount. However, a cap would create no significant change from the status quo in this respect because under the current liability regime, compensation beyond MPL losses essentially depends on whether the Congress appropriates such money. In a liability cap regime, the same will be true. For example, assume an accident occurs involving $2 billion in third-party damages under the current regime and the MPL for the launch was calculated at $50 million. Insurers will pay the third parties for amounts up to the MPL. If Congress appropriates money in accordance with the indemnification promise, the government will indemnify operators for the remaining $1.95 billion due to injured third-parties. If Congress does not pass an appropriation, some third parties will go unpaid because no operator will have assets to pay out that amount of claims (or at least pay out that amount of claims without severely damaging its operations). And, in such a situation, it is certainly possible that the operator will essentially be forced out of business as assets are sold to pay at least some portion of remaining claims. There will be less competition in the launch industry and less redundancy. The nation will lose a commercial launch operator despite having placed importance on the development of the commercial space industry for national economic and national security reasons. Now assume a liability cap is established at the MPL and the same incident occurs, one involving $2 billion in third-party liability. Insurance will pay $50 million in third-party claims. Whether the remaining third parties are

72. This information is based on discussions with various foreign launch operators at conferences.
compensated once again depends on whether Congress appropriates money. The difference is that the space operator will not be forced out of business. Thus, in the exceedingly rare (potentially one in a one hundred thousand years) accident in which third-party damages exceed the MPL, a third-party-liability-cap regime will have no impact on whether innocent third parties are fully compensated for their losses. This will continue to depend, just as in the current liability regime, on whether Congress passes an appropriation. The differences in the two regimes are whether U.S. commercial space companies will be certain to avoid crushing liability, a protection that major competitors benefit from in foreign countries, and whether U.S. national security will be diminished through the loss of a space company or companies.

C. Maximum Probable Loss Determinations

As stated before, by statute and regulation, operators are required to obtain insurance up to the MPL as determined by the FAA for third-party liability. MPL calculations have ranged between $3 million (for suborbital test launches) and $268 million. The average MPL is $82 million, although some recent SpaceX Falcon 9 launches have had an MPL as low as $45 million.\(^73\) FAA has been using essentially the same factor and formulas for MPL calculations over the last decade. Despite calls for reform of the MPL calculation, change to the formula should be resisted. Those advocating for reform of the MPL calculation argue the value of life in the calculation is outdated.\(^74\) They also argue that an artificially low MPL places government funds at risk as it makes it more likely the government would need to live up to its promise to indemnify operators for third-party damages that exceed the MPL, particularly in an environment in which the number of launches will increase.\(^75\) However, accuracy can never be

---


\(^74\). See GAO Report, supra note 5, at 11:

FAA uses a figure of $3 million when estimating the cost of a single potential casualty—that includes either injury or death—which FAA officials said has not been updated since they began using it in 1988. Two insurers, as well as representatives of two companies that specialize in estimating damages from catastrophic events (modeling companies), said that this figure is likely understated. Because this number has not been adjusted for inflation or updated in other ways, it may not adequately represent the current cost of injury or death caused by commercial space launch failures.

\(^75\). See Alicia Cackley, Testimony Before Space Subcommittee of the House Science Committee, Commercial Space Launches: FAA Risk Assessment Process Is Not Yet Updated,
guaranteed when calculating such a low probability event. Again, no third-party
damage or claims have ever been made in over 230 commercial launches since
1989. Thus, forecasts for 291 licensed commercial launches in the next decade
should not be an impetus for changing the regime. Even if third-party claims
ever arise, the chances of those claims exceeding the MPL, even as currently
calculated, are beyond minuscule since “the FAA calculates that the chance of
loss exceeding the required insurance and thus resulting in potential U.S.
government liability is lower than one in ten million.”

Another concern with creating a third-party liability cap is that it might lead
to increased calls to adjust the current calculation for MPL. Indeed, some want
the value of life to be increased in the MPL calculation. However, a large
factor affecting MPL already is the choice to base the calculation on a one-in-ten
million probability of loss exceeding that figure. That choice already leads to a
very conservative approach to MPL and one that does not need to be adjusted
given the familiarity the FAA, the launch industry, and insurance market have
with the current calculation. U.S. commercial launches over the past twenty
years have averaged less than nine per year and new estimates only anticipate
this figure increasing to somewhere between twenty and thirty launches per year
in the next decade. Even with a launch rate of one hundred per year, an MPL-
exceeding third-party loss event could only be expected once every one hundred
thousand years. Any reform of the MPL calculation without also changing the
initial choice of a one-in-ten million event will likely lead to higher MPL
numbers. A higher MPL will lead to higher insurance costs, leaving U.S.
industry at a competitive disadvantage with foreign competitors in an
environment in which insurance rates may already climb due to increased
activity and new vehicles. This is of particular concern to suborbital actors
because such launches have a lower MPL but generally pay a higher premium
rate and also anticipate a much greater frequency of launches than orbital launch
g companies.

D. International Treaty Dimensions Under the Liability Convention

Under the 1972 Liability Convention, the U.S. government, if it is
considered a “launching State” of the space object causing damage, will be

6. See GAO REPORT, supra note 5, at 6. See also An Examination of Future Commercial
Launch Markets & FAA’s Launch Indemnification Program: Hearing Before the Subcomm. on
Space and Aeronautics of the H. Comm on Sci., Space, and Tech., 112th Cong. 2 (June
hearings/HHRG-112-%20SY16-20120606-SD001.pdf [hereinafter Hearing on FAA Launch
Indemnification] (“The first commercial space launch took place in 1989 when Space Services Inc.
launched the CONSORT-1 satellite from the White Sands Missile Range in New Mexico on a
Starfire suborbital rocket.”).
7. Hearing on FAA Launch Indemnification, supra note 76, at 3.
8. See GAO REPORT, supra note 5, at 13.
absolutely liable for foreign third-party damage where the damage occurs on Earth or to aircraft in flight, and the U.S. government could be liable for damage caused to a foreign nation’s space object (or persons on board) elsewhere than on surface of the Earth if fault is found.\(^79\) Launching State status is given to the State that launches or procures the launch or from whose territory or facility the launch occurs.\(^80\) This formula can lead to multiple launching States for a given launch, and in such cases the liability is joint and several.\(^81\) There are no caps or limits on liability at the international level under the Liability Convention. Thus, some might be concerned with establishing a liability cap for industry in U.S. domestic legislation as the U.S. government might have liability to a foreign government for which industry will be protected from liability via the domestic cap.

However, the U.S. government should not be overly concerned about the impact of establishing a liability cap in national law at the MPL amount for U.S. space operators regarding third-party liability in light of the Liability Convention. First, the U.S. government already promises to indemnify operators for up to $2.8 billion in third-party damages that exceed the MPL, so even under the current regime the U.S. will not be seeking reimbursement from space launch operators for MPL-exceeding accidents. Second, while the United States will remain absolutely liable for damages on Earth or to aircraft in flight at the international level, the Convention only applies in cases of damage to other nations (or their nationals, whether natural or legal persons) that are party to the Liability Convention.\(^82\) There are currently ninety-one parties to the Liability Convention.\(^83\) A less detailed obligation providing no particular standards of liability in the Outer Space Treaty covers an additional dozen nations, as 103 countries are now party to it.\(^84\) However, given that it is highly unlikely


\(^80\) Liability Convention, supra note 21, art. I(c).

\(^81\) Id. art. V.

\(^82\) Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331. Of course, if the rules in the Liability Convention are considered customary international law, they could also bind nonparties. Given the absence of international third-party claims under the Liability Convention, with at most one case being brought under it—in the late 1970’s by Canada against the Soviet Union when a nuclear-powered satellite crashed into Northwest Canada—it is unlikely the Liability Conventions provisions are customary international law.


(roughly a probability of one in ten million) that third-party liability will exceed the MPL insured amount, it is even less likely that third-party damage in a foreign country or to foreign nationals will exceed this amount. This is so because most U.S. spaceports are located on coasts and designed to launch over oceans so that the early stages of a launch, which tend to be the most dangerous, take place over U.S. territory and oceans. In the forty-two years of operation of the Liability Convention, only one claim has been made by a nation against another nation—in the late 1970’s when Soviet nuclear-powered satellite Cosmos 954 crashed in the Northwest Territories of Canada. Canada mentioned the Liability Convention in its diplomatic exchanges with the Soviet Union and the Soviet Union ultimately paid roughly $6 million to the Canadian government.

II.

LIABILITY WITH RESPECT TO SPACE FLIGHT PARTICIPANTS (SFPs)

A. U.S. Domestic Liability Regime with Respect to SFPs

Flights by private individuals into space are set to begin on a significant scale soon, greatly increasing the number of persons flying to space commercially beyond the few that have traveled to the ISS aboard Russia’s Soyuz. For example, the Tauri Report, commissioned by the FAA, gives a ten-year forecast in the suborbital-reusable-vehicle market:

The dominant suborbital-reusable-vehicle market is Commercial Human Spaceflight, generating 80% of suborbital-reusable-vehicle demand. Our analysis indicates that about 8,000 high net worth individuals (with net worth exceeding $5 million) from across the globe are sufficiently interested and have spending patterns likely to result in the purchase of a suborbital flight at current prices. Roughly, one-third of these consumers are from the United States. We estimate that about 40% of the interested, high net worth population, or 3600 individuals, will take suborbital flights in next 10 years. This estimate may turn out to be conservative, as many of the 925 individuals that have made deposits for suborbital flights do not have net worth of $5 million, although they clearly have high net worth relative to the population as a whole. Additionally, low-earth-orbit missions with passengers to private space hotels or

Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the Moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies.

See also UNOOSA Report, supra note 83, at 10.
Finally, U.S. commercial space operators will take NASA crew to the ISS in the next three or so years, thus eliminating the need for the U.S. government to pay $71 million per seat to the Russian government. NASA-contracted flights for its astronauts are anticipated to be subject to joint oversight by FAA and NASA. FAA will have responsibility for licensing the launch and reentry activities of the NASA contractor for public safety, while NASA will retain responsibility for certifying the vehicle meets NASA requirements relating to both safety and mission assurance. Although NASA astronauts traveling on contractor vehicles technically fall within the definition of SFP under FAA regulations, legal and policy considerations arising outside the current regulatory framework may require a reconsideration of this issue before commercial operators begin to take NASA astronauts to the ISS in three or so years. For this reason, the analysis below focuses on non-NASA SFPs.

1. SFPs Under the Commercial Space Launch Amendments Act of 2004

Currently, SFPs are partially exempted from the CSLAA’s extensive cross-waiver regime in the CSLAA, the major piece of federal legislation governing commercial space activities. Specifically, while SFPs must still enter cross-waivers with the federal government, they do not do so with private entities

89. Based on discussions with NASA and FAA officials.
90. See id.
91. 51 U.S.C. § 50914(b) (2012):
   Reciprocal Waiver of Claims—(1) A launch or reentry license issued or transferred under this chapter shall contain a provision requiring the licensee or transferee to make a reciprocal waiver of claims with its contractors, subcontractors, and customers, and contractors and subcontractors of the customers, involved in launch services or reentry services under which each party to the waiver agrees to be responsible for property damage or loss it sustains, or for personal injury to, death of, or property damage or loss sustained by its own employees resulting from an activity carried out under the applicable license.
92. Id. § 50914 (b)(2):
   The Secretary of Transportation shall make, for the Government, executive agencies of the Government involved in launch services or reentry services, and contractors and subcontractors involved in launch services or reentry services, a reciprocal waiver of claims with the licensee or transferee, contractors, subcontractors, crew, space flight participants, and customers of the licensee or transferee, and contractors and subcontractors of the customers, involved in launch services or reentry services under which each party to the waiver agrees to be responsible for property damage or loss it
involved in commercial launches, including the space-flight operator. In contrast, the space-flight operator must, as a condition to obtaining a launch or reentry license, enter into cross-waivers of liability with its customers (not including SFPs) and each must “flow down” the cross-waivers to their contractors and subcontractors “under which each party waives and releases claims against all the other parties to the waiver.” There is a statutory exception for “willful misconduct” to the waivers of liability, and the FAA has interpreted this language to mean that the waivers prevent claims based on negligence as well as gross negligence claims. The original House bill for the CSLAA of 2004 would have required SFPs to be part of the full system of cross-waivers, entering into cross-waivers with space-flight operators. Thus, the House bill would have only allowed SFP claims against space operators if those operators engaged in willful misconduct. However, the final law did not include such a provision. The final law and regulations make clear, however, that SFPs are not third parties eligible for government indemnification. SFPs are defined as “an individual, who is not crew, carried aboard a launch vehicle or reentry vehicle.”

Third parties are defined as:

- a person except—
  - (A) the United States Government or the Government’s contractors or subcontractors involved in launch services or reentry services;
  - (B) a licensee or transferee under this chapter;
  - (C) a licensee’s or transferee’s contractors, subcontractors, or customers involved in launch services or reentry services;
  - (D) the customer’s contractors or subcontractors involved in launch services or reentry services; or
  - (E) crew or space flight participants.

Rather than requiring SFP’s to engage in the full federal cross-waiver regime, Congress chose to establish a written-informed-consent regime in the CSLAA of 2004 with respect to SFPs. Specifically, the space flight operator is

sustains, or for personal injury to, death of, or property damage or loss sustained by its own employees or by space flight participants, resulting from an activity carried out under the applicable license.

93. See, e.g., Hughes & Rosenberg, supra note 6, at 63.
95. Id. § 440 app. B para. 7(b). The original House bill committee report referred to exceptions in cases of gross negligence. See Hughes & Rosenberg, supra note 6, at 36–37. The six states passing specific legislation related to immunity for space operators for injury or death to SFPs all make exceptions for “gross negligence” or “willful and wanton” disregard.
97. Hughes & Rosenberg, supra note 6, at 36; see also Laura Montgomery, Space Tourism and Informed Consent: To Knowingly Go, 51 FED. LAW. 26, 27 (2004); see generally H.R. 3752, 108th Cong. § 2 (2004).
required to “inform each space flight participant in writing about the risks of the launch and reentry, including the safety record of the launch or reentry vehicle type” prior to entering an agreement with or taking compensation from an SFP. 100 While the regulations lay out in detail the type of information that must be transmitted to SFPs, 101 the written informed consent simply alerts SFPs to possible risks and does not in itself act as a waiver of liability. 102

100. 14 C.F.R. § 460.45 (2014). See also Montgomery, supra note 97, at 27.

101. 14 C.F.R. § 460.45 reads:

(a) Before receiving compensation or making an agreement to fly a space flight participant, an operator must satisfy the requirements of this section. An operator . . . must disclose in writing—

(1) For each mission, each known hazard and risk that could result in a serious injury, death, disability, or total or partial loss of physical and mental function;

(2) That there are hazards that are not known; and

(3) That participation in space flight may result in death, serious injury, or total or partial loss of physical or mental function.

(b) An operator must inform each space flight participant that the United States Government has not certified the launch vehicle and any reentry vehicle as safe for carrying crew or space flight participants.

(c) An operator must inform each space flight participant of the safety record of all launch or reentry vehicles that have carried one or more persons on board, including both U.S. government and private sector vehicles. This information must include—

(1) The total number of people who have been on a suborbital or orbital space flight and the total number of people who have died or been seriously injured on these flights; and

(2) The total number of launches and reentries conducted with people on board and the number of catastrophic failures of those launches and reentries.

(d) An operator must describe the safety record of its vehicle to each space flight participant. The operator’s safety record must cover launch and reentry accidents and human space flight incidents that occurred during and after vehicle verification performed in accordance with § 460.17, and include—

(1) The number of vehicle flights;

(2) The number of accidents and human space flight incidents as defined by section 401.5; and

(3) Whether any corrective actions were taken to resolve these accidents and human space flight incidents.

(e) An operator must inform a space flight participant that he or she may request additional information regarding any accidents and human space flight incidents reported.

(f) Before flight, an operator must provide each space flight participant an opportunity to ask questions orally to acquire a better understanding of the hazards and risks of the mission, and each space flight participant must then provide consent in writing to participate in a launch or reentry. The consent must—

(1) Identify the specific launch vehicle the consent covers;

(2) State that the space flight participant understands the risk, and his or her presence on board the launch vehicle is voluntary; and

(3) Be signed and dated by the space flight participant.

2. Contractual Waivers Under State Common Law

Space operators will no doubt seek contractual waivers from SFPs. In many states, exculpatory clauses are disfavored and thus will be narrowly construed. As a general rule, to be upheld in court, such clauses must be clear and unambiguous. Nevertheless, in some U.S. states, like California, the common law is very favorable to contractual waivers of liability for recreational sports activities. California courts have found that “[e]xculpatory agreements in the recreational sports context do not implicate the public interest.” Since recreational sports activities are not essential activities, a “release of all premises liability in consideration for permission to enter recreational and social facilities for any purpose does not violate public policy.” Indeed, public policy analysis in California (and several other states) relies on the so-called Tunkl factors, and recreational activities such as space tourism will not run afoul of those factors because the service is not a “matter of practical necessity” and is not an “essential activity” leading to an imbalance in bargaining power. For example, in Booth v. Santa Barbara Biplanes LLC., the California court enforced an exculpatory clause for simple negligence obtained by a tourist company offering sight-seeing tours by aircraft, noting that the company was not “transporting passengers for compensation between points within this state” and thus not like other common carriers. Indeed, as evidenced in Booth, it seems unlikely that common carriage jurisprudence limiting exculpatory clauses for negligence will apply, and, in any event, such jurisprudence may be preempted by the CSLAA of 2004 through its choice of “space-flight participant” terminology rather than “passenger.”

However, approaches vary between the states, and some states’ common law is not as favorable to contractual waivers for recreational sports activity. Indeed, another space-active state, Virginia, never enforces agreements whereby

---

103. See id.
107. Benedek v. PLC Santa Monica, 129 Cal. Rptr. 2d 197, 204 ( Ct. App. 2002).
108. Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441 ( Cal. 1963). See also ELSER, supra note 104, at 5.
110. For further discussion of common carriage jurisprudence as applied to and potentially complicating liability waivers, see Justin Silver, Note, Houston, We Have a (Liability) Problem, 112 MICH. L. REV. 833 (2014) (arguing common carriage designation is a real risk for suborbital flights). A third reason it unlikely is the existence of state liability immunity statutes, although arguably the poor drafting in some of those might lead to questions regarding common carriage as well.
one party seeks to waive liability for negligence in advance of an accident.\textsuperscript{111} The four other states seeking to incentivize space activities (Colorado, New Mexico, Texas, and Florida) all have waiver laws that have been classified as neither strict nor lenient, but rather as moderate according to one comprehensive study of state waiver law.\textsuperscript{112}

Additionally, real differences exist among states as to whether contractual waivers prevent heirs of the participant in the activity from successfully suing recreational sports operators. In California, courts hold that a waiver of liability clause signed in advance of recreational activity and before injury that specifically precludes claims based on the possible defendant’s negligence will prevent a successful suit not only by the participant in the activity but also by the decedent’s heirs. For example, in \textit{Coates v. Newhall}, a dirt bike rider’s release of all liability of the dirt bike track owner was found valid and prevented a successful suit by his heirs.\textsuperscript{113} In another California case, \textit{Madison v. Superior Court}, the court addressed a scuba diving death and the exculpatory clause the diver had signed, ultimately holding that “a plaintiff in a wrongful death action is subject to any defenses which could have been asserted against the decedent, including an express agreement by the decedent to waive the defendants’ negligence and assume all risks.”\textsuperscript{114} As explained more fully in \textit{Gregorie v. Alpine Meadows Ski Corp.}:

Preliminarily, the waiver and release purports to release Alpine from any cause of action for wrongful death, however decedent did not have the ability to waive a cause of action on behalf of her heirs. The longstanding rule is that wrongful death action is a separate and distinct right belonging to the heirs and it does not arise until the death of the decedent. . . . Nevertheless, in a wrongful death action the plaintiff is subject to any defenses which could have been asserted against the decedent, including an express agreement by the decedent to waive the defendants’ negligence and assume all risks. Therefore, although an express waiver of liability is legally ineffective to release a wrongful death cause of action, a release may provide a defendant with a complete defense to all claims, including wrongful death actions.\textsuperscript{115}

The rule in Texas and Georgia is similar to that of California.\textsuperscript{116} Heirs are prevented from successfully suing based on allegations of negligence if the exculpatory clause the decedent signed is valid.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{111} Hiett v. Lake Barcroft Comty. Ass’n., 418 S.E.2d 894, 896 (Va. 1992); see also ELSER, \textit{supra} note 104, at 20.
\item \textsuperscript{112} See DOVICE J. COTTEN & MARY B. COTTEN, \textit{WAIVERS & RELEASES OF LIABILITY} 111 (8th ed. 2012).
\item \textsuperscript{113} Coates v. Newhall Land & Farming, Inc., 236 Cal. Rptr. 181 (Ct. App. 1987).
\item \textsuperscript{114} Madison v. Superior Court, 250 Cal. Rptr. 299, 303 (Ct. App. 1988) (internal citations omitted).
\item \textsuperscript{115} No. CIV.S-08-259 LKK/DAD, 2009 WL 2425960, at *14 (E.D. Cal. Aug. 7, 2009) (unpublished) (internal quotation marks and citations omitted).
\item \textsuperscript{116} See Turner v. Walker Cnty., 408 S.E.2d 818 (Ga. Ct. App. 1991); Sullivan-Sanford
\end{enumerate}
\end{footnotesize}
However, in other states, such as New Jersey, the common law does not prevent heirs from suing. For example, in *Gershon v. Regency Diving Center*, the New Jersey court found that an exculpatory clause signed by the decedent and claiming to prevent suit by his heirs would not bar an heir’s suit.117 The heirs were allowed to proceed with a wrongful death action against the diving center. The court found that the societal interest in having the heirs achieve economic compensation for wrongful death outweighed the decedent scuba diver’s freedom of contract. As the court held, the “decedents’ unilateral decision to contractually waive his right of recovery does not preclude his heirs, who were not parties to the agreement and received no benefit in exchange for such a waiver, from instituting and prosecuting a wrongful death action.”118 Courts in numerous states have yet to address the issue of whether heirs, under the common law, are prevented by a contractual waiver signed by the participant from successfully suing a recreational sports operator.119 Additionally, some states that prevent heirs’ wrongful death suits allow suit by heirs for loss of consortium.120 Since significant space launch accidents could result in death, the uncertainty created by state common-law approaches to how a decedent’s waiver impacts suits by the decedent’s heirs is of particular concern.

### 3. State Legislation Granting Space Operators (Partial) Immunity from Liability

In an effort to improve or clarify the situation existing under the common law and create an incentive for space companies to operate from their respective states, at least six states—California,121 New Mexico,122 Virginia,123 Colorado,124 Texas,125 and Florida126—have passed immunity legislation, presumably seeking to protect space flight operators from negligence claims made by SFPs or their heirs.127 In April 2014, Arizona became the seventh state

---

118. *Id.*
119. See *COTTEN & COTTEN*, supra note 112, at 113 fig.8.2.
120. See, e.g., *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978). See also *COTTEN & COTTEN*, supra note 112, at 113 fig.8.2 (listing California, Colorado, Florida, and New Mexico as states possibly allowing consortium-based suits as well).
122. *N.M. STAT. ANN § 41-14-1 to -3* (2014).
123. *VA. CODE. ANN. § 8.01-227.8 to -227.10* (2014).
to pass this type of legislation, but the initial and primary purpose of the statute was to cover the high altitude balloon flights that the FAA recently determined would be treated as a launch vehicle necessitating a launch license. Additionally, Arizona currently does not have a spaceport or detailed plans for one. Therefore, its law will not be further analyzed alongside those of states that have active space programs.

The state statutes are imperfect at best. Table 1 provides a comparison of relevant state statutes. None of the statutes explicitly immunize operators from negligence claims. Rather, in most cases, the statutes do so by implication as they only expressly exempt from immunity gross negligence and intentional acts. And four of the six statutes muddy the waters further because of exemptions to immunity where the operator “knew or should have known” of a dangerous condition on land or in the equipment. “Knew or should have known” is the language of negligence. Some commentators believe courts will be mindful that the state statutes were seeking to offer significant immunity, and thus will require the “condition” to be preexisting, to have caused the accident, and to be unrelated to the mission itself. Others are less sure state courts will be so favorable to the space industry in their interpretations. Indeed, rather than explicitly precluding negligence claims, most of the statutes immunize operators from claims based on inherent risks (and some further narrow any potential immunity a court might find by stating only damages caused “exclusively” by inherent risks of the activity are captured by the immunity). Courts may vary widely in what they view as an inherent risk, and negligence


131. See Meredith & Lammers, supra note 102, at 6–7 (“The statutory protections are limited and sometimes ambiguous.”).


134. See Carminati, supra note 127.

135. See Yates, supra note 133, at 15; see also von der Dunk, supra note 127.
claims may not be significantly curbed. Determining in the space domain whether an accident was caused by inherent risk versus a negligent act is a very difficult exercise, and one of the reasons why space operators need protection from negligence suits.

Other gaps and ambiguities exist in the state statutes. For example, California’s law does not cover the manufacture that supplies the space vehicle to a space flight operator nor contractors of a space-flight entity, thus leaving them exposed to potential lawsuits—a particular problem for space operators that are also manufacturer vehicles. New Mexico’s law originally shared this weakness but has been corrected recently. It is even possible that in some states legislation could worsen companies’ ability to successfully use contractual waivers against such claims under the common law. State statutes addressing the equine industry provide a cautionary tale. Courts in at least three states, including New Mexico, have found that the presence of a statute that does not clearly immunize operators from negligence liability (only from inherent risk) means that it is state policy not to enforce contractual waivers seeking to release operators from liability for their negligence. Additionally, judicial interpretations of equine-activity statutes can vary widely, and in a manner that does not immunize operators from negligence suits. For example, Colorado courts have interpreted their equine-activity statute as not protecting operators from negligence suits, even though Colorado’s statute does not clearly exempt operator negligence from the immunity provided (as is done in some other states’ statutes). Even if the state statutes are interpreted to provide significant

138. See generally Carminati, supra note 127.

Ironically, courts in three states have held that the existence of an equine activity statute invalidates a release from liability that would otherwise have been valid. Courts in Hawaii, New Mexico and Missouri have held that because their equine activity statutes exclude equine professional or sponsor negligence from the protection of the statute, they express a public policy that professionals or sponsors should be held financially accountable for the consequences of their own negligence. A release from liability is not consistent with that public policy because it attempts to protect from negligence. At least in the absence of an explicit expression of a purpose to override the statute, the release will not be held to be valid in those states. In those three jurisdictions, the equine industry is worse off in terms of protection from negligence after enactment of their equine activity statutes than before. This clearly was not the purpose of industry lobbyists in seeking enactment of these statutes.
140. See generally Carminati, supra note 127.
141. Dawson, supra note 139, § 2:

Courts in Colorado . . . have held that the definition of inherent risks does not include injuries that result from the negligence of equine professionals or sponsors. In those jurisdictions, professional or sponsor negligence is not protected by the statutes. Only
immunity, it is possible that plaintiffs will argue the state statutes are preempted by the CSLAA of 2004, which provides:

a) STATES AND POLITICAL SUBDIVISIONS.—A State or political subdivision of a State—
   1) may not adopt or have in effect a law, regulation, standard, or order inconsistent with this chapter; but
   2) may adopt or have in effect a law, regulation, standard, or order consistent with this chapter that is in addition to or more stringent than a requirement of, or regulation prescribed under, this chapter.142

a valid release from liability will protect such a professional or sponsor from the legal consequences of his or her own negligence.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Virginia</td>
<td>No (no such statute)</td>
<td>1. No; agreements in advance to waive liability for negligence are unenforceable</td>
<td>1. Inherent risk exclusively</td>
<td>1. Explicitly sets floor; does not impact other limitations of liability in law</td>
<td>1. Moderate (enforceable if conspicuous and expressly refers to negligence)</td>
<td>1. Narrowly (might eliminate validity of contractual waiver)</td>
</tr>
<tr>
<td>Colorado</td>
<td>Yes</td>
<td>1. Yes</td>
<td>1. Inherent risks exclusively</td>
<td>1. Explicitly sets floor, i.e., by pronouncing the validity of the statutorily required waiver and any additional limitations on liability agreed to between parties</td>
<td>1. Moderate (enforceable if conspicuous and expressly refers to negligence)</td>
<td>1. Narrowly</td>
</tr>
<tr>
<td>Texas</td>
<td>Yes</td>
<td>1. Yes</td>
<td>1. Any loss or injury arising from participation in spaceflight</td>
<td>1. Explicitly sets floor, i.e., by pronouncing the validity of the statutorily required waiver and any additional limitations on liability agreed to between parties</td>
<td>1. Moderate (enforceable if conspicuous and expressly refers to negligence)</td>
<td>1. Broadly</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Yes</td>
<td>1. Yes</td>
<td>1. Any loss or injury arising from participation in spaceflight</td>
<td>1. Explicitly sets floor, i.e., by pronouncing the validity of the statutorily required waiver and any additional limitations on liability agreed to between parties</td>
<td>1. Moderate (enforceable if conspicuous and expressly refers to negligence)</td>
<td>1. Narrowly</td>
</tr>
<tr>
<td>California</td>
<td>No (expressly)</td>
<td>1. Yes</td>
<td>1. Any loss or injury arising from participation in spaceflight</td>
<td>1. Explicitly sets floor; does not impact other limitations of liability in law</td>
<td>1. Moderate (but very favorable to recreational sports)</td>
<td>1. Narrowly</td>
</tr>
<tr>
<td>Florida</td>
<td>Yes</td>
<td>1. Yes</td>
<td>1. Inherent risks exclusively</td>
<td>1. Explicitly sets floor; immunity in statute in addition to any others provided in law</td>
<td>1. Moderate</td>
<td>1. Narrowly</td>
</tr>
</tbody>
</table>

TABLE 1: COMPARISON OF STATE LEGISLATION GRANTING IMMUNITY FOR SPACE ACTIVITY
The crux of preemption analysis is congressional intent. Plaintiffs will argue that based on paragraph (c)(1) a state statute preventing suit by an SFP based on negligence is inconsistent with congressional intent because even though the original House bill required SFPs to enter cross-waivers with space-flight operators, Congress ultimately elected to forgo that requirement. Defendant space-flight operators will then point to the “savings clause” in paragraph (c)(2) allowing states to enact laws “in addition to or more stringent than a requirement” in the federal law. The argument will be that the immunity provided to space-flight operators protecting them from SFP suits is an additional or more stringent requirement than merely protecting the federal government from SFP suits. While it is probable that the preemption argument of SFPs will fail, it is by no means certain, particularly when one considers the uncertainties of preemption analysis. The fact that a preemption argument can already be made based on the current federal law to override state immunity legislation for space operators should reduce the weight of any states’ rights arguments against new federal legislation preempting state law to achieve the opposite result—namely to ensure SFPs or their heirs may only sue space operators in cases of willful misconduct or, as a middle road solution, also allow claims based on gross negligence. If SFPs are required to join the full federal cross-waiver regime, they will only be allowed to make claims for willful misconduct, and not for negligence or gross negligence. It may be more politically palatable to Congress to pass legislation that only bars negligence suits rather than both negligence and gross-negligence claims. It may also be administratively easier to simply bar negligence suits than require all SFPs to sign cross-waivers once human space flights are regular events and the number of SFPs grows.

4. Choice-of-Court and Choice-of-Law Clauses and Their Enforcement

Companies will also undoubtedly seek to rely on choice-of-court and choice-of-law clauses in their contracts with SFPs for further protection. These clauses will specifically seek to have litigation occur in the courts of the state where the launch occurred and be subject to state space-activity statutes designed (perhaps unsuccessfully) to ensure space-operator immunity from suit.

143. Matthew Schaefer, "Constraints on State-Level Foreign Policy: (Re)Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine," 41 SETON HALL L. REV. 201, 289 ("In preemption analysis, the intent or purpose of Congress is the "ultimate touchstone."); see, e.g., Retail Clerks Int’l Ass’n v. Schermerhorn, 375 U.S. 96, 103 (1963).

144. The preemption argument will likely be based on either obstacles conflicts (i.e., the state statute is standing as an obstacle to achieving the full purpose of the federal enactment) or occupation-of-the-field lines of argument.


146. See Silver, supra note 110.
U.S. courts generally enforce forum-selection and choice-of-law clauses unless fraud or duress is involved, the clauses run counter to public policy, or they are seriously inconvenient or otherwise unreasonable. However, divergent case law exists on whether heirs in a wrongful death action are bound to arbitration (and presumably choice-of-court) clauses the decedent signed. In the California case *Herbert v. Superior Court*, the court held that the decedents’ signature on a group healthcare plan contract with an arbitration clause bound the decedents’ adult non-plan members, requiring them to arbitrate rather than litigate their wrongful death action. The Texas Supreme Court has issued a similar ruling. In contrast, in the Colorado case *Pacheco v. Allen*, the court considered California’s approach in *Herbert* but rejected it and held that the heirs were not bound by the arbitration agreement. The Colorado court reasoned that a wrongful death action under Colorado’s Wrongful Death Act arose independently from and was not derivative of the deceased’s cause of action. Thus, it is possible that U.S. heirs of American SFPs could seek to sue in a different state than the choice-of-court clause’s chosen forum in the contract between the SFP and the space operator, and courts might not enforce the clause and thus permit suit to occur in a different jurisdiction that still has personal jurisdiction over the space operator.

5. Potential for Litigation by SFPs or Their Heirs in Foreign Court

Importantly, the SFP market is an international market. The FAA-commissioned Tauri Report predicted that over half of all early SFPs would be foreign nationals. Statistics of the company with the largest number of SFP deposits supports this prediction—sixty percent are foreign nationals. Questions arise whether an injured SFP, or in cases of death, an SFP’s heir,

---

149. *In re Labatt Food Serv.*, 279 S.W.3d 640, 646 (Tex. 2009):

The beneficiaries also argue that they should not be bound because Dancy did not have the authority to bind them to the arbitration agreement when the wrongful death cause of action actually belongs to the surviving spouse, children, and parents of the deceased. While it is true that damages for a wrongful death action are for the exclusive benefit of the beneficiaries and are meant to compensate them for their own personal loss, the cause of action is still entirely derivative of the decedent’s rights. Thus, regardless of the fact that Dancy’s beneficiaries are seeking compensation for their own personal loss, they still stand in Dancy’s legal shoes and are bound by his agreement. (citations omitted).
150. 55 P.3d 141, 144 (Colo. App. 2001).
151. Id. at 143–44.
might sue in a foreign court. The hurdles a foreign SFP or their heir would need to overcome in such a situation are numerous but perhaps not entirely insurmountable.

First, a foreign court would need to have personal jurisdiction over the space operator or manufacturer. Space operators can structure marketing and sales of tickets in a manner that limits contacts in foreign jurisdictions. However, personal-jurisdiction jurisprudence is quite malleable, not only in the United States but in at least several other countries as well, and it yields potentially uncertain results given courts’ discretion and the fact-intensive nature of their inquiries into a party’s contacts. Additionally, the jurisprudence in some countries balances the plaintiff’s interests with the defendant’s to a much greater degree than does the U.S. system. For example, even in Canada, the United States’ largest trading partner, adoption by the Canadian Supreme Court of a “‘real and substantial connection’ [test for personal jurisdiction] has not been exactly defined, and the previous tradition of greatly favoring plaintiffs has remained intact.”

Indeed, a Canadian lawyer recently warned that “U.S. defendants could be subject to suit in Canada even if they have few contacts to the forum.”

As the lawyer explained:

Canadian courts take a very different approach to personal jurisdiction from the Due Process analysis familiar to U.S. litigants. The balancing approach taken by Canadian courts favors asserting jurisdiction over foreign defendants, as long as the plaintiff can demonstrate a strong connection to the forum and the inconvenience to the plaintiff in litigating in a foreign jurisdiction outweighs any inconvenience to the defendant in litigating in the Canadian jurisdiction.

For decades, Canadian courts were applying highly discretionary personal-jurisdiction rules. While a recent 2012 Canadian Supreme Court opinion has narrowed and better defined Canada’s “real and substantial connection” test, making clear that advertising in a Canadian jurisdiction would not be sufficient to establish jurisdiction over the defendant, nuances and uncertainty remain.

153. For instance, plaintiff’s counsel would need to factor into any initial forum choice the fact that punitive damages are less likely to be available in foreign jurisdictions and that attorneys fees may be the responsibility of the losing side, depending on the foreign jurisdiction selected.


155. Id.

156. Id.


The Supreme Court’s decision adds welcome clarity, simplicity, and direction to what had been confusion in applying the real and substantial connection test. Only time will tell if the apparent simplicity of the test is difficult to apply and how it will be used in different contexts other than inter-jurisdictional tort claims.
Thus, the case-by-case discretion of Canadian courts is narrowed by the opinion, but not eliminated. If Canada has historically utilized malleable rules regarding personal jurisdiction, it is certainly possible that other nations also maintain discretionary personal jurisdiction rules today.\(^{158}\)

Other countries have more pro-plaintiff rules on personal jurisdiction than the United States. For example, in Russia, courts may exercise jurisdiction over a foreign defendant in cases of “damages caused by injury, other health impairment or death of a breadwinner, [when] harm is caused on the territory of the Russian Federation, or the plaintiff has his domicile in the Russian Federation.”\(^{159}\) In Ukraine, in cases involving a foreign defendant, the courts may accept jurisdiction in cases in which the claimant for damage compensation is a Ukrainian domiciliary and a natural person.\(^{160}\)

Second, in order for an SFP or SFP heir to sue a U.S. launch operator in a foreign court, the foreign court would have to reject a forum-selection clause in the contract specifying a U.S. state law, most likely the law of the state from which the launch occurred. It is conceivable this could happen in certain jurisdictions. For example, a German court recently rejected a choice-of-forum clause in a contract between a U.S. corporation and a German sales agent for the corporation. The clause specified Virginia courts, but the German court feared that mandatory European Union law on agents’ posttermination rights would not be applied, especially because the contract’s choice-of-law clause also chose Virginia law.\(^{161}\) Additionally, in Latin American nations, there has historically been a tendency to treat “competence to hear a case” as a matter of public policy and not allow parties’ choice to oust courts of jurisdiction to hear cases.\(^{162}\) Indeed, failure of courts to enforce choice of court clauses is one reason the Hague Conference on Private International Law sponsored negotiations on a Choice of Courts Convention, though that treaty is not yet in effect and would cover only business-to-business agreements and thus would not govern SFP suits against U.S. launch operators.\(^{163}\) Interestingly, even that treaty has an


\(^{159}\) Kirill Trofimov, Russian Federation (Russia), in 5 INTERNATIONAL ENCYCLOPEDIA OF LAWS: CIVIL PROCEDURE 68 (Piet Taelman ed., 2013) (emphasis added).

\(^{160}\) See Anna Tsirat & Gennadii Tsirat, Ukraine, in 6 INTERNATIONAL ENCYCLOPEDIA OF LAWS: CIVIL PROCEDURE 77 (Piet Taelman ed., 2013).


exception in Article VI to enforcement of such clauses if enforcement would be “manifestly contrary [to] public policy.” 164 Finally, if the SFP is suing a manufacturer or supplier of the space operator, the choice-of-forum clause obstacle to litigation in foreign courts will not be present.

Third, if the SFP is to successfully sue the space launch operator in a foreign court, the foreign court may also need to reject the choice-of-law clause included in the contract between the SFP and the space operator. It is, of course, possible that a foreign court could apply the law of the U.S. state chosen, and simply interpret that law not to grant immunity to the space operator given the ambiguities and gaps in the state statutes, or interpret that law to void the contractual waiver, but application of foreign law would more likely preclude immunity for the space operator. Conflict-of-law rules, not only in the United States but also in many foreign countries, are quite malleable and allow plenty of room for home-law bias. Indeed, Latin American nations have been resistant to party autonomy in choice of law. 165 Even in Canada, concerns have been expressed that some courts are improperly refusing to enforce choice-of-law clauses under *forum non conveniens* analysis:

Regrettably, some lower courts treat the strong-cause test as a gloss on the *forum non conveniens* analysis they would undertake in the absence of a forum-selection clause (and others simply conflate the two tests). In jurisdictions that have adopted the Court Jurisdiction and Proceedings Transfer Act . . . matters are confused further since the CJPTA is treated as codifying the conflicts-of-law rules for a local court taking jurisdiction. The fact that forum-selection clauses are only expressly dealt with in [section] 10 of the CJPTA (dealing with territorial competence) and are not referred to in [section] 11 (the *forum non conveniens* provision) feeds the notion that [British Columbia provincial] courts are entitled to engage in a full *forum non conveniens* analysis even in the face of an exclusive-forum clause by which the parties have selected another jurisdiction. 166

Moreover, some countries may view ‘attempts by U.S. state governments in legislation and by U.S. space operators through contractual terms to bar negligence claims by SFPs against space operators as a violation of public policy and reject the application of U.S. state laws even if conflict-of-law rules or the choice-of-law clause would otherwise point to its application. Numerous countries will not enforce such exculpatory clauses. For example, in Germany, “[t]he user of a standard form contract may not exclude or limit his liability for negligently caused injury to life, body, or health.” 167 In Spain, exculpatory

---

164. *See id. art. VI.*


clauses in consumer contracts or where damage is caused to one’s health or well-being are void in most situations.\footnote{168} In other countries, like South Africa, such clauses are enforceable but not against the participant’s heirs.\footnote{169} Moreover, there is some debate in South African jurisprudence whether such clauses even apply in cases of death.\footnote{170}

Of course, even if an SFP or his heir obtains a money judgment in a foreign court against a U.S. space-flight operator, the SFP or the heir will need to secure enforcement of the award in the United States or another country where the space-flight operator has assets. Enforcement of a foreign court judgment in the United States under the common law standard laid out in \textit{Hilton} generally is not a high bar to clear, particularly as “lack of reciprocity . . . is no longer an automatic bar to the enforcement of a foreign country judgment.”\footnote{171}

However, most states, including all space active states,\footnote{172} have now enacted in its entirety or with some modification the Uniform Foreign Money Judgments Recognition Act (UFMJRA)\footnote{173} or its slightly revised 2005 successor the Uniform Foreign Country Money Judgments Recognition Act (UFCMJRA).\footnote{174} If there is a lack of due process in the foreign proceeding or the foreign court lacked personal or subject-matter jurisdiction, then the UFMJRA and UFCMJRA require the court where enforcement is sought to refuse to enforce the judgment.\footnote{175} However, with respect to the personal jurisdiction criteria, “U.S. courts generally apply U.S. minimum contacts analysis,\footnote{176} such that a showing that the foreign judgment was obtained with proper personal jurisdiction under the principles of that foreign country will not suffice” to ensure enforcement of the foreign judgment in US courts.\footnote{177} Additionally, permissive grounds for refusing enforcement of foreign money judgments under

\footnotesize

\begin{itemize}
  \item \textsuperscript{168} Sergio Nasarre-Aznar, \textit{Spain}, in 4 \textit{INTERNATIONAL ENCYCLOPEDIA OF LAWS: TORT LAW}, \textit{supra} note 167, at 197.
  \item \textsuperscript{169} See Max Loubser, \textit{South Africa}, in 4 \textit{INTERNATIONAL ENCYCLOPEDIA OF LAWS: TORT LAW}, \textit{supra} note 167, at 320.
  \item \textsuperscript{170} See \textit{id}.
  \item \textsuperscript{173} UFMJRA, \textit{available at} \url{http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf}.
  \item \textsuperscript{174} UFCMJRA at 1, \textit{available at} \url{http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf}.
  \item \textsuperscript{175} UNIF. \textit{FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT} § 4 (2005); UNIF. \textit{FOREIGN MONEY-JUDGMENTS RECOGNITION ACT} § 4 (1962).
  \item \textsuperscript{176} Davis Jr. & Escobar, \textit{supra} note 171, at 133–34.
\end{itemize}
the UFMJRA and UFCMJRA include failure of the foreign court to respect
the parties’ choice-of-court agreements and instances where the claim on which the
judgment is based is “repugnant to the public policy” of the forum. However,
if an heir sues and obtains a judgment, the question arises as to whether the
choice-of-forum agreement has been violated. It is also questionable whether a
foreign judgment in favor of an SFP contrary to a state law seeking to immunize
a space-flight operator would be sufficient to find a violation of public policy
under the UFMJRA and UFCMJRA. Moreover, foreign judgment creditors can
act strategically to seek recognition of a foreign court judgment in a U.S. State
with lenient recognition standards before seeking to enforce the judgment in
another U.S. State under the Full Faith and Credit Clause of the U.S.
Constitution. Although a minority of U.S. courts have resisted this strategic
technique by insisting the foreign judgment be treated as such (i.e. as a foreign
judgment), it is more common for courts to accept the strategy. Finally,
even if the judgment were not immediately enforceable in the U.S. courts, space
operators in such circumstances would need to take care as to where they
positioned their assets globally.

If space operators choose to use arbitration clauses with foreign SFPs, this
will reduce the risk of foreign courts taking the case, as under the widely
subscribed-to Convention on the Recognition and Enforcement of Foreign
Arbitral Awards (New York Convention), countries must compel the parties to
the dispute to arbitrate as long as the New York Convention applies. The
New York Convention generally applies to agreements in writing, arising out of
a commercial legal relationship, with arbitration to occur in a New York
Convention country, and with parties from different nations. However, there
are defenses to this obligation, including public policy and nonarbitrability
defenses. Thus, a foreign court might still exercise jurisdiction where the
arbitration clause combined with a choice-of-law clause acts as a prospective
waiver of negligence claims. In addition, an arbitration award would be more
readily enforced globally because of the New York Convention’s enforcement

178. See UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(C)(3), (C)(5)

179. See Murr, supra note 177, at 358–59.

180. See id.

181. See Gregory H. Shill, Ending Judgment Arbitrage: Jurisdictional Competition and the
(2013) (“[R]are is the state court that will resist the constitutional default rule of full faith and credit
and deny enforcement of a sister-state judgment recognizing a foreign judgment.”).

182. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II,

183. See id. arts. I, II.

184. See id. art. V.
obligations, potentially placing a company’s assets at risk in multiple jurisdictions. This near-global enforceability of an arbitration award might be one reason human space flight companies wishing to avoid payments to SFPs or their heirs in the aftermath of an accident apparently will still choose a less reliable court-selection clause rather than an arbitration clause.

6. Summary

Given the international character of the SFP customer base, the fact that suits in foreign courts by SFPs or their heirs might be successful, and that enforcement of such judgments may be possible in the United States, the U.S. Congress should pass legislation refusing enforcement of foreign court judgments against space-flight operators obtained by SFPs or their heirs. Because most SFPs are high-net-worth individuals, contractual waivers may not bind heirs, and state space activity immunity statutes contain many uncertainties, companies could conceivably be exposed to potentially high claims—maybe as high as several hundred million dollars (if one assumes high-net worth individuals may have lives valued at $40 million or so). Given the importance of the commercial space industry to U.S. national security and the U.S. economy, the human space-flight industry in its nascent stages should not be burdened with this additional cost, particularly when high-net-worth individuals should be able to garner insurance or bear the burden of these risks, and companies may soon be in competition with foreign competitors in this arena as well. Indeed, the House Committee report for the House version of the CSLAA of 2004 expressed the belief that “space flight participants can purchase their own insurance.”

Operators may even require SFPs to obtain certain levels of insurance once insurance premiums come down as vehicle safety records are established.

Federal legislation that includes SFPs fully in the federal cross-waiver regime—by barring claims except those based on willful misconduct or, alternatively, federal legislation that seeks a middle ground by preempting state tort law negligence (but not gross negligence) claims by SFPs—combined with language specifically excluding such claims by SFP heirs too, would solve these problems arising in the U.S. system. States would still compete for commercial space investment on natural, geographical advantages as well as infrastructure investment and the provision of educated workforces. Given the global

——

185. See id. art. IV.
186. H.R. Rep. No. 108-429, at 12 (2004). It is not clear if the Committee is referring to insurance by SFPs to cover their own injuries or to cover third-party claims or both.
187. See Meredith & Lammers, supra note 102, at 6 (noting that in the case of an International Space Station tourist, the purchase agreement required the tourist to obtain at least five million dollars million in both life and health insurance).
customer base and the importance of the industry to the U.S. economy and national security, differing regulatory rules regarding liability are not beneficial grounds for competition among the states. In fact, they are only likely to lead to unnecessary litigation in the event of an accident.

It is possible that third parties injured during space activities could attempt to add high-net-worth SFPs as defendants in cases against the space operator. Under the current FAA regulations, space-flight operators are not required to include SFPs as an additional insured in their third-party liability insurance policies unless the SFPs are employees of a flight sponsor (i.e., employees of a "customer"). If SFPs join the full federal cross-waiver regime precluding both negligence and gross negligence claims, or otherwise have their state tort law negligence suits foreclosed, Congress could also consider requiring the addition of all SFPs as additional insureds on third-party liability policies obtained by space-flight operators. Alternatively, it could continue to simply allow SFPs to negotiate such benefits contractually with space-flight operators or have operators offer such benefits on their own accord. But in any event, this seems to be a fair addition to efforts to include SFPs in the full federal cross-waiver, or alternatively simply barring negligence suits by SFPs.

B. International Treaty Dimensions Under the Liability Convention

Foreign SFPs on U.S. space flights who suffer an accident involving a single rocket or a single spacecraft are not covered by the Liability Convention. Article III of the Liability Convention makes clear it is referring to third-party liability, stating:

In the event of damage being caused elsewhere than on the surface of the Earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.

Thus, foreign SFPs aboard one spacecraft are covered by the Liability Convention when that craft is hit by another nation’s spacecraft (presuming fault

Beyond natural locational advantages states compete for investments [by improving] the quality of the overall business climate by, for instance, improving the state educational system to produce an educated workforce, enhancing infrastructure within the state, maintaining or developing the stability of the state’s fiscal condition . . . .

189. See Hughes & Rosenberg, supra note 6, at 59.
190. See 14 C.F.R. § 440.9(b) (2014); Meredith & Lammers, supra note 102, at 7.
191. See Meredith & Lammers, supra note 102, at 7 (suggesting operators might choose to add such SFPs as additional insureds even if not required).
192. See Hughes & Rosenberg, supra note 6, at 59 (“[A] smart consumer [SFP] might demand it and a smart operator might offer it as a competitive advantage.”).
193. Liability Convention, supra note 21, art. III.
can be established), but SFP injuries do not fall within the Convention’s’ ambit when the craft suffers an accident not involving another nation’s spacecraft.194 In the former case, the foreign SFPs are third parties; in the latter case, they are not.

Arguably, there may be two narrow situations in which the Liability Convention may prima facie apply to a single-spacecraft or single-rocket accident injuring or killing a foreign SFP: first, when the launch vehicle never leaves the surface of the Earth, and second, when the death or injury to the foreign SFP only occurs once a spacecraft crash lands back to the surface of the Earth. The reason for potential Liability Convention coverage in these instances is that Article II of the Liability Convention provides that a “launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth . . . .”195 However, even in these two narrow instances of prima facie application of the Liability Convention in a single-rocket or spacecraft accident, an exemption will ultimately prevent application of the Convention. The Liability Convention’s Article VII(b) provides an exemption whereby a State party will not be liable for damage caused by one of its space objects to

(foreign nationals during such time as they are participating in the operation of that space object from the time of its launching or at any stage thereafter until its descent, or during such time as they are in the immediate vicinity of a planned launching or recovery area as the result of an invitation by that launching State.196

Treaties are to be interpreted in accordance with the Vienna Convention on the Law of Treaties (VCLT), and in particular Articles 31 and 32,197 which are widely viewed by nations as a codification of customary international law rules of treaty interpretation. For example, the United States recognizes the VCLT as an authoritative source of treaty law despite the fact the United States has not ratified the VCLT. The VCLT places primary emphasis on the textual or objective method of treaty interpretation and turns first to the ordinary meaning of the terms of the treaty.198 The question is whether foreign SFPs should be considered to be “participating in the operation of the spacecraft” under the Liability Convention and thus exempt States from liability. One American dictionary defines participating as “being involved with others in doing something.”199 The same dictionary defines operation as “performance of a

194. See Stephan Hobe, Legal Aspects of Space Tourism, 86 Neb. L. Rev. 439, 450 (2007) (“Moreover, Article III of the Liability Convention clearly refers to cases where third parties are involved, so that fault-based liability cannot be applied with respect to passengers.”).
195. Liability Convention, supra note 21, art. II59.
196. Id. art. VII (emphasis added).
198. See id. art. 31(1).
practical work or of something involving the practical application of principles or processes.”

But textual terms are to be interpreted “in their context and in the light of its’ object and purpose.” The object and purpose of the treaty as a whole and the particular provision at issue both may be examined. Context includes the text of the treaty, particularly surrounding articles. As analyzed above, Article III shows the Liability Convention was seeking only to cover third-party liability and provides another strong reason to exclude from coverage under the Liability Convention foreign SFPs who voluntarily place themselves on the spacecraft.

The object and purpose of Article VII(b)’s exemption also appears to be to exclude those foreign nationals who voluntarily and intentionally bring themselves to a space launch or its vicinity and are not mere bystanders.

Further, under the VCLT, if the textual or objective method leaves the meaning ambiguous or obscure, then one can turn to the drafting history. The Liability Convention’s drafting history suggests that one of the two major negotiating countries, the Soviet Union, was even pressing so far as to exclude all foreign nationals injured by a space object in another nation’s territory. That broad exemption was rejected and thus the language “participating in the operation of the space object” was possibly intended to exclude all persons aboard the space object from Liability Convention coverage, but not any innocent bystanders that would be foreign nationals. The United States should seek understandings with other countries, formally or informally, that any

---


203. See Liability Convention, supra note 21, at art. III; Hobe, supra note 194, at 450.

204. See Liability Convention, supra note 21, at art. VII(b); Hobe, supra note 194, at 450 (“Yet, by participating in a space mission, passengers of a space flight voluntarily put themselves at a high risk. Against this background, absolute liability of the launching state for damages caused to passengers of its space object seems inappropriate.”).

205. Vienna Convention on Law of Treaties, supra note 82, art. 32.

206. See U.N. Office for Outer Space Affairs, Comm. on the Peaceful Uses of Outer Space, Legal Subcomm, Summary Record of the 49th mtg., Sept. 28, 1965, at 4, U.N. Doc. A/AC.105/C.2/SR.49 (Nov. 30, 1965), available at http://www.unoosa.org/pdf/transcripts/legal/AC105_C2_SR049E.pdf (quoting the USSR delegate as stating his country’s belief “that the convention should not apply to damage caused in the territory of the launching State, even to aliens” since “aliens present in the territory of a State should be treated there on an equal footing with the nationals of the State in question”).
foreign SFP involved in a single-rocket or space vehicle accident falls outside the scope of the Liability Convention and thus no claim could be raised against the United States by another country under the State-to-State claim process of the Liability Convention. While these claims would be made formally by a foreign government, that government might pass on the proceeds of any such claim to SFPs or their heirs. In any such international negotiations, the United States might additionally place obligations on countries to prevent suit in national courts by SFPs or their heirs, although this would go beyond simply reaffirming the Liability Convention’s obligations and thus would be more difficult.

Once again, the vast majority of SFPs, at least in the first decade of commercial human suborbital flight, will be high-net-worth individuals capable of purchasing tickets costing roughly $90,000–$200,000. Thus SFPs, whether U.S. or foreign nationals, should be barred from making claims (other than in cases of willful neglect and possibly gross negligence) against operators directly or through their governments under the Liability Convention. Such individuals should have the capacity to bear the risk or obtain personal accident insurance on the market. Indeed, one company, Prembroke, offers up to $5 million coverage for SFPs for death or injury, although it is unclear how many SFPs will choose to purchase such policies given the premium is likely to run over $100,000 in the initial stages of suborbital travel, and effectively raise the cost of suborbital travel by 50%–100%.

It is possible foreign governments would seek to make claims against the United States for a foreign national injured aboard a U.S. spacecraft outside the context of the Liability Convention but this would be difficult and likely unsuccessful. Under general international law, governments are not responsible for private party conduct absent some close nexus between the government and the private actor. Article VI of the Outer Space Treaty does create a specialized rule applicable in the space domain—specifically making countries internationally responsible for the conduct of their nongovernmental actors. However, in order to bring a claim, there would need to be an internationally wrongful act. For an act to be internationally wrongful, it must be attributable to the state and involve a breach of international obligations, such as a treaty obligation. The mere fact that an accident occurred with respect to a spacecraft would not be sufficient on its own to be such an act. Presumably,
foreign countries could also attempt to claim that the U.S. government had not exercised properly its duty to provide “authorization and continuing supervision” over private entities’ activities in space as also called for by Article VI of the Outer Space Treaty. This is not a strong claim given the United States has the most advanced human space-flight regime of any nation in the world. In any event, such a claim would be handled diplomatically only, not before an international tribunal, as the Outer Space Treaty contains no mandatory dispute-settlement clause.

III. CORPORATE- OR UNIVERSITY-SPONSORED FLIGHTS FOR SFPs AND RELATIONSHIP TO STATE WORKERS’ COMPENSATION REGIMES

Individuals will purchase tickets to become SFPs, but space flight tickets will also be bought by sponsors, including corporations, universities, and NASA. In situations in which NASA is sponsoring a flight and sending its astronauts on a commercial vehicle, the FAA and NASA would likely coordinate to develop a joint oversight approach. In such situations, the FAA will have responsibility for licensing the launch and reentry activities of the NASA contractor for public safety, while NASA will retain responsibility for certifying the vehicle to NASA requirements relating to both safety and mission assurance. Thus, the NASA-sponsored flight situation is unique and will not be addressed further here.

However, significant complexities surround corporate- and university-sponsored flights, particularly with regard to state workers’ compensation regimes. If a company (other than the space flight operator itself) sponsors a human space flight and sends up an employee on the space flight—perhaps as a bonus to executives or to have an employee conduct research—and the employee is injured or dies in the course of the space flight, what legal recourse is available to the employee or his or her heirs? The employee’s (or his or her heirs’) remedy against the employer—the sponsoring company or “customer” in FAA regulatory terminology—will include claims under the workers’ compensation statute in the relevant state. However, the employee (or his or her heir) may attempt to proceed against the space-flight operator as well, since, as described above, SFPs are not subject to the full federal cross-waiver regime. Further, state space-activity immunity legislation may not fully protect the space-flight entity. Indeed, given the potential complications with contractual waivers and holes in the drafting or application of state space-operator liability immunity legislation, it is possible that an SFP or his or her heirs could recover against a space-flight operator. If the SFP obtaining the judgment is an

211. See id.
employee of a flight sponsor, the flight sponsor would be required to indemnify the space-flight operator under FAA regulations since the flight sponsor falls within the definition of “customer” under the FAA regulations. This type of legal regime could inhibit or restrict the sponsored-flight market for commercial space operators and thus the research that could be undertaken. For example, a corporation or university may be less likely to send an employee on a research-oriented space flight if there are concerns that above and beyond workers’ compensation claims it indemnify a space-flight operator for a judgment against it brought by an SFP, or an heir of the SFP, for injury or death suffered in a space flight. Additionally, state universities may have certain legal restraints on entering contracts requiring such an indemnification obligation, thus further limiting their ability to enter the market as a flight sponsor under current federal regulations. Of course, the operator could seek such an indemnification agreement via contract with the sponsor of the flight even in the absence of the FAA regulation, but presumably such an indemnification agreement by contract would be subject to negotiation.

Additionally, this federal regulatory regime is at odds with the normal practice under state workers’ compensation laws. In many jurisdictions, the injured person or, in case of death, the person’s heirs, can pursue actions against those responsible for their injuries in addition to workers’ compensation. To the extent the employer has already paid as required by the state workers’ compensation regime, the employer obtains a subrogation lien against the judgment obtained by the employer’s employee or the employee’s heir in a suit against the third party. For example, Tennessee Code Annotated Section 50-6-112 provides:

When the injury or death for which compensation is payable under this chapter was caused under circumstances creating a legal liability against some person other than the employer to pay damages, the injured worker, or the injured worker’s dependents, shall have the right to take compensation under this chapter, and the injured worker, or those to whom the injured worker’s right of action survives at law, may pursue the injured worker’s or their remedy by proper action in a court of competent jurisdiction against the other person . . . .

(c)(1) In the event of a recovery against the third person by the worker, or by those to whom the worker’s right of action survives, by judgment, settlement or

---

212. See 14 C.F.R. 440.17(b)–(c), app. B. See also Meredith & Lammers, supra note 102, at 7: If the SFP is an employee of the Sponsor, the CSLA makes the Sponsor financially responsible for the death and bodily injury of the SFP and requires that the Sponsor “agree[] to hold harmless and indemnify [the Operator and its suppliers] from bodily injury or property damage sustained by its employees, resulting [from the spaceflight], regardless of fault.” Thus, if a corporation decides to buy three spaceflight tickets as performance rewards for senior executives, the corporation would be financially responsible for any injury or death those executives may suffer and would need to indemnify the Operator and its contractors against any claims by the executives.

213. 1 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW, § 115.03 (Matthew Bender, Rev. ed., 2014).

214. See id. §§ 115.03, 116.01.
otherwise, and the employer’s maximum liability for workers’ compensation under this chapter has been fully or partially paid and discharged, the employer shall have a subrogation lien against the recovery, and the employer may intervene in any action to protect and enforce the lien.

The purpose behind this system (which exists in many states workers’ compensation regimes) is the following:

The statutory provisions in the Workers’ Compensation Law that permit recoveries from third parties whose conduct causes an employee’s on-the-job injuries are strictly for the benefit of the employee and the employer. These provisions advance the policies of the workers’ compensation program because they: (1) place the financial burden of the employee’s injury on the party responsible to the same extent as if no workers’ compensation was involved, (2) prevent the employee from obtaining a double recovery while, at the same time, recovering additional damages that would not be available under the workers’ compensation program, and (3) permit the employer to come out even by being reimbursed for its workers’ compensation expenditures. Thus, the goals of the workers’ compensation program are advanced by giving an employer the right “to collect from a blameworthy third party an amount equivalent to the compensation that it paid and/or will pay to an injured employee,” or by permitting an employer to pursue a claim against the third party who caused its employee’s injuries if the employee himself or herself does not pursue the claim . . . .

Again, the FAA regulations appear to require the flight sponsor to indemnify the space-flight operator for any judgment obtained by any of the sponsor’s employees against the space-flight operator, thus substantially reversing the rule provided by many state workers’ compensation regimes. In most jurisdictions, “[e]mployees who choose to bring a civil action against the third-party tortfeasor are not prohibited from obtaining workers’ compensation if their suit is not fully successful.” So even in states that require employees to initially choose between suing their employer and a third-party tortfeasor, SFPs or heirs could take their chances suing the space operator, and then resort to workers’ compensation if the suit fails. However, if SFPs are included in the full federal cross-waiver regime, with the exception of entering into cross-waivers with their employer, then it would be an easy choice for employees or their heirs to pursue a claim for workers’ compensation rather than bring an action against the space-flight operator, in which they would have to allege “willful misconduct” in order to overcome the cross-waiver. Alternatively, if the federal legislation pursues the middle road solution and only bars negligence (but not gross-negligence claims) by SFPs against space-flight operators, the election decision is still an easy one since gross-negligence claims are difficult to prove as well.

Additionally, FAA federal regulations requiring indemnification of space-flight operators by flight sponsors of any judgments obtained by the sponsors’

216. LARSON, supra note 213, § 115.02.
employees appear to possibly preempt state laws under which the employer liability under workers’ compensation regime for employee injury or death is “exclusive and in place of all other liability.” Thus, under current FAA regulations, the sponsor of the space flight—the employer of the injured or deceased employee—is clearly in a different position when the employee is injured during a space flight than any other employment-related activity. The employer is responsible not only for workers’ compensation, but also to indemnify the space-flight operator should the SFP (or presumably the SFP’s heirs) obtain a judgment against the space-flight operator.

Just as with the gaps, holes, and complications surrounding contractual waivers and state space-operator liability immunity legislation, the recommended solution is to include SFPs in the federal cross-waiver regime or otherwise preempt state tort law negligence claims to eliminate the chance that SFPs (or their heirs) obtain judgments against space-flight operators and that the current FAA regulations disrupt the normal operation of state workers’ compensation statutes and create disincentives for sponsored flights. However, SFPs and their employers—the flight sponsors—should not be required to enter cross-waivers. If they are required to enter cross-waivers, there should be a carve-out to allow SFP employees to pursue a workers’ compensation claim against their employer—the flight sponsor—so that employees of companies sponsoring space flights are adequately protected by state workers’ compensation laws. This seems consonant with the overall intent behind the cross-waiver regime that has been established under the CSLAA of 2004 and FAA regulations. The FAA regulations’ sample cross-waiver (when the federal government is involved in a launch activity) provide that “[n]othing contained herein shall be construed as a waiver or release by Licensee, Customer or the United States of any claim by an employee of the Licensee, Customer or the United States, respectively, including a member of the Armed Forces of the United States, for Bodily Injury or Property Damage, resulting from Licensed Activities.”

The decision to either exempt SFPs from entering into cross-waivers with their employer flight sponsors or make them enter into cross-waivers but with mandatory carve-outs for workers’ compensation claims will mainly impact those few states, such as Texas, that do not require employers to enter the workers’ compensation regime. For example, if SFPs and their employer flight sponsors are not required to enter into cross-waivers, then the SFPs could pursue claims against their Texas employers who opted not to enter the workers’ compensation regime. If SFPs are required to enter into cross-waivers with their employers but a carve-out is created for workers’ compensation claims, then

SFPs would still not be able to bring a claim—based in tort or workers’ compensation—against a Texas employer who opted not to enter into the workers’ compensation regime. Thus, Congress will need to be careful when drafting any carve-out for workers’ compensation claims to also make clear its wishes with respect to SFP versus employer flight sponsor claims in those few states, such as Texas, in which workers’ compensation is optional.

One final complication is that under some state workers’ compensation regimes, even persons labeled as “independent contractors” can occasionally be eligible for workers’ compensation. Most workers’ compensation statutes do not define an employee beyond the general phrasing “every person in the service of another under contract of hire, express or implied.” In interpretation and application of this language, most courts have found that the “common-law definition of employee . . . worked out for vicarious tort liability purposes, was meant to be adopted.” And, thus, many courts have turned to the tests laid out in the Restatement of Agency (Second) when making such determinations, including the extent of control of the employer over details of the work, the skill required for the particular occupation, who supplied the tools, the length of time for which a person was employed, the method of payment to the person, and whether or not the work was part of the regular business. If a space-flight sponsor hires a person to conduct research aboard a spacecraft and labels that person an independent contractor, then the flight sponsor, considered a customer under FAA regulations, will engage in a cross-waiver with the space-flight operator and both of those entities will be required to “flow down” the waiver to their contractors and subcontractors. Thus, as a contractor to the customer, the researcher will be required to enter into a cross-waiver. However, if the researcher will be the SFP, then he is not required to enter into cross-waivers under the current federal scheme for SFPs. This is the first conundrum. An additional complexity is that contractor is defined as an “entity” in federal regulations, and this raises the question of whether a contractor, who is an individual, would be part of the cross-waiver flow-down from the sponsor. In any event, this conundrum can be resolved once again by making SFPs part of the federal cross-waiver regime but not requiring SFPs to waive rights to pursue workers’ compensation claims against their employers. The conundrum is also

220. See Larson, supra note 213, § 60.01.
221. See id.
222. See id.
223. 14 C.F.R. § 440.3 (2014) (“Contractors and subcontractors means those entities that are involved at any level, directly or indirectly, in licensed or permitted activities, and includes suppliers of property and services, and the component manufacturers of a launch vehicle, reentry vehicle, or payload.”) (emphasis added). However, unlike the term customer, from which SFPs are specifically excluded, SFPs are not specifically excluded from the definition of contractors. Id. (“A space flight participant, for the purposes of this part, is not a customer.”).
resolved if Congress pursues the alternative solution of only barring negligence (but not gross-negligence) claims by SFPs against space operators and other entities involved in the cross-waiver regime, and if a carve-out for workers’ compensation claims is included.

The second conundrum is that the individuals labeled as independent contractors may upon closer inspection be employees for purposes of state workers’ compensation statutes, and they would have waived, through the federal cross-waiver “flow-down,” their right to pursue workers’ compensation claims against the flight sponsor. Because it will not always be known with certainty in advance when a person initially labeled an independent contractor is actually an employee covered by a workers’ compensation law, Congress should make clear that the federal cross-waiver regime is not intended to preempt provisions of state workers’ compensation laws allowing an employee (or independent contract later found to meet requirements to be considered an employee) to proceed directly against an employer.

Additionally, as noted earlier, the CSLAA of 2004 has provisions addressing preemption of state laws.224

If an independent contractor who is an individual enters into a flow-down cross-waiver with their employer flight sponsor, he or she is waiving claims against the employer flight sponsor. Thus, if he or she is later found to be an employee with state workers’ compensation law applicable to them, the state workers’ compensation law may be held preempted as inconsistent with the CSLAA of 2004. In addition to either exempting SFP employees and their employer flight sponsors from the cross-waiver regime or otherwise making clear such waiver does not impact the applicability of workers’ compensation claims by employees directly against their employers, Congress should, for additional certainty, also consider establishing a general “savings clause” provision in the preemption section of the CSLAA of 2004. That clause should state the CSLAA is not intended to preempt provisions of state workers’ compensation laws allowing employees, as defined by state workers’ compensation laws (even if originally categorized as independent contractors), or their heirs, from making workers’ compensation claims directly against their employers.

CONCLUSION

Federal preemption is often controversial, and international negotiations are often difficult. Yet, both are necessary in the case of liability issues surrounding the nascent U.S. commercial space industry given the importance of the industry to U.S. national security and economic well-being. In the 2012–2014 period, with the retirement of the Space Shuttle, two U.S. commercial companies have begun ferrying cargo to the International Space Station for the U.S. government.

224. See Part III.A.3 supra.
Commercial human space flight will begin in earnest soon. Indeed, in 2016 or soon thereafter, companies will begin suborbital space flights from the United States for tourism and research purposes. The current U.S. approach to third-party liability and SFP liability suffers from unnecessary uncertainty, due in part to current federal approaches and in part to a patchwork of divergent state statutes and common-law rules.

Recognizing the importance of the growing commercial space industry to U.S. national security and the national economy, enhanced liability protections should be afforded to the nascent industry to avoid “crushing liability” on U.S. space companies and to place the industry on a level playing field with foreign competitors in the case of a massive, catastrophic accident. Preemptive federal legislation that would create a liability cap on third-party liability is fully supported by existing and prior legislation in which Congress has afforded similar protections to the antiterrorism technology industry, for national security purposes, and the nuclear industry, to protect a critical national asset. Preemptive federal legislation preventing suits by SFPs or their heirs against space companies, except in cases of willful misconduct (or, alternatively, gross negligence), is also supported at the early stages of human space flight given the high net worth and sophistication of SFPs. However, this Article also cautions that federal preemption should not occur with respect to workers’ compensation claims against employers that send their employees to space, as protection of the myriad of employers potentially sending employees to space from workers; compensation claims is not critical to incentivizing and maintaining commercial space activity in the United States.

The United States should also pursue international negotiations to clarify that Liability Convention claims cannot be made against the United States based on foreign SFP injuries resulting from single spacecraft accidents. The United States should also pursue negotiations in which foreign countries agree to bar SFP suits in their national courts. International agreements and federal legislation with these provisions will ensure the United States remains a leader in the commercial space industry and that U.S. industry is placed on an equal liability footing with foreign competitors.
Securing the Resources of the Deep: Dividing and Governing the Extended Continental Shelf

Clive Schofield*

Half of the world’s coastal States are in the process of delineating continental-shelf limits seawards of their 200-nautical-mile exclusive economic zones. This Article outlines the complex criteria and process involved in the definition of outer-continental-shelf limits, highlights associated uncertainties and ambiguities, and points to progress and remaining obstacles to the finalization of such limits. Key potential marine resource opportunities that may arise within seabed areas seaward of the 200-nautical-mile limit are noted and challenges to securing rights over these resources are explored.

TABLE OF CONTENTS

INTRODUCTION ........................................................................................................ 275
I. DEFINING THE OUTER LIMITS OF THE CONTINENTAL SHELF ....................... 276
   A. The Terms of Article 76 ................................................................................. 279
   B. The United Nations Commission on the Limits of the Continental Shelf ........ 281
II. DEADLINES AND PROGRESS TOWARDS FIXING LIMITS ............................... 284
III. EXTENDED-CONTINENTAL-SHELF RESOURCES ....................................... 286
IV. SECURING THE RESOURCES OF THE EXTENDED CONTINENTAL SHELF:
    PROSPECTS AND CHALLENGES ............................................................... 291
CONCLUSIONS ........................................................................................................ 293

* Professor and Director of Research, Australian National Centre for Ocean Resources and Security (ANCORS), University of Wollongong (UOW), Wollongong, NSW 2522, Australia. He is also the Leader of the University’s Sustaining Oceans and Coastal Communities research theme within UOW’s Global Challenges Program. E-mail: clives@uow.edu.au. Professor Schofield is the recipient of an Australian Research Council Future Fellowship (FT100100990).
INTRODUCTION

Early 2009 saw a flurry of submissions on proposed outer-continental-shelf limits to the United Nations (UN) Commission on the Limits of the Continental Shelf (CLCS)1—a specialized scientific and technical body created through the United Nations Convention on the Law of the Sea (LOSC or the Convention).2 These submissions relate to continental-shelf limits located seawards of the 200-nautical-mile (nm)3 limit from coastal baselines.4 The so-called extended- or outer-continental-shelf areas contained within these proposed limits encompass an enormous area: in excess of twenty-nine million square kilometers of continental shelf area seawards of the 200 nm exclusive-economic-zone (EEZ) limits.5 This vast “extension” of the maritime jurisdictions of many coastal States raises significant potential resource opportunities. Arguably, because extended-continental-shelf areas are subject to well-established national regulatory regimes they are more likely to be subject to exploration and development than is the international seabed area (the Area)—seabed and subsoil areas beyond national jurisdiction6—regulations for which are being progressively developed by the International Seabed Authority (ISA).7

1. The Commission comprises twenty-one scientists, whose purpose is “to facilitate the implementation of the United Nations Convention on the Law of the Sea . . . in respect of the establishment of the outer limits of the continental shelf beyond 200 nautical miles [] from the baselines from which the breadth of the territorial sea are measured.” Commission on the Limits of the Continental Shelf (CLCS), Purpose, Functions and Sessions, COMM'N ON LIMITS OF CONT'L SHELF, http://www.un.org/Depts/los/clcs_new/commission_purpose.htm#Purpose.


3. It is acknowledged that technically the correct abbreviation for a nautical mile is “M” and that “nm” properly refers to nanometres. However, “nm” is widely used by many authorities (for example the UN Office of Ocean Affairs and the Law of the Sea) and appears to cause less confusion than “M,” which is often assumed to be an abbreviation for meters. Consequently “nm” will be used to denote nautical miles herein.


5. See id. at 72.

6. See LOSC, supra note 2, art. 1, para. 1(1) and part XI.

7. For details of the Mining Code, a “comprehensive set of rules, regulations and procedures” issued by the International Seabed Authority (ISA) to “regulate prospecting, exploration and exploitation of marine minerals in the international seabed Area,” see the ISA’s website at http://www.isa.org.jm/en/mcode.
While significant marine-resource opportunities may exist, so too do notable obstacles to their realization. In particular, it is clear that many of the submissions made to the CLCS relate to the same areas of extended continental shelf. For example, the first submission made, that of the Russian Federation, generated five reactions from interested States (Canada, Denmark, Japan, Norway, and the United States) keen to reserve their positions in the event that their own submissions would relate to the same areas of extended continental shelf. These overlapping submissions highlight the existence of multiple potential extended-continental-shelf boundaries that have yet to be delimited, as well as the prospect of disputes over these boundaries developing, especially as efforts to access the resources of these areas progress.

This paper outlines the process by which coastal States delineate outer-continental-shelf limits, before providing an overview and assessment of extended-continental-shelf submissions. The paper goes on to discuss a number of the salient challenges that are emerging in respect to both securing and governing continental-shelf areas under national jurisdiction beyond 200 nm from the coast—challenges that have significant implications for accessing and securing the resources of the extended continental shelf.

I. DEFINING THE OUTER LIMITS OF THE CONTINENTAL SHELF

A particular virtue of the LOSC is the spatial framework it establishes for claims to maritime jurisdiction. Both the Convention and its established maritime-jurisdictional framework are now generally accepted, and the vast

8. These overlapping submissions areas can be viewed via the maps and data provided by the GRID-Arendal Continental Shelf Programme, See Updated Extended Continental Shelf Areas, CONTINENTALSHELF.ORG, http://www.continentalshelf.org/onestopdatashop.aspx (last visited Dec. 24, 2014). The overlaps between areas of extended continental shelf defined by proposed outer-continental-shelf limits are also demonstrated by the reactions of States to submission recorded on the CLCS website. See Submissions, Through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, Pursuant to Article 76, Paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982, COMM’N ON LIMITS CONT’L SHELF, http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm (last updated Dec. 17, 2014) [hereinafter Submissions to the CLCS].


11. At the time of writing, 165 States plus the European Union were parties to the Convention. See Status of the United Nations Convention on the Law of the Sea, of the Agreement Relating to the Implementation of Part XI of the Convention and of the Agreement for the Implementation of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks: Table Recapitulating the Status of the Convention and of the Related Agreements, as at 10 October 2014, DIV. FOR OCEAN AFFAIRS & LAW OF SEA,
majority of maritime claims are in keeping with its terms. This is particularly the case where clear distance-based limits to maritime claims were defined from baselines along the coast, namely twelve nm as the maximum breadth of the territorial sea, twenty-four nm for the contiguous zone, and 200 nm for the EEZ (see Figure 1).

Agreement on the limits of the territorial sea and the introduction of the EEZ were especially noteworthy developments, bringing a measure of certainty to the maximum breadth of maritime claims that had previously been lacking. Three decades after LOSC opened for signature, twelve nm territorial seas have become commonplace, although a few exceptions to the rule remain, largely in the form of anachronistic 200 nm territorial-sea claims. Here it is worth recalling that the general consensus on the maximum limit of the territorial sea was a significant breakthrough given the contentious nature of this issue, which had confounded earlier codification efforts. The codification of the EEZ also

http://www.un.org/Depts/los/reference_files/status2010.pdf. While it is the case that Article 309 of the LOSC precludes “reservations or exceptions” to the Convention, save where permitted by other Articles, Article 310 allows for “declarations or statements” relating, for example, to the harmonization of a State’s laws and regulations with the provisions of the Convention, provided that such declarations and statements “do not purport to exclude or modify the legal effect” of the provisions of the Convention to the declaring State. Numerous States parties to the Convention have opted to make such declarations or statements, whether on signing LOSC, upon ratification or accession to the Convention, or subsequently. See Declarations and Statements, DIV. FOR OCEAN AFFAIRS & LAW OF SEA, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm (last updated Oct. 29, 2013).


13. Such baselines along the coast are often termed “territorial sea baselines”—see Figure 1—but are important to the definition of the full range of zones of maritime jurisdiction under the Convention. LOSC defines “normal” baselines as being consistent with “the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.” LOSC, supra note 2, art. 5. LOSC also allows for a number of other types of straight line-type baselines to be constructed along the coast. These include straight baselines, river closing lines, bay closing lines, lines related to ports and permanent harbour works, and in respect of archipelagic States. See id. arts. 7, 9–11, 47.

14. Id. arts. 3, 4.

15. Id. art. 33.

16. LOSC Article 57 states that: “The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.” Id. art. 57. As most coastal States claim a 12 nm territorial sea, the actual breadth of the EEZ is usually 188 nm seaward of territorial-sea limits.

17. While the majority of “excessive” territorial-sea claims have been “rolled back” to the international norm of twelve nm, a number of coastal States retain claims to 200 nm territorial seas (Benin, Ecuador, El Salvador, and Peru) or, in the case of Togo, a thirty nm territorial sea. See J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 148 (3d ed. 2012). It is worth noting that Somalia, long thought to claim a 200 nm breadth territorial sea has, since June 30, 2014, claimed a 200 nm breadth EEZ. See Proclamation by the President of the Federal Republic of Somalia, Dated 30 June 2014, DIV. FOR OCEAN AFFAIRS & LAW OF SEA, available at http://www.un.org/Depts/los/LEGALIZATIONANDTREATIES/PDFFILES/SOM_2014_Proclamation.pdf.
represented a major change, essentially transferring rights over resources within 200 nm of baselines along the coast from an international regime (the high seas) to national jurisdiction. The significance of this shift is underlined by the fact that in 1984 the UN’s Food and Agriculture Organization estimated that ninety percent of marine fish and shellfish were caught within 200 nm of the coast. Similarly, it was estimated that eighty-seven percent of the world’s known submarine oil deposits would fall within 200 nm breadth zones of jurisdiction.

**FIGURE 1: ZONES OF MARITIME JURISDICTION**

LOSC’s definition, or redefinition, of the limits of the continental shelf was similarly groundbreaking because it marked a distinct shift away from the unsatisfactorily open-ended definition provided by the Convention on the Continental Shelf of 1958. Article 1 of that Convention defined the continental shelf as either “the seabed and subsoil of the submarine areas adjacent to the

coast but outside the area of the territorial sea to a depth of 200 metres,” or, “beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.” The latter criterion for the definition of continental shelf limits is clearly dependent on the technologies available to enable the exploitation of seabed resources. Consequently, continental-shelf limits defined on this basis were potentially susceptible to change over time.

LOSC instead offers a complex series of formulae, outlined below, through which the coastal State can establish the outer limit of its continental shelf, seaward of the 200 nm limit. While the criteria laid down under LOSC for the delineation of outer-continental-shelf limits are undoubtedly complex, they provide for a definable outer limit to coastal States’ continental-shelf claims. Nevertheless, a number of uncertainties and ambiguities are attendant on the critical part of LOSC—Article 76.

A. The Terms of Article 76

Article 76 provides three options for establishing continental-shelf entitlement, coupled with two “cut off” lines. First, it sets the 200 nm limit as the continental shelf of a coastal State that consists of “the seabed and subsoil of submarine areas” extending to a distance of 200 nm from relevant baselines. This definition of continental-shelf limits is in keeping with the codification of the EEZ, which provides every coastal State with the potential to claim sovereign rights over both the seabed and water column out to 200 nm, provided that there are no overlapping claims with neighbouring States. This applies regardless of whether the continental-shelf margin physically extends that distance offshore or not.

The two other options relate to coastal States whose continental margins extend beyond the 200 nm limit of the EEZ. Both criteria are designed to demonstrate that such continental-shelf areas exist beyond the 200 nm limit and form part of the “natural prolongation” of the coastal State in question. In accordance with Article 76 of the Convention, the two ways in which coastal States can establish the existence of a continental margin beyond the 200 nm limit that forms part of the State’s natural prolongation are through the application of either the “Gardiner Line,” based on a reference to the depth or

---

22. The term “cut off line” is not a term of art drawn from the Convention but is a commonly used shorthand for the two constraint lines defined in Article 76(5). See LOSC, supra note 2, art. 76, para. 5

23. Id. art. 76, para. 1.

24. These rights are, however, governed in accordance with Part VI (dealing with the continental shelf) of the Convention rather than Part V (dealing with the EEZ).

25. LOSC Article 76(1) states that, as an alternative to the 200 nm limit, the continental shelf is defined as extending “throughout the natural prolongation of its land territory to the outer edge of the continental margin.” LOSC, supra note 2, art. 76, para. 1.
thickness of sedimentary rocks overlying the continental crust,26 or the “Hedberg Line,” which uses a distance formula of sixty nm.27 Both entitlement formulae are measured from the foot of the continental slope, which is defined as the point of maximum change in gradient at the base of the continental slope (unless there is “evidence to the contrary”).28

However, the extended continental rights of broad-continental-margin States are constrained by two maximum cut-off lines, defined as either a distance of 350 nm from relevant baselines or 100 nm from the 2500-meter isobath.29 Furthermore, Article 76 provides that the coastal State may define the outer limits of its continental shelf where it extends beyond 200 nm from its baselines by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.30 Areas of continental shelf seawards of the 200 nm limit are often termed the “outer”31 or “extended”32 continental shelf. However, both of these terms are less than ideal. On the one hand, the term outer continental shelf suggests that the continental shelf is divided into distinct inner and outer parts when, in fact, this is not the case.33 On the other hand, the term extended continental shelf appears to suggest


27. See LOSC, supra note 2, art. 76, para. 4(b). Whichever of the formulae is most advantageous to the coastal State may be used.

28. Id. art. 76, para. 5. Again, whichever of these cut-off lines is most advantageous to the coastal State may be used.

29. Id. art. 76, para. 7. All the straight lines and distances referred to in the Convention are geodesics, that is, straight lines on the surface of a mathematical model (reference ellipsoid) of the Earth. See Alan Dodson & Terry Moore, Geodetic Techniques, in CONTINENTAL SHELF LIMITS, supra note 27, at 87, 102.

30. For example, the International Hydrographic Organization in its Manual on Technical Aspects of the Law of the Sea (TALOS Manual) refers to “outer continental shelf.” See TALOS MANUAL, supra note 27, at ch. 5, sec. 7.


32. For example, in its judgment in the Bay of Bengal Case, the International Tribunal for the Law of the Sea observed that “Article 76 of the Convention embodies the concept of a single continental shelf” and that “in accordance with Article 77, paragraphs 1 and 2 of the Convention, the coastal State exercises exclusive sovereign rights over the continental shelf in its entirety without any distinction being made between the shelf within 200 nm and the shelf beyond that limit.” See Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl./Myan.), Case No. 16, Judgment of Mar.
that coastal States are claiming additional areas of continental shelf, which conflicts with the well-established view that the continental shelf is inherent to the coastal State. 34

B. The United Nations Commission on the Limits of the Continental Shelf

In order to establish the outer limits of its continental shelf in accordance with Article 76, a coastal State is required to make a submission to the CLCS on its proposed continental-shelf limits seawards of the 200 nm limit. 35 Such submissions need to fulfill the complex requirements of Article 76 outlined above. Accordingly, coastal States are required to gather information related to the morphology (in order to locate the foot of continental slope) and geological characteristics of its continental margin (in order to define the Gardiner Line) as well as the bathymetric information relating to water depth (with a view to locating the 2500-meter isobaths plus 100 nm cut-off line). 36 Additionally, geodetically robust distance measurements are necessary in order to determine, for example, the location of 200 nm EEZ limits and the 350 nm cut-off line. 37

The process of gathering the necessary scientific and technical information, analyzing and interpreting this data, and preparing a submission for and presenting it to the CLCS represents a complex, time-consuming, and expensive process. For example, Japan reportedly devoted in excess of $500 million on preparing its submission. 38 Even if the Japanese experience is an extreme example, it is nonetheless indicative of the substantial costs involved in gathering the information for a submission for the CLCS on outer-continental-shelf limits—an especially daunting issue for many developing coastal States. Formulating a submission therefore almost inevitably requires a State to assemble a multidisciplinary team. This was certainly the case for Australia, which adopted a “whole-of-government” approach involving the participation of...
multiple government agencies. The commitment towards preparing and delivering a submission to the CLCS is also often a long-term process. In Australia’s case this team devoted over a decade to the task of preparing, delivering, and defending its submissions.

The CLCS assesses the submissions made to it and makes “recommendations” to the coastal State in question, on the basis of which the coastal State can establish limits that are “final and binding.” An important consideration in this context is that the provisions of Article 76 are specifically “without prejudice” to the delimitation of continental shelf between neighbouring States, and thus, the Commission lacks the mandate to consider the relative merits of competing and overlapping submissions. Instead, the CLCS plays, or was intended to play, a technical role, evaluating whether coastal States through their submissions have fulfilled the requirements of Article 76.

Coastal States making such submissions are not claiming outer-continental-shelf areas as such. As noted above, coastal States’ rights over the continental shelf are inherent. Therefore, the submissions made to the CLCS concern the outer limits of the continental shelf beyond the 200 nm limit rather than outer-continental-shelf areas per se. That said, the establishment of those limits based on the Commission’s recommendations in effect confirms the rights of a particular coastal State to areas of extended continental shelf.

The Commission’s consideration of submissions and the subsequent fixing of final and binding outer-continental-shelf limits takes considerable time. As a
part of this process, the coastal State has the opportunity to send representatives “to participate in the relevant proceedings without the right to vote.”

This offers the coastal State an opportunity to interact with the Subcommission tasked with evaluating its proposed outer-continental-shelf limits. Dialogue between the coastal State and Subcommission can take the form of consultations where the Subcommission requires some clarification on aspects of the submission, or “[a]t an advanced stage during the examination of the submission” when the Subcommission “shall invite the delegation of the coastal State to one or several meetings at which it shall provide a comprehensive presentation of its views and general conclusions arising from the examination of part or all of the submission.”

The practical application of the process by which outer-continental shelf-submissions are dealt with by the CLCS has raised a number of issues in respect to the Commission’s interpretation of certain aspects of Article 76. For example, Article 76(6) contains specific, though potentially problematic, provisions concerning how the constraint lines mentioned above are to be applied to submarine ridges and analogous features, which commentators have termed “a masterpiece of ambiguity” and “manifestly unhelpful.”

The Commission’s Scientific and Technical Guidelines offer little clarification, merely stating: “[T]he issue of ridges will be examined on a case-by-case basis.”

Further, the work and practice of the Commission itself has excited considerable debate, especially with respect to the apparently rigorous nature of its assessment of submissions; issues related to data gathering, baselines and maritime disputes; and the time that is required by the Commission for the consideration of each submission. Additionally, concerns have been raised over the fact that there is no requirement for submissions to be made public, leading many interested coastal States to keep the detailed contents of their submissions—save for an executive summary—confidential. This means that

43. LOSC, supra note 2, annex II, art. 5; see also CLCS Rules of Procedure, supra note 42, r. 52.

44. While such clarifications can be submitted in writing, “[i]f the delegation of experts from the coastal State is available at United Nations Headquarters in New York, the written communication should be combined with consultations between the national experts and members of the subcommission at meetings arranged by the Secretariat.” See id., annex III, para. 6.

45. See id., annex IV, para. 10(3).


49. These debates are beyond the scope of the present paper. For further discussion of these issues, see McDorman, supra note 41; Macnab, Submarine Elevations, supra note 47; Schofield & Arsana, supra note 36, at 33–41.

50. On confidentiality requirements, see CLCS Rules of Procedure, supra note 42, annex II. See also Ron Macnab, The Case for Transparency in the Delimitation of the Outer Continental Shelf

http://scholarship.law.berkeley.edu/bjil/vol33/iss1/1
coastal States preparing their submissions have found it difficult to build on the experience of those States that have already made their submissions and had them considered by the Commission. Consequently, some have suggested there is a danger that a submitting State may “make the same faulty assumptions concerning ridges and elevations that caused problems for other coastal States,” forcing a costly and time-consuming reevaluation and resubmission as a result.

II. DEADLINES AND PROGRESS TOWARDS FIXING LIMITS

According to LOSC, as it was originally drafted, the deadline for the submission of information on the outer limits of the continental shelf was defined as “10 years of the entry into force of this Convention for that State.” As the Convention entered into force on November 16, 1994, the ten-year deadline applicable to coastal States that had ratified the Convention by the date when it entered into force was set as November 16, 2004. However, it became clear as this deadline approached that many interested coastal States would struggle to formulate submissions in time—something perhaps not surprising given the complexity of the terms of Article 76 and the exacting nature of the task of gathering the required information. Further, the Commission itself was only established in 1997, three years after the Convention’s entry into force, and the CLCS did not adopt its Scientific and Technical Guidelines until 1999. In 2001, concerns over the approaching deadline, coupled with the fact that the Commission’s Guidelines provide official guidance for coastal States on how to delineate the outer limits of their continental shelf, led the State Parties to the Convention to push the deadline back. The ten-year clock was reset to ten years from the date that the Commission’s Guidelines were adopted—which was May 13, 1999—to May 13, 2009.

in Accordance with UNCLOS Article 76, 35 OCEAN DEV. & INT’L L. 1, 11–14 (2004); Macnab, Submarine Elevations, supra note 47, at 224–225.

51. Schofield & Arsana, supra note 36, at 40.
52. Macnab, Submarine Elevations, supra note 47, at 225.
53. LOSC, supra note 2, annex II, art. 4.
As this deadline approached, it once again became clear that many coastal States would struggle to make their submissions in time. In order to address these concerns, rather than once again revising the deadline, a meeting of the State Parties to the Convention in June 2008 opted to relax the terms for meeting the deadline.\(^{57}\) As a consequence of this decision, instead of a full submission, States have the alternative option of submitting "preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles and a description of the status of preparation and intended date of making a submission."\(^{58}\)

The May 2009 deadline induced a notable surge in submissions to the CLCS. From eleven submissions a year prior to the May 2009 deadline, the Commission was faced with fifty-one full submissions and forty-one submissions of preliminary information in the immediate aftermath of the deadline.\(^{59}\) These figures have since expanded to over 100 submissions overall (seventy-four full and thirty-one preliminary) involving eighty coastal States.\(^{60}\)

These submissions collectively encompass an enormous area, in excess of thirty million square kilometers.\(^{61}\) As coastal States have made their submissions, it has become clear that there are numerous overlapping claims to the same areas of outer continental shelf. These overlaps encompass well over three million square kilometers of potential outer-continental-shelf areas.\(^{62}\)

These figures on the areas covered by submissions and the areas subject to overlapping submissions are likely to grow significantly over time.\(^{63}\) For example, the above-mentioned submissions area does not include submission areas for Chile, China, the Comoros, and Vanuatu. This is because the


\(^{59}\) See Submissions to the CLCS, supra note 8.

\(^{60}\) See id. As of September 18, 2014, the Commission had received sixty-eight individual State full submissions and six joint full submissions involving sixty States as well as twenty-eight individual State preliminary submissions and three joint preliminary submissions involving twenty States. Schofield & van de Poll, Exploring the Outer Continental Shelf, supra note 4, at 72.

\(^{61}\) Schofield and van de Poll put the approximate area covered by outer-continental-shelf submissions at the end of 2013 at approximately 29,417,052 square kilometers. Subsequent submissions have taken this figure well beyond thirty million square kilometres. Schofield & van de Poll, Exploring the Outer Continental Shelf, supra note 4, at 72.

\(^{62}\) In late 2013, Schofield and van de Poll put the approximate area covered by overlapping outer-continental-shelf submissions at approximately 3,227,110 square kilometers. Id.

\(^{63}\) Id.
submissions of preliminary information for these States are not explicit as to which areas seawards of their 200 nm EEZ limits are subject to submission.\(^64\)

Additionally, a number of coastal States may yet make submissions, meaning that the process is not yet at an end.\(^65\) Such anticipated further submissions are also highly likely to result in additional overlaps between submissions.

Therefore, as many as eighty-five coastal States may ultimately be in a position to make submissions for outer-continental-shelf rights to the Commission.\(^66\) Additionally, the substantial number of preliminary submissions that have been made will in due course be replaced by full submissions, clarifying areas of extended continental shelf where there is currently some uncertainty.

At the time of this writing, the Commission had adopted twenty sets of recommendations on submissions over the period from 2002 to 2014.\(^67\) The Commission has been constrained by the limited number of subcommissions that can be formed to consider each submission and formulate recommendations, although this issue is now being at least partially addressed through revised working practices on the part of the Commission.\(^68\) Other constraints include practical issues such as the provision of support facilities at UN headquarters in New York, including access to geographical information systems services and related technical support, as well as funding for its members. These factors, coupled with the arguably rigorous examination the Commission conducts of the proposed outer-continental-shelf limits, mean that the rate of consideration of submissions has been around two per annum.\(^69\) Given the 2009 surge in submissions with many more full submissions to come, it is clear that the Commission has a daunting backlog of work. At the Commission’s current rate of progress, several decades are likely to pass before final and binding outer limits to national continental-shelf claims can be fixed for all States that have submitted claims.

III. EXTED-CONTINENTAL-SHELF RESOURCES

Coastal States exercise sovereign rights over continental-shelf areas “for the purpose of exploring [them] and exploiting [their] natural resources.”\(^70\)

---

\(^64\) Id.

\(^65\) Id.

\(^66\) Id.

\(^67\) See Submissions to the CLCS, supra note 8.

\(^68\) For example, through adopting flexible working practices regarding the size of subcommissions, the frequency and length of meetings, tasking subcommissions to examine more than one submission at a time and relating to Commission members working remotely from New York. See Eighteenth Meeting of States Parties, supra note 58.

\(^69\) See Submissions to the CLCS, supra note 8.

\(^70\) LOSC, supra note 2, art. 77, para. 1.
Although the potential resources of the extended continental shelf are necessarily remote from shore and often overlain by deep water, these extensive areas of seabed and subsoil are of increasing interest from a marine-resource-development perspective. Key emerging seabed-resource opportunities in extended-continental-shelf areas potentially include energy resources (such as oil, gas, and gas hydrates), seabed minerals, and marine genetic resources.71

With respect to seabed hydrocarbons, extended-continental-shelf areas are likely to be of increasing interest to oil companies. This is the case because global demand for oil remains high, and it is anticipated that demand will continue to rise in the future, in particular driven by the transport and petrochemical sectors.72 At the same time, conventional crude-oil production is set to decline.73 Moreover, it has been estimated that forty-five percent, or 1200 billion barrels, of “remaining recoverable conventional oil resources . . . [are] located in offshore fields.”74 Similarly, demand for natural gas is expected to rise significantly in the future, with the International Energy Agency predicting a rise of “1.6 percent per year on average” in the 2012–2035 period.75 Offshore gas resources are likely to play an increasingly important role in this context with, analogously to oil resources, enhanced exploration in deeper waters and in more hostile environments, potentially including the extended continental shelf. Indeed, industry figures suggest that thirty percent of global oil production and twenty-seven percent of global gas production in 2010 came from offshore sources, such that offshore areas represent “a nonnegotiable imperative for oil companies.”76

These factors, coupled with elevated oil prices77 and notable advances in drilling technology78 allowing for exploration in deeper waters, have excited

71. Schofield, New Marine Resource Opportunities, supra note 33, at 715.
73. The International Energy Agency notes that once past their initial production peak, conventional oil fields show decline in production rates of “6% per year.” Id. at 457.
74. INT’L ENERGY AGENCY, REDRAWING THE ENERGY-CLIMATE MAP: WORLD ENERGY OUTLOOK SPECIAL REPORT 2013 93 (2013). This estimate excludes “light tight oil.” Light tight oil has been defined as “oil produced from shales or other very low permeability formations, using multi-stage hydraulic fracturing in horizontal wells.” See WORLD ENERGY OUTLOOK 2013, supra note 72, at 424.
75. This estimate is consistent with the International Energy Agency’s New Policies Scenario, which countenances a “continuation of existing policies and measures as well as cautious implementation of policies that have been announced by governments but are yet to be given effect.” REDRAWING THE ENERGY-CLIMATE MAP, supra note 74, at 33, 36, 99.
77. For example, the average price of Brent crude oil, one of the major classifications of crude oil in use internationally, over the five-year period 2008–2012 was $92.27, as compared with $51.83 for the previous five-year period. See BP Statistical Review of World Energy June 2013, BP PLC 15 (2013), available at http://www.bp.com/content/dam/bp/pdf/statistical-review/statistical_review_of_world_energy_2013.pdf.
increasing interest in hydrocarbons exploration in extended-continental-shelf areas. Accordingly, although inevitably remote from shore, it has been suggested that extended-continental-shelf areas are likely to offer the “next frontier” for the oil and gas industry over the next 25 years.

It remains to be seen, however, to what extent the drivers for deep-water hydrocarbon exploration and development are offset by recent developments with respect to the exploitation of unconventional sources of oil and gas, such as terrestrial shale gas and oil. In the offshore context, gas hydrates offer an especially attractive potential resource opportunity for the future, including in areas of extended continental shelf. “Gas hydrates” have been defined as “naturally occurring ice-like solids (clathrates) in which water molecules trap gas molecules.” In effect, lattices or cages of frozen water molecules trap gas molecules, predominantly methane but potentially also ethane and carbon dioxide. The International Energy Agency has observed that although estimates regarding methane hydrate deposits “vary by several orders of magnitude,” they are uniformly “extremely large.”

According to the United States Geological Survey, it has been estimated that “most of the global gas hydrate occurs in the uppermost hundreds of meters of sediments at ocean water depths greater than ~500 [meters] and close to continental margins”—locations and water depths consistent with areas of extended continental shelf. While formidable technical barriers to the commercial development of offshore gas hydrate deposits exist, leading them to be generally considered the “most difficult and expensive of all unconventional gas resources to recover,” the potential for the development of gas-hydrate resources has excited increasing interest in recent years. This has led to efforts to overcome the technical obstacles involved. For example, in May 2012 a

---

78. See Paul L. Kelly, Deepwater Oil Resources: The Expanding Frontier, in LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS 413, 414–16 (Myron H. Nordquist et al. eds., 2004).


82. See Gas Hydrates Primer, supra note 81.

83. See WORLD ENERGY OUTLOOK 2013, supra note 72, at 119.

84. See Gas Hydrates Primer, supra note 81.

85. Owen & Schofield, supra note 81, at 813.
successful field test of gas-hydrate production was made from a test well on the North Slope of Alaska.\textsuperscript{86} Moreover, in March 2013, methane was successfully extracted from hydrates in sediments located in the Nankai Trough east of Japan in what was billed as “the world’s first hydrate production test in deep water.”\textsuperscript{87} While efforts to extract methane from submarine gas-hydrate deposits remain in their infancy, there exists considerable potential for the development of such resources in the future, including from extended-continental-shelf areas.

Analogous to developments in the oil and gas industry, high mineral prices, coupled with progress in exploration and extraction technologies, suggest that the commercially viable extraction of mineral resources from seabed areas, including from areas of extended continental shelf, may now be in view. Such potential seabed-resource opportunities include those offered by polymetallic or manganese nodules, seafloor massive sulfide deposits, ferromanganese nodules and crusts, cobalt-rich crusts, and marine phosphates.\textsuperscript{88} These deposits also have the potential to contain rare-earth elements, something that is likely to enhance their attractiveness as targets for seabed-resource development.\textsuperscript{89}

States such as the Cook Islands, Federated States of Micronesia, Fiji, Kiribati, and Palau have expressed interest in seabed mining, including on areas of outer continental shelf,\textsuperscript{90} with some suggesting that “tens of billions” of dollars could be at stake.\textsuperscript{91} For all the excitement associated with potential seabed-mining opportunities, whether on the extended continental shelf or otherwise, it should be borne in mind that commercial exploitation of such resources has yet to occur. Indeed, the most advanced project of this type is the Solwara 1 project concerning the exploitation of high-grade seafloor massive sulfide deposits in the Bismarck Sea off Papa New Guinea,\textsuperscript{92} where the


\textsuperscript{88}. See Clive Schofield & Robert van de Poll, Exploring the Outer Continental Shelf, supra note 4, at 77.


\textsuperscript{90}. Schofield, New Marine Resource Opportunities, supra note 33, at 726–29.

\textsuperscript{91}. Id. at 728; see also Rupert Neate, Seabed Mining Could Earn Cook Islands Tens of Billions of Dollars, THE GUARDIAN (Aug. 6, 2013), http://www.theguardian.com/business/2013/aug/05/seabed-mining-cook-islands-billions.

government granted the world’s first deep-sea mining lease in January 2011. However, the project has run into serious difficulties as a consequence of commercial disputes over funding the development and concerns over the social and particularly acute environmental impacts. Nonetheless, seabed mining developments in areas of extended continental shelf can be anticipated in the future, especially as outer-continental-shelf limits are progressively confirmed and finalized.

In addition to mineral and other nonliving resources contained in the seabed and subsoil of the outer continental shelf, coastal States also have sovereign rights over “living organisms belonging to sedentary species,” defined as “organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.” The continental shelf, including extended-continental-shelf areas, therefore offers resource potential in living resources, possibly encompassing valuable marine genetic resources.

Marine biota (plants and animals) represent a relatively untapped resource offering developmental potential for a range of valuable applications. In the context of marine genetic resources and biotechnology, marine species and microorganisms that have evolved to exist in extreme environments, so-called extremophiles, are of particular interest. Organisms living in these environments have adapted to survive in the complete absence of light, in conditions of extremely high pressure, in either low or very high temperatures (such as in the vicinity of a hot water vent), and in extremely saline or acidic waters. While this suggests enormous potential, there are significant challenges, obstacles, and limitations, which serve to limit the realization of this potential of marine genetic resources, including that of the extended continental shelf. In particular, securing adequate supplies of marine natural products or, alternatively, cultivating or synthesizing such marine-derived biotechnology products at a reasonable cost, has proved to be highly problematic. Furthermore, it has been suggested that “technological revolutions” in the fields


95. LOSC, supra note 2, art. 77, para. 4.


97. Id. at 222.

98. See id. at 217–19; see also Schofield, New Marine Resource Opportunities, supra note 33, at 731.
of biology and biotechnology “could eventually result in the biotechnology of the future being less and less dependent on biodiversity.”

For all of the considerable obstacles to their development, it seems clear that there are multiple marine resource opportunities associated with extended-continental-shelf areas and that coastal States engaged in finalizing their outer-continental-shelf limits are exhibiting increasing interest in how such resources may be located, developed, and managed in the future.

IV. SECURING THE RESOURCES OF THE EXTENDED CONTINENTAL SHELF: PROSPECTS AND CHALLENGES

While extended-continental-shelf areas offer considerable potential marine resource opportunities, accessing the resources of the extended continental shelf is dependent on determining the spatial extent of coastal-State sovereign rights. While some progress has been made in the finalization of outer-continental-shelf limits, much remains to be done. Despite its diligent work, the CLCS faces a daunting backlog of submissions to address—something which will inevitably lead to significant delays in the finalisation of outer-continental-shelf limits. Further, as noted above, overlapping outer-continental-shelf claims encompass seabed areas in excess of three million square kilometers. These overlaps give rise to multiple “new” outer-continental-shelf boundaries and possibly a proliferation in outer-continental-shelf boundary disputes. The resolution of these disputes through the delimitation of outer-continental-shelf boundaries remains a key challenge for the coastal States involved, as this task is beyond the purview of the Commission. Overlapping jurisdictional claims will likely compromise the realization of marine resource opportunities and the benefits potentially arising from rights over outer-continental-shelf areas. This is because the existence of overlapping claims deprives commercial entities, such as international oil and gas companies, of the fiscal and legal certainty they require in order to invest the billions of dollars necessary to undertake offshore exploration, let alone development.

Although the delimitation of outer-continental-shelf boundaries, and thus the resolution of overlapping claims to outer-continental-shelf areas, is limited, it appears that the approaches to delimitation within and beyond 200 nm limits will be similar. This is supported by past State practice, where it has been


100. Van de Poll & Schofield, Exploring to the Outer Limits, supra note 80, at 3.

101. As noted above, in keeping with LOSC Article 76(10), the Commission’s recommendations are specifically without prejudice to the delimitation of continental-shelf boundaries.
concluded that geophysical factors have had no more than “a limited role.”
Additionally, in the Bay of Bengal Case between Bangladesh and Myanmar before the International Tribunal on the Law of the Sea, Bangladesh argued unsuccessfully that geophysical factors constituted relevant circumstances that should influence the course of the maritime delimitation line both within and beyond the 200 nm limit. Instead, the Tribunal deemed that coastal geography was the dominant consideration to delimit both the EEZ and extended-continental-shelf boundaries. Analogously, in the case between Bangladesh and India, coastal-geography factors were crucial to the delimitation of the maritime boundary between the two States. The outcome of these cases suggests that outer-continental-shelf delimitation will proceed on substantially the same basis as delimitations within the 200 nm inner-continental-shelf/EEZ limit.

Similarly, significant ocean-governance challenges arise with respect to outer-continental-shelf areas, even where no overlapping claims exist. Although much of the debate relating to the outer continental shelf has been concerned with the process by which States can secure their rights over continental-shelf areas located seaward of their 200 nm limits, this is only the beginning. Once extended-continental-shelf areas are secured, considerable management and ocean-governance responsibilities and challenges with respect to these remote, subsurface seabed areas under national jurisdiction are likely to arise. Coastal States are, however, in a position to draw inspiration from the rapidly increasing experience of the International Seabed Authority. In particular, the International Seabed Authority has progressively developed a Mining Code for activities in the Area. Regional approaches may prove advantageous, as illustrated by the recent drafting of a regional legislative and regulatory framework for deep-sea minerals exploration and exploitation for the African

103. Bay of Bengal Case, supra note 33.
105. Bay of Bengal Case, supra note 33, ¶ 322.
108. The ISA is an “autonomous international organization established under” LOSC. See About Us, INT’L SEABED AUTH., www.isa.org.jm/en/about (last visited Dec. 24, 2014). It is defined as “the organization through which States Parties shall . . . organize and control activities in the Area, particularly with a view to administering the resources of the Area.” LOSC, supra note 2, art. 157, para. 1.
Caribbean Pacific States. These developments offer some positive prospects for the future, though daunting surveillance, regulation, and enforcement challenges remain with respect to securing the resources of extended-continental-shelf areas.

CONCLUSIONS

The United Nations Convention on the Law of the Sea codified and clarified the criteria whereby the outer limits of the continental shelf seaward of 200 nm from baselines along the coast may be established. Over half of the world’s coastal States have delineated, or are in the process of delineating, their outer-continental-shelf limits. The existence of a deadline applicable to many coastal States to deliver submissions to the scientific and technical body tasked with considering and making recommendations on proposed outer-continental-shelf limits, the CLCS, resulted in a surge in such submissions in early 2009. Consequently, at present rates of progress, it will take considerable time, perhaps decades, for the Commission to address this backlog. This is despite the dedicated work of the Commissioners themselves as well as recent efforts to alter the working practices of the CLCS so as to speed up the process.

Although the establishment of outer-continental-shelf limits is a complex, expensive, and time-consuming one, the potential benefits of doing so may be significant, at least in terms of “extending” the maritime jurisdiction of coastal States spatially. Already established and presently proposed outer-continental-shelf limits encompass vast areas of extended continental shelf. Proposed extended-continental-shelf limits have, however, resulted in substantial seabed areas beyond 200 nm limits subject to more than one submission, giving rise to multiple “new” extended-continental-shelf boundaries to delimit and, perhaps inevitably, outer-continental-shelf disputes to resolve.

The broad areas of seabed and subsoil within established and proposed outer-continental-shelf limits afford coastal States rights over the resources contained thereon or therein. Such valuable marine resources potentially include seabed energy resources and seabed mineral opportunities as well as marine living and genetic resources. While these resources may well be realized in time, challenges are associated with each of these potential resource opportunities and a sense of perspective is advisable.

Review of The UNCITRAL Arbitration Rules—A Commentary (Second Edition) by David D. Caron and Lee M. Caplan

Jawad Ahmad*

INTRODUCTION

A key driver to international arbitration’s success and popularity has been the inherent flexibility and freedom afforded to the parties on how their dispute is to be administered. On this basis, the choice of the arbitral procedural rules to be adopted is an important decision for the parties and can have severe implications on, for instance, the constitution of the arbitral tribunal and arbitrator challenges. More importantly, the choice between ad hoc rules and institutional rules (such as the International Chamber of Commerce (ICC) Rules of Arbitration or London Court of International Arbitration (LCIA) Rules) can make a substantial difference in how organized and efficient the arbitral proceedings may be. Ad hoc arbitration is driven by the parties and not administered by an institution, thus offering greater freedom for parties to determine all aspects of the arbitration process. This has its obvious setbacks, as it will require parties to cooperate in order to lift the arbitration proceedings off the ground. Ad hoc arbitration’s primary benefit is that it enables party freedom and can be cost efficient.

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, the first version of which was issued in 1976 and the most recent in 2010, provide a truly comprehensive set of procedural rules geared towards ad hoc arbitration. And thus, at their core, the Rules respect procedural freedom by allowing parties to shape and adjust the arbitral proceedings to govern their dispute as they deem fit.

David D. Caron’s1 and Lee M. Caplan’s2 The UNCITRAL Arbitration Rules—A Commentary (Second Edition) provides a substantive analysis of the

---

* Associate (Foreign Lawyer) at Rajah & Tann Singapore LLP’s International Arbitration Practice. LL.B. In European Legal Studies (Kent) (First Class Hons.); LL.M. (University of California, Berkeley, School of Law). Attorney-at-law (New York).

1. Professor Caron joined King’s College London in May 2013, where he is currently the
2010 Rules and remains, arguably, the leading reference book on the subject. As opposed to adopting an article-by-article approach, the book structures the rules according to overall themes organized under six Parts, thus offering a comprehensive take on the particular rule in question and how it relates, if at all, to others. This situation-based approach is intended to provide the reader with a fuller understanding of how the situation or rule in question relates to the overall arbitral procedure.

Each Part contains its share of chapters, which deal with issues and rules in more detail. Each chapter deploys a similar structure: (1) the text of the relevant 2010 rule; (2) a commentary on that rule with reference to the travaux préparatoires of the Rules, international arbitration practice, and a comparison with the 1976 Rules; and (3) extracts from arbitral tribunal awards and procedural orders to understand the application of the rule in question.

The remainder of this book review will provide, first, a basic overview of the UNCITRAL Arbitration Rules and their significance to international arbitration practice and, second, a short summary of three topics that represent the major changes to the 2010 Rules from the 1976 Rules. The latter will draw on various chapters from the book in order to give the reader a flavor of the book’s content. Brevity does not permit a thorough analysis of the commentary in each chapter.

---

Dean of the Dickson Poon School of Law. Previously, Professor Caron taught at the University of California, Berkeley, School of Law (where he also obtained his JD) as the C. William Maxeiner Distinguished Professor of Law (Emeritus).

After obtaining his JD in 1983, David served as legal assistant to Judges Richard M. Mosk and Charles N. Brower at the Iran-United States Claims Tribunal in The Hague. While in The Hague, he also obtained a Diploma from The Hague Academy of International Law in 1984, making him the twenty-fifth American to receive such a degree.

He also obtained a Doctorandus (International Law) from Leiden University in 1985 and a Dr. jur. in 1990. He practiced at the San Francisco firm of Pillsbury Madison & Sutro and was a senior research fellow at the Max Planck Institute for Comparative Public and International Law.

Qualified and experienced in the field of international arbitration, he was counsel for Ethiopia before the Eritrea-Ethiopia Claims Commission, President of the International Centre for Settlement of Investments Disputes Tribunal in the matter of Aguas del Tunari v. The Republic of Bolivia, and a member of the NAFTA Chapter 11 Arbitration Panels in the matters of Glamis Gold v. The United States and Cargill Industries v. The United States of Mexico.

2. Mr. Caplan is currently a partner at Arent Fox LLP in the firm’s international arbitration and dispute resolution practice group in Washington D.C. Lee graduated from Vanderbilt University with a BA (magna cum laude, Phi Beta Kappa) in 1992 and thereafter obtained his Master of Law and Diplomacy from Tufts University, The Fletcher School of Law and Diplomacy in 1995. He then attended the University of California, Berkeley, School of Law for his JD, which he obtained in 2000.

Prior to joining Arent Fox, Lee represented the United States successfully in numerous arbitrations before the Iran-U.S. Claims Tribunal and worked closely with the U.S. Department of State’s Investment Arbitration Team in matters relating to NAFTA and CAFTA-DR arbitration. He also served as a U.S. delegate to the UNCITRAL during the development of rules of transparency for use in investor-State arbitration.
I.

SUMMARY

A. The UNCITRAL Arbitration Rules

UNCITRAL was created in 1966 by the United Nations General Assembly as part “of the effort at that time to change the direction of the international economic order, to open it up to more actors.” Part of its mandate is to promote the adoption of new international conventions, model laws, and uniform laws to give effect to this international economic order, including the construction of an international arbitration framework.

To achieve this, the UNCITRAL has adopted a three-pronged approach to overcome the differences in States’ legal systems and cultures that may undermine the efficacy of international arbitration. The first prong was the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which provides a legal framework for national courts to respect arbitration agreements and ensure the recognition and enforcement—within limits—of awards rendered in other jurisdictions that are party to the New York Convention.

The second prong was the creation of the 1976 Rules so as to provide a model for the process of the arbitration itself. Considering its intent to overcome the differences between States’ legal systems and cultures in their approaches towards arbitration as a dispute-resolution process, the Rules seek to reflect the balance amongst the many States that were involved. Interestingly, the “UNCITRAL Rules were recommended for use in a world where a number of arbitration institutions, such as the ICC, offered their own rules and administered arbitration proceedings in specific cities around the world.” In this regard, the Rules provided an alternative to institutional arbitration.

The history of the Rules cannot be understood without the significant role that the Iran-U.S. Claims Tribunal played in their application. In the aftermath of the 1979 Islamic Revolution in Iran, Iran-U.S. relations ventured into an economic and political crisis. Pursuant to several agreements, the American hostages were released on January 19, 1981, at the same time that the United States froze Iranian assets. One billion dollars of the frozen Iranian assets were to be adjudicated pursuant to international arbitration proceedings, and one of the settlement agreements provided for the procedural and substantive law framework that would settle the claims through arbitration. For the procedural

4. Id. at 1.
5. Id.
6. Id. at 4.
7. Id.
rules applying to the arbitral procedures, the negotiators turned to the Rules, which were prepared by leading experts from diverse legal systems. 8 “If there had been concern in 1976 that the UNCITRAL Rules might not be used to any significant extent, the situation changed dramatically as the Tribunal began its work.” 9

The Iran-U.S. Claims Tribunal developed a body of case law that illustrated the Rules’ intricacies and procedures. Furthermore, the Tribunal’s practices contributed to the development of the final prong in UNCITRAL’s work, the creation of the 1985 UNCITRAL Model Law on International Commercial Arbitration (the Model Law), which sought to harmonize national arbitration legislations by presenting itself as the ideal text or template for national legislatures to adopt.

The popularity of the Rules cannot be overstated. After the work of the Iran-U.S. Claims Tribunal, their prominence spread widely and influenced the institutional arbitral rules of regional arbitral centers—for instance, the Cairo International Commercial Arbitration Centre, the Kuala Lumpur Regional Centre, and the Hong Kong International Arbitration Centre—and formed the procedural rules for the administration of disputes under investment treaties. 10

B. Changes Introduced by the 2010 Rules

The movement to revise the 1976 Rules came from leading international arbitration practitioners starting with Pieter Sanders’s article “Has the Moment Come to Revise the UNCITRAL Rules of Arbitration?” published in Arbitration International in 2004. 11 This was followed by a study by Jan Paulsson and Georgios Petrochilos submitted to UNCITRAL to guide its work. 12 These combined influences resulted in the Working Group II of UNCITRAL commencing work on the revision of Rules in the fall of 2006. 13

At the outset, it was agreed that the spirit and text of the UNCITRAL Arbitration Rules would not be affected, and the objective was to align the Rules with current international arbitration practices. Some believed that the Rules should maintain their universal application to various types of disputes. In this regard, the popularity of the 1976 Rules in governing investment-treaty disputes triggered a debate on the extent to which the revision should accommodate this growing field of international arbitration. This was, however, tabled, as the UNCITRAL Commission believed that including specific provisions on treaty-

8. Id. at 5.
9. Id.
10. Id. at 6–7.
11. Id. at 8.
13. CARON & CAPLAN, supra note 3, at 8.
based arbitrations would delay the completion of the revision of the UNCITRAL Arbitration Rules. The Commission agreed to address this issue in the future, in particular rules regarding transparency.\footnote{After discussion, the Commission agreed that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes that the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. Annotated Provisional Agenda, U.N. Comm’n on Int’l Trade L., Working Group II (Arbitration and Conciliation), 53rd Sess., Oct. 4–8, 2010, ¶ 7, U.N. Doc. A/CN.9/WG.II/WP.15 (July 21, 2010).}

Before embarking on the consultation and revision process, the Working Group II, as a guiding principle, “cautioned against any unnecessary amendments or statements being included in the travaux préparatoires that would call into question the legitimacy of prior applications of the Rules in specific cases.”\footnote{Rep. of the Working Group on Arbitration and Conciliation on the Work of its Forty-Fifth Session, U.N. Comm’n on Int’l Trade L., 45th Sess., Sept. 11–15, 2006, ¶ 16, UN Doc. A/614 (2006).} As such, the objective of the revision was to adapt to the changes of the last thirty years and avoid making the Rules complex. It is in light of this guiding principle that the changes in the 2010 Rules must be understood.

1. Modernization of the Rules

Since the introduction of the 1976 Rules, the decades that followed saw technological advancements in the means of communication between commercial parties and the use of digital information (such as electronic documents and emails).\footnote{Daria Kozlovska, The Revised UNCITRAL Arbitration Rules Seen Through the Prism of Electronic Disclosure, 28 J. INT’L ARB. 51, 51 (2011).} This development became relevant with respect to document production. In light of the growing use of electronic evidence, it was common for recalcitrant parties to request extensive electronic documents, thus increasing costs and creating an unreasonable burden on the producing party to disclose documents.\footnote{Id. at 51.}

Under the 1976 Rules, Article 15(1) granted the parties an unrestricted opportunity to present their case: “[s]ubject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings...
each party is given a full opportunity of presenting his case.”

The words “any stage” and “full opportunity” gave a party ammunition to demand the disclosure of voluminous electronic documents. Therefore, Article 17(1) of the 2010 Rules (equivalent to Article 15(1) under the 1976 Rules) softened the language so as to avoid “a party . . . hav[ing] unreasonable expectations concerning its rights under the Rules.” Article 17(1) of the 2010 Rules states:

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.

Thus, parties no longer had a “full opportunity” but “a reasonable opportunity” to present their case and this could no longer be provided “at any stage” but “at an appropriate stage” of the arbitration determined by the arbitral tribunal. Additionally, the second sentence under Article 17(1) is entirely new and expressly requires the tribunal to conduct the proceedings in a fair and efficient manner. While some delegates argued during drafting that this was implicit, it was felt that expressly acknowledging this would provide the tribunal “leverage” when responding to parties or another arbitrator while acting under the Rules.

One of the significant changes in the 2010 Rules was recognition of the widespread range of disputes that the 1976 Rules had been applied to. As a result, Article 1(1) of the 2010 Rules refers to disputes “in respect of a defined legal relationship, whether contractual or not.” Thus the scope of application of the 2010 Rules is wider and not restricted to a “contract” as previously provided for in the 1976 Rules. This broadening of scope was intentional, allowing the inclusion of noncontractual disputes, such as trademark infringements or noncontractual issues on State responsibility under investment treaties.

Article 1(2) of the 2010 Rules removes the 1976 Rules’ requirement that arbitration agreements be concluded in writing. It recognized the commercial reality that arbitration agreements do not necessarily need to be in writing in

---

18. Id. at 53 (emphasis added).
19. Id. at 54 (“Especially in an era of electronic communication where, in case of a dispute, enormous amounts of electronic evidence can be produced, the full opportunity for the parties to present their case at any stage of the proceedings could easily lead to high costs and lengthy procedures. Moreover, under the previous Rules, the arbitral tribunal had few tools to restrict dilatory tactics of the parties obstructing the proceedings.”).
20. CARON & CAPLAN, supra note 3, at 59.
22. CARON & CAPLAN, supra note 3, at 59
23. Id. at 24.
24. Id. at 18.
order for the Rules to apply. The book provides useful commentary on the attitudes of the delegates at the Working Group discussions: "some delegates cautioned against the change, citing some of the same reasons as the original drafters of the [1976] Rules, clarity and conformity." Further, delegates highlighted that removing the writing requirement was preferable in light of the growing number of national arbitration legislations that omitted this requirement in arbitration agreements.\(^{26}\)

With the prominence of the Internet and wireless technology, Article 2(1) of the 2010 Rules also relaxed the 1976 Rules’ requirement that notices be delivered physically. Under the 2010 Rules, notices may now be delivered by “any means of communication,” thus including electronic communication.\(^{27}\) However, this rule is limited by Article 2(2) of the 2010 Rules, which only permits delivery by electronic means if the address provided has been designated by the parties or authorized by the tribunal for this specific purpose.\(^{28}\) While it was the intention of the 2010 Rules to reflect modern developments in the means of communication, it was important to include this condition under Article 2(2) of the 2010 Rules in order to “avoid unfair surprise.”\(^{29}\)

Article 28(4) of the 2010 Rules also gives the tribunal discretion to conduct the examination of witnesses (including experts) through means of telecommunication (including videoconference). “The term ‘telecommunication’ is deliberately broad to ensure that the rule applies when new forms of communication are developed and utilized in arbitration.”\(^{30}\) Although not specifically provided for in the Rules, “[t]he arbitral tribunal has authority to determine the admissibility, relevance, materiality and weight of any evidence provided remotely by telecommunication under Article 27(4).”\(^{31}\)

2. Institutionalization

Broadening the role of the appointing authority under the 2010 Rules is a significant change from the 1976 Rules: “[w]ithout an appointing authority to make necessary appointments, the process of arbitration would come to a halt.”\(^{32}\)

\(^{25}\) Id. at 19.

\(^{26}\) Id.

\(^{27}\) Id. at 395.

\(^{28}\) Id. at 399.

\(^{29}\) Id. at 400 (citing James Castello, Unveiling the 2010 UNCITRAL Arbitration Rules, DISP. RESOL. J., May–July 2010, at 21, 147–48)).

\(^{30}\) Id. at 609.

\(^{31}\) Id. at 610.

\(^{32}\) Id. at 149.
The 2010 Rules expand the role of an appointing authority into, amongst others, three new areas: (1) the appointing authority may, at the request of a party, decide that a sole arbitrator be appointed if it determines that, in view of the circumstances, this is more appropriate (Article 7(2) of the 2010 Rules); (2) in exceptional circumstances and upon request by a party, the appointing authority may, after giving the parties and the remaining arbitrators an opportunity to express their views, appoint a substitute arbitrator and, thus, deny a party the right to appoint its own substitute (Article 14(2) of the 2010 Rules); and (3) pursuant to the request of a party, the appointing authority may review and adjust both the tribunal’s proposal and determination of its fees and expenses (Article 41 of the 2010 Rules).

Article 6 of the 2010 Rules, which deals with the designation and appointment of authorities, is largely unchanged from the 1976 Rules in several respects. There are, however, some useful revisions. Previously, the Permanent Court of Arbitration (PCA) was given a limited role to act in the constitution of the arbitral tribunal and address challenges to an arbitrator. However, Article 6(2) of the 2010 Rules specifically identifies the Secretary-General of the PCA as the designating authority of the appointing authority if the parties do not reach an agreement on the appointing authority within thirty days. Also, Article 6(1) expressly states that the Secretary-General of the PCA may serve as the appointing authority. As such, the addition expressly clarifies that while the Secretary-General of the PCA may act as the designating authority, the Secretary-General may also be chosen to serve directly as the appointing authority.33

The logic behind the designating authority choosing the appointing authority is to ensure that the arbitral proceedings are not subjected to undesired delay tactics. It also provides parties with the certainty (and security) that the Rules do provide for some degree of oversight to the proceedings.

During the discussions to revise the Rules, delegates considered a more defined role for the PCA in the appointing process, in the interest of certainty and predictability.34 Some delegates proposed the Secretary-General of the PCA as the default appointing authority in the event that the parties could not reach consensus. However, as the authors explain, some delegates expressed “[c]oncerns . . . that [this proposal] did not sufficiently take into account the ‘multi-regional applicability of the UNCITRAL Arbitration Rules’ and would ‘centraliz[e] all cases where the parties had not designated an appointing authority in the hands of one organization.’”35 Other delegates also believed that it would not be useful in domestic and regional arbitration.36

33. Id. at 150.
34. Id.
35. Id.
36. Id. at 150–51.
In light of the expansive role of the appointing authority, “the 2010 Rules resemble more institutional rules in that they rely on a third party (other than a national court) for procedural decision-making support.”\(^{37}\) Despite the wide role of the appointing authority, the 2010 Rules still remain true to party autonomy and the adjustments’ only purpose was to avoid halts to the arbitral proceedings and permit intervention in certain circumstances.

3. Interim Measures

The ability to obtain effective and immediate interim measures in international arbitration is an important consideration for parties involved in the dispute. Interim measures are “designed to protect parties or property during the pendency of international arbitration proceedings.”\(^{38}\) Such powers are very significant and largely depend upon the national arbitration legislation.

The provision on interim measures under the 2010 Rules—Article 26—is significantly wider compared to its 1976 predecessor. While Article 26 of the 1976 Rules was thin on the types of interim measures that could be granted and, in particular, the standard to grant such measures, the new Article 26 of the 2010 Rules is detailed. The authors note that “[i]n one respect, the dramatic expansion of the article runs counter to the guiding principles the Working Group adopted, namely ‘any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its sprit and drafting style and that it should respect the flexibility of the text rather than make it more complex.’”\(^{39}\) Interestingly, “Article 26 of the 2010 Rules does not so much track the 1976 Rules as it tracks, with some deviations, Article 17 of the Model Law, as amended.”\(^{40}\) In this regard, the expansion was a response to the need to mirror those national arbitration laws based on the 2006 Model Law so as to make a national court “comfortable enforcing interim measures if the law authorizing such measures was absolutely clear about the scope of the arbitrator’s power.”\(^{41}\)

The fact that the 2010 Rules are more detailed as to the scope of the arbitrator’s power to grant interim measures can also be a “guidepost” to arbitrators whose tribunal was constituted under the 1976 Rules when they exercise their discretion. In this regard, the 2010 Rules are persuasive in making

---

38. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2525 (2d ed. 2014).
39. CARON & CAPLAN, supra note 3, at 515.
40. Id.
up for the lack of specificity under the 1976 Rules on the type of interim measures that arbitrators may grant.42

II.
DISCUSSION

The 2010 Rules are still a relatively recent addition to the international arbitration practice and their application will be closely observed over time. That being said, a new version of the UNCITRAL Arbitration Rules came into effect on April 1, 2014, so as to establish a link to the recently adopted UNCITRAL Rules on Transparency. The Rules on Transparency, which are the result of a three-year effort by the Working Group II, represent a major development in making investor-State arbitrations more accessible and open to the public.

One of the most heated debates during the preparation of the Rules on Transparency concerned their scope of application with respect to existing and future treaties (i.e. those concluded after the Rules of Transparency’s effective date).43 The majority of delegates from Working Group II supported the “opt in” approach. This view called for the application of the Rules on Transparency only when the parties to the investment treaty or those in the underlying dispute expressly agreed to their applicability.44 This would have made the Rules on Transparency a “stand-alone” set of rules rather than an integrated part of the UNCITRAL Arbitration Rules.45 The minority of delegates advocated for the “opt-out” approach, which called for a presumption that the Rules on Transparency applied to the arbitration unless the parties to the investment treaty expressly opted out.46 Thus, insofar as an investment treaty made a general reference to the “UNCITRAL Arbitration Rules,” it would mean, subject to the rules on treaty interpretation, that the Rules on Transparency applied to the dispute.47 This approach would have ensured that the Rules on Transparency applied to disputes arising out of existing and future treaties.48

A compromise, however, was struck. With respect to future treaties, the Rules on Transparency will apply by default unless the parties to the treaty expressly opt out of their application. With respect to existing treaties, the Transparency Rules will not apply unless one of the following situations occurs:
(a) The disputing parties voluntarily agree to the application of the Transparency Rules with respect to the arbitration between them; or

42. The Authors opine that “[i]n all likelihood, the detail of the 2010 Rules will come to influence the way discretion is used under the 1976 Rules.” Id. at 532.
43. Id. at 23.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
(b) The State parties to the treaty agree to the application of the Transparency Rules after the effective date when the Transparency Rules come into force.49

How the Rules on Transparency will affect other provisions under the 2010 or 1976 Rules is not yet clear. Given the movement towards more transparency, parties that are more commercially sensitive may alter how they draft their pleadings and evaluate the degree of documentary material on which they will rely.50 Overall, the Rules on Transparency defer a large degree of decision making to the arbitral tribunal. This is particularly the case with respect to determining whether information is confidential or protected, or whether the publication of certain information would jeopardize the integrity of the arbitral process. The disputing parties will be consulted, but the final decision will rest with the arbitral tribunal.

By the end of the book one can appreciate the level of sophistication and precision employed in finalizing the 2010 Rules. Navigating the Rules and the various situations in which they become relevant, the book provides in-depth coverage useful for any practitioner engaged in the field. In particular, the careful selection of extracts from the workings of the Iran-U.S. Claims Tribunal, arbitrations under Chapter 11 of the North American Free Trade Agreement, and other ad hoc tribunals make for excellent sources on how the Rules are applied in practice.

The book does not provide an extensive comparison between the UNCITRAL Arbitration Rules and other arbitral rules, legislation, and treaties. However, the book does reference these instruments to shed light on the Rules. In this regard, the book has a “Table of Instruments”, which provides a list organized according to various legal instruments (Other Institutions’ Rules, National Legislation, UNCITRAL Instruments, and others). This table assists the reader in identifying the relevant pages of the book where a particular provision under the legal instrument was discussed. For instance, the book provides useful commentary and comparisons between the Rules and the default provisions under the Model Law. This comparison adds another layer of analysis on why, for instance, additional details were added to the Rules in light of the default position under the Model Law.

49. In the case of a multilateral treaty, the transparency rules will apply if the home State of the investor and respondent State agree to their applicability.

50. Deborah Wilkie, UNCITRAL Unveils New Transparency Rules—Blazing a Trail Towards Transparency in Investor-State Arbitration?, KLUWER ARBITRATION BLOG (July 25, 2013), http://kluwerarbitrationblog.com/blog/2013/07/25/uncitral-unveils-new-transparency-rules-blazing-a-trail-towards-transparency-in-investor-state-arbitration/ ("On a more practical level, it will also be interesting to see whether this increased transparency has any impact on the way that the parties draft their pleadings, or perhaps to limit the documents they refer to, in order to avoid potential disclosure requests.")
Even if practitioners are engaged in an arbitration pursuant to another set of arbitral rules, it is not uncommon to refer to the UNCITRAL Arbitration Rules as an influential guide, given the international effort involved in preparing them. For instance, while most arbitral rules recognize the power of an arbitral tribunal to award interim measures, the 2010 Rules are unique in that they go further and list the conditions for granting such measures (Article 26(3) of the 2010 Rules). So in circumstances where the applicable arbitral rules and the lex loci arbitri are silent on the standard arbitral tribunals should adopt in granting interim measures, Article 26(3) of the 2010 Rules and the commentary in the book provide an invaluable source of guidance.

The key appeal of the book is that it succinctly summarizes the major debates arising out of the plethora of Working Group II documents on the 2010 Rules. This makes the book a powerful source for any practitioner or arbitrator seeking to substantiate their reasons on why a particular course of action should be deployed in the arbitration proceedings. In this regard, the book provides a quick means of access to the travaux préparatoires.

Both authors have seen the growing prominence of the UNCITRAL Rules throughout their careers and witnessed the application and refinement of the Rules:

Our careers have witnessed the emergence of the 1976 UNCITRAL Rules through the work of the Iran-U.S. Claims Tribunal’s practice, its widespread designation as a basis for arbitration in bilateral investment treaties and its subsequent use in arbitrations brought under those treaties, and the global influence the Rules have played on the Rules adopted by Arbitration Centers in cities around the world and by global institutions offering arbitration services. For us, it has always been clear that the practice regarding the UNCITRAL Rules of Arbitral Procedure, if analyzed and accessible, would be very significant.

Given both authors’ extensive experience, the book is arguably one of the authoritative texts on the subject. For the above reasons, the book serves as a key reference source for any practitioner or arbitrator engaged with the Rules. It can also serve as a useful source for understanding procedural issues arising under other arbitral rules, given the Rules’ immense popularity and prominence in the field of international arbitration.


52. CARON & CAPLAN, supra note 3, at vii.