Texas International Law Journal

Volume 52 Fall 2017 Number 3

Volume 52, Issue 3

Articles

Notes

The University of Texas School of Law

TEXAS
INTERNATIONAL
LAW
JOURNAL

Volume 52
Issue 3
Fall 2017

CONTENTS

ARTICLES

NOTES

In the rapidly expanding discipline of international law, the *Texas International Law Journal* helps readers stay abreast and informed of recent developments and new scholarship by providing access to leading international legal, theoretical, and policy analysis. The *Journal* publishes academic articles, essays, and student notes in the areas of public and private international law, international legal theory, the law of international organizations, comparative and foreign law, and domestic laws with significant international implications. The editors and staff aim to fulfill these needs by concentrating on groundbreaking articles that will be useful to both practitioners and scholars. We hope you enjoy this latest issue.

The *Journal* is among the oldest and best-established student-published international law journals in the United States. In the wake of the Bay of Pigs disaster and the Cuban Missile Crisis, our publication began as an offshoot of the Texas International Law Society.[1] In January 1965, under the guidance of Professor E. Ernest Goldstein, we planted the Texas flag in the international arena with our first issue, entitled *The Journal of the University of Texas International Law Society*. Publications thereafter were biannual, taking the name *Texas International Law Forum* until summer 1971, when the *Journal* adopted its present title and began publishing three or four issues per year. Of the more than one hundred student-published international law journals across the country, only three schools have an older international heritage: Harvard, Columbia, and Virginia.

Over the years, the *Journal* staff has made the most of its established heritage. We have developed international repute by forging close ties with numerous scholars and authors worldwide. As a result, we receive over six hundred unsolicited manuscripts each year and are extremely selective in our publication choices. This position has helped us develop one of the largest student-published subscription circulations of any international law journal in the United States. The *Journal*'s subscription base includes law schools, government entities, law firms, corporations, embassies, international organizations, and individuals from virtually every state in the U.S. and more than forty-five countries.

With over thirty editorial board members and more than eighty staff members made up of full-time J.D. and LL.M. students, the *Journal* maintains a refined and well-organized editing process. As economic integration accelerates and nations forge closer ties in the new millennium, we are confident the *Journal* will continue to provide a significant contribution to the burgeoning field of international law.

DISTINGUISHED AUTHORS

The *Journal* has been fortunate to publish articles from a number of eminent scholars, including:

The Honorable William O. Douglas, former Justice of the Supreme Court of the United States; **W. Page Keeton**, former dean of the University of Texas School of Law; **Thomas Buergenthal**, former president of the Inter-American Court of Human Rights; **Charles Alan Wright**, former professor at the University of Texas School of Law, co-author of the leading treatise *Federal Practice and Procedure*, and former president of the American Law Institute; **Louis Henkin**, former president of the American Society of International Law, chief reporter of the Restatement of Foreign Relations Law of the

1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the* Texas International Law Journal *Were Born*, 30 TEX. INT'L L.J. 223 (1995).

United States, and former editor-in-chief of the *American Journal of International Law*; **the Honorable Richard J. Goldstone**, member of the Constitutional Court of South Africa and former chief prosecutor of the United Nations International War Crimes Tribunal for the former Yugoslavia and Rwanda; and **the Honorable Dalia Dorner**, Associate Justice of the Supreme Court of Israel.

OUTSTANDING CONTRIBUTORS

Our submissions consistently reflect the highest degree of quality from outstanding professionals, including:

Robert Reich, former U.S. Secretary of Labor, former professor of government and public policy at Harvard University, and former director of public policy for the Federal Trade Commission; **Joseph Jove**, former U.S. ambassador to Mexico; **Andreas Lowenfeld**, professor at New York University School of Law and leading international law scholar; **Dean Rusk**, U.S. Secretary of State under President Johnson; **Ewell "Pat" Murphy**, former chairman of the International Law Section of the American Bar Association and respected practicing attorney in the field of international business transactions; **Walter S. Surrey**, former chairman of the National Council for U.S.-China Trade and former president of the American Society of International Law; and **W. Michael Reisman**, professor at Yale Law School and member the board of directors of the American Society of International Law.

MISSION STATEMENT

Practitioners, scholars, and courts of all levels have cited articles from the *Texas International Law Journal* as legal authority since its first issue appeared in 1965. Members of the *Journal* seek to maintain this tradition of excellence for our 44th continuous year of publishing by providing the legal community with the highest quality of secondary source material on current and relevant international legal developments.

COPYRIGHT

The *Texas International Law Journal* (ISSN 0163-7479) is published three or four times a year by University of Texas School of Law Publications.

Cite as: TEX. INT'L L.J.

SUBSCRIPTIONS

Annual subscriptions to the *Journal* are available at the following rates:

$45.00 for domestic subscribers
$40.00 for *TILJ* alumni and current law students
$50.00 for foreign subscribers

To subscribe to the *Texas International Law Journal*, order reprints, or indicate a change of address, please visit www.tilj.org or write to:

University of Texas School of Law Publications
P.O. Box 8670
Austin, TX 78713
www.TexasLawPublications.com

Subscriptions are renewed automatically unless timely notice of termination is received. For any questions or problems concerning a subscription, please contact our Business Manager at (512) 232-1149 or Publications@law.utexas.edu.

BACK ISSUES

William S. Hein & Co., Inc. holds the back stock rights to all previous volumes of the *Texas International Law Journal*. For back issues and previous volumes of the *Journal*, please direct inquiries to:

William S. Hein & Co., Inc.
1285 Main St.
Buffalo, NY 14209
www.wshein.com

THE *FORUM*

The *Texas International Law Journal Forum* is the online companion to our printed volumes. The *Forum* publishes original scholarship on topics relating to recent developments in international law, as well as responses to scholarship printed in the *Texas International Law Journal.*

As with the *Journal*, all submissions are reviewed blindly throughout the year on a rolling basis. For more information regarding the *Forum*, please contact our Managing Editors at tilj@law.utexas.edu or visit www.tilj.org/forum.

ANNUAL SYMPOSIUM

The *Journal* hosts an annual symposium offering in-depth treatment of a topic of international legal concern. The purpose of these symposia is to promote the awareness of important developments in the formation of international law and to forge closer ties among scholars, practitioners, students, and members of the global legal community. We welcome your interest in these events. For more information regarding our annual symposium, please contact our Symposium Coordinator at tilj@law.utexas.edu or visit www.tilj.org/symposium.

MANUSCRIPT SUBMISSIONS AND EDITORIAL POLICIES

In conformity with the standard practice of scholarly legal publications in the United States, the *Texas International Law Journal* holds copyrights to its published works. Neither the Editorial Board nor the University of Texas are in any way responsible for the views expressed by contributors.

The *Journal* welcomes submissions from scholars, practitioners, businesspeople, government officials, and judges on topics relating to recent developments in international law. In addition to articles, the *Journal* also invites authors to submit shorter works, such as comments, book reviews, essays, notes, and bibliographies. All submissions are reviewed blindly throughout the year on a rolling basis.

We accept both hard-copy and electronic submissions. Please send article submissions, accompanied by a curriculum vitae, cover letter, and abstract, to the attention of the Submissions Editor. Manuscripts should conform with *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 18th ed. 2005) and, to the extent feasible, follow *The Chicago Manual of Style* (Univ. of Chicago Press, 15th ed. 2003). Manuscripts should be typewritten and footnoted where necessary.

All submission inquiries and requests for review should be directed to the Submissions Editor at:

Submissions Editor
Texas International Law Journal
The University of Texas School of Law
727 E. Dean Keeton St.
Austin, TX 78705

Tel: (512) 232-1277
Fax: (512) 471-4299
E-Mail: tilj@law.utexas.edu
www.tilj.org

VOLUME 52 STAFF

Iman Ali*	Sean Doyle	Leonel Mata
Caroline Barrow	Madeline Gaffney*	George Miller
Justin Campbell*	Andrew Gille*	Olivia Mora
Carolyn Campion	David Holmes	Jonathon Morace
Ana Cenaj	Irene Kau	Jackson Oliver*
Alicia Chan	Apostolos Kyprios*	Jack Polisini*
Vanessa Chorush	Taylor LeMay	Beth Rozacky
Lorenza Cigarroa*	Leslie Liberman	Judy Schweinfurth
Christiaan Cleary*	Erika López*	Tatyanna Senel
Erin Cusenbary	Julian Martinez	Vickie Wang

* Third-Year Member + LL.M. Member ^ Abroad/Away

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

ADMINISTRATIVE OFFICERS

WARD FARNSWORTH, B.A., J.D.; *Dean, John Jeffers Research Chair in Law.*
JOHN B. BECKWORTH, B.A., J.D.; *Associate Dean for Administration and Strategic Planning, Lecturer.*
ROBERT M. CHESNEY, B.S., J.D.; *Associate Dean for Academic Affairs, Charles I. Professor in Law.*
WILLIAM E. FORBATH, A.B., B.A., Ph.D., J.D.; *Associate Dean for Research, Lloyd M. Bentsen Chair in Law.*
EDEN E. HARRINGTON, J.D.; *Associate Dean for Experiential Education, Clinical Professor, Director of William Wayne Justice Center for Public Interest Law.*
ELIZABETH T. BANGS, A.B., J.D.; *Assistant Dean for Student Affairs.*
KIMBERLY L. BIAR, B.B.A., C.P.A.; *Assistant Dean for Financial Affairs.*
MICHAEL G. HARVEY, B.A., B.S.; *Assistant Dean for Technology.*
REBECCA MELTON, B.A., J.D.; *Assistant Dean for Alumni Relations and Development.*
MONICA K. INGRAM, B.A., J.D.; *Assistant Dean for Admissions and Financial Aid.*
DAVID A. MONTOYA, B.A., J.D.; *Assistant Dean for Career Services.*
GREGORY J. SMITH, B.A., J.D.; *Assistant Dean for Continuing Legal Education.*

FACULTY EMERITI

HANS W. BAADE, A.B., J.D., LL.B., LL.M.; *Hugh Lamar Stone Chair Emeritus in Civil Law.*
RICHARD V. BARNDT, B.S.L., LL.B.; *Professor Emeritus.*
JULIUS G. GETMAN, B.A., LL.B., LL.M.; *Earl E. Sheffield Regents Chair Emeritus.*
WILLIAM W. GIBSON, JR., B.A., LL.B.; *Sylvan Lang Professor Emeritus in Law of Trusts.*
ROBERT W. HAMILTON, A.B., J.D.; *Minerva House Drysdale Regents Chair Emeritus.*
DOUGLAS LAYCOCK, B.A., J.D.; *Alice McKean Young Regents Chair Emeritus.*
J.S. LEBOWITZ, A.B., J.D., LL.M.; *Joseph C. Hutcheson Professor Emeritus.*
BASIL S. MARKESINIS, LL.B., Ph.D., D.C.L., LL.D.; *Jamail Regents Chair Emeritus in Law.*
JOHN T. RATLIFF, JR., B.A., LL.B.; *Ben Gardner Sewell Professor Emeritus in Civil Trial Advocacy.*
JAMES M. TREECE, B.S., J.D., M.A.; *Charles I. Francis Professor Emeritus in Law.*

PROFESSORS

JEFFREY B. ABRAMSON, B.A., J.D., Ph.D.; *Professor of Government and Law.*
DAVID E. ADELMAN, B.A., Ph.D., J.D.; *Harry Reasoner Regents Chair in Law.*
DAVID A. ANDERSON, A.B., J.D.; *Fred and Emily Marshall Wulff Centennial Chair in Law.*
MARILYN ARMOUR, B.A., M.S.W., Ph.D.; *Associate Professor of Social Work.*
MARK L. ASCHER, B.A., M.A., J.D., LL.M.; *Joseph D. Jamail Centennial Chair in Law.*
RONEN AVRAHAM, M.B.A., LL.B., LL.M., S.J.D.; *Thomas Shelton Maxey Professor in Law.*
LYNN A. BAKER, B.A., B.A., J.D.; *Frederick M. Baron Chair in Law.*
BARBARA A. BINTLIFF, M.A., J.D.; *Joseph C. Hutcheson Professor in Law, Director of Tarlton Law Library and the Jamail Center Legal Research.*
LYNN E. BLAIS, A.B., J.D.; *Leroy G. Denman, Jr. Regents Professor in Real Property Law.*
ROBERT G. BONE, B.A., J.D.; *G. Rollie White Teaching Excellence Chair in Law.*
OREN BRACHA, LL.B., S.J.D.; *Howrey LLP and Arnold, White & Durkee Centennial Professor.*
DANIEL M. BRINKS, A.B., J.D., Ph.D.; *Associate Professor, Co-Director of Bernard and Audre Rapaport Center for Human Rights and Justice.*
J. BUDZISZEWSKI, B.A., M.A., Ph.D.; *Professor of Government.*
NORMA V. CANTU, B.A., J.D.; *Professor of Education and Law.*
LOFTUS C. CARSON II, B.S., M. Pub. Affrs., M.B.A., J.D.; *Ronald D. Krist Professor.*
MICHAEL J. CHURGIN, A.G., J.D.; *Raybourne Thompson Centennial Professor.*
JANE M. COHEN, B.A., J.D.; *Edward Clark Centennial Professor.*
FRANK B. CROSS, B.A., J.D.; *Herbert D. Kelleher Centennial Professor of Business Law, Professor of Law.*
WILLIAM H. CUNNINGHAM, B.A., M.B.A., Ph.D.; *Professor of Marketing Administration.*
JENS C. DAMMANN, J.D., LL.M., Dr. Jur., J.S.D.; *William Stamps Farish Professor in Law.*
JOHN DEIGH, B.A., M.A., Ph.D; *Professory of Philosophy and Law.*
MECHELE DICKERSON, B.A., J.D.; *Arthur L. Moller Chair in Bankruptcy Law and Practice.*
GEORGE E. DIX, B.A., J.D.; *George R. Killam, Jr. Chair of Criminal Law.*
JOHN S. DZIENKOWSKI, B.B.A., J.D.; *Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process.*
DAVID J. EATON, B.A., M.Sc., M.A., Ph.D.; *Professor of Public Affairs.*
ZACHARY S. ELKINS, B.A., M.A., Ph.D.; *Associate Professor of Government.*
KAREN L. ENGLE, B.A., J.D.; *Minerva House Drysdale Regents Chair in Law, Founder and Co-Director of Bernard and Audre Rapoport Center for Human Rights and Justice.*
KENNETH FLAMM, A.B., Ph.D.; *Professor of Public Affairs.*
MIRA GANOR, B.A., M.B.A., LL.B., LL.M., J.S.D.; *Professor of Law.*
CHARLES E. GHOLZ, B.S., B.S., Ph.D; *Associate Professor of Public Affairs.*
JOHN M. GOLDEN, A.B., J.D., Ph.D.; *Loomer Family Professor in Law.*
STEVEN GOODE, B.A., J.D.; *W. James Kronzer Chair in Trial and Appellate Advocacy, University Distinguished Teaching Professor.*
LINO A. GRAGLIA, B.A., LL.B.; *A. W. Walker Centennial Chair in Law.*
BENJAMIN G. GREGG, B.A., M.S., Ph.D.; *Associate Professor of Government.*
CHARLES G. GROAT, B.A., M.S., Ph.D.; *Professor of Public Affairs.*
PATRICIA I. HANSEN, A.B., M.P.A., J.D.; *J. Waddy Bullion Professor.*
HENRY T. C. HU, B.S., M.A., J.D.; *Allan Shivers Chair in the Law of Banking and Finance.*
BOBBY R. INMAN, B.A.; *Professor of Public Affairs.*
GARY J. JACOBSON, B.A., M.A., Ph.D.; *Professor of Government and Law.*
DEREK P. JINKS, B.A., M.A., J.D.; *The Marrs McLean Professor in Law.*

STANLEY M. JOHANSON, B.S., LL.B., LL.M.; *James A. Elkins Centennial Chair in Law, University Distinguished Teaching Professor.*
CALVIN H. JOHNSON, B.A. J.D.; *Andrews & Kurth Centennial Professor.*
SUSAN R. KLEIN, B.A., J.D.; *Alice McKean Young Regents Chair in Law.*
JENNIFER E. LAURIN, B.A., J.D.; *Professor of Law.*
SANFORD V. LEVINSON, A.B., Ph.D., J.D.; *W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, Professor of Government.*
ANGELA K. LITTWIN, B.A., J.D.; *Professor of Law.*
VIJAY MAHAJAN, M.S.Ch.E., Ph.D.; *Professor of Marketing Administration.*
INGA MARKOVITS, LL.M.; *"The Friends of Joe Jamail" Regents Chair.*
RICHARD S. MARKOVITS, B.A., LL.B., Ph.D.; *John B. Connally Chair.*
THOMAS O. MCGARITY, B.A., J.D.; *Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law.*
STEVEN A. MOORE, B.A., Ph.D.; *Professor of Architecture.*
LINDA S. MULLENIX, B.A., M.Phil., J.D., Ph.D.; *Morris and Rita Atlas Chair in Advocacy.*
STEVEN P. NICHOLS, B.S.M.E., M.S.M.E., J.D., Ph.D.; *Professor of Engineering.*
ROBERT J. PERONI, B.S.C., J.D., LL.M.; *The Fondren Foundation Centennial Chair for Faculty Excellence.*
H. W. PERRY, JR., B.A., M.A., Ph.D.; *Associate Professor of Government and Law.*
LUCAS A. POWE, JR., B.A., J.D.; *Anne Green Regents Chair in Law, Professor of Government.*
WILLIAM C. POWERS, JR., B.A., J.D.; *Hines H. Baker and Thelma Kelley Baker Chair in Law, University Distinguished Teaching Professor.*
DAVID A. RABBAN, B.A., J.D.; *Dahr Jamail, Randall Hage Jamail and Robert Lee Jamail Regents Chair, University Distinguished Teaching Professor.*
ALAN S. RAU, B.A., LL.B.; *Mark G. and Judy G. Yudof Chair in Law.*
DAVID W. ROBERTSON, B.A., LL.B., LL.M., J.S.D.; *W. Page Keeton Chair in Tort Law, University Distinguished Teaching Professor.*
JOHN A. ROBERTSON, A.B., J.D.; *Vinson & Elkins Chair.*
MARY ROSE, A.B., M.A., Ph.D.; *Associate Professor of Sociology.*
WILLIAM M. SAGE, A.B., M.D., J.D.; *James R. Dougherty Chair for Faculty Excellence.*
LAWRENCE G. SAGER, B.A., LL.B.; *Alice Jane Drysdale Sheffield Regents Chair.*
JOHN J. SAMPSON, B.B.A., LL.B.; *William Benjamin Wynne Professor.*
CHARLES M. SILVER, B.A., M.A., J.D.; *Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure, Professor of Government, Co-Director of Center on Lawyers, Civil Justice and the Media.*
ERNEST E. SMITH, B.A., LL.B.; *Rex G. Baker Centennial Chair in Natural Resources Law.*
TARA A. SMITH, B.A., Ph.D.; *Professor.*
DAVID B. SPENCE, B.A., J.D., M.A., Ph.D.; *Professor of Business, Government and Society, and Law.*
JAMES C. SPINDLER, B.A., M.A., J.D., Ph.D.; *The Sylvan Lang Pforessor of Law, Professor of Business.*
JANE STAPLETON, B.S., Ph.D., LL.B., D.C.L., D. Phil.; *Ernest E. Smith Professor.*
JORDAN M. STEIKER, B.A., J.D.; *Judge Robert M. Parker Endowed Chair in Law, Director of Capital Punishment Center.*
MICHAEL F. STURLEY, B.A., J.D.; *Fannie Coplin Regents Chair.*
JEREMI SURI, A.B., M.A., Ph.D.; *Professor of Public Affairs.*
JEFFREY K. TULIS, B.A., M.A., Ph.D.; *Associate Professor of Government.*
GREGORY J. VINCENT, B.A., J.D., Ed.D.; *Professor, Vice President for Diversity and Community Engagement.*
SRIRAM VISHWANATH, B.S., M.S., Ph.D.; *Associate Professor of Electrical and Computer Engineering.*
WENDY E. WAGNER, B.A., M.E.S., J.D.; *Joe A. Worsham Centennial Professor.*
LOUISE WEINBERG, A.B., LL.M., J.D.; *William B. Bates Chair for the Administration of Justice.*
OLIN G. WELLBORN, A.B., J.D.; *William C. Liedtke, Sr. Professor.*
JAY L. WESTBROOK, B.A., J.D.; *Benno C. Schmidt Chair of Business Law.*
ABRAHAM L. WICKELGREN, A.B., J.D., Ph.D.; *Bernard J. Ward Centennial Professor in Law.*
SEAN H. WILLIAMS, B.A., J.D.; *Professor of Law.*
ZIPPORAH B. WISEMAN, B.A., M.A., LL.B.; *Thos. H. Law Centennial Professor.*
PATRICK WOOLLEY, A.B., J.D.; *Beck, Redden &Secrest Professor in Law.*

ASSISTANT PROFESSORS

JOSEPH R. FISHKIN, B.A., M. Phil., J.D., D. Phil.
CARY C. FRANKLIN, B.A., M.St., D. Phil., J.D.
JAMES W. MCCLELLAND, B.S., Ph.D.
SUSAN C. MORSE, A.B., J.D.
TIMOTHY D. WERNER, B.A., M.A., Ph.D.

SENIOR LECTURERS, WRITING LECTURERS, AND CLINICAL PROFESSORS

ALEXANDRA W. ALBRIGHT, B.A., J.D.; *Senior Lecturer.*
WILLIAM P. ALLISON, B.A., J.D.; *Clinical Professor, Director of Criminal Defense Clinic.*
WILLIAM H. BEARDALL, JR., B.A., J.D.; *Clinical Professor, Transnational Worker Rights Clinic.*
NATALIA V. BLINKOVA, B.A., M.A., J.D.; *Lecturer.*
PHILIP C. BOBBITT, A.B., J.D., Ph.D.; *Distinguished Senior Lecturer.*
HUGH L. BRADY, B.A., J.D.; *Clinical Professor, Director of Legislative Lawyering Clinic.*
KAMELA S. BRIDGES, B.A., B.J., J.D.; *Lecturer.*
JOHN C. BUTLER, B.B.A., Ph.D.; *Clinical Associate Professor.*
MARY R. CROUTER, A.B., J.D.; *Clinical Professor, Assistant Director of William Wayne Justice Center for Public Interest Law.*
MICHELE Y. DEITCH, B.A., M.S., J.D.; *Senior Lecturer.*
TIFFANY J. DOWLING, B.A., J.D.; *Clinical Instructor, Director of Actual Innocence Clinic.*
LORI K. DUKE, B.A., J.D.; *Clinical Professor.*
TINA V. FERNANDEZ, A.B., J.D.; LECTURER.
ELIZABETH FRUMKIN, B.A., M.A., J.D.; *Lecturer.*
ARIEL E. DULITZKY, J.D., LL.M.; *Clinical Professor, Director of Human Rights Clinic.*
ELANA S. EINHORN, B.A., J.D.; *Lecturer.*
LISA R. ESKOW, A.B., J.D.; *Lecturer.*
TINA V. FERNANDEZ, A.B., J.D.; *Clinical Professor, Director of Pro Bono Programs.*

LAUREN FIELDER, B.A., J.D.; *Senior Lecturer, Director of Graduate and International Programs.*
LYNDA E. FROST, B.A., M.Ed., J.D., Ph.D.; *Clinical Associate Professor.*
DENISE L. GILMAN, B.A., J.D.; *Clinical Professor, Co-Director of Immigration Clinic.*
KELLY L. HARAGAN, B.A., J.D.; *Clinical Professor, Director of Environmental Law Clinic.*
BARBARA HINES, B.A., J.D.; *Clinical Professor, Co-Director of Immigration Clinic*
HARRISON KELLER, B.A., M.A., Ph.D.; *Senior Lecturer, Vice Provost for Higher Education Policy [at the University of Texas at Austin].*
ANDREW KULL, B.A., B.A., M.A., J.D.; *Senior Lecturer.*
BRIAN R. LENDECKY, B.B.A., M.P.A.; *Senior Lecturer.*
JEANA A. LUNGWITZ, B.A., J.D.; *Clinical Professor, Director of Domestic Violence Clinic.*
JIM MARCUS, B.A., J.D.; *Clinical Professor.*
FRANCES L. MARTINEZ, B.A., J.D.; *Clinical Professor.*
TRACY W. MCCORMACK, B.A., J.D.; *Senior Lecturer, Director of Advocacy Programs.*
F. SCOTT MCCOWN, B.S., J.D.; *Clinical Professor, Director of Children's Rights Clinic.*
ROBIN B. MEYER, B.A., M.A., J.D.; *Lecturer.*
RANJANA NATARAJAN, B.A., J.D.; *Clinical Professor, Director of Civil Rights Clinic.*
RACHAEL RAWLINS, B.A., M.R.P., J.D.; *Senior Lecturer.*
SEAN J. PETRIE, B.A., J.D.; *Lecturer.*
ELIZA T. PLATTS-MILLS, B.A., J.D.; *Clinical Professor.*
WAYNE SCHIESS, B.A., J.D.; *Senior Lecturer, Director of The David J. Beck Center for Legal Research, Writing and Appellate Advocacy.*
RAOUL D. SCHONEMANN, B.A., J.D., LL.M.; *Clinical Professor.*
PAMELA J. SIGMAN, B.A., J.D.; *Clinical Professor, Director of Juvenile Justice Clinic.*
DAVID S. SOKOLOW, B.A., M.A., J.D., M.B.A.; *Distinguished Senior Lecturer, Director of Student Life.*
LESLIE L. STRAUCH, B.A., J.D.; *Clinical Professor.*
MELINDA E. TAYLOR, B.A., J.D.; *Senior Lecturer, Executive Director of Center for Global Energy, International Arbitration and Environmental Law.*
HEATHER K. WAY, B.A., B.J., J.D.; *Clinical Professor, Director of Entrepreneurship and Community Development Clinic.*
LUCILLE D. WOOD, B.A., J.D.; *Clinical Professor.*
ELIZABETH M. YOUNGDALE, B.A., M.L.I.S., J.D.; *Lecturer.*

ADJUNCT PROFESSORS AND OTHER LECTURERS

ELIZABETH AEBERSOLD, B.A., M.S.
WILLIAM R. ALLENSWORTH, B.A., J.D.
ANDREW W. AUSTIN, B.A., M.Phil., J.D.
MARJORIE I. BACHMAN, B.S., J.D.
CRAIG D. BALL, B.A., J.D.
SHARON C. BAXTER, B.S., J.D.
KARL O. BAYER, B.A., M.S., J.D.
JERRY A. BELL, B.A., J.D.
ALLISON H. BENESCH, B.A., M.S.W., J.D.
CRAIG R. BENNETT, B.S., J.D.
JAMES B. BENNETT, B.B.A., J.D.
MURFF F. BLEDSOE, B.A., J.D.
WILLIAM P. BOWERS, B.B.A., J.D., LL.M.
STACY L. BRAININ, B.A., J.D.
ANTHONY W. BROWN, B.A., J.D.
JAMES E. BROWN, B.S., LL.B., J.D.
TOMMY L. BROYLES, B.A., J.D.
PAUL J. BURKA, B.A., LL.B.
W. AMON BURTON, JR., B.A., M.A., LL.B.
ERIN G. BUSBY, B.A., J.D.
DAVID J. CAMPBELL, B.A., J.D.
AGNES E. CASAS, B.A., J.D.
RUBEN V. CASTANEDA, B.A., J.D.
EDWARD A. CAVAZOS, B.A., J.D.
LINDA BRAY CHANOW, B.A., J.D.
JEFF CIVINS, A.B., M.S., J.D.
ELIZABETH COHEN, B.A., M.S.W., J.D.
KEVIN D. COLLINS, B.A., J.D.
KASIA SOLON CRISTOBAL, B.A., M.S., J.D.
PATRICIA J. CUMMINGS, B.A., J.D.
KEITH B. DAVIS, B.S., J.D.
SCOTT D. DEATHERAGE, B.A., J.D.
DICK DEGUERIN, B.A., LL.B.
ADAM R. DELL, B.A., J.D.
MELONIE M. DEROSE, B.A., J.D.
RICHARD D. DEUTSCH, B.A., B.A., J.D.
STEVEN K. DEWOLF, B.A., J.D., LL.M.
REBECCA H. DIFFEN, B.A., J.D.
ANDREW S. DREIER
CASEY D. DUNCAN, B.A., M.L.I.S., J.D.
PHILIP DURST, B.A., M.A., J.D.
JAY D. ELLWANGER, B.A., J.D.
EDWARD Z. FAIR, B.A., M.S.W., J.D.
ROSS FISCHER, B.A., J.D.
JOHN C. FLEMING, B.A., J.D.
KYLE K. FOX, B.A., J.D.
DAVID C. FREDERICK, B.A., Ph.D., J.D.
GREGORY D. FREED, B.A., J.D.
FRED J. FUCHS, B.A., J.D.
RYAN M. GARCIA, B.G.S., J.D.
GRETTA G. GARDNER, B.A., J.D.
BRYAN A. GARNER, B.A., J.D.
MICHAEL S. GOLDBERG, B.A., J.D.
MICHAEL J. GOLDEN, A.B., J.D.
DAVID M. GONZALEZ, B.A., J.D.
JOHN F. GREENMAN
DAVID HALPERN, B.A., J.D.
ELIZABETH HALUSKA-RAUSCH, B.A., M.A., M.S., Ph.D.
BARBARA HANNON, B.A., M.S., J.D., Ph.D.
CLINT A. HARBOUR, B.A., B.A., J.D., LL.M
ROBERT L. HARGETT, B.B.A., J.D.
MARY L. HARRELL, B.S., J.D.
CHRISTOPHER S. HARRISON, Ph.D., J.D.
WILLIAM M. HART, B.A., J.D.
JOHN R. HAYS, JR., B.A., J.D.
SUSAN J. HIGHTOWER, B.A., M.A., J.D.
KENNETH E. HOUP, JR., B.A., J.D.
RANDY R. HOWRY, B.J., J.D.
MONTY G. HUMBLE, B.A., J.D.
JENNIFER D. JASPER, B.S., M.A., J.D.
DIRK M. JORDAN, B.A., J.D.
JEFFREY R. JURY, B.A., J.D.
PATRICK O. KEEL, B.A., J.D.
DOUGLAS L. KEENE, B.A. M.Ed., Ph.D.
CHARI L. KELLY, B.A., J.D.
JEAN A. KELLY, B.A., J.D.
ROBERT N. KEPPLE, B.A., J.D.
PAUL S. KIMBOL, B.A., J.D.
MARK L. KINCAID, B.B.A., J.D.
ALICE L. KING, B.A., J.D.
MICHAEL R. KRAWZSENEK, B.S., J.D.
AMI L. LARSON, B.A., J.D.
LARRY LAUDAN, B.A., M.A., Ph.D.
JODI R. LAZAR, B.A., J.D.
KEVIN L. LEAHY, B.A., J.D.
DAVID P. LEIN, B.A., M.P.A., J.D.
ANDRES J. LINETZKY, B.A., LL.M.
JAMES-LLOYD LOFTIS, B.B.A., J.D.
MANUEL LOPEZ, A.B., J.D.
MARIO A. LOYOLA, B.A., J.D.
ANDREW F. MACRAE, B.J., J.D.

ANDREA M. MARSH, B.A., J.D.
HARRY S. MARTIN, A.B., M.L.S., J.D.
LORI R. MASON, B.A., J.D.
PHILIP K. MAXWELL, B.A., J.D.
PETER C. MCCABE, B.A., J.D.
ANN M. MCGEEHAN, B.A., J.D.
BARRY F. MCNEIL, B.A., J.D.
MARGARET M. MENICUCCI, B.A., J.D.
JO ANN MERICA, B.A., J.D.
RANELLE M. MERONEY, B.A., J.D.
ELIZABETH N. MILLER, B.A., J.D.
JONATHAN F. MITCHELL, B.A., J.D.
DARYL L. MOORE, B.A., M.L.A., J.D.
EDWIN G. MORRIS, B.S., J.D.
SARAH J. MUNSON, B.A., J.D.
HENRY C. MYERS, B.S., J.D.
JOHN A. NEAL, B.A., J.D.
MANUEL H. NEWBURGER, B.A., J.D.
HOWARD D. NIRKEN, B.A., M.P.AFF., J.D.
CHRISTINE S. NISHIMURA, B.A., J.D.
DAVID G. NIX, B.S.E., LL.M., J.D.
JOSEPH W. NOEL, B.S.E., J.D., M.S.L.S.
JANE A. O'CONNELL, B.A., M.S., J.D.
PATRICK L. O'DANIEL, B.B.A., J.D.
M. ARIEL PAYAN, B.A., J.D.
MARK L. PERLMUTTER, B.S., J.D.
JONATHAN PRATTER, B.A., M.S.L.I.S., J.D.
VELVA L. PRICE, B.A., J.D.
MARGARET K. REIN, B.A., J.D.
CLARK W. RICHARDS, B.A., LL.M., J.D.
BRIAN C. RIDER, B.A., J.D.
ROBERT M. ROACH, JR., B.A., J.D.
BRIAN J. ROARK, B.A., J.D.
BETTY E. RODRIGUEZ, B.S.W., J.D.
JAMES D. ROWE, B.A., J.D.
MATTHEW C. RYAN, B.A., J.D.
KAREN R. SAGE, B.A., J.D.
MARK A. SANTOS, B.A., J.D.
JAMES J. SCHESKE, B.A., J.D.
MICHAEL J. SCHLESS, B.A., J.D.
SUSAN SCHULTZ, B.S., J.D.
AMY J. SCHUMACHER, B.A., J.D.
SUZANNE SCHWARTZ, B.J., J.D.
RICHARD J. SEGURA, JR., B.A., J.D.
STACEY ROGERS SHARP, B.S., J.D.
DAVID A. SHEPPARD, B.A., J.D.
HON. ERIC M. SHEPPERD, B.A., J.D.
A. HAAG SHERMAN, B.B.A., J.D., C.P.A.
RONALD J. SIEVERT, B.A., J.D.
AMBROSIO A. SILVA, B.S., J.D.
STUART R. SINGER, A.B., J.D.
HON. BEA A. SMITH, B.A., M.A., J.D.
LYDIA N. SOLIZ, B.B.A., J.D.
STEPHEN M. SONNENBERG, A.B., M.D.
JAMES M. SPELLINGS, JR., B.S., J.D.
KACIE L. STARR, B.A., J.D.
MATTHEW R. STEINKE, B.A., M.L.I.S., J.D.
MOLLIE E. STEMPER, B.A., J.D.
WILLIAM F. STUTTS, B.A., J.D.
MATTHEW J. SULLIVAN, B.S., J.D.
GRETCHEN S. SWEEN, B.A., M.A., Ph.D., J.D.
JEREMY S. SYLESTINE, B.A., J.D.
BRADLEY P. TEMPLE, B.A., J.D.
SHERINE E. THOMAS, B.A., J.D.
TERRY O. TOTTENHAM, B.S., LL.M., J.D.
CARLOS R. TREVINO
TRISHA TRIGILIO, B.A., J.D.
MICHAEL S. TRUESDALE, B.A., M.A., J.D.
TIMOTHY J. TYLER, B.A., J.D.
SUSAN S. VANCE, B.B.A., J.D.
LANA K. VARNEY, B.A., J.D.
DEBORAH M. WAGNER, B.A., M.Arch., J.D.
CHRISTOPHER M. WEIMER
WARE V. WENDELL, A.B., J.D.
RODERICK E. WETSEL, B.A., J.D.
THEA WHALEN, B.A., J.D.
DARA WHITEHEAD, B.A., M.S.
RANDALL B. WILHITE, B.B.A., J.D.
TIMOTHY A. WILKINS, B.A., M.P.P., J.D.
DAVID G. WILLE, B.S.E.E., M.S.E.E., J.D.
ANDREW M. WILLIAMS, B.A., J.D.
CHRISTINA T. WISDOM, B.A., J.D.
TRAVIS M. WOHLERS
STEPHEN M. WOLFSON, B.A., M.S., J.D.
DENNEY L. WRIGHT, B.B.A., J.D., LL.M.
DANIEL J. YOUNG, B.A., J.D.
EVAN A. YOUNG, A.B., B.A., J.D.
TREVOR YOUNG, B.A., B.A., M.A., J.D., LL.M.

VISITING PROFESSORS

OWEN L. ANDERSON, B.A., J.D.
ANTONIO H. BENJAMIN, LL.B., LL.M.
VICTOR FERRERES, J.D., LL.M., J.S.D.
ALON KLEMENT
GRAHAM B. STRONG, B.A., J.D., LL.M.

Multilateral Investment Treaties in Africa and the Antagonistic Narratives of Bilateralism and Regionalism

ODYSSEAS G. REPOUSIS*

ABSTRACT

In the aftermath of mounting concerns over the legitimacy of international investment law and investor-state arbitration in the middle and late 2000s, African countries sought to project an alternative image of international investment law through hard law instruments. This brought about three multilateral investment treaties: The Protocol on Finance and Investment of the Southern African Development Community (SADC), the Investment Agreement of the Common Market for Eastern and Southern Africa (COMESA), and the Supplementary Act on Investment of the Economic Community of West African States (ECOWAS). These treaties operate on both the multilateral and intra-African levels but are distinct from other mainstream investment treaties inside and outside of Africa in their inclusion of anti-bribery and labor standards as well as other developmental provisions. Furthermore, the SADC Protocol requires the exhaustion of local remedies prior to resorting to investor-state arbitration, and the Supplementary Act of the ECOWAS abandons investor-state dispute settlement mechanisms altogether. However, these multilateral investment law instruments are not the only type of investment treaty that exists among African countries. In fact, African countries have long made use of bilateral investment treaties (BITs), not only with Western, ex-colonial powers (extra-Africa BITs), but also with other African countries (intra-Africa BITs). In addition to these BITs, there have been two prior multilateral investment treaties among African states, modeled after extra-African BITs. Lastly, there have been a series of multilateral investment treaties between Arab and Muslim states to which some African countries are a party.

This Article seeks to answer a twofold question. First, how different are the latest African multilateral investment treaties from mainstream investment treaties, and how, if at all, do they manage to establish a new developmental model that is better suited to the African context? And second, if the most recent African multilateral investment treaties truly capture a drastic shift towards Africa-centric investment

* LLM (Harvard), PhD candidate (University of Hong Kong). Associate, Quinn Emanuel Urquhart and Sullivan, LLP. London, United Kingdom. Email: odysseasrepousis@quinnemanuel.com. The author thanks Mark Wu for his support and helpful comments.

models, how is their operation affected by the parallel existence of both intra- and extra-African BITs?

TABLE OF CONTENTS

INTRODUCTION

International investment law is now traversing one of its most controversial and ambivalent times. While various moves have been made toward the modernization of international investment law and the "transparencization" of investor-state arbitration proceedings,[1] this field of law is increasingly marked by regional, and in many regards antithetical, trends.[2] The latest of such trends is the stance of the European Union (EU) to push for permanent investor-state courts in its free trade agreements[3] while eliminating intra-EU investment treaties.[4] This development is significant when viewed through the prism of mega-regionalism, until recently advanced by prominent endeavors such as the Trans-Pacific Partnership

1. *See, e.g.*, Lise Johnson, *The Transparency Rules and Transparency Convention: A Good Start and Model for Broader Reform in Investor-State Arbitration*, COLUM. FDI PERSP., July 21, 2014, at 1 (describing the UNCITRAL rules on transparency in treaty-based investor-state arbitration).

2. Vivienne Bath, *ASEAN: The Liberalization of Investment through Regional Agreements*, *in* REGIONALISM IN INTERNATIONAL INVESTMENT LAW 182, 206–13 (Leon E. Trakman & Nicola W. Ranieri eds., 2013).

3. One of the goals of the European Union (EU) is to establish a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Comprehensive Economic and Trade Agreement (CETA) arts. 8.27–8.29, Oct. 30, 2016, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf [hereinafter EU-Canada CETA].

4. European Commission Press Release IP/15/5198, Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties (June 18, 2015).

(TPP), the Transatlantic Trade and Investment Partnership (TTIP), and the EU-Canada Comprehensive Economic and Trade Agreement (CETA). Aside from these mega-regional endeavors, there exists a series of other multilateral investment treaty clusters whose emergence and potential impact has not yet been fully contemplated.[5] In this sense, Africa is a prominent area of study, and of particular interest are the multilateral investment treaties concluded under the auspices of African Regional Economic Communities (RECs).[6] However, a study of multilateral investment treaties in Africa and a deeper understanding of their perceived goals and purposes require an examination of the BIT network that also exists on the continent. In turn, understanding the driving forces behind BITs in Africa and the role of international investment law in the African context presently necessitates a historical step back to the 1960s and 1970s.

In the wake of decolonization, developing countries sought to reshape the law on the protection of alien property abroad by advocating before the United Nations General Assembly (UNGA) for a New International Economic Order (NIEO).[7] In 1962, a compromise with ex-colonial powers gave birth to Resolution 1803 on the Permanent Sovereignty over Natural Resources.[8] However, it was not long before newly emerging states intensified their efforts and passed Resolution 3281 in 1974.[9] Resolution 3281 aimed at superseding the previous compromise of 1962, which had led to the promulgation of Resolution 1803.[10] Whereas Resolution 1803 recognized that states had the right to expropriate alien property "based on grounds or reasons of public utility, security or the national interest" and upon payment of "appropriate compensation" in accordance with international law and with the possibility of subjecting such disputes to international arbitration,[11] Resolution 3281 did not limit expropriation to these grounds and made no reference to international law.[12] On the contrary, any controversy with respect to the appropriate compensation would be "settled under the domestic law of the nationalizing State and by its tribunals."[13] Despite the efforts of emerging states to reshape the law on the protection of alien property abroad, Resolution 3281—and the NIEO movement—was doomed to fade into oblivion due to the contradictory and antithetical actions taken by emerging states

5. *See generally* THE REGIONALIZATION OF INTERNATIONAL INVESTMENT TREATY ARRANGEMENTS (N. Jansen Calamita & Mavluda Sattorova eds., 2015).

6. Africa is subdivided into numerous Regional Economic Communities (RECs) that often have overlapping memberships. These RECs form the African Economic Community (AEC), the umbrella economic organization of the African Union. *See* Richard Frimpong Oppong, *Redefining the Relations Between the African Union and Regional Economic Communities in Africa*, *in* 9 MONITORING REGIONAL INTEGRATION IN SOUTHERN AFRICA 5, 9 (Anton Bösl et al. eds., 2009), http://www.kas.de/wf/doc/kas_20303-544-2-30.pdf?100812164613 (discussing the intention to merge RECs into AEC).

7. JESWALD SALACUSE, THE LAW OF INVESTMENT TREATIES 68–74 (2010); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 30–33 (2009).

8. G.A. Res. 1803 (XVII), Permanent Sovereignty over Natural Resources (Dec. 14, 1962) [hereinafter UNGA Res 1803].

9. G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States (Dec. 12, 1974) [hereinafter UNGA Res 3281].

10. *Compare* UNGA Res 1803, *supra* note 8, para. 4, *with* UNGA Res. 3281, *supra* note 9, arts. 2(2)(b)–(c); ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 491–93 (2008).

11. UNGA Res 1803, *supra* note 8, para. 4.

12. *See* UNGA Res 3281, *supra* note 9, art. 2 (providing no limitations on the expropriation of foreign property, with the caveats that appropriate compensation must be paid and that disputes be settled under the "domestic law of the nationalizing state," unless otherwise agreed upon).

13. *Id.* art. 2(2)(c).

in the international investment law arena.[14] Ironically, at the same time, these emerging countries were advocating before the UNGA for a NIEO, they were also entering into BITs that conflicted with the NIEO movement. For example, around the same period Resolution 3281 was passed, African countries entered into a series of BITs with ex-colonial powers.[15]

This paradox should not be overlooked. These BITs contained standards in conflict with the NIEO movement, such as investor-state arbitration and the obligation to pay prompt, adequate, and effective compensation for expropriation in accordance with international law.[16] Even more paradoxical is the fact that in the 1980s and 1990s, African countries began entering into intra-African BITs while also expanding the use of extra-African BITs.[17] These intra-African BITs of the 1980s and 1990s were modeled after their extra-African counterparts; they were usually "Western-style" treaties, often direct replicas of BITs with ex-colonial powers from the 1970s onwards. To make things even more troubling, the same model was also replicated on the multilateral level in the Arab Maghreb Union (AMU) Investment Agreement, and again in the Economic Community of West African States (ECOWAS) Energy Protocol, which replicated the text of the Energy Charter Treaty (ECT), a more advanced multilateral investment treaty from 1994.[18]

The "Western" model refers to the predominant model of investment treaties as they arose in the 1960s.[19] Since that time, BITs have undergone many changes, with some of the most advanced versions being the United States and Canadian models,[20] the EU's emerging model,[21] and China's third-generation model.[22] However, the majority of intra-African BITs were concluded in the 1980s and 1990s and thus do not capture the more recent developments.[23] The same does not hold entirely true for

14. *See* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 408–10 (Pieter H. F. Bekker et al. eds., 2010) (explaining that because investors had no effective means of enforcing their foreign claims and obligations, investors were concerned for the safety of their investments and scrambled for alternative means of enforcement).

15. *See* Victor Mosoti, *Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?*, 26 NW. J. INT'L L. & BUS. 95, 111–12 (2005) (discussing developed countries' resistance to NIEO).

16. *See* Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT'L L. 131, 141 (2013) (highlighting the emphasis on fair and quick compensation for expropriation).

17. *Id.* at 133; Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, *in* 269 RECUEIL DES COURS 251, 263 (1997).

18. Arab Maghreb Union Investment Agreement, July 23, 1990, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2405 [hereinafter AMU Investment Agreement]; ECOWAS Energy Protocol, Jan. 31, 2003, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5477 [hereinafter ECOWAS Energy Protocol].

19. The first BIT was concluded between Germany and Pakistan in 1959. JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 305 (Frank Berman ed., 2015).

20. 2012 U.S. Model Bilateral Investment Treaty: Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [hereinafter U.S. Model BIT (2012)]; Agreement between Canada and [____] for the Promotion and Protection of Investment, 2004 Model BIT, http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf.

21. EU-Canada CETA, *supra* note 3; Mark A. Clodfelter, *The Future Direction of Investment Agreements in the European Union*, 12 SANTA CLARA J. INT'L L. 159, 169–71 (2013).

22. Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 76 (2007).

23. *See* U.N. ECON. COMM'N. FOR AFR., INVESTMENT POLICIES AND BILATERAL INVESTMENT TREATIES IN AFRICA: IMPLICATIONS FOR REGIONAL INTEGRATION 20–22 (2016) (stating that the first

extra-African BITs. While the majority of extra-African BITs were concluded between the 1970s and 1990s, Canada began a new series of extra-African BITs in 2014. These BITs contain standards integrating the latest developments in international investment law-making and are distinct from those BITs from the previous decades.[24] In 2004, the United States and Morocco entered into a free trade agreement (FTA) which contains an investment chapter and is also distinct from the older extra-African investment treaties.[25] Though these modern extra-African investment treaties are in the minority, they do reflect a distinct investment treaty model.[26]

In the mid-2000s, African countries decided to take action and, under the aegis of RECs, started to use multilateral investment treaties to project an alternative view of international investment law.[27] This new wave echoed the legacy of the NIEO movement and has led to three new multilateral investment treaties in Africa. These treaties reflect a break from previously used models of international investment lawmaking in both intra- and extra-African BITs. The new model treaties are the Protocol on Finance and Investment of the Southern African Development Community (SADC), the Investment Agreement of the Common Market for Eastern and Southern Africa (COMESA), and the Supplementary Act on Investment of the ECOWAS.[28] These treaties capture a regional trend in Africa that is very interesting considering that they were concluded between 2006 and 2008 and therefore predate the current trends occurring on the mega-regional scale.[29]

These three multilateral investment treaties seek to project an alternative, regional take on the predominant investment treaty models. For instance, the SADC Protocol requires the exhaustion of local remedies prior to resorting to investor-state arbitration and includes anti-bribery and labor standards not found in the old models

intra-African BIT was "in 1982 by Egypt and Somalia" and that this practice continued through the 1990s).

24. *Compare* EU-Canada CETA, *supra* note 3, *with* Treaty Between the Government of Canada and the Republic of Panama for the Promotion and Protection of Investment, Can.-Pan., Sept. 12, 1996, CTS 1998 No. 35 (Can.) [hereinafter Canada-Panama BIT].

25. *See generally* The United States-Morocco Free Trade Agreement, Morocco-U.S., June 15, 2004, KAV 7206 [hereinafter US-Morocco FTA].

26. *See* Kathryn Gordon & Joachim Pohl, *Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World* 29–31 (OECD/Working Papers on Int'l Inv. 2015/02) (discussing a rare tax or prudential feature included in recent treaties concluded by Canada, Columbia, the United States, and Peru).

27. *See, e.g.*, *id.* at 7 (describing changes to South African investment treaty law).

28. Protocol on Finance and Investment annex 1, Aug. 18, 2006, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2730 [hereinafter SADC Protocol]; Investment Agreement for the COMESA Common Investment Area, May 23, 2007, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092 [hereinafter COMESA Investment Agreement]; Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, Dec. 19, 2008, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3266 [hereinafter ECOWAS Supplementary Act on Investment].

29. This Article draws a distinction between the notion of regionalism and that of multilateralism. In particular, three main conceptions can be employed when defining regionalism in international investment law: "(1) regionalism and different regions in international investment law, (2) regionalism through the perspective of non-regional specific analysis, and (3) regionalism as an autonomous analytical perspective." Michail Risvas, *Book Review*, 15 J. WORLD INV. & TRADE 357, 357 (2014) (reviewing REGIONALISM IN INTERNATIONAL INVESTMENT LAW (Leon E. Trakman & Nicola W. Ranieri eds., 2013)). In light of these conceptions, the investment treaties concluded by African RECs could arguably be classified as regional by reference to their territorial scope and intra-African membership. Regardless, this Article utilizes regionalism as an autonomous analytical perspective that describes the endeavor of African countries to project an alternative stance towards international investment law. In that sense, regionalism should not be confused with multilateralism, which for the purposes of this Article, merely refers to the conclusion of multilateral investment treaties between three or more contacting parties.

of investment treaties.[30] But at the same time, African regionalism as it is expressed in these three multilateral investment treaties creates various questions about future mega-regional ventures in Africa, such as those negotiated by the EU and the United States with COMESA, the East African Community (EAC), ECOWAS, and SADC,[31] not to mention the launching of the COMESA-EAC-SADC free trade area.[32] Building on African regionalism, the SADC Secretariat also published a Model BIT in 2012 (SADC 2012 Model BIT),[33] which is expected to influence future intra-African investment lawmaking. Lastly, on March 26, 2016, the United Nations Economic Commission for Africa adopted the Draft Pan-African Investment Code (PAIC), which is a non-binding instrument that attempts to either become a multilateral investment treaty (in the event African states sign and ratify it under the form of a treaty) or influence intra-African investment frameworks more generally.[34] The PAIC mirrors various provisions found in the COMESA Investment Agreement, the SADC Protocol on Finance and Investment, and the SADC Model BIT, as well as the ECOWAS Additional Act on Investment.[35] Interestingly, the PAIC provides:

> 1. This Code does not affect rights and obligations of Member States deriving from any existing investment agreement.
>
> 2. Notwithstanding [the above], Member States may agree that this Code replaces the intra-African bilateral investment treaties (BITs) or investment chapters in intra-African trade agreements after a period of time determined by the Member States or after the termination period as set in the existing BITs and investment chapters in the trade agreements.
>
> 3. Member States and Regional Economic Communites (RECs) shall take into account as far as possible the provisions of this Code when entering into any new agreement with a third country in order to avoid any conflict between its present or future obligations under this Code and its obligations in the other agreement.
>
> 4. Member States may agree that in the case of a conflict between this Code and any intra-African BIT, investment chapter in any intra-African

30. SADC Protocol, *supra* note 28, annex 1, arts. 15, 28.

31. *See, e.g.*, Trade and Investment Framework Agreement, East African Community-U.S., July 16, 2008, T.I.A.S. No. 08-716.1 (discussing investment relations between the East African Community and the United States).

32. Sharm El Sheikh Declaration Launching the COMESA-EAC-SADC Tripartite Free Trade Area, June 10, 2015, http://www.tralac.org/images/Resources/Tripartite_FTA/Sharm_El_Sheikh_Declaration_Launching_COMESA-EAC-SADC_Tripartite_FTA_June_2015.pdf.

33. SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY (2012), http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf [hereinafter SADC 2012 Model BIT].

34. U.N. Econ. Comm'n for Africa, *Draft Pan-African Investment Code*, U.N. Doc. E/ECA/COE/35/18 (Mar. 26, 2016) [hereinafter *PAIC*]. Makane Moïses Mbengue & Stefanie Schacherer, *The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime*, 18 J. WORLD INV. & TRADE L. 414, 423 (2017).

35. *PAIC*, art. 42.

trade agreement, or regional investment arrangements, this Code shall take precedence.[36]

Finally, various African countries are also parties to a series of multilateral investment treaties among Arab and Muslim states.[37] These treaties fall into a distinct category of Arab and Muslim regionalism which is nevertheless important when considering their wide application in Africa.

In summary, an examination of multilateral investment treaties in Africa presupposes an understanding of the various conflicting and antithetical investment law instruments that apply to this continent. On the bilateral level, extra-African BITs concluded in the 1970s and thereafter are similar in many regards to intra-African BITs concluded in the 1980s and 1990s, but are distinct from the most recent extra-African BITs. Furthermore, the SADC Model BIT is distinct from intra-African BITs currently in effect. Similarly, Arab and Muslim multilateral investment treaties are distinct from the Agreement on Investment of the AMU and the Energy Protocol of the ECOWAS. The latter two treaties are also fundamentally different from the three multilateral investment treaties concluded between 2006 and 2008. In turn, the latter three treaties are distinct from intra- and extra-African BITs as well as from other multilateral investment treaties applicable between African countries.

This Article will focus mainly on African regionalism as expressed by the multilateral investment treaties concluded by RECs between 2006 and 2008. Within these confines the research question that arises is twofold. First, how different are the latest African multilateral investment treaties from the predominant models of investment treaties, and how, if at all, do they manage to establish a new developmental model more suitable to the African context? Second, if the most recent African multilateral investment treaties truly reflect a drastic shift towards Africa-centric investment models, how is their operation affected by the parallel existence of intra-African BITs with lower standards?

Setting out these research questions, this Article examines the relationship between African multilateral investment treaties and intra-African BITs. While it appears that African countries are willing to project a regional stance toward international investment law, they are at the same time hesitant to directly terminate older BITs. Thus, they fail to project a coherent and uniform position. For example, while the SADC Protocol on Finance and Investment is exceedingly different from intra-SADC BITs, SADC states have not sought to expressly regulate the relationship between the former treaty and the latter BITs. This Article discusses the parallelism existing between African investment treaties and explores the possibility of settling the shortcomings of parallelism through treaty interpretation.

Additionally, this Article examines whether the perceived goals of African countries could also be addressed by the transplantation of the latest models used by such actors as the United States, Canada, or the EU. This calls for a deeper

36. *Id.* art. 3.

37. Unified Agreement for the Investment of Arab Capital in the Arab States (signed on Nov. 26, 1980), U.N. Conference on Trade and Development, *International Investment Instruments: A Compendium, Volume II: Regional Instruments*, 211, UNCTAD/DTCI/30(Vol.II) (May 31 1996), http://unctad.org/en/Docs/dtci30vol2_en.pdf [hereinafter Unified Agreement for the Investment of Arab Capital] (including as member states both African countries, namely, Sudan, Somalia, Libya, Egypt, and Mauritania, and non-African countries); General Secretariat of the Organisation of the Islamic Conference, General Agreement for Economic, Technical, and Commercial Cooperation Among Member States of the Islamic Conference, ICFM/8-77/ICESC-9 (entered into force Apr. 1981).

examination and appraisal of the standards advanced on the African regional level vis-à-vis the wider transformation of international investment law.

This Article is divided into four parts and a conclusion. Part I focuses on bilateralism in Africa and lays out the competing bilateral investment models that exist in Africa. Part II focuses on multilateral investment treaties in Africa and gives particular emphasis to those concluded from 2006 onwards by SADC, COMESA and ECOWAS states. Part III then assesses the latter treaties side by side with the SADC Model BIT and examines whether these instruments encapsulate a coherent regional trend that is more suitable for African states than the predominant Western models. Lastly, Part IV builds on the previous Part and shows that even if one were to accept that the latest trends in Africa signify a move toward the resurgence of African regionalism, this trend is seriously affected, if not impeded, by the coexistence of intra-African bilateral and multilateral investment treaties. Finally, the conclusion contains some remarks on the future transformation of international investment law on the mega-regional scale and the role that African regionalism can play in this context.

Before delving deeper into the substance of the Article, the following observations underscore the novelty of this Article's content and analysis. This Article is the first to examine the totality of multilateral investment treaties in Africa through the prism of the multilateral-bilateral relationship and through the perspective of investment treaty models, African regionalism, and parallelism. African multilateral investment treaties have generally not been examined in as much depth as other multilateral treaties, though some scholarship on this subject does exist.[38] This Article will be novel insofar as it will present in a concise manner the various levels of investment treaties that exist in Africa and the various models they encapsulate. Most importantly, this Article will map the future of African investment treaty practice and will provide the framework for alleviating concerns arising in the bilateral/multilateral and intra/extra-African contexts.

I. BILATERALISM IN AFRICA AND ITS CHARACTERISTICS

A. *An Overview of BIT Conclusion in Africa*

As alluded to in the introduction of this Article, the BIT era has marked post-colonial Africa with various conflicting investment law instruments. In a way, it could be argued that the historical "chains" of colonialism found new form in the conclusion

38. *See generally* Peter Muchlinski, *The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement, in* ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 131 (Chin Leng Lim ed., 2016) (covering the COMESA Investment Agreement but not discussing African multilateral investment treaties as a whole); Ibironke T. Odumosu-Ayanu, *South-South Investment Treaties, Transnational Capital and African Peoples*, 21 AFR. J. INT'L & COMP. L. 172 (2013) (discussing the ECOWAS Energy Protocol, the COMESA Investment Agreement, and the SADC Protocol on Finance and Investment, and entering the discussion of South-South investment treaty norms and standards); Uche Ewelukwa Ofodile, *Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?*, 1 TRANSNAT'L DISP. MGMT. (2014) (discussing the COMESA Investment Agreement and the SADC Protocol on Finance and Investment but focusing on the dispute settlement design and particularly the inclusion of investor-state arbitration in African multilateral investment treaties); Dirk te Velde & Themba Munalula, *Regional Integration and Foreign Direct Investment in COMESA, in* THE REGIONALIZATION OF INTERNATIONAL INVESTMENT TREATY ARRANGEMENTS 147 (N. Jansen Calamita & Mavluda Sattorova eds., 2015) (focusing solely on the COMESA Investment Agreement).

of extra-African BITs.[39] In time, these treaties along with subsequent intra-African BITs corroded the efforts of African countries to restate the law on the protection of alien property abroad before the UNGA.[40] To date, African countries have concluded nearly 1000 BITs, around 20 percent of which are intra-African.[41] The extra-African BITs have been concluded with ex-colonial powers[42] and contain all the major substantive rights usually encountered in BITs, such as the fair and equitable treatment (FET) standard,[43] the full protection and security (FPS) standard,[44] the national treatment (NT)[45] and most-favored nation treatment (MFN) standard,[46] provisions against uncompensated expropriation,[47] and provisions for the free transfer of capital.[48] The majority of extra-African BITs also provide for investor-state arbitration, with ICSID being available as an option given that a vast number of African states have ratified the Washington 1965 Convention.[49] Lastly, other than the U.S. investment treaties that contain security exceptions, African investment treaties with developed and ex-colonial powers rarely include any exceptions at all.[50] In a nutshell, extra-African BITs mainly represent examples of older BITs that capture the various Model BITs of European countries and the US Model BIT of 1984.[51] These

39. For decolonization discussions, see generally MATTHEW CRAVEN, THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES (2007); ROBERT J.C. YOUNG, POSTCOLONIALISM: A VERY SHORT INTRODUCTION (2003).

40. *See generally* U.N. Econ. & Sec. Council, Investment Agreements Landscape in Africa, U.N. Doc. E/ECA/CRCI/9/5 (Oct. 21, 2015).

41. U.N. ECON. COMM'N AFR., INVESTMENT POLICIES AND BILATERAL INVESTMENT TREATIES IN AFRICA: IMPLICATIONS FOR REGIONAL INTEGRATION 16 (2016).

42. *E.g.*, Accord Entre l'Union Économique Belgo-Luxembourgeoise et la République Algérienne Démocratique Populaire Concernant l'Encouragement et la Protection Réciproques des Investissements, Apr. 24, 1991, 2221 U.N.T.S. 409 (entered into force Oct. 17, 2002); Accord Entre la République du Benin et l'Union Économique Belgo-Luxembourgeoise Concernant l'Encouragement et la Protection Réciproques des Investissements, May 18, 2001, 2477 U.N.T.S. 107 (entered into force Aug. 30, 2007).

43. Katia Yannaca-Small, *The Fair and Equitable Treatment Standard*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 385, 385–400 (Katia Yannaca-Small ed., 2010).

44. *See generally* Giuditta Cordero Moss, *Full Protection and Security*, *in* STANDARDS OF INVESTMENT PROTECTION (August Reinisch ed., 2008).

45. *See generally* Andrea K. Bjorklund, *National Treatment*, *in* STANDARDS OF INVESTMENT PROTECTION (August Reinisch ed., 2008); Andrea K. Bjorklund, *National Treatment*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 411, 411–18 (Katia Yannaca-Small ed., 2010).

46. Andreas R. Ziegler, *Most-Favoured-Nation (MFN) Treatment*, *in* STANDARDS OF INVESTMENT PROTECTION 59, 60–64 (August Reinisch ed., 2008).

47. *See, e.g.*, Luke Eric Peterson, *South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights*, 26 DIALOGUE ON GLOBALIZATION 1, 22 (2006) ("As a rule, South Africa's investment treaties warrant against uncompensated expropriation.").

48. For standards of protection, see generally SALACUSE, *supra* note 19.

49. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention]. Forty-eight African states have signed the Convention while forty-six of them have ratified it. INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, 2015 ANNUAL REPORT 9–13 (2015).

50. *But see* Wolfgang Alschner, *Diffusion of Public Policy Exceptions in Investment Treaties—How Africa Turned from Innovator to Imitator*, MAPPING BITS BLOG (June 29, 2016), http://mappinginvestmenttreaties.com/blog/2016/06/african-innovators/ (discussing how some African countries routinely include public policy exceptions in their treaties); Agreement Between the Belgian-Luxembourg Economic Union and the Republic of Mauritius on the Reciprocal Promotion and Protection of Investments, arts. 5 & 6, Nov. 30, 2005, http://investmentpolicyhub.unctad.org/Download/TreatyFile/384 (entered into force Jan. 16, 2010) (addressing some environmental issues and some issues related to labor).

51. *See generally* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (Chester Brown ed.,

models are further discussed below, but suffice it to say that intra-African BITs almost indistinctly mimic extra-African BITs.[52] From a historical perspective, it would be expected that African countries, being major proponents of the NIEO movement, would have sought to advance a distinct investment treaty model;[53] however, even the study undertaken by the Asia-African Legal Consultative Committee in 1984 produced models that simply replicated the same provisions found in extra-African BITs.[54] In fact, the BITs between African states from the 1980s onward have largely replicated the provisions found in European Model BITs and to a lesser extent have replicated the provisions found in the U.S. Model BITs.[55]

Still, there seems to be a drawback from the actual adoption of the Western-backed paradigm in intra-Africa relations. While it is true that intra-African BITs mimic extra-African BITs, African countries have generally abstained from ratifying intra-African BITs.[56] In fact, while two-thirds of extra-African BITs have entered into force, the same holds true for less than a fifth of intra-Africa BITs.[57] The first intra-African BIT was signed in 1982 between Egypt and Somalia.[58] Egypt has signed by

---

2013).

52. *See* Alschner, *supra* note 50 ("A review of recent African BITs suggests that most of its public policy exceptions are imported.").

53. *See* Nils Gilman, *The New International Economic Order: A Reintroduction*, 6 HUMAN. J. 1, 5 (2015), http://www.humanityjournal.org/wp-content/uploads/2015/03/HUM-6.1-final-text-GILMAN.pdf ("The most important legal theorist for the NIEO was Algerian jurist Mohammed Bedjaoui . . . ."). *See generally* AFRICA, THE MIDDLE EAST AND THE NEW INTERNATIONAL ECONOMIC ORDER (Jorge Lozoya & Hector Cuadra eds., 1980).

54. Asian-African Legal Consultative Committee, Model Bilateral Agreements on Promotion and Protection of Investments, 23 I.L.M. 237, 241–68 (1984).

55. *Intra*-African BITs contain the same substantive provisions as the *extra*-African BITs. They reiterate the Hull formula (prompt, adequate, and effective compensation) with regard to expropriation and also provide for investor-state arbitration. *See, e.g.*, Accord Entre le Gouvernement de la République Algérienne Démocratique et Populaire et le Gouvernement de la République du Mali Relatif à la Promotion et à la Protection Réciproques des Investissements, Alg.-Mali, art. 4, July 11, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/54 [hereinafter Algeria-Mali BIT]; Accord Entre le Gouvernement de la République de Maurice le Gouvernement de la République du Burundi Concernant la Promotion et la Protection Réciproque des Investissements, Burundi-Mauritius, art. 7(1), May 18, 2001, http://investmentpolicyhub.unctad.org/Download/TreatyFile/569 [hereinafter Burundi-Mauritius BIT]; Agreement Between the Government of the Republic of Mauritius and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments, Mauritius-Zim., art. 6, May 17, 2000, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1998 [hereinafter Mauritius-Zimbabwe BIT].

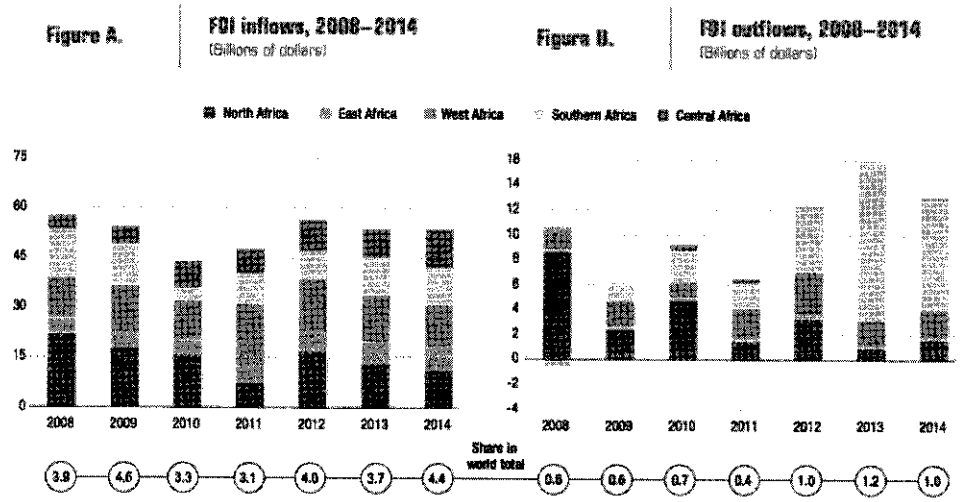
56. Stuart Bruce Juliette Huard-Bourgois, *Maximizing Investment Protection in Africa: The Role of Investment Treaties and Investment Arbitration in Africa*, KING & WOOD MALLESONS (Mar. 21, 2015), http://www.kwm.com/en/be/knowledge/insights/role-of-investment-treaties-and-investment-arbitration-in-africa-20150316.

57. From around 200 BITs signed between African states only the following 36 have entered into force: Algeria-Ethiopia BIT; Algeria-Mali BIT; Algeria-Mozambique BIT; Angola-Cape Verde BIT; Burkina Faso-Guinea BIT; Burkina Faso-Morocco BIT; Burundi-Mauritius BIT; Comoros-Egypt BIT; Congo-Mauritius BIT; Egypt-Algeria BIT; Egypt-Tunisia BIT; Egypt-Somalia BIT; Egypt-Malawi BIT; Egypt-Ethiopia BIT; Egypt-Libya BIT; Egypt-Mauritius BIT; Egypt-Morocco BIT; Egypt-Mali BIT; Ethiopia-Libya BIT; Ethiopia-Sudan BIT; Ethiopia-Tunisia BIT; Gabon-Morocco BIT; Gambia-Morocco BIT; Guinea-Burkina Faso BIT; Libya-Morocco BIT; Madagascar-Mauritius BIT; Mauritania-Morocco BIT; Mauritius-Senegal BIT; Mauritius-South Africa BIT; Mauritius-Mozambique BIT; Morocco-Mali BIT; Morocco-Sudan BIT; Morocco-Tunisia BIT; South Africa-Mozambique BIT; South Africa-Nigeria BIT; Sudan-Egypt BIT. UNCTAD, *Investment Policy Hub, International Investment Agreements Navigator*, http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (last visited Jan. 31, 2017).

58. Bisha'in al-Muwafaqah 'alá Iṭifāq Tashjī' wa Ḥimāyat al-Istithmārāt Bayna Ḥukūmatay Jumhūriyat Maṣr al-'Arabiyah wa Jumhūriyat al-Ṣūmāl al-Dimuqraṭiyah [Agreement to Encourage and Protect

far the most—31—intra-African BITs followed by Mauritius, which has signed 22 intra-African BITs.[59] With respect to foreign direct investment (FDI) inflows and outflows, in the aftermath of the Arab Spring, there has been a significant decrease of FDI inflows in North Africa and a rather dramatic decrease in FDI outflows from the same region (Figure 1 below).[60] In 2014, FDI flows to Africa equaled around $54 billion; the inflow in North Africa decreased while that in Sub-Saharan Africa increased from 2013.[61] The top five inflows were to South Africa, Congo, Mozambique, Egypt, and Nigeria, while the top five outflows were from South Africa, Angola, Nigeria, Libya, and Togo.[62]

Figure 1: FDI flows to Africa (2008–2014)



Source: World Investment Report 2015

In terms of investor-state claims between 1972 and 2014, African countries have been respondents in 111 cases, one-fifth of which were treaty-based.[63] Egypt has been a respondent in the largest number of cases (more than twenty cases), with other frequent respondents being the Democratic Republic of the Congo (DRC), Algeria, and Guinea.[64] Almost all of these claims have been brought under extra-African BITs.[65]

Investments Between the Governments of the Arab Republic of Egypt and the Democratic Republic of Somalia], May 29, 1982, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3470 (entered into force Apr. 16, 1983).

59. UNCTAD, *International Investment Agreements Navigator*, http://investmentpolicyhub.unctad.org/IIA/CountryBits/62#iiaInnerMenu (last visited Mar. 5, 2016).

60. UNCTAD, WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE 33 (2015).

61. *Id.* at 34.

62. *Id.* at 32.

63. Investment Agreements Landscape in Africa, *supra* note 40, at 5.

64. *Id.*

65. By 2014, BITs invoked against African states were mainly the United States-Congo (3), United Kingdom-Egypt (3), United States-Egypt (2), Italy-Morocco (2), United Kingdom-Tanzania (2), Belgium and Luxembourg-Burundi, Belgium and Luxembourg-Egypt, Belgium and Luxembourg-South Africa, France-Ethiopia, Italy-Algeria, Italy-Egypt, Italy-South Africa, Uganda-United Kingdom, Netherlands-Zimbabwe, Netherlands-Senegal, Germany-Zimbabwe, Germany-Ghana, Switzerland-Central African Republic, Switzerland-Zimbabwe, Denmark-Egypt BITs. Most of the pending claims have been filed under

B. Bilateral Investment Models in Africa

Bilateral investment models in Africa can be divided into five rough categories: First, extra-African BITs concluded between the 1960s and the 1990s; second, extra-African BITs concluded in the post-NAFTA/ECT era; third, intra-African BITs concluded from 1982 onward; fourth, BITs with China; and fifth, the emerging SADC 2012 Model BIT.

The first category, extra-African treaties from the 1960s through 1990s, represents the majority of African BITs and can be loosely characterized as "Western" style, as they adopt the same models used by European countries, Canada, and the United States throughout the previous century. These treaties are generally characterized by their inclusion of provisions which address national treatment (NT) and most-favored nation (MFN) treatment; fair and equitable treatment (FET) and full protection and security (FPS); limits on specific requirements; key personnel engagement regardless of nationality; free transfer of funds; expropriation upon adequate, prompt, and effective compensation (but only for public purposes and non-discriminatorily); and investor-state arbitration.[66]

However, from the 1990s onward, investment treaties started to change and evolve exponentially for two main reasons. First, starting in 1990, investors began to file investor-state cases by invoking the provisions found in various investment treaties.[67] This led to the production of an initial body of cases that has influenced subsequent treaty drafting and interpretation.[68] Second, in 1992 and 1994, two iconic multilateral investment treaties were concluded.[69] These treaties were NAFTA and the Energy Charter Treaty (ECT), which together provided the model for the further evolution of Western BITs.[70] This evolution was signified in part by the sophistication of procedural and admissibility provisions such as denial of benefits clauses,[71] the

---

the United States-Egypt (2), France-Egypt, Germany-Algeria, Belgium and Luxembourg-Burundi and Spain-Equatorial Guinea BITs. *See, e.g.*, Foresti v. S. Afr., ICSID Case No. ARB(AF)/07/1, Award (Aug. 4, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0337.pdf; Funnekotter v. Zim., ICSID Case No. ARB/05/6, Award (Apr. 22, 2009), http://www.italaw.com/documents/ZimbabweAward.pdf.

66. Andrew Newcombe, *Developments in IIA Treat Making*, *in* IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 15, 21–22 (Armand de Mestral & Céline Lévesque eds., 2013).

67. *See, e.g.*, Asian Agric. Prod. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Award (June 27, 1990), 4 ICSID Rep. 246 (1997) (awarding the first investor-state arbitration award under a treaty in 1990).

68. There have been at least 600 cases, of which 356 had been concluded by the end of 2014. UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2014 2 (2015), http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d2_en.pdf. For the latest statistics, see generally INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, 2015 ANNUAL REPORT.

69. *See* Gordon & Pohl, *supra* note 26, at 25 (noting "NAFTA-inspired" approaches to modern treaty provisions); Paul M. Blyschak, *Yukos Universal v. Russia: Shell Companies and Treaty Shopping in International Energy Disputes*, 10 RICH. J. GLOBAL L. & BUS. 179, 184–86 (2011) (noting the broad relevance and importance of the ECT).

70. MIRIAN KENE OMALU, NAFTA AND THE ENERGY CHARTER TREATY: COMPLIANCE WITH, IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL INVESTMENT AGREEMENTS 226 (1998).

71. *See, e.g.*, Energy Charter Treaty art. 17(1), Dec. 17, 1994, 2080 U.N.T.S. 114 ("Each contracting party reserves the right to deny the advantages of this Part to: [a] legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised . . . ."). *See* Pac Rim Cayman LLC v. Republic of El Sal., ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, pt. 4 (June 1, 2012), http://www.italaw.com/documents/PacRimDecisiononJurisdiction.pdf (interpreting the applicability of denial of benefits clauses); Mark Feldman, *Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration*, 27 ICSID REV. 281, 296 (2012) (discussing the imposition of evidentiary burden and notice requirements on respondents in denial of benefit provision cases).

inclusion of specific provisions that refer to the environment,[72] the furthering of the transparency of arbitral proceedings,[73] and the inclusion of exceptions modeled after Article XX of the General Agreement on Tariffs and Trade.[74] In addition, this evolution was accompanied by more sophisticated security exceptions,[75] more detailed provisions on the transfer of funds[76] and the inclusion of annexes that seek to clarify the notion of indirect expropriation.[77] These and many more developments have influenced the text of bilateral FTA investment chapters, multilateral investment treaties such as the CAFTA-DR, the latest Model BITs of Canada and the United States, and mega-regional investment agreements such as TPP and the EU-Canada CETA.[78]

---

72. *E.g.*, Energy Charter Treaty, *supra* note 71, art. 19(1); North American Free Trade Agreement art. 1114(1), Dec. 17, 1992, 32 ILM 605, 642; Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey* 8 (OECD/Working Papers on Int'l Inv. No. 2011/01), https://www.oecd.org/investment/internationalinvestmentagreements/WP-2011_1.pdf.

73. J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L. J. 681, 697–706 (2007); Lise Johnson, *The Transparency Rules and Transparency Convention: A Good Start and Model for Broader Reform in Investor-State Arbitration*, 126 COLUM. FDI PERSP. 1, 1 (2014), http://ccsi.columbia.edu/files/2013/10/No-126-Johnson-FINAL1.pdf.

74. *See, e.g.*, Energy Charter Treaty, *supra* note 71, art. 24(2)(b) (stipulating that nothing in this agreement will preclude the contracting parties "from adopting or enforcing any measure (i) necessary to protect human, animal or plant life or health," provided that "no such measure shall constitute a disguised restriction on Economic Activity in the Energy Sector, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties" and provided that these measures "shall not nullify or impair any benefit" reasonably expected under the ECT "to an extent greater than is strictly necessary to the stated end"). Similarly the Canada-Panama BIT stipulates that "[p]rovided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures: . . . necessary to protect human, animal or plant life or health." Treaty Between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments art. 17(3), Sept. 12 1996, 1998 Can. T.S. No. 35, http://www.sice.oas.org/Investment/BITSbyCountry/BITs/CAN_Panama_e.asp [hereinafter Canada-Panama BIT]. *See also* General Agreement on Tarriffs and Trade (1947) art. 20, Oct. 30, 1947, 55 U.N.T.S. 194, https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf ("Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health . . . ."). For a general overview, see Andrew Newcombe, *General Exceptions in International Investment Agreements*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 356–60 (Marie-Claire Cordonier Segger et al. eds., 2011).

75. *See* William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 307–30 (2008); U.S. Model BIT (2012), *supra* note 20, art. 18(2).

76. U.S. Model BIT (2012), *supra* note 20, art. 7(4) ("[A] Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to: (a) bankruptcy, insolvency, or the protection of the rights of creditors; (b) issuing, trading, or dealing in securities, futures, options, or derivatives; (c) criminal or penal offenses; (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.").

77. KORUS Free Trade Agreement, S. Kor.-U.S., annex 11-B(3)(b), Mar. 15, 2012, 125 Stat. 428 ("Except in rare circumstances, such as . . . when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, [and] the environment . . . do not constitute indirect expropriations.").

78. *See generally* Dominican Republic-Central America Free Trade Agreement, Aug. 5, 2004, 119 Stat. 462; U.S. Model BIT (2012), *supra* note 20; EU-Canada CETA, *supra* note 3.

However, BITs between African countries have failed to incorporate these developments. Some intra-African BITs concluded by Mauritius contain some exception provisions, but again, very few of them have entered into force.[79] In fact, the only BITs in Africa that include the standards of the post-NAFTA/ECT era are those concluded between African countries and Western countries.[80] Lately, Canada has actively negotiated and concluded a series of BITs with African countries that contain these standards plus explicit references to corporate social responsibility while also including express provisions for health, safety, and environmental measures, in addition to GATT-like exceptions. [81] An example of such corporate social responsibility provisions is as follows:

> Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.[82]

Apart from the BITs discussed above, reference should also be made to BITs between African countries and China. China has entered into BITs with about 130 countries, 33 of which in Africa. [83] The characteristics of Chinese BITs differ

79. *See, e.g.*, Mauritius-Zimbabwe BIT, *supra* note 55, art. 12 ("The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants."). *See also* Burundi-Mauritius BIT, *supra* note 55, art. 12 (containing an exception provision that was ratified).

80. *See, e.g.*, Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, Rwanda-U.S., art. 12, February 19, 2008, https://www.state.gov/documents/organization/101735.pdf [hereinafter U.S.-Rwanda BIT] (including language similar to NAFTA and the ECT); UNCTAD, ENVIRONMENT 22–36 (2001) (including language similar to NAFTA and the ECT); U.S.-Morocco FTA, *supra* note 25 (including language similar to NAFTA and the ECT).

81. *See, e.g.*, Agreement Between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, Burk. Faso-Can. art. 15, Apr. 20, 2015, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3460 [hereinafter Canada-Burkina Faso BIT] ("The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, those measures to encourage the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding the encouragement.").

82. *Id.* art. 16. *See also* Rainbow Willard & Sarah Morreau, *The Canadian Model BIT—A Step in the Right Direction for Canadian Investment in Africa?*, KLUWER ARB. BLOG (July 18, 2015), http://kluwerarbitrationblog.com/2015/07/18/the-canadian-model-bit-a-step-in-the-right-direction-for-canadian-investment-in-africa/?print=pdf (discussing the inclusion of voluntary corporate social responsibility provisions in all new BITs with African states since 2010). *But see* Agreement Between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments, Can.-Tanz., May 17, 2013, http://investmentpolicyhub.unctad.org/Download/TreatyFile/636 [hereinafter Canada-Tanzania BIT] (lacking a corporate social responsibility provision).

83. *See* UNCTAD, *International Investment Navigator, China: Bilateral Investment Treaties (BITs)*, http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu (last visited on Apr. 16, 2017) [hereinafter China BITs] (listing bilateral investment treaties between China and other countries).

depending on the time frame they fall into.[84] There are three generations of China's investment treaties, the first of which is situated between 1982 and 1989 and is regarded as the most conservative.[85] The second ranges between 1990 and 1997 and is distinct because China had acceded to the Washington Convention, otherwise known as the Convention on the Settlement Investment Disputes between States and Nationals of Other State (ICSID Convention).[86] During this period, China started to insert ICSID arbitration clauses into its BITs, whose scope was nevertheless limited to disputes concerning the amount of compensation for expropriation.[87] The third generation of Chinese BITs is characterized by the "Going Out" strategy implemented from 1998 onward.[88] Unlike the second generation, BITs that fall into the third category not only provide ICSID arbitration clauses, but also render arbitrable all kinds of disputes falling within the scope of the substantive rights provided in the BIT.[89] There are 21 of these third-generation Chinese treaties with African countries.[90] However, these treaties are very similar to the pre-NAFTA/ECT Western models and do not capture any of the developments discussed above.[91] For example, China's third generation BITs with African countries do not contain environmental protection clauses, provisions for transparency, GATT-like exceptions, security exceptions, or annexes for indirect expropriation.[92]

Finally, the latest development with respect to bilateral investment models in Africa comes from an initiative of the SADC that promulgated a Model BIT in 2012 (SADC 2012 Model Bit).[93] This Model BIT was published a few years after the conclusion of the SADC Protocol on Finance and Development, examined below in Part II. Although a soft law instrument, this is an important document because it seeks to project an alternative investment treaty model that best corresponds to the needs of the African continent.[94]

Many provisions in the SADC 2012 Model BIT deviate from the post-NAFTA/ECT Western models. First, the SADC 2012 Model BIT carves out debt securities issued by a government and portfolio investments from the definition of

84. *See* Schill, *supra* note 22, at 82–83 (discussing the shift in China's BIT practice regarding international investment protection).

85. *E.g.*, NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE 35–36 (2009) (discussing the three generations of Chinese investment treaties).

86. *Id.* at 38.

87. *Id. But see* Señor Tza Yap Shum v. Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (June 19, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0880.pdf (ruling that the ICSID could go beyond the scope concerning the amount of compensation for expropriation based on the bilateral investment treaty between China and Peru).

88. *See* Aravind Yelery, *China's 'Going Out' Policy: Sub-National Economic Trajectories*, INST. OF CHINESE STUD. ANALYSIS (Dec. 2014), http://www.icsin.org/uploads/2015/04/12/e50f1e532774c4c354b2488 5fcb327c5.pdf (discussing China's "going out" strategy and how it affects China's economic system).

89. *See, e.g.*, The Government of the People's Republic of China and the Government of the Republic of Benin, Benin-China, Feb. 18, 2004, http://investmentpolicyhub.unctad.org/Download/TreatyFile/440 [hereinafter China-Benin BIT] (containing an ICSID arbitration clause).

90. China BITs, *supra* note 83.

91. *Compare* Agreement Between the Government of the PRC and the Government of the Kingdom of Norway on the Mutual Protection of Investments, China-Nor., Nov. 21, 1984, http://investmentpolicyhub.unctad.org/Download/TreatyFile/765 [hereinafter China-Norway BIT] (containing pre-NAFTA/ECT language), *and* Canada-Burkina Faso BIT, *supra* note 81 (containing language such as health safety and environmental measures), *with* China-Benin BIT, *supra* note 89 (lacking post-NAFTA/ECT developments such as environmental protection clauses).

92. *E.g.*, China-Benin BIT, *supra* note 89.

93. SADC 2012 Model BIT, *supra* note 33.

94. *See id.* at 3. (discussing the treaty template created by South African countries).

investment as well as "claims to money that arise solely from commercial contracts for the sale of goods."[95] Second, the SADC 2012 Model BIT includes express provisions dictating common obligations against bribery that go beyond mere references to corporate social responsibility, unlike the most recent BITs between Canada and African countries.[96] Third, direct reference is made to minimum standards for human rights, the environment, and labor standards.[97] Fourth, an investor liability provision subjects

> investors and investments to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.[98]

Fifth, "a State Party may grant preferential treatment in accordance with its domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals."[99] In addition, a state party may:

> (a) support the development of local entrepreneurs, and (b) seek to enhance productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer and other benefits of investment through the use of specified requirements on investors made at the time of the establishment or acquisition of the investment and applied during its operation.[100]

Furthermore, "a State Party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement."[101] Sixth, investor-state arbitration is available only after the exhaustion of local remedies or demonstration that there "are no reasonably available legal remedies capable of providing effective remedies of the dispute concerning the underlying measure, or the legal remedies provide no reasonable possibility of such remedies in a reasonable period of time."[102] Seventh, host states may file counterclaims against investors before any arbitration tribunal.[103] Other provisions include environmental and social impact assessments which must be complied with prior to the establishment of an investment,[104] the maintenance of environmental management systems, good business practice standards and emergency response mechanisms,[105] compliance with national and internationally accepted

95. *Id.* art. 2(I).
96. *Id.* art. 10.
97. *Id.* art. 15.
98. *Id.* art. 17.1.
99. SADC 2012 Model BIT, *supra* note 33, art. 21.1.
100. *Id.* art. 21.2.
101. *Id.* art. 21.3.
102. *Id.* art. 29.4(b)(i)–(ii).
103. *Id.* art. 19.2.
104. *Id.* art. 13.1.
105. SADC 2012 Model BIT, *supra* note 33, art. 14.

standards of corporate governance,[106] the publication of all contracts, and payments related to the establishment or right to operate an investment in the host state.[107]

The provisions of the SADC 2012 Model BIT should be further appraised after an examination of the latest multilateral investment treaties in Africa, particularly those concluded by SADC, ECOWAS and COMESA, which are analyzed in the next Part. Suffice it to say, however, that to date, neither SADC members nor other African countries have used the SADC 2012 Model BIT in negotiating intra- or extra-African BITs.[108] It remains to be seen whether African countries will start using this model in their future BITs and whether this model will influence any of the pending negotiations between African RECs and the United States or the EU.

II. MULTILATERAL INVESTMENT TREATIES IN AFRICA

The previous Part traced the genesis and evolution of bilateralism in Africa and concluded with the SADC 2012 Model BIT, which represents the first solid effort to project a regional trend of bilateral investment treaty design in Africa.[109] This Part focuses on multilateralism and particularly multilateral investment treaties among African countries. However, certain multilateral investment treaties among Arab and Muslim states also apply among African states, and will therefore be briefly touched upon.[110]

Multilateral investment treaties in Africa can be broken into four categories. First, there are multilateral investment treaties concluded by Arab and Muslim states. Second, there are early multilateral investment treaty endeavors among African countries. This category basically comprises one trilateral treaty concluded in 1982 among the DRC, Rwanda, and Burundi.[111] Third, there are multilateral investment treaties between African countries that are modeled after pre- and post-NAFTA/ECT "Western" investment treaties. Fourth, there are multilateral investment treaties among African investment states that seek to project an alternative to the predominant investment treaty model.

A. Arab and Muslim States

The first multilateral investment treaties were an initiative of Arab and Muslim states and were concluded in the 1970s and 1980s under the auspices of the Arab League, the Council of Arab Economic Unity (CAEU) established under the

106. *Id.* art. 16.1.

107. *Id.* art. 18.1.

108. *See* Ofodile, *supra* note 38 (discussing the unenforceability of the SADC 2012 Model BIT on SADC member states because it has not been adopted by any country in the region with the exception of South Africa).

109. *See* Francesco Seatzu & Paolo Vargiu, *Africanizing Bilateral Investment Treaties ('BITs'): Some Case Studies and Further Prospects of a Pro-Active African Approach to International Investment*, 30 CONN. J. INT'L L. 143, 155 (2015) ("The SADC Model BIT can be considered the first African instrument that puts forward, in a strong fashion, Southern African perceptions of the international law on foreign investment . . . .").

110. *See, e.g.*, Unified Agreement for the Investment of Arab Capital, *supra* note 37, at 211 (including African countries, namely, Sudan, Somalia, Libya, Egypt and Mauritania, as well as non-African countries as its member states).

111. Community Investment Code of the Economic Community of the Great Lakes Countries, Jan. 31, 1982, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2400 [hereinafter Community Investment Code of the CEPGL].

aegis of the Arab League, and the then Organization of the Islamic Conference (now Organization of Islamic Co-operation—OIC).[112] These instruments pre-date NAFTA and ECT and should be examined through the lens of de-colonization, taking into consideration also that perhaps the most significant driver of these treaties was the oil boom in the Gulf countries.[113] Indeed, these treaties called for the promotion and protection of Arab capital and investment and sought to foster investment between wealthy oil-producing Arab states and less wealthy Arab states.[114] The following Parts shed more light on: i) The Agreement on Investment and Free Movement of Arab Capital Among Arab Countries of the CAEU (CAEU Investment Agreement); ii) the Unified Agreement for the Investment of Arab Capital in the Arab States of the Arab League (Unified Agreement); and iii) the Agreement on Promotion, Protection, and Guarantee of Investments Among Member States of the Organization of the Islamic Conference (OIC Investment Agreement). These treaties were signed in 1970, 1980, and 1981, respectively.[115] However, in 2000 and 2013, respectively, the CAEU Investment Agreement and the Unified Agreement underwent drastic modifications.[116] The Agreement on Investment of the AMU might also be grouped with these three treaties but for the fact that it includes only Arab and Muslim countries in Africa, whereas membership to the above treaties includes both African and Asian countries.[117]

1. The CAEU Investment Agreement (1970)

a. General Characteristics

The Agreement on Investment and Free Movement of Arab Capital Among Arab Countries (CAEU Investment Agreement) was concluded in 1970 as an initiative of the CAEU.[118] The CAEU was in turn established on May 30, 1964,

---

112. This Part focuses specifically on these three treaties. For a more comprehensive overview of the various treaties entered into by Arab states which contain investment provisions, see generally Hamed El-Kady, *The Proliferation of International Trade and Investment Arrangements in the Arab World: Key Issues and Challenges*, 3 AFR. TECH. & DEV. F.J. 48, 48–49 (2006).

113. SALACUSE, *supra* note 7, at 97.

114. *Id.*; Jeswald W. Salacuse, *Arab Capital and Trilateral Ventures in the Middle East: Is Three a Crowd?*, *in* RICH AND POOR STATES IN THE MIDDLE EAST: EGYPT AND THE NEW ARAB ORDER 129, 129–35 (Malcolm H. Kerr & El Sayed Yassin eds., 1982).

115. Agreement on Investment and Free Movement of Arab Capital Among Arab Countries, Aug. 29. 1970, UNCTAD/DTCI/30 (Vol.II); Unified Agreement for the Investment of Arab Capital in the Arab States, *supra* note 37; Agreement on Promotion, Protection, and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference, *opened for signature* June 1–5, 1981, UNCTAD/DTCI/30 (Vol.II) (entered into force on Sept. 23, 1986) [hereinafter OIC Investment Agreement].

116. Convention on the Promotion and Protection of Investments and the Transfer of Capital Between Arab Countries, *approved on* July 6, 2000, http://www.enaraf.org/en/page/470 [hereinafter CAEU Investment Agreement (2000)]; Org. for Econ. Cooperation & Dev., *The 2013 Amendment to the 1980 Arab League Investment Agreement: A Step Towards Improving the Region's Attractiveness to Investors*, https://www.oecd.org/mena/competitiveness/OECD%20Study_Amended%20Arab%20League%20Investment%20Agreement%20(English).pdf.

117. AMU Investment Agreement, *supra* note 18; Treaty Instituting the Arab Maghreb Union, Feb. 17, 1989, 1546 U.N.T.S. 161.

118. Agreement on Investment and Free Movement of Arab Capital Among Arab Countries, *supra* note 115.

following the 1957 Economic Unity Agreement of the Economic and Social Council of the Arab League (ESC)—then known as the Economic Council.[119]

To complete this institutional flashback, suffice it to say that the ESC was established in 1950, implementing Article II of the Arab League Charter that calls for "a close co-operation of the member States" on "[e]conomic and financial matters, including trade, customs, currency, agriculture and industry."[120]

While the CAEU Investment Agreement was signed on August 29, 1970, it subsequently underwent further amendments on December 3, 1973.[121] Its signatories included seven countries: Egypt, Iraq, Jordan, Kuwait, Sudan, the Syrian Arab Republic, and the Arab Republic of Yemen.[122] This treaty further implemented Article II of the Arab League Charter,[123] as well as Article I of the Economic Unity Agreement of the ESC, which reads as follows:

> A complete economic unity shall be established among the states of the Arab League. It shall guarantee for these states and their nationals in particular the following freedoms and rights on equal footing:
>
> 1. Freedom of personal and capital mobility.
> 2. Freedom of exchange of national and foreign goods and products.
>
> 3. Freedom of residence, work, employment and exercise of economic activities.
>
> 4. Freedom of transport, transit and use of transport, ports and civil airports.
>
> 5. Rights of possession, bequeath and inheritance.[124]

While the CAEU Investment Agreement does not provide for investor-state arbitration,[125] it is an important instrument because it was the precursor of the Unified Agreement for the Investment of Arab Capital that was the initiative of the Arab League itself.[126] Furthermore, the Unified Agreement for the Investment of Arab Capital paved the way for two more treaties that were concluded in 2000 and replaced this treaty.[127]

---

119. Agreement for Economic Unity Among Arab League States arts. 3–12, *entered into force* April 30, 1964, 3 I.L.M. 1096 (1964). Originally named the Economic Council, the Economic and Social Council of the Arab League was established in 195, and is the institution of the Arab League which coordinates the economic integration of its member states. Five of the CAEU's eleven members are African countries. *See id.* (listing the governments that are subject to the treaty by either signing or depositing the instruments of ratification).

120. Pact of the League of Arab States art. 2, Mar. 22, 1945, 70 U.N.T.S. 241.

121. Agreement on Investment and Free Movement of Arab Capital among Arab Countries, *supra* note 115; Council of Arab Econ. Unity [CAEU], *Amendments to Article 3 and 6 of the Agreement On the Investment and Free Movement of Arab Capital*, Res. No. 648/S.22 (Dec. 3, 1973) [hereinafter Amended CAEU Agreement on Investment and Free Movement of Arab Capital].

122. Agreement on Investment and Free Movement of Arab Capital Among Arab Countries, *supra* note 115.

123. *Id.*

124. Agreement for Economic Unity Among Arab League States, *supra* note 119, art. 1.

125. *See generally* CAEU Investment Agreement (2000), *supra* note 116.

126. Agreement on Investment and Free Movement of Arab Capital Among Arab Countries, *supra* note 115.

127. CAEU Investment Agreement (2000), *supra* note 116, art. 8 (establishing this agreement as

The objectives of the CAEU Investment Agreement are stated in its initial provisions and Preamble to the amendments to Articles 3 and 6, which call for the investment of Arab capital for the "economic development inside the Arab countries" and reaffirm "the mutual interests between the Arab countries" with financial surpluses "and those in need thereof."[128] However, Articles 1, 2, and 3 contain general wording that does not provide definitions of relevant investors, investments, or measures.[129] Rather, the treaty provides that member states will "determine the procedures, terms, and limits which govern Arab investment" and "designate the sectors earmarked for same," in accordance with the principle of "each state's sovereignty over its own resources," and the desire of the member states "to create the appropriate atmosphere for promoting Arab investment."[130] Furthermore, Article 1 states that "[e]very Arab state exporting capital shall exert efforts to promote preferential investments in the other Arab states and provide whatever services and facilities [are] required in this respect," and Article 2 states that member states "shall foster investment of Arab capital in the joint economic projects in pursuance of economic integration among Arab states."[131]

b. Standards of Treatment

The CAEU Investment Agreement includes protections against discrimination and expropriation that are limited to Arab investors.[132] In particular, Article 4 states that the contracting parties "undertake to treat Arab investments . . . without discrimination and on equal footing with indigenous investments,"[133] and Article 5 provides for a most-favored nation MFN clause that is delimited to "foreign investments that may be granted special privileges."[134] The CAEU Investment Agreement, however, does not include the FET or FPS standards that have been commonly inserted in BITs since their inception in 1959.[135] Regardless, it protects the free transfer of capital[136] and also provides that Arab investors "shall be entitled to reside in the host country in order to carry out [their] investment activities."[137]

---

succeeding the previously drafted investment agreement); Convention on the Settlement of Investment Disputes in the Arab Countries, *approved on* June 12, 2000, http://www.enaraf.org/en/page/471 (succeeding the previous agreement on settling investment disputes) [hereinafter CAEU Agreement on the Settlement of Investment Disputes].

128. Amended CAEU Agreement on Investment and Free Movement of Arab Capital, *supra* note 121.

129. Agreement on Investment and Free Movement of Arab Capital Among Arab Countries, *supra* note 115, arts. 1–3 (outlining general situations where member states should give preference to other members).

130. *Id.* art. 3.

131. *Id.* arts. 1–2.

132. *But see id.* art. 9 (requiring each party state to take any measure necessary in order to conform to the agreement).

133. *Id.* art. 4.

134. *Id.* art. 5 (requiring member states to treat Arab investments at least as favorably as foreign investments with special privileges).

135. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargains*, 46 HARV. INT'L L.J. 67, 82–83 (2005).

136. *See* Agreement on Investment and Free Movement of Arab Capital Among Arab Countries, *supra* note 115, art. 7 (allowing member states to take their gains from investments made according to this agreement).

137. *Id.* art. 8.

With respect to expropriation, it is worth noting that the initial version of the treaty merely recognized the "inalienable right of the state" to "nationalize, confiscate and expropriate within the framework of public interest" and upon "fair and effective compensation within a reasonable period of time."[138] The 1973 amendment modified this provision to read as follows:

> Member states shall pledge not to nationalize or confiscate Arab investments in the sectors earmarked thereof in conformity with the provisions of Article III of this Agreement. The notification mentioned in that Article is considered an application submitted by the country host to Arab investment.[139]

In its new form, the provision does not set any specific standards with respect to expropriation, but rather points to Article 3 which provides that member states will "determine the procedures, terms, and limits which govern Arab investment" as well as "designate the sectors earmarked for same."[140]

c. Exceptions and Other Relevant Provisions

The CAEU Investment Agreement does not include specific exception provisions, but Article 1 provides that "States importing capital shall exert efforts to the full extent of their power and provide all facilities required for preferential investment of Arab Capital in accordance with their economic development programmes."[141] This reference to the economic development programs of the contracting parties, along with the reference in Article 3, leaves space for the imposition of certain exceptions.[142]

d. Dispute Settlement

As already noted, the CAEU Investment Agreement does not provide for investor-state arbitration or any other form of dispute settlement between investors and states.[143] However, the procedural framework for bringing investor-state arbitration claims between Arab investors and Arab countries was provided for in the Convention on the Settlement of Investment Disputes Between States Hosting Arab Investment and Citizens of Other States (1974 Convention).[144] This treaty was concluded in 1974 by the eleven members of the CAEU and is modeled after the ICSID Convention.[145] The 1974 Convention and the CAEU Investment Agreement were both modified in 2000, as will be discussed below.[146]

---

138. *Id.* art. 6.

139. Amended CAEU Agreement on Investment and Free Movement of Arab Capital, *supra* note 121.

140. Agreement on Investment and Free Movement of Arab Capital Among Arab Countries, *supra* note 115, art. 3.

141. *Id.* art. 1.

142. *See generally id.* arts. 1, 3.

143. *Id.* arts. 1–3.

144. SAMI SHUBBER, THE LAW OF INVESTMENT IN IRAQ 154–55 (2009).

145. FATH EL RAHMAN & ABDALLA EL SHEIKH, THE LEGAL REGIME OF FOREIGN PRIVATE INVESTMENT IN SUDAN AND SAUDI ARABIA 417–18 (2003).

146. *See generally* CAEU Investment Agreement (2000), *supra* note 116; CAEU Agreement on the Settlement of Investment Disputes, *supra* note 127.

2. The CAEU Investment Agreement and the Agreement on the Settlement of Investment Disputes (2000)

In 2000, the CAEU concluded the Agreement on the Encouragement and Protection of Investments and Transfer of Capitals among Arab Countries (2000 CAEU Investment Agreement), superseding the 1970 CAEU Investment Agreement.[147] Shortly after, the CAEU also concluded the Agreement on the Settlement of Investment Disputes in Arab Countries (CAEU Agreement on the Settlement of Investment Disputes).[148]

The 2000 CAEU Investment Agreement is briefer than its predecessor, but it still provides similar protection against expropriation[149] and also includes non-discriminatory standards and a MFN clause, the scope of which is not entirely clear.[150] However, the provisions for the free transfer of capital that existed in the 1970 Agreement have not been reproduced.[151] Like the 1970 Agreement, this treaty does not provide for any kind of investor-state dispute settlement mechanism.[152]

The 2000 CAEU Agreement on the Settlement of Investment Disputes (2000 CAEU Disputes Agreement), like the 1974 Convention on the Settlement of Investment Disputes between States Hosting Arab Investment and Citizens of Other States, is modeled after the ICSID Convention.[153] While the 2000 CAEU Disputes Agreement does not expressly terminate the 1974 Convention, it seems consistent to accept this result. Unlike the 2000 CAEU Investment Agreement, this treaty only deals with dispute settlement and thus does not include substantive provisions.[154] In fact, it appears that the 2000 CAEU Disputes Agreement may serve as a supplement to the 2000 CAEU Investment Agreement.[155] However, it is not entirely clear whether the two treaties concluded by the CAEU should be construed as one instrument. At the same time, it is not certain whether the investor-state provisions included in the 2000 CAEU Disputes Agreement contain a binding and enforceable arbitration clause. Pursuant to Article 10, investor-state claims shall be submitted to the Secretary General of the CAEU who will facilitate the parties in appointing the

147. CAEU Investment Agreement (2000), *supra* note 116.

148. CAEU Agreement on the Settlement of Investment Disputes, *supra* note 127.

149. *See* CAEU Investment Agreement (2000), *supra* note 116, art. 4 ("1. Projects shall not be nationalized or confiscated, nor shall they be subject to acts of restraining, seizure, freezing, confiscating, reserving or interdiction of properties through means other than the judiciary system; 2. Investment projects shall not be subject to acts of expropriation wholly or partly except for public interest, according to the law and without discrimination as to a fair compensation.").

150. *See id.* art. 3(5) ("All member countries shall be committed to treat investments in a way equal to any special privileges granted to foreign investments. All Arab investments shall automatically enjoy the same privileges once they are given. The investor, demanding the same treatment as that given to the most privileged country, shall not rely on the treatment of investors from a third country arising from a present or future custom or economic federation or arising from the establishment of a free zone or a present or future economic institution.").

151. *But see id.* art. 3(4) ("The Arab investor from any contracting country and all his family members shall have the right to live in the hosting country to practice his investment activities, and this right shall extend to include the right to visas of entry and exit without any administrative restrictions.").

152. *See generally id.*

153. *See* CAEU Agreement on the Settlement of Investment Disputes, *supra* note 127, arts. 10–14 (establishing a procedure similar to ICSID's procedure).

154. *See id.* art. 2 ("This agreement aims at settling any dispute that may arise . . . .").

155. *See id.* pmbl. ("For the purpose of achieving the objectives of the Agreement of the Encouragement and Protection of Investments and Transfer of Capitals among Arab Countries adopted by the CAEU's decision No. 1125 of 7/6/2000 in its 71st regular session.").

arbitral tribunal and, upon failure of the parties to act, will appoint all members of the tribunal.[156] Final awards can also be annulled by ad hoc Committees, similar to the procedures and grounds provided for in the ICSID Convention.[157] Apart from these provisions, there is no other indication as to whether the investor-state arbitration clause is binding.[158] To date, neither the 1970 CAEU Investment Agreement nor either of the Agreements from 2000 have been invoked in any known investor-state proceedings.

3. The Unified Agreement for the Investment of Arab Capital (1980)

a. General Characteristics

The second multilateral investment treaty among Arab and Muslim states was the Unified Agreement for the Investment of Arab Capital in the Arab States (Unified Agreement). This treaty was signed on November 26, 1980 under the auspices of the League of Arab States (Arab League).[159] This treaty entered into force on February 22, 1988 but has recently undergone drastic modifications.[160] Of the twenty-two members of the Arab league, nine of them are African states, but Algeria and Comoros have not ratified the Unified Agreement. [161] Like the 2000 CAEU Investment Agreement, this treaty is limited to Arab investors and Arab capital.[162] It provides that an "Arab investor" is "an Arab citizen who owns Arab capital which he invests in the territory of a State Party of which he is not a national."[163] An "Arab citizen" is "an individual or a body corporate having the nationality of a State Party, provided that no part of the capital of such body corporate belongs either directly or

156. *Id.*

157. *Id.* arts. 10, 19.

158. *Id.* art. 2 ("This agreement aims at settling any dispute that may arise directly from any investment between an Arab country party to the agreement and hosting the investments or one of its authorities, public institutions, companies or nationals and between any other Arab country party to the agreement or one of its authorities, public institutions, companies or nationals towards ensuring an appropriate environment that may encourage establishing on-growing Arab investments in the Arab countries. The term 'nationals' shall, in this article, include physical persons and legal persons holding the nationality of a country party to the agreement.").

159. Unified Agreement for the Investment of Arab Capital, *supra* note 37, at 211.

160. Hamed El Kady, *The Amendments to the 1980 Arab League Investment Agreement: Implications on the Right to Regulate Investment in Arab Countries*, 3 TRANSNAT'L DISP. MGMT. 1, 1 (2014).

161. The African states are Algeria, Comoros, Djibouti, Egypt, Libyan Arab Jamahiriya, Mauritania, Somalia, Sudan, and Tunisia; the other Arab League in states are Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Occupied Palestinian territory, Oman, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, UAE and Yemen. Unified Agreement for the Investment of Arab Capital, *supra* note 37, at 211.

162. *See id.* pmbl. ("Proceeding from the aim of strengthening overall Arab development and Arab economic integration, Believing that investment dealings between Arab States are an essential part of joint Arab economic action, the regulation of which will mobilize production and thus enhance joint development on the basis of reciprocal benefits and national interests, ... Bearing in mind that the provisions of this Agreement constitute a minimum standard to be applied in the treatment of Arab capital and investments, whether in the context of concerted Arab economic action or at the level of bilateral cooperation or within the scope of the domestic legislation of each State . . . .").

163. *Id.* art. 1(7).

indirectly to non-Arab citizens."[164] Similarly, the treaty limits its scope to "Arab capital" and the "[i]nvestment of Arab capital."[165]

However, on January 22, 2013, some Arab countries adopted an amendment to the Unified Agreement that brought about a series of changes.[166] With respect to the scope of its application, the 2013 amendment now expands the definition of covered investors by providing that an "Arab investor" is an investor who "invests in the territory of a State Party of which it is not a national, provided that the Arab investor holds directly at least 51% of the share capital."[167] Furthermore, "Arab capital" is now defined as funds owned by "Arab investors."[168] In other words, Arab investors are now defined not by reference to their nationality but rather by reference to the control of Arab capital.[169]

b. Standards of Treatment

The Unified Agreement includes a set of substantive provisions that are construed "as a minimum standard to be applied in the treatment of any investment subject thereto," which "shall have priority of application in instances where [it] conflict[s] . . . with the laws and regulations in the States Parties."[170] Furthermore, general provisions protecting against discriminatory measures are included along with a national treatment (NT) standard[171] and an MFN clause that extends to non-Arab investment.[172] The free transfer of capital is protected in a detailed manner,[173] as is the right of Arab investors and their families to "unimpeded entry, residence, relocation and departure."[174] In addition, the Agreement includes certain provisions regarding labor and the employment of foreign experts.[175] In particular, Article 13 provides that "[w]here the requisite professional skills are available, priority in filling

164. *Id.* art. 1(4). This Article also provides that "[j]oint Arab projects which are fully owned by Arab citizens shall be deemed to be included within this definition in instances where they do not have the nationality of another State; Arab States and bodies corporate which are fully State-owned, whether directly or indirectly, shall likewise be regarded as Arab citizens." *Id.*

165. *Id.* art. 1(5)–(6) (defining "Arab capital" as "assets owned by an Arab citizen comprising any material and immaterial rights which have a cash valuation, including bank deposits and financial investments. Revenues accruing from Arab assets shall be regarded as Arab assets, as shall any joint share to which this definition applies," and defining "[i]nvestment of Arab capital" as "the use of Arab capital in a field of economic development with a view to obtaining a return in the territory of a State Party other than the State of which the Arab investor is a national or its transfer to a State Party for such purpose in accordance with the provisions of this Agreement").

166. This amendment has only been ratified by five states—Iraq, Jordan, Kuwait, Oman, and Palestine—and will enter into force on April 24, 2016. Org. for Econ. Cooperation & Dev., *The 2013 Amendment to the 1980 Arab League Investment Agreement*, *supra* note 116.

167. Unified Agreement for the Investment of Arab Capital, *supra* note 37, art. 1.

168. El Kady, *supra* note 160, at 2.

169. *Id.*

170. Unified Agreement for the Investment of Arab Capital, *supra* note 37, art. 3.

171. *Id.* arts. 5, 6, 8.

172. *Id.* art. 6.

173. *See id.* art. 7(1) (stating that Arab investors have the freedom to make periodic transfers and retransfers without being subject to any discriminatory banking, administrative or legal restrictions, or any taxes or duties).

174. *Id.* art. 12.

175. *Id.* art. 13.

the relevant vacancies shall go to nationals of the State in which the investment is made, followed by Arab employees and, finally, experts of other nationalities."[176]

The Unified Agreement also includes extensive provisions on expropriation.[177] Pursuant to Article 9:

> [T]he capital of the Arab investor shall not be subject to any specific or general measures, whether permanent or temporary and irrespective of their legal form, which wholly or partially affect any of the assets, reserves or revenues of the investor and which lead to confiscation, compulsory seizure, dispossession, nationalization, liquidation, dissolution, the extortion or elimination of secrets regarding technical ownership or other material rights, the forcible prevention or delay of debt settlement or any other measures leading to the sequestration, freezing or administration of assets, or any other action which infringes the right of ownership itself or prejudices the intrinsic authority of the owner in terms of his control and possession of the investment, his right to administer it, his acquisition of the revenues therefrom or the fulfillment of his rights and the discharge of his obligations.[178]

Such actions, however, are permissible only when realized for the public benefit, in a non-discriminatory way, and upon the payment of fair compensation.[179] In addition, compensation may be due for damages sustained for breaches "undermining any of the rights and guarantees" under the Unified Agreement.[180]

Similar to the CAEU Investment Agreement, the Unified Agreement did not originally include a FET or FPS standard.[181] However, with the 2013 amendment, Article 2 has been modified to include an unqualified FET clause.[182] Still, the recent amendment did not change "fair compensation" to prompt, adequate and effective compensation.[183]

All its substantive standards should be interpreted in accordance with the principles and aims which inspired the Unified Agreement, "followed by the rules and principles common to the respective legislation of the States members of the League of Arab States and, finally, by the principles recognized in international law."[184]

c. Exceptions and Other Relevant Provisions

Exception provisions like the ones found in the post-ECT/NAFTA investment treaties were not included in the Unified Agreement.[185] Nevertheless, a

176. Unified Agreement for the Investment of Arab Capital, *supra* note 37, art. 13.

177. *See generally id.* arts. 9–11.

178. *Id.* art. 9(1).

179. *See generally id.* arts. 9(2), 10–11.

180. *Id.* art. 10(1)(a).

181. *But see id.* art. 10(1)(b) (providing for the payment of compensation for the breach "of any international obligations or undertakings binding on the State Party and arising from this Agreement in favour of the Arab investor or failing to take the necessary steps to implement them, whether deliberately or through negligence").

182. *See* El Kady, *supra* note 160, at 2.

183. *Id.*

184. Unified Agreement for the Investment of Arab Capital, *supra* note 37, art. 4.

185. *Compare* International Energy Charter Consolidated Energy Charter Treaty art. 24, *adopted on* May 20 2015, http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECT-Positive_Annex_

series of provisions placed restrictions on the transfer of capital,[186] inserted legality requirements,[187] and required compliance with national development objectives.[188] Furthermore, certain provisions obligated investors to refrain from actions which might violate public order, offend morality, or involve illegitimate gains;[189] allowed Arab states to provide privileges to investment projects of strategic importance to national economies;[190] and allowed Arab states to take measures to suspend certain provisions in cases of utmost necessity.[191] All of these provisions were deleted with the 2013 amendment, which relaxed restrictions on the transfer of capital.[192]

d. Dispute Settlement

The dispute settlement scheme of the Unified Agreement is much more elaborate than that of its predecessor, the CAEU Investment Agreement, which did not provide for any form of investor-state dispute settlement.[193] In particular, Article 25 stipulates that disputes arising from the Unified Agreement between Arab investors and Arab states "shall be settled by way of conciliation or arbitration or by recourse to the Arab Investment Court."[194] Furthermore, Article 26 stipulates that conciliation and arbitration "shall be conducted in accordance with the regulations and procedures contained in the annex to the Agreement which is regarded as an integral part thereof."[195] Thus, Articles 25 and 26 together create a double-track dispute resolution system, one before the Arab Investment Court and another pursuant to the Annex on Conciliation and Arbitration.

With respect to the former, the Annex provides that "[w]here the two parties fail to agree to conciliation or where the conciliator proves unable to render his decision within the period specified or where the parties do not agree to accept the solutions proposed, they may agree to resort to arbitration."[196] The use of the verb "may" appears to conflict with the use of the verb "shall" in Articles 25 and 26 and puts into question the binding nature of this investor-state arbitration clause of the Unified Agreement as an unconditional offer to arbitrate.[197] In a recent case, an arbitral tribunal vested itself with jurisdiction for claims arising under the Unified Agreement, but the cause of action was an investment contract that expressly provided

W.pdf (demonstrating general exemption provisions found in post-ECT/NAFTA investment treaties), *with* Unified Agreement for the Investment of Arab Capital, *supra* note 37 (illustrating that general exception provisions are absent from the treaty).

186. Unified Agreement for the Investment of Arab Capital, *supra* note 37, art. 7(3).

187. *Id.* arts. 14–15.

188. *Id.* art. 14(1).

189. *Id.* art. 15.

190. *Id.* art. 16.

191. *Id.* art. 19(2).

192. *See* El Kady, *supra* note 160, at 2–4.

193. Unified Agreement for the Investment of Arab Capital, *supra* note 37, arts. 25–36; EL RAHMAN & EL SHEIKH, *supra* note 145, at 420–25.

194. Unified Agreement for the Investment of Arab Capital, *supra* note 37, art. 25.

195. *Id.* art. 26.

196. *Id.* annex art. 2(1).

197. *See* Matteo M. Winkler, *Arbitration Without Privity and Russian Oil: The Yukos Case Before the Houston Court*, 27 U. PA. J. INT'L ECON. L. 115, 132–35 (2006) (discussing the binding consent to arbitration of states that sign the ICSID convention).

for arbitration pursuant to the Unified Agreement, leaving unsettled the issue of whether the clause is binding.[198]

The second available option, the Arab Investment Court, was established when the treaty was entered into force on February 22, 1988.[199] The Court did not decide its first case until 2004, and it has been reported that seven other cases are currently pending before it.[200] The rather small docket since its founding suggests that the Arab Investment Court has not become a popular forum for the settlement of disputes between Arab investors and countries.

4. The Investment Agreement of the Organization of the Islamic Conference (1981)

The Investment Agreement of the Organization of the Islamic Conference, now known as Organization of Islamic Co-operation, was signed in 1981 and entered into force in 1986.[201] Among fifty-two state parties of this Agreement, twenty-six are African.[202] However, not all twenty-six African states have signed and ratified this treaty.[203]

a. General Characteristics

The Investment Agreement of the Organization of the Islamic Conference (OIC Investment Agreement) provides broad stipulations with respect to the investors and investments it reaches and does not limit its scope to Arab or Muslim investors.[204] Rather, "investment" is defined as "[t]he employment of capital in one of the permissible fields in the territories of a contracting party with a view to achieving a profitable return, or the transfer of capital to a contracting party for the same purpose, in accordance with this Agreement."[205] Furthermore, like the Unified Agreement,

198. Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya, Cairo Reg'l Ctr. Int'l Com. Arb., Final Arbitral Award, para. 15.1. (Mar. 22, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw1554.pdf.

199. Unified Agreement for the Investment of Arab Capital, *supra* note 37, at 211.

200. Walid Ben Hamida, *The First Arab Investment Court Decision*, 7 J. WORLD INV. & TRADE 699, 700 (2006); Walid Ben Hamida, *Arab Region: Are Investors Rediscovering Regional Investment Agreements from the '80s?*, UNCTAD INV. POL. HUB: INV. POL. BLOG (Oct. 23, 2012), http://investmentpolicyhub.unctad.org/Blog/Index/17.

201. OIC Investment Agreement, *supra* note 115, at 241.

202. These are Algeria, Benin, Burkina Faso, Cameroon, Chad, Comoros, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Libya, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tunisia, Uganda and Tanzania. *Id.*

203. It has been ratified by Burkina Faso, Cameroon, Egypt, Gabon, Guinea, Libya, Mali, Morocco, Senegal, Somalia, Sudan, Tunisia, and Uganda. It has been signed but not ratified by Djibouti and Gambia. *List of Member States who Signed/Ratified the Different Agreements and Statutes on Economic, Commercial and Technical Cooperation Among OIC Member States*, ORG. OF ISLAMIC COOPERATION (Jan. 13, 2009), http://www.oicun.org/uploads/files/convenion/agreements-En.pdf.

204. OIC Investment Agreement, *supra* note 115, art. 1(5)–(6).

205. *Id.* art. 1(5). Capital is defined as "[a]ll assets (including everything that can be evaluated in monetary terms) owned by a contracting party to this Agreement or by its nationals, whether a natural person or a corporate body and present in the territories of another contracting party whether these were transferred to or earned in it, and whether these be movable, immovable, in cash, in kind, tangible as well as everything pertaining to these capitals and investments by way of rights or claims and shall include the net profits accruing from such assets and the undivided shares and intangible rights." *Id.* art. 1(4).

covered investors are defined to be nationals (natural persons or legal entities) of a contracting party and also the contracting parties themselves.[206]

b. Standards of Treatment

In terms of substantive provisions, Articles 2 and 11 guarantee the free transfer of capital while Article 2 also provides that invested capital "shall enjoy adequate protection and security."[207] Article 5 provides for the "entry, exit, residence and work" of the investor and his family along with key personnel.[208]

The OIC Investment Agreement also provides for both a MFN[209] and a NT clause.[210] However, the scope of the NT clause is limited to damage caused by hostilities of international nature, or civil disturbances or violent acts of general nature.[211] Furthermore, protections against expropriation are found in Article 10,[212] which allows expropriation only for reasons of

> public interest in accordance with the law, without discrimination and on prompt payment of adequate and effective compensation to the investor in accordance with the laws of the host state regulating such compensation, provided that the investor shall have the right to contest the measure of expropriation in the competent court of the host state.[213]

While this formula seems to adopt the Hull doctrine on expropriation, the reference to the calculation of such compensation in accordance with the host state laws seems to suggest that international law is not applicable when deciding issues of expropriation.[214] This issue has not been expressly dealt with by investor-state tribunals and it remains to be seen whether future determinations will shed more light on these provisions. In *Warraq v. Indonesia*, the only known case arising under the OIC Investment Agreement, the tribunal did not expressly deal with the matter.[215] However, the tribunal did import a FET standard to the Agreement by virtue of the MFN clause[216] and also found that the adequate protection and security standard of Article 2 is not a higher standard than FPS clauses found in BITs.[217]

206. *Id.* art. 1(6).
207. *Id.* arts. 2, 11.
208. *Id.* art. 5.
209. OIC Investment Agreement, *supra* note 115, art. 8(1).
210. *Id.* art. 14.
211. *Id.*
212. *Id.* art. 10(1).
213. *Id.* art. 10(2)(a).
214. *See id.* art. 13 (making no reference to either international law or the laws of the host state).
215. *See* Al Warraq v. Indon., UNCITRAL Trib., Final Award, paras. 518–39 (Dec. 15, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf (failing to utilize international law and focusing on Indonesian law as well as the precise wording of the OIC Investment Agreement).
216. *Id.* paras. 540–621.
217. *Id.* paras. 622–30.

c. Exceptions and Other Relevant Provisions

The OIC Investment Agreement provides a general legality provision in Article 9 providing that investors "shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest."[218] This Article also provides that investors must "refrain from exercising restrictive practices and from trying to achieve gains through unlawful means."[219] This provision was successfully invoked in *Warraq v. Indonesia*.[220] Furthermore, Article 11 also places some restrictions on the free transfer of capital.[221]

d. Dispute Settlement

The OIC Investment Agreement includes an investor-state arbitration clause that was found by the *Warraq* tribunal to be binding and enforceable.[222] In particular, Articles 16 and 17 contain dispute settlement provisions allowing investors to resort to host state courts or to investor-state arbitration.[223] The first case to arise under the OIC Investment Agreement, *Warraq*, was filed in 2011, well after the entry into force of the Agreement in 1986.[224] Recently, three claims have been filed against Egypt under the OIC Investment Agreement, but it appears that Egypt is openly contesting the binding character of this treaty's investor-state arbitration clause.[225]

218. OIC Investment Agreement, *supra* note 115, art. 9.

219. *Id.*

220. Al Warraq v. Indon., UNCITRAL Trib., Final Award, paras. 631–48 (Dec. 15, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf.

221. *See* OIC Investment Agreement, *supra* note 115, art. 11(4) (showing that certain restrictions on transfers are allowed).

222. *See* Al Warraq v. Indon., UNCITRAL Trib., Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, paras. 73–93 (June 21, 2012), http://www.italaw.com/sites/default/files/case-documents/italaw3174_0.pdf (detailing the dispute provision of the OIC Agreement).

223. The choice between these venues also triggers a fork-in-the-road provision. OIC Investment Agreement, *supra* note 115, arts. 16–17.

224. Al Warraq v. Indon., UNCITRAL Trib., Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, para. 7 (June 21, 2012), http://www.italaw.com/sites/default/files/case-documents/italaw3174_0.pdf; OIC Investment Agreement, *supra* note 115, at 1.

225. IAReporter, *Egypt Arbitration Round-Up: Updates on U.S. and German Investor Claims at ICSID, and on Three Ad-Hoc Claims Under OIC Agreement*, INV. ARB. REP. (Nov. 5, 2014), http://www.iareporter.com/articles/egypt-arbitration-round-up-updates-on-u-s-and-german-investor-claims-at-icsid-and-on-three-ad-hoc-claims-under-oic-agreement/.

Figure 2: Participation of African Countries in Arab and Muslim Investment Treaties

^signed
*ratified or equivalent effect

CAEU (1970 & 2000)	**Arab League (1980)**	**Islamic Conference (1981)**	
1. Sudan*	1. Algeria^	1. Algeria	16. Morocco*
2. Somalia	2. Comoros^	2. Benin	17. Mozambique
3. Libya*	3. Djibouti*	3. Burkina Faso*	18. Niger
4. Egypt*	4. Egypt*	4. Cameroon*	19. Nigeria
5. Mauritania.	5. Libya*	5. Chad	20. Senegal*
	6. Mauritania*	6. Comoros	21. Sierra Leone
	7. Somalia*	7. Djibouti^	22. Somalia*
	8. Sudan*	8. Egypt*	23. Sudan*
	9. Tunisia*	9. Gabon*	24. Tunisia*
		10. Gambia^	25. Uganda*
		11. Guinea*	26. Tanzania
		12. Guinea-Bissau	
		13. Libya*	
		14. Mali*	
		15. Mauritania	

B. Early African Multilateralism: The CEPGL Community Investment Code

The previous Section examined the multilateral investment treaties concluded by Arab and Muslim countries. Overall, this group of treaties seems to represent a regional trend toward international investment. The very conclusion of these treaties in the decolonization era and during the NIEO movement corroborates this thesis. However, these treaties target predominantly the non-African, Arab group of countries and do not deal with any of the pressing issues faced by countries in sub-Saharan Africa. Furthermore, the recent amendments of the CAEU Investment Agreement and of the Unified Agreement do not align with the objectives of such regional trends as expressed in the SADC 2012 Model BIT and the latest multilateral investment treaties concluded by the SADC, COMESA and ECOWAS discussed in this Part.

The next three Sections all focus on multilateral investment treaties solely among African countries. The following Section examines the Community Investment Code of the Economic Community of the Great Lakes Countries (CEPGL).[226]

226. Community Investment Code of the CEPGL, *supra* note 111.

a. General Characteristics

The Community Investment Code of the CEPGL (Community Investment Code) was concluded in 1982 between the members of the CEPGL, namely Burundi, the DRC, and Rwanda.[227] Though negotiated during a time when many African countries were entering into BITs with Western characteristics, this treaty is unique in that it contains some of the characteristics from the NIEO movement. This treaty aimed at setting a specific framework for two sorts of investors realizing investments in CEPGL countries.[228] The first type is called a "joint enterprise."[229] These include joint enterprises of all three CEPGL countries, or enterprises in which CEPGL countries control the majority of their shares.[230] The second type is called a "Community enterprise."[231] This covers enterprises established in a CEPGL country that "must turn to account either available resources belonging to at least two member States or a sufficiently large amount of resources from a single member State the use of which, however, involves another member State of the Community."[232] Such terms are not absolutely clear, since, at least in the case of community enterprises, the link between CEPGL member states may not always be easy to prove. In addition, joint and Community enterprises can undertake projects in various areas,[233] and may follow a specific authorization process[234] that provides economic, financial and tax advantages.[235] These advantages are indicated in an authorization document.[236] Authorization can also grant enterprises the benefit of an enacting agreement, which establishes the duration and procedures for the extension of these advantages.[237] Regardless, the capital of both joint and Community enterprises may originate from various sources, and it may well consist of capital from non-CEPGL countries—that is, foreign capital.[238] These provisions make it clear that the purpose of this treaty is to establish a framework for investment principally realized within the boundaries of the CEPGL. The local or foreign origin of the invested capital is irrelevant, provided that the investment is realized through a joint or Community enterprise.[239] This is also in line with the principal aims of the treaty establishing the CEPGL, including the "organization and development of activities of common interest[]" and close cooperation in "social, economic, commercial . . . [and] financial" matters.[240]

227. *Id.* pmbl.

228. *Id.* art. 1.

229. *Id.*

230. *See id.* art. 2(a) ("A joint enterprise means a business entity which is a joint proprietorship of all the member States of the Community or in which they hold at least a 51-per-cent majority of the shares, and which is under joint management and financing and has joint decision-making bodies.").

231. *Id.*

232. Community Investment Code of the CEPGL, *supra* note 111, art. 2(b).

233. *Id.* art. 5.

234. *See id.* arts. 14–21 (explaining the authorization process).

235. *See id.* arts. 22–40 (showing the various advantages offered by different authorization regimes).

236. *Id.* art. 18(c).

237. *Id.* arts. 37–38.

238. Community Investment Code of the CEPGL, *supra* note 111, art. 4(c).

239. *Id.* art. 4.

240. Convention Establishing the Economic Community of the Great Lakes Countries (CEPGL) art. 2, Sept. 20, 1976, 1092 U.N.T.S. 43.

b. Standards of Treatment

Turning to the substantive provisions of the Community Investment Code, the relevant provisions differ from those usually encountered in both the BITs of this era and the multilateral investment treaties of Arab and Muslim states. First, investments are protected during the pre-establishment phase and not just after the realization of the investment.[241] Non-discriminatory standards are expressed narrowly in a quasi-general national treatment provision.[242] In addition, community enterprises "shall not be subject to any discrimination under the law," but provisions similar to the MFN, FET, and FPS standards are not included.[243] Article 7 appears to refer to expropriation even though this is not spelled out expressly; rather, it provides:

> Acquired rights of all kinds to individual or collective property shall be guaranteed to all natural or juridical persons, without discrimination either among foreign nationalities or among foreign nationals and nationals. Such rights may not be prejudiced except in the public interest and in accordance with the principles of international law, and subject to the payment of fair and equitable compensation to the injured holder of such rights.[244]

Furthermore, the Community Investment Code protects the transfer of funds by guaranteeing the "freedom to transfer capital" subject to "existing legislation governing exchange regulations,"[245] and, for enterprises with foreign capital or mixed capital, subject to the "fiscal legislation of the host country."[246] Lastly, two articles of the Community Investment Code include labor provisions and protect against discriminatory treatment of Community workers or foreign nationals[247], but do not specifically give preference to Community workers in the way other African multilateral investment treaties do, which will be examined below.[248]

c. Exceptions and Other Relevant Provisions

Exception provisions per se have not been included in this treaty, but the restrictions on the covered investments and investors, as well as the return to "existing legislation governing exchange regulations" on the transfer of capital, should be regarded as such.[249]

---

241. *See* Community Investment Code of the CEPGL, *supra* note 111, art. 6 ("As provided by this Code, the freedom to form and invest capital shall be guaranteed to any natural or juridical person wishing to establish an enterprise in the territory of one of the member States.").

242. *Id.* arts. 9–10.

243. *See id.* art. 10 (detailing the rights and protection of community enterprises, and extending them to other industrial property).

244. *Id.* art. 7.

245. *Id.* art. 8.

246. *Id.* art. 13.

247. Community Investment Code of the CEPGL, *supra* note 111, arts. 11–12.

248. *See generally infra*, Part C.

249. *See* Community Investment Code of the CEPGL, *supra* note 111, art. 8 (placing the guarantee of freedom to transfer capital subject to existing legislation).

d. Dispute Settlement

The Community Investment Code does not grant investors the right to bring claims against CEPGL countries, but rather it enables the latter to bring claims against joint or Community enterprises that benefit from specific economic, financial, and tax advantages embodied in authorization documents or enacting agreements.[250] Such claims may be filed for cases "involving serious dereliction, duly recorded, by an enterprise which benefits from [these] advantages"[251] and may lead to the revocation of such benefits after a decision "taken by [the] Conference of Heads of State on the advice of the Council of Ministers and the State Commissioner."[252] In these proceedings, the enterprise against which the claim is filed "must submit its plea in defence" and also has the right to appeal the decision of the Conference of Heads of State.[253] This appeal is filed in accordance with Article 54 of the Community Investment Code.[254] However, this Article provides that:

> The settlement of disputes arising from the provisions of an enacting agreement and from the application of the authorization document of an authorized enterprise, as well as the determination of any compensation due because of failure to honour commitments entered into, may be the subject of an arbitration procedure as provided for in each authorization document or enacting agreement.[255]

It is therefore not entirely clear whether the arbitration procedure provided in this provision is only an option as an appeal against the decision taken by the Conference of Heads of State in proceedings initiated by a CEPGL country, or if an investor can also file a claim against a CEPGL country.[256]

In conclusion, the Community Investment Code appears to be the first multilateral investment treaty that sought to project an alternative model to the extra- and intra-African BITs of the 1980s. However, in reality, this treaty failed to influence investment treaty-making in Africa, and general assumptions about larger trends should not be extracted from its communal character. The next Section examines the two African multilateral investment treaties that followed the Community Investment Code.

C. Transplanting Western Standards in African Multilateralism

With the exception of the CEPGL Community Investment Code and the participation of certain African countries in Arab and Muslim multilateral investment

250. *See id.* arts. 50–53 (detailing the process for revocation of authorization).

251. *Id.* art. 50.

252. *Id.* art. 52.

253. *Id.* arts. 51, 53.

254. Community Investment Code of the CEPGL, *supra* note 111, art. 53.

255. *Id.* art. 54.

256. The remainder of Article 54 seems perplexing since it provides for a tripartite arbitration procedure, where the decision "shall be handed down by a majority of the arbitrators," but "[i]n the case of Community enterprises the majority of whose capital is initially foreign-held . . . the authorization document may provide for international arbitration procedures replacing those referred to above." *Id.* art. 54. This provision may leave space to allege that investors that fall under the scope of the Community Investment Code may also file claims against CEPGL countries given that the arbitration clause contained in their authorization document or enacting agreement will provide so.

treaties, African countries did not seek to join intra-Africa multilateral investment treaties until 1990. Prior to 1990, African countries had entered into a series of intra-African BITs that, as discussed above, were "Western" in that they were modeled after their extra-African counterparts. The logical consequence of this was the transplantation of "Western" standards into the multilateral investment arena.

This Section focuses on the Arab Maghreb Union (AMU) Investment Agreement and on the ECOWAS Energy Protocol concluded in 1990 and 2003 respectively.[257] As will become apparent, the former treaty replicates the provisions generally found in BITs between African countries while the latter is modeled after the Energy Charter Treaty (ECT) of 1994.

1. The Arab Maghreb Union Investment Agreement (1990)

The AMU Investment Agreement was concluded in 1990 just one year after the establishment of the AMU; however, it has not yet entered into force.[258] The members to the AMU and the AMU Investment Agreement are Algeria, Libya, Mauritania, Morocco and Tunisia.[259] Despite not being in force, this multilateral investment treaty among African countries is significant for two main reasons. First, while its members Arab countries, it is considerably different from the other multilateral investment treaties involving Arab and Muslim countries. Second, it is the first multilateral investment treaty in Africa that, following the trend of intra-African BITs, is modeled after extra-African BITs.

The first provisions of the treaty include the general definitions of covered investors and investments. These provisions cover nationals and legal entities of AMU members when investing in another AMU member,[260] and provide an indicative list of covered investments.[261] This treaty also includes a FET standard[262] and NT and MFN standards,[263] as well as provisions for the employment of key personnel,[264] the free movement of capital,[265] and expropriation.[266] Of the few exceptions to this treaty is Article 14, which enables a contracting Party to offer special additional benefits to joint ventures between countries of the AMU or nationals of AMU countries as well as to projects of developmental nature.[267] Finally, this treaty also provides for investor-state arbitration.[268]

257. AMU Investment Agreement, *supra* note 18; ECOWAS Energy Protocol, *supra* note 18.
258. AMU Investment Agreement, *supra* note 18.
259. *Id.*
260. *Id.* ch. 1.
261. *Id.* ch. 1(2) & (4)
262. *Id.* art. 2.
263. *Id.* arts. 3, 6.
264. AMU Investment Agreement, *supra* note 18, art. 4.
265. *Id.* art. 11.
266. *Id.* art. 15.
267. *Id.* art. 14.
268. *Id.* arts. 19–20.

2. The ECOWAS Energy Protocol (2003)

a. General Characteristics

The ECOWAS Energy Protocol was signed in 2003[269] by the members of the Economic Community of West African States (ECOWAS), established in 1975.[270] This multilateral investment treaty is a sectoral agreement that applies only to investments connected with or related to the energy sector.[271] The ECOWAS Energy Protocol is modeled after the ECT; in fact, it is almost an identical replica.[272]

The ECOWAS Energy Protocol has been ratified by ten ECOWAS members.[273] However, this does not mean that the Energy Protocol does not apply to those members that have not ratified it. As already noted, the Energy Protocol is very similar to the ECT. It replicates its clauses on provisional application pending entry into force.[274] Similarly to the ECT, this provision states that the ECOWAS Energy Protocol will apply provisionally with respect to a signatory's territory pending its entry into force for such signatory.[275] And since none of the signatories to the Energy Protocol have decided to exclude its provisional application, it appears that this treaty also applies with respect to those ECOWAS members that have not yet ratified it.[276]

b. Standards of Treatment

Indicative of the similarities between the ECT and the Energy Protocol is that the latter provides for a FPS standard and a FET standard, declaring that qualifying investments shall "enjoy the most constant protection and security," a phrase also employed by the ECT.[277] It also provides that "no Contracting Party shall in any way impair by unreasonable or discriminatory measures [such investments'] management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations."[278] In addition, the ECOWAS Energy Protocol provides an

---

269. ECOWAS Energy Protocol, *supra* note 18

270. Treaty of the Economic Community of West African States (ECOWAS) pmbl., May 28, 1975, 1010 U.N.T.S. 17 (including as member states Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo).

271. ECOWAS Energy Protocol, *supra* note 18, art. 1(13).

272. *See id.* pmbl. (praising "adherence to the terms and principles of the Energy Charter Treaty").

273. The ten countries that have ratified the ECOWAS Energy Protocol are: Benin (Sep. 14, 2005), Burkina Faso (July 5, 2012), Gambia (Mar. 1, 2007), Ghana (Jan. 24, 2005) Guinea (Feb. 10, 2005), Guinea-Bissau (Feb. 13, 2012), Niger (Apr. 3, 2006), Nigeria (Oct. 22, 2004), Senegal (Sep. 20, 2006), and Togo (Feb. 20, 2008). The countries that have only signed the ECOWAS Energy Protocol are Cape Verde, Côte d'Ivoire, Liberia, Mali, and Sierra Leone. 2012 ECOWAS ANNUAL REPORT ANNEXES 24, 30 (2012), http://events.ecowas.int/wp-content/uploads/2013/03/2012-Annual-Report_Annexes_English_final.pdf

274. *Compare* ECOWAS Energy Protocol, *supra* note 18, art. 40, *with* Energy Charter Treaty, *supra* note 71, art. 45 (containing the same provisional application terms).

275. ECOWAS Energy Protocol, *supra* note 18, art. 40.

276. Energy Charter Treaty, *supra* note 71, arts. 45(1)–(3); Kardassopoulos v. Geor., ICSID Case No. ARB/05/18, Decision on Jurisdiction, paras. 195–252 (July 6, 2007), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC3352_En&caseId=C63; René Lefeber, *The Provisional Application of Treaties*, *in* ESSAYS ON THE LAW OF TREATIES 81, 84–85 (Jan Klabbers & René Lefeber eds., 1998).

277. ECOWAS Energy Protocol, *supra* note 18, art. 10(1); Energy Charter Treaty, *supra* note 71, art. 10(1).

278. ECOWAS Energy Protocol, *supra* note 18, art. 10(1).

umbrella clause, a NT clause, and a MFN clause, clauses guaranteeing the free transfer of funds and protections against expropriation.[279] It also includes labor provisions that guarantee the employment of key personnel.[280] All of these provisions were copied word for word from the ECT. But, unlike the ECT, the ECOWAS Energy Protocol extends these protections to apply during the pre-establishment phase of investments as well.[281]

c. Exceptions and Other Relevant Provisions

The Energy Protocol, provides for a denial of benefits clause,[282] for provisions that address environmental and transparency issues, [283] and for GATT-like exceptions.[284] Once again, all these provisions are transplanted from the ECT.

d. Dispute Settlement

Article 26 of the Energy Protocol provides for investor-state arbitration along the same lines as does the ECT. With respect to available arbitral fora, the Energy Protocol provides for arbitration under the ICSID Convention, the ICSID Additional Facility, the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), but it also adds the possibility to pursue arbitral proceedings under the Organization for the Harmonization of Trade Laws in Africa (OHADA).[285] To date, no investor-state claims are known to have been filed under the Energy Protocol.[286] Nevertheless, the brief delineation of this treaty reveals its similarity to the ECT and generally to the Western-type post-NAFTA/ECT investment models.[287]

D. The Emergence of African Regionalism

This Section focuses on the multilateral investment treaties concluded from 2006 onward under the auspices of the SADC, COMESA, and ECOWAS. As alluded to above, these treaties are distinct from those discussed in the previous Sections in that they seek to project an alternative image of international investment law. Certainly, traces of African regionalism can also be found in the CEPGL Community Investment Code. However, these three multilateral investment treaties solidify the

279. *Id.* arts. 10, 13–14.

280. *Id.* art. 11.

281. *Id.* arts. 1, 10.

282. *Id.* art. 17.

283. ECOWAS Energy Protocol, *supra* note 18, arts. 18–20.

284. *Id.* art. 26.

285. *Id.* art. 26(4).

286. Ibironke Odumosu, *The Settlement of Investor-State Oil and Gas Disputes in Africa*, *in* NATURAL RESOURCE INVESTMENT AND AFRICA'S DEVELOPMENT 395, 406–07 (Francis N. Botchway ed., 2011) (discussing the ECOWAS Energy Protocol tribunal but not mentioning any claims that have been brought before it).

287. *Compare generally* ECOWAS Energy Protocol, *supra* note 18, *with* Energy Charter Treaty, *supra* note 71 (generally mirroring each other and repeating many of the same provisions).

efforts of African countries to craft a new model of international investment law that best suits their objectives.

1. The Protocol on Finance and Investment of the SADC (2006)

a. General Characteristics

The Protocol on Finance and Investment of the SADC was signed in 2006 and entered into force on April 16, 2010.[288] Among the fifteen members of the SADC, only Seychelles has not signed the Protocol.[289] The provisions of Annex 1 of the Protocol on Finance and Investment (SADC Protocol) are briefly analyzed below. The SADC Protocol defines covered investments and investors broadly;[290] yet it also grants the host state the power to exclude "short-term portfolio investments of a speculative nature or any sector sensitive to its development or which would have a negative effect on its economy" from the protections of this treaty, provided that due notice is given.[291] A large portion of the SADC Protocol has been transposed to the SADC 2012 Model BIT.[292]

b. Standards of Treatment

Some of the protections offered to investors include the FET standard,[293] the MFN treatment,[294] the free transfer of funds,[295] and the Hull formula for the payment of compensation in case of expropriation or nationalization, which is only allowed for public purposes and must not be discriminatory.[296] The SADC Protocol does not however include a FPS or NT standard or an umbrella clause.[297]

c. Exceptions and Other Relevant Provisions

The SADC Protocol includes various exception provisions.[298] Article 7 stipulates that preferential treatment may be granted to specific investments and

---

288. SADC Protocol, *supra* note 28, at 25.

289. *Id.* SADC members are Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. *Member States*, S. AFR. DEV. CMTY., www.sadc.int/member-states/ (last visited Apr. 20, 2017).

290. SADC Protocol, *supra* note 28, annex 1, art. 1.

291. *See id.* (stating that the notice is a three-month one, yet it is not clarified whether this interval of time runs from the time when a dispute has arisen or by the time the investor realizes her investment).

292. *Compare generally* SADC Protocol, *supra* note 28, *with* SADC 2012 Model BIT, *supra* note 33.

293. SADC Protocol, *supra* note 28, annex 1, art. 6(1).

294. *See id.* annex 1, art. 6(2) (stating that treatment of covered investors will be no less favorable than that given to any investors of a third state).

295. *See id.* annex 1, art. 9 (stating that State Parties "shall ensure that investors are allowed facilities in relation to repatriation of investments and returns in accordance with the rules and regulations stipulated by the Host State").

296. *Id.* annex 1, art. 5.

297. *See id.* (lacking any mention of full legal protections and services clauses, national treatment standards, or umbrella clauses).

298. *Id.* annex 1, art. 7.

investors in order to achieve national development objectives.[299] Specific provisions for transparency and corporate social responsibility are also provided.[300] A very interesting provision is put into place with regard to labor: In principle, while foreign investors are permitted to hire key personnel of any nationality, under the SADC Protocol, investors are only permited to do so provided that the specific skills possessed by the personnel whom the investor wishes to engage cannot be found by hiring someone from within the host state.[301] These provisions are supplemented by other provisions that refer to the optimal use of natural resources, environmental measures, and the host state's right to regulate.[302] Of particular interest is also Article 20, which deviates from both NT and MFN obligations by stipulating that:

> State Parties shall establish conditions favouring the participation of least-developed countries of SADC in the economic integration process, based on the principles of non-reciprocity and mutual benefit. For the purpose of ensuring that least-developed countries of SADC receive effective preferential treatment, State Parties shall investigate the establishment of market openings as well as the setting up of programmes and other specific forms of cooperation including in relation to derogations in respect of investment incentives.[303]

d. Dispute Settlement

Of additional interest are the dispute settlement provisions of the SADC Protocol.[304] First, unlike the majority of investment treaties, the SADC Protocol's investor-state arbitration clause is not limited to investors who are nationals of the contracting parties.[305] On the contrary, any investor is eligible to arbitrate pursuant to the SADC Protocol provided that she had realized an investment in the territory of a SADC state.[306] Certainly, the definition of investor is also meant to refer to "a person that has been admitted to make or has made an investment,"[307] but the broad scope of the investor-state arbitration clause most closely resembles those usually found in national investment laws, not investment treaties.[308] Second, while covered investors are defined broadly, recourse to investor-state arbitration under the SADC Protocol is only available subject to the exhaustion of local remedies.[309] In this regard, the requirement to exhaust local remedies appears to have been influenced by the Model BIT of the International Institute of Sustainable Development (IISD), which was the only instrument that provided for this scenario at the time of the SADC

299. SADC Protocol, *supra* note 28, annex 1, art. 7(1).

300. *Id.* annex 1, arts. 8, 10.

301. *Id.* annex 1, art. 11.

302. *Id.* annex 1, arts. 12–14.

303. *Id.* annex 1, art. 20.

304. SADC Protocol, *supra* note 28, annex 1, art. 28.

305. *Id.*

306. *Id.*

307. *Id.* annex 1, art. 1.

308. *See* SALACUSE, *supra* note 19, at 152–53. (discussing the distinctions between dispute-resolving mechanisms in customary international law and in international investment treaties).

309. SADC Protocol, *supra* note 28, annex 1, art. 28(1).

Protocol.[310] As previously discussed, this feature is now replicated in the SADC 2012 Model BIT.[311]

Furthermore, the SADC Protocol allows investors to submit their claims to ICSID or to an ad hoc tribunal under the UNCITRAL Arbitration Rules, as well as provides for recourse to the SADC Tribunal.[312] The SADC Tribunal was created in 1992, but its members were not appointed until 2005.[313] In 2007 the Tribunal heard its first case, which was filed by a white African farmer, Mike Campbell, against Zimbabwe.[314] In this case, which was not filed under the SADC Protocol, Campbell's claim was upheld.[315] It was decided that Zimbabwe could not evict Campbell from his farm, as this eviction amounted to de facto discrimination.[316] This decision created a fierce opposition from the SADC member states, leading the 2012 SADC Summit to limit the jurisdiction of the SADC Tribunal to disputes arising between member states.[317]

Therefore, under the SADC Protocol, resort to the SADC Tribunal is no longer an option for investors. However, after the entry into force of the SADC Protocol in 2010, mining investors, who had previously filed a claim with the SADC Tribunal, filed a new claim under the SADC Protocol before a UNCITRAL tribunal.[318] This tribunal issued an award finding that Lesotho had committed a denial of justice "in relation to its involvment in the politically-controversial decision of SADC member-states to suspend and then shutter" the SADC Tribunal's jurisdiction over indviduals and companies,[319] and ordered Lesotho to participate in a new arbitration that would determine the merits of the claim.[320] A new UNCITRAL tribunal was constituted to hear the case, but Lesotho is currently also seeking to set aside the first award in Singapore (the legal seat of the arbitration).[321] Meanwhile, it has recently been reported that another case under the SADC Protocol has been initiated against Swaziland.[322]

In the aftermath of these developments, the SADC Summit in 2016 adopted yet another amendment to the SADC Protocol, which if ratified, will bring about

310. HOWARD MANN ET AL., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT, INT'L INST. SUSTAINABLE DEV. art. 5(2) (2005), https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf [hereinafter IISD Model BIT].

311. SADC 2012 Model BIT, *supra* note 33, art. 29.4.

312. SADC Protocol, *supra* note 28, annex 1, art. 28(2).

313. *SADC Tribunal*, S. AFR. DEV. CMTY., http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (last visited Apr. 20, 2017).

314. *See* Mike Campbell (Pvt) Ltd. v. Zimbabwe, S. Afr. Dev. Cmty. Trib. 2/2007, Judgment, 6–8 (2008) (providing factual background of the case).

315. *Id.* at 54–55.

316. *Id.* at 50.

317. *SADC Tribunal*, *supra* note 313.

318. Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho, (SADC (T) 04/2009) [2010] SADCT 4, 11 June 2010; Swissbourgh Diamond Mines (Pty) Ltd v. Kingdom of Lesotho, PCA Case No. 2013-29, Partial Final Award, 18 April 2016.

319. Swissbourgh Diamond Mines (Pty) Ltd v. Kingdom of Lesotho, PCA Case No. 2013-29, Partial Final Award, 18 April 2016.

320. *Id.*

321. Douglas Thomson, *Lesotho Award Set Aside in Singapore*, GLOB. ARB. REV. (Aug. 15, 2017), http://globalarbitrationreview.com/article/1145681/lesotho-award-set-aside-in-singapore.

322. Jarrod Hepburn & Luke Eric Peterson, *Southern Africa: Updates On Lesotho, Swaziland, Mozambique And Zimbabwe Investment Disputes*, INV. ARB. REP. (Feb. 4, 2015), https://www.iareporter.com/articles/southern-africa-updates-on-lesotho-swaziland-mozambique-and-zimbabwe-investment-disputes/.

significant changes to the SADC Protocol, including the deletion of the FET provision and the removal of the investor-state arbitration clause.[323]

2. The Investment Agreement of the COMESA Common Investment Area (2007)

a. General Characteristics

The COMESA was created in December 1994 with a principal aim to foster the economic integration of its members, now 19 African states.[324] In May 2007, the Investment Agreement for the COMESA Common Investment Area (COMESA Investment Agreement) was adopted.[325] This treaty is another African multilateral investment treaty which seeks "to boost trade within the region by attracting both regional and foreign direct investment."[326] The COMESA Investment Agreement has not yet entered into force, as at least six states need to ratify it and this condition has not been met.[327]

Similar to the SADC Protocol, Article 1 of the COMESA Investment Agreement provides the definitions of covered investors and investments.[328] Yet with regard to legal entities, a quasi-denial of benefits clause is inserted into the very definition of investors.[329] This approach is a peculiar one, since investment treaties usually provide for a denial of benefits clause as an admissibility provision that grants host states the power to deny the protections accorded to investors and investments when the claimant is a shell or "mailbox" company that has no substantial business activities in its territory.

b. Standards of Treatment

In terms of substantive provisions, the COMESA Investment Agreement provides for a FET standard but does not include a FPS provision.[330] The relevant provision clarifies that the FET standard is to be construed pursuant to "the customary

323. *See Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, U.N. CONFERENCE ON TRADE & DEV., http://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf (noting that the SADC amended the SADC Protocol, ommitting the FET provision and the inter-state dispute settlement mechanism, which is in the process of ratification).

324. These member states are Burundi, Comoros, the Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe. *COMESA Members States,* COMESA, http://www.comesa.int/comesa-members-states/ (last visited May 16, 2017).

325. COMESA Investment Agreement, *supra* note 28.

326. COMESA, COMESA INVESTMENT REPORT 2011 19 (2011), http://www.comesa.int/wp-content/uploads/2016/06/2011-COMESA-Investment-Report-1.pdf.

327. COMESA Investment Agreement, *supra* note 28, art. 37(1); Investment Agreements Landscape in Africa, *supra* note 40, para. 31.

328. COMESA Investment Agreement, *supra* note 28, art. 1.

329. *Id.* art. 1(4) & (9).

330. *Id.* art. 14.

international law minimum standard of treatment of aliens"[331] but provides for the following caveat:

> For greater certainty, Member States understand that different Member States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time. Paragraphs 1 and 2 of this Article do not establish a single international standard in this context.[332]

This is a somewhat peculiar provision, as it provides that there are multiple international minimum standards that largely depend on the development of COMESA countries. Apart from this provision, the COMESA Investment Agreement provides for a NT and MFN clause,[333] for the free transfer of capital,[334] and for protection against expropriation, which is only allowed on a non-discriminatory basis in accordance with due process of law and upon payment of "prompt adequate compensation"[335] that "shall be freely transferable."[336] In addition, Article 20 also provides that:

> A measure of general application shall not be considered an expropriation of a debt security or loan covered by this Agreement solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt .... Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.[337]

This provision seeks to delineate the boundaries between indirect expropriation and bona fide regulatory measures, and bears similarity to provisions in post-NAFTA/ECT investment treaties.[338] Another important provision of the COMESA Investment Agreement is Article 16, which guarantees the right of investors to hire "technically qualified persons from any country,"[339] but also provides that "COMESA investors shall accord a priority to workers who possess the same qualifications and are available in the Member State or any other Member State."[340]

---

331. *Id.* art. 14(2).

332. *Id.* art. 14(3).

333. COMESA Investment Agreement, *supra* note 28, arts. 17, 19. *Cf. id.* art. 18 (providing some exceptions to the national treatment standard, which is usual in many recent investment treaties).

334. *Id.* art. 15.

335. *Id.* art. 20(1)(d). *See also id.* art. 20(2) ("Compensation may be adjusted to reflect the aggravating conduct by a COMESA investor or such conduct that does not seek to mitigate damages.").

336. *Id.* art. 20(5).

337. *Id.* art. 20(7)–(8).

338. *Supra* Part II.B.

339. COMESA Investment Agreement, *supra* note 28, art. 16.

340. *Id.*

c. Exceptions and Other Relevant Provisions

The COMESA Investment Agreement additionally provides for a general exception for the protection of national security and public morals; human, animal, and plant life; and the health and the overall protection of the environment.[341] More sophisticated exceptions are also provided in situations of external financial difficulties.[342] Apart from these provisions, emphasis is on transparency issues in both administrative and dispute settlement procedures.[343]

d. Dispute Settlement

The COMESA Investment Agreement provides for investor-state arbitration without the requirement of first exhausting of local remedies encountered in the SADC Protocol.[344] Recourse is provided to the COMESA Court of Justice and to investment arbitration under the ICSID Convention.[345] Since the treaty has not entered into force, no claims have been brought under this treaty.[346]

3. The ECOWAS Supplementary Act on Investment (2008)

a. General Characteristics

In 2008 the ECOWAS countries adopted three Supplementary Acts to the ECOWAS Treaty, one of which—the ECOWAS Supplementary Act—refers directly to investment.[347] Unlike the ECOWAS Energy Protocol, the ECOWAS Supplementary Act is not limited to disputes in the energy sector.[348] The ECOWAS Supplementary Act is fundamentally different from the ECOWAS Energy Protocol and has many similarities to the SADC Protocol and the COMESA Investment Agreement. The ECOWAS Supplementary Act adopts a more restrictive definition of covered investments, requiring that they are not "in the nature of portfolio investments" and that "there is a significant physical presence of the investment in the host State."[349]

With respect to the status of the ECOWAS Supplementary Act, Ibironke Odumosu-Avanu states that "[t]here is some confusion regarding the status of this Supplementary Act."[350] The ECOWAS Supplementary Act itself provides that it "'is

341. *Id.* art. 22(1).

342. *Id.* arts. 24–25.

343. *Id.* arts. 4, 28(5).

344. *Id.* art. 28.

345. COMESA Investment Agreement, *supra* note 28, art. 28.

346. *See* Investment Agreements Landscape in Africa, *supra* note 40, para. 31 (noting the treaty has not entered into force).

347. *See* ECOWAS Supplementary Act on Investment, *supra* note 28 (detailing community rules on investments and modalities of their implementation with ECOWAS).

348. *Id.* art. 4(1).

349. *Id.* art. 1(c)(v).

350. Ibironke T. Odumosu-Ayanu, *South-South Investment Treaties, Transnational Capital and African Peoples*, 21 AFR. J. INT'L & COMP. L. 172, 201 (2013).

annexed to the ECOWAS Treaty of which it is an integral part."[351] However, the ECOWAS Supplementary Act appears to have entered into force, since its entry into force is premised upon its publication, which took place 30 days after its conclusion.[352]

b. Standards of Treatment

The ECOWAS Supplementary Act includes a NT[353] and MFN[354] clause, the FET and FPS standards,[355] protection against expropriation,[356] provisions for the free transfer of funds,[357] and provisions for the employment of key personnel.[358] In addition, the ECOWAS Supplementary Act follows the structure of the Model BIT of the IISD, which as already noted appears to have also influenced the drafting of the SADC Protocol, and to a lesser extent, of the COMESA Investment Agreement. The ECOWAS Supplementary Act copies the "obligations and duties of investors and investments" provisions of the IISD Model BIT,[359] replicating its pre-establishment impact assessment provisions[360] and anti-corruption provisions.[361] Article 18 of the IISD Model BIT, which does not allow investors to initiate dispute settlement proceedings when found liable of corruption, is also replicated in the ECOWAS Supplementary Act with identical structure and content.[362] Furthermore, other provisions drawn from the IISD Model BIT address the host state's obligations and rights,[363] which allow host states to impose certain performance requirements that "promote domestic development benefits from investments."[364] Lastly, provisions for the home state's rights and obligations are also included, rounding out the state-investor balance that the ECOWAS Supplementary Act envisages.[365]

c. Exceptions and Other Relevant Provisions

An important element of the ECOWAS Supplementary Act is the inclusion of specific security and general exceptions,[366] the most notable being Article 38. The Article uses the language of the IISD Model BIT and provides for the non-application of the ECOWAS Supplementary Act to

351. ECOWAS Supplementary Act on Investment, *supra* note 28, art. 42.

352. *Id.* arts. 41 & 42(1).

353. *Id.* art. 5.

354. *Id.* art. 6.

355. *Id.* art. 7(2).

356. *Id.* art. 8 (providing a somewhat different provision than those usually provided in recent "classic" investment treaties).

357. ECOWAS Supplementary Act on Investment, *supra* note 28, art. 10.

358. *Id.* art. 9.

359. *Id.* arts. 11–18.

360. *Id.* art. 12.

361. *Id.* art. 13.

362. *Id.* art. 18; *see also* IISD Model BIT, *supra* note 310, art. 18 (using the same organizational structure for the same subject matter in the two acts).

363. *See generally* ECOWAS Supplementary Act on Investment, *supra* note 28, arts. 19–26.

364. *Id.* art. 24(2).

365. *Id.* arts. 27–30.

366. *Id.* arts. 37–38.

> any law or other measure of a host State the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by long-term historic discrimination in its territory.[367]

This provision does not apply to expropriation and must also be compatible with Article 19, which obligates states to safeguard procedural fairness and prohibits them from acting in a manner that creates "a denial of justice in judicial and administrative proceedings."[368]

The inclusion of such provisions may prove fundamental when dealing with cases that involve similar considerations. For example, the dispute in *Foresti*[369] arose in light of South Africa's economic empowerment initiatives for the black population, including the granting of licenses in the minerals industry.[370] This was regarded as a violation of the Italy-South Africa and Belgium-Luxembourg-South Africa BITs and led to the *Foresti* claim.[371] This case was ultimately discontinued. Yet had those BITS provided for exceptions like the one included in the Supplementary Act, they probably would have dissuaded the investors from filing their claims in the first place.[372]

d. Dispute Settlement

Unlike the SADC Protocol and the COMESA Investment Agreement, the ECOWAS Supplementary Act does not appear to include a binding and enforceable investor-state arbitration clause.[373] Article 33 provides that:

> In the event of a dispute between Member States, or between a Member State and an investor, or between an investor and a host State, the party wishing to raise the dispute shall issue a notice of intention to initiate arbitration to the other potential disputing Party or Parties using a dispute settlement procedure prescribed below.[374]

However, the Article also provides that:

> Any dispute between a host Member State and an Investor, as envisaged under this Article that is not amicably settled through mutual discussions may be submitted to arbitration as follows: (a) a national court; (b) any

367. *Id.* art. 38(1).

368. *Id.* art. 19(2).

369. Foresti v. South Africa, ICSID Case No. ARB(AF)/07/1, Award, 1 (Aug. 4, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0337.pdf.

370. Christoph Schreuer & Ursula Kriebaum, *From Individual to Community Interest in International Investment Law*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 1079, 1091 (Ulrich Fastenrath et al. eds., 2011).

371. *Foresti*, ICSID Case No. ARB(AF)/07/01, para. 1.

372. *Id.* paras. 38, 53.

373. *See* ECOWAS Supplementary Act on Investment, *supra* note 28, art. 33(6) ("Any dispute between a host Member State and an Investor . . . under this Article . . . may be submitted to arbitration.").

374. *Id.* art. 33(1).

> national machinery for the settlement of investment disputes; (c) the relevant national court of the Member States.[375]

Finally, it provides that "[w]here in respect of any dispute envisaged under this Article, there is disagreement as to the method of dispute settlement to be adopted; the dispute shall be referred to the ECOWAS Court of Justice."[376] It is unclear whether these provisions create a binding and enforceable arbitration clause.

III. THE EMERGING AFRICAN MODEL?

Parts I and II have established that when it comes to Africa, there is no one investment treaty model. In fact, there are a considerable number of models, operating on the bilateral, multilateral, extra- and intra-African levels.

In summary, African investment treaties can be classified into the following categories: Extra-African BITs concluded between the 1960s and the 1990s (these adopt the models used by European countries, Canada, and the United States in the previous century); intra-African BITs concluded from 1982 onwards (these replicate the extra-African BITs concluded around the same time); extra-African BITs concluded in the post-NAFTA/ECT era (with particular reference to Canadian and U.S. BITs, these include the main bulk of the provisions found in the NAFTA and the ECT); Chinese BITs (the majority of BITs with African countries are modeled after China's third generation BITs, which are very similar to pre-NAFTA/ECT extra-African BITs); the SADC 2012 Model BIT (this adopts many of the provisions found in the NAFTA and the ECT but also a series of provisions found in the IISD Model BIT); Arab and Muslim investment treaties; the CEPGL Community Investment Code; the AMU Investment Agreement; the SADC Energy Protocol; and the trio of the SADC Protocol on Finance and Investment, the COMESA Investment Agreement, and the ECOWAS Supplementary Act. Finally, it remains to be seen whether the currently non-binding PAIC, which mirrors various provisions of the COMESA Investment Agreement, the SADC Protocol on Finance and Development, the SADC Model BIT, and the ECOWAS Supplementary Act, will eventually influence investment treatymaking in Africa.

This Part focuses on emerging African regionalism as it is captured by the SADC Protocol, the COMESA Investment Agreement, the ECOWAS Supplementary Act, and the SADC 2012 Model BIT. In this respect, two main questions can be raised: First, are we experiencing the emergence of an African investment model, and if so, how different is it from the latest models of the United States, Canada, and the European Union? Second, assuming that we are indeed witnessing the emergence of an African investment model, how, if at all, is the solidification of this model affected by the burgeoning parallelism existent at the bilateral and multilateral intra-African level? The first question is addressed below, while the latter is addressed in Part IV.

While traces of African multilateral investment law regionalism can be found in the CEPGL Community Investment Code, the emergence of an African model can only be found from 2006 onward, when the SADC Protocol was concluded. The COMESA Investment Agreement and ECOWAS Supplementary Act followed shortly thereafter, and in 2012, the SADC 2012 Model BIT was published. This

375. *Id.* art. 33(6).
376. *Id.* art. 33(7).

timeframe is no strange coincidence but rather should be linked to the work of the IISD, which in 2005 published its Model BIT while working closely with many African countries.[377] Indeed, as indicated in Part II, the multilateral investment treaties concluded from 2006 onward and the SADC 2012 Model BIT were all highly influenced by the IISD Model BIT.[378] However, Part II also showed that while African countries have started to project a regional trend toward the predominant models of international investment law-making, such efforts are not synchronized. In fact, though there are many convergent aspects between the three multilateral investment instruments and the SADC 2012 Model BIT, there are significant differences with respect to both dispute settlement provisions and substantive provisions.[379] Furthermore, the COMESA Investment Agreement has not entered into force even though almost ten years have passed since its conclusion.[380]

The examination of the SADC Protocol, the COMESA Investment Agreement, and the ECOWAS Supplementary Act reveals that these treaties have incorporated many of the substantive standards found in mainstream investment treaties but have also included a series of exceptions not typically found in extra-African investment treaties. These exceptions generally derive from the IISD Model BIT.[381] Of particular importance are labor provisions for the engagement of the local population,[382] provisions for the optimal use of natural resources and the safeguarding of environmental interests,[383] anti-bribery clauses,[384] and preferential treatment based on the level of development achieved by certain African states.[385] The SADC Protocol goes one step further by requiring the exhaustion of local remedies before resorting to investor-state arbitration.[386] In comparison, the COMESA Investment Agreement does not provide for such limitations, and the ECOWAS Supplementary Act does not appear to provide for a binding investor-state arbitration clause at all.[387] On the other

377. *See* IISD Model Bit, *supra* note 310 (noting that the IISD Model BIT was the result of collaborative process of drafting and consultations, including a high-level experts meeting in January 2005 in The Hague and that a parallel exercise developing a Southern Agenda on Investment also fed strongly into the process).

378. *See* SADC 2012 Model BIT, *supra* note 33, at 3 ("The preparation of the SADC Model BIT Template has been undertaken . . . by a drafting committee consisting of representatives [from the International Institute for Sustainable Development (IISD)].").

379. *Compare* SADC 2012 Model BIT, *supra* note 33, art. 19, *with* ECOWAS Supplementary Act, *supra* note 28, art. 18, *and* COMESA Investment Agreement, *supra* note 28, arts. 26–31.

380. *See* Peter Muchlinski, *The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement* 1–2 (Univ. of London Sch. of Oriental & Afr. Stud. Research Paper No. 11, 2010) (stating that the COMESA authority adopted the CCIA Agreement in 2007); Investment Agreements Landscape in Africa, *supra* note 40, at 6–7 (stating the CCIA Agreement has yet to be ratified).

381. *See, e.g.*, SADC Protocol, *supra* note 28, arts. 5, 6(1)–(2), 9 (requiring a solemn declaration enforcing term limits and explaining how to disqualify members); COMESA Investment Agreement, *supra* note 28, arts. 14–19 (following the Model BIT on expropriation and fair and equitable trade).

382. *See* COMESA Investment Agreement, *supra* note 28, art. 16 (stating that priority is given to workers who reside in the member state); *SADC Tribunal*, *supra* note 313 (discussing the basis of jurisdiction and the SADC tribunal's exclusive rights involving employment disputes).

383. SADC Protocol, *supra* note 28, arts. 12–14; COMESA Investment Agreement, *supra* note 28, art. 20(8).

384. ECOWAS Supplementary Act on Investment, *supra* note 28, arts. 13, 18; SADC 2012 Model BIT, *supra* note 33, art. 10; COMESA Investment Agreement, *supra* note 28, art. 1(4) & (9).

385. SADC Protocol, *supra* note 28, arts. 7, 20; COMESA Investment Agreement, *supra* note 28, art. 14(3).

386. SADC Protocol, *supra* note 28, art. 28(1).

387. COMESA Investment Agreement, *supra* note 28, art. 28; ECOWAS Supplementary Act on Investment, *supra* note 28, art. 33.

hand, the SADC 2012 Model BIT expands the provisions found in the SADC Protocol by incorporating the IISD Model BIT even more extensively.[388] One of the main characteristics of the SADC 2012 Model BIT discussed in Part I is that it subjects investors to civil liability actions in their home states for acts or omissions leading to significant damage, personal injuries, or loss of life in the host state. It also explicitly allows for counterclaims [389] and requires the publication of all contracts [390] and payments related to the establishment or right to operate an investment in the host state.[391] However, to date, the SADC 2012 Model BIT has not been used as a model for the conclusion of a BIT.[392]

Perhaps one of the most defining characteristics of these instruments is the inclusion of developmental provisions that allow for the granting of preferential treatment to specific investments and investors. However, this approach is not uniform. The SADC Protocol allows for preferential treatment in order to achieve national development objectives [393] and to favor the participation of the least developed countries.[394] The COMESA Investment Agreement provides that the FET standard is to be construed pursuant to "the customary international law minimum standard of treatment of aliens"[395] but such standard can be adjusted depending on the "different levels of development" achieved by COMESA member states.[396] The ECOWAS Supplementary Act generally excludes its application from "any law or other measure of a host State the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by long-term historic discrimination in its territory."[397] A similar provision is also found in the SADC 2012 Model BIT.[398]

While there are new elements in the most recent African multilateral investment treaties and the SADC 2012 Model BIT, the projection of African regionalism is not finely tuned. Not only are there many differences between the three most recent African multilateral investment treaties, but there are also differences between the SADC Protocol and the SADC 2012 Model BIT.[399] Aside from that, one needs to take into account that the post-NAFTA/ECT models of the United States and Canada, along with the emerging model of the EU, contain a host of provisions that safeguard the states' regulatory powers in areas such as environment, public health and corporate social responsibility.[400] This is also evident when examining the

388. *Compare* SADC 2012 Model BIT, *supra* note 33, art. 36, *with* IISD Model BIT, *supra* note 310, art. 4 (demonstrating that the IISD Model BIT incorporated the structure and language of the SADC 2012 Model BIT).

389. SADC 2012 Model BIT, *supra* note 33, art. 19(2).

390. *Id.* art. 18(1).

391. *Id.* art. 18(2).

392. Ofodile, *supra* note 16, at 201.

393. SADC Protocol, *supra* note 28, art. 7(1).

394. *Id.* art. 20(2).

395. COMESA Investment Agreement, *supra* note 28, art. 14(2).

396. *Id.* art. 14(3).

397. ECOWAS Supplementary Act on Investment, *supra* note 28, art. 38(1).

398. *See* SADC 2012 Model BIT, *supra* note 33, art. 21(3) (stipulating that a state party may take measures to address economic disparities due to prior discrimination).

399. *See* Sean Woolfrey, *Is an Overhaul on the SADC Protocol on Finance and Investment Imminent?*, TRALAC TRADE L. CTR. NPC (Mar. 13, 2014), https://www.tralac.org/discussions/article/5358-is-an-overhaul-of-the-sadc-protocol-on-finance-and-investment-imminent.html ("[The SADC Protocol] contains a number of provisions which provide foreign investors in SADC with BIT-type protection and which are inconsistent with the recommendations contained in the SADC Model BIT.").

400. *See* Thomas W. Wälde, *International Disciplines on National Environmental Regulation: With*

most recent extra-African BITs. For example, as discussed in Part I, the BITs between Canada and African states over the past few years contain a series of exception clauses along with specific provisions on corporate social responsibility.[401] Still, the provisions in African multilateral investment treaties on the engagement of local personnel, on developmental objectives, and on bribery are not present in post-NAFTA/ECT investment treaties.[402]

With respect to investor-state dispute settlement, while the SADC advances the rule requiring exhaustion of local remedies prior to arbitration, other African RECs have not followed suit. At the same time, the EU is actively advocating in favor of an international investment court and the establishment of standing bodies in its free trade agreements.[403] While this development is still in progress, it remains to be seen how it will influence future provisions on investor-state dispute settlement in African treaties, particularly in the treaties currently under negotiation between African RECs and the United States or the EU.

All in all, while African multilateral investment treaties are not finely tuned, they do contain a series of provisions that differentiate them from other extra-African investment treaties, particularly from the predominant models of Canada, the United States and the EU. However, even accepting that the most recent African multilateral investment treaties truly capture an alternative model, the burgeoning parallelism existent in the intra-African level appears to cripple or diminish the impact of this regional trend.

IV. PARALLELISM AS A RESTRAINING FACTOR OF AFRICAN REGIONALISM

An OECD report states that "[c]oherence and compatibility among agreements from the region need to be further analysed in order to ensure effective investment policies and to stimulate intra-regional investment flows."[404] This seems to be equally appropriate in the context of African states. The existence of multiple bilateral and multilateral investment treaties between the same African states, along with the membership of African countries to Arab and Muslim investment treaties, creates a mosaic of standards and instruments. This mosaic arguably calls into question not only the coherence and compatibility of international investment law in Africa, but also, most importantly, the ability of the most recent African multilateral investment treaties to establish an emergent African investment-treaty model. Figures 3 and 4 below summarize this parallelism in the terrain of multilateral investment

Particular Focus on Multilateral Investments Treaties, *in* INTERNATIONAL INVESTMENTS AND PROTECTION OF THE ENVIRONMENT: THE ROLE OF DISPUTE RESOLUTION MECHANISMS 29, 47–48 (International Bureau of the Permanent Court of Arbitration ed., 2000) (explaining that NAFTA provisions not only safeguard states' environmental regulatory powers, but also ensure that health, safety, and environmental standards are not relaxed to encourage investment).

401. *Supra* notes 81–82 and accompanying text.

402. *See supra* notes 95–96 (providing examples of BITs between Canada and African states containing general exceptions and social responsibility provisions).

403. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* 15, COM (2015) 497 final (Oct. 14, 2015), https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-497-EN-F1-1.PDF.

404. ORG. FOR ECON. COOPERATION & DEV., EVOLUTION OF INTERNATIONAL INVESTMENT AGREEMENT (IIAS) IN THE MENA REGION 14 (2010), http://www.oecd.org/mena/competitiveness//46581917.pdf.

treaties. However, this issue also arises vividly in the bilateral terrain. For example, a UNCTAD report notes that the SADC Protocol co-exists with some 16 intra-SADC BITs, and the COMESA Investment Agreement co-exists with some 24 intra-COMESA BITs.[405]

Figure 3: Parallelism in African Multilateral Investment Treaties

CEPGL (1982)	**AMU (1990)** *not in force	**ECOWAS Energy Protocol (2003)**	**SADC Protocol (2006)**	**COMESA (2007)** *not in force	**ECOWAS (2008)**
1. Burundi	1. Algeria	1. Benin	1. Angola	1. Burundi	1. Benin
2. The DRC	2. Libya	2. Burkina Faso	2. Botswana	2. Comoros	2. Burkina Faso
3. Rwanda	3. Mauritania	3. Cape Verde	3. The DRC	3. The DRC	3. Cape Verde
	4. Morocco	4. Côte d'Ivoire	4. Lesotho	4. Djibouti	4. Côte d'Ivoire
	5. Tunisia	5. Gambia	5. Madagascar	5. Egypt	5. Gambia
		6. Ghana	6. Malawi	6. Eritrea	6. Ghana
		7. Guinea	7. Mauritius	7. Ethiopia	7. Guinea
		8. Guinea-Bissau	8. Mozambique	8. Kenya	8. Guinea-Bissau
		9. Liberia	9. Namibia	9. Libya	9. Liberia
		10. Mali	10. Seychelles	10. Madagascar	10. Mali
		11. Niger	11. South Africa	11. Malawi	11. Niger
		12. Nigeria	12. Swaziland	12. Mauritius	12. Nigeria
		13. Senegal	13. Tanzania	13. Rwanda	13. Senegal
		14. Sierra Leone	14. Zambia	14. Seychelles	14. Sierra Leone
		15. Togo	15. Zimbabwe	15. South Sudan	15. Togo
				16. Sudan	
				17. Swaziland	
				18. Uganda	
				19. Zambia	
				20. Zimbabwe	

405. U.N. CONF. ON TRADE & DEV., *The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?*, 3 IIA ISSUES NOTE 1, 5 (June 2013).

Figure 4: Parallelism in All Multilateral Investment Treaties in Force
^signature
*ratification or equivalent effect

Arab League (1980)	**Islamic Conference (1981)**	**CEPGL (1982)**	**CAEU (2000)**
1. Algeria^	1. Algeria	1. Burundi*	1. Sudan*
2. Comoros^	2. Benin	2. The DRC*	2. Somalia
3. Djibouti*	3. Burkina Faso*	3. Rwanda*	3. Libya*
4. Egypt*	4. Cameroon*		4. Egypt*
5. Libya*	5. Chad		5. Mauritania
6. Mauritania*	6. Comoros		
7. Somalia*	7. Djibouti^		
8. Sudan*	8. Egypt*		
9. Tunisia*	9. Gabon*		
	10. Gambia^		
	11. Guinea*		
	12. Guinea-Bissau		
	13. Libya*		
	14. Mali*		
	15. Mauritania		
	16. Morocco*		
	17. Mozambique		
	18. Niger		
	19. Nigeria		
	20. Senegal*		
	21. Sierra Leone		
	22. Somalia*		
	23. Sudan*		
	24. Tunisia*		
	25. Uganda*		
	26. Tanzania		

ECOWAS Energy Protocol (2003)	**SADC Protocol (2006)**	**ECOWAS (2008)**
1. Benin*	1. Angola*	1. Benin*
2. Burkina Faso*	2. Botswana*	2. Burkina Faso*
3. Cape Verde^	3. The DRC*	3. Cape Verde*
4. Côte d'Ivoire^	4. Lesotho*	4. Côte d'Ivoire*
5. Gambia*	5. Madagascar*	5. Gambia*
6. Ghana*	6. Malawi*	6. Ghana*
7. Guinea*	7. Mauritius*	7. Guinea*
8. Guinea-Bissau*	8. Mozambique*	8. Guinea-Bissau*
9. Liberia^	9. Namibia*	9. Liberia*
10. Mali^	10. Seychelles	10. Mali*
11. Niger*	11. South Africa*	11. Niger*
12. Nigeria*	12. Swaziland*	12. Nigeria*
13. Senegal*	13. Tanzania*	13. Senegal*
14. Sierra Leone^	14. Zambia*	14. Sierra Leone*
15. Togo*	15. Zimbabwe*	15. Togo*

These figures demonstrate the need for an examination of the relationship between the existing multilateral and bilateral investment treaties among African countries. The treaties should first be examined to determine whether the African countries have

included specific conflict clauses in their investment treaties. If the conflict clauses are absent, then the Vienna Convention can help interpret the relationship between the treaties.[406]

However paradoxical it might seem, African multilateral investment treaties appear to favor parallelism. The SADC Protocol specifically stipulates that the parties to this treaty can conclude BITs with third states, yet it does not adopt a clear stance toward the existing BITs between SADC states.[407] More elaborate provisions are found in the COMESA Investment Agreement, which provides in Article 32 that it shall not affect existing investment treaties and that in the event of inconsistency between this treaty and other bilateral investment treaties of the COMESA states, the former shall prevail.[408] Article 32 further provides that the parties to this investment treaty shall strive to renegotiate existing investment treaties with third parties in order to render them consistent with the COMESA Investment Agreement.[409] Finally, the ECOWAS Supplementary Act provides that "Member States may conclude co-operation agreements on matters covered by this Supplementary Act, as well as on the development of regional capacities in this field."[410] These instruments show a high degree of tolerance toward intra-African BITs and, with the exception of the COMESA Investment Agreement, do not seek to harmonize the multilateral and bilateral layers. Such tolerance is also encountered in Arab and Muslim multilateral investment treaties. For instance, Article 18 of the OIC Investment Agreement provides that "[t]wo or more contracting parties may enter into an agreement between them that may provide a treatment which is more preferential than that stipulated in this Agreement."[411]

The inclusion of specific conflict clauses favoring parallelism seems to exclude the possibility of determining the relationship between bilateral and multilateral African investment treaties through treaty interpretation. However, if African countries had elected not to include specific conflict clauses, certain norms enshrined in the Vienna Convention could perhaps be invoked in order to determine the relationship between intra-Africa investment treaties. For example, Article 59 of the Vienna Convention provides that:

> A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.[412]

Based on this provision, one could argue that the SADC Protocol has brought about the termination of other intra-SADC BITs. While the vast differences between these treaties could perhaps satisfy the second prong of the test (incompatibility), it is likely

406. *See generally* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

407. *See* SADC Protocol, *supra* note 28, art. 26 (omitting a statement regarding existing BITs between SADC states).

408. COMESA Investment Agreement, *supra* note 28, art. 32(2)–(3).

409. *Id.* art. 32(5).

410. ECOWAS Supplementary Act, *supra* note 28, art. 39.

411. OIC Investment Agreement, *supra* note 115, art. 18.

412. Vienna Convention on the Law of Treaties, *supra* note 406, art. 59(1).

that the first prong would not be satisfied given that the SADC Protocol provides for a clause that expressly favors parallelism. Furthermore, even if the latter clause were not inserted in the SADC Protocol, technically the only way to apply Article 59 would be to accept that it can be partially applied because there are only two parties to the intra-SADC BIT, whereas for the SADC Protocol, all SADC member states (except the Seychelles) are parties.

Similarly, there is little, if any, room to apply Article 30 of the Vienna Convention. Article 30 provides that:

> When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter [sic] treaty.[413]

The difficulty in applying this provision is that while there are many differences between the ECOWAS Supplementary Act, the ECOWAS Energy Protocol, and intra-ECOWAS BITs, it is very hard to allege that the provisions of the former treaty are incompatible with the provisions of the latter treaties. This is because at least some of the standards included in these treaties are identical. However, even if it were accepted that the above treaties are incompatible, Article 30 of the Vienna Convention would still be unlikely to apply because the ECOWAS Supplementary Act contains a conflict clause that expressly favors parallelism.[414]

In order to visualize how Articles 30 and 59 of the Vienna Convention could be invoked in the African context, assume that a SADC investor files a claim against a SADC state under an intra-SADC BIT. Could the respondent state then allege that this intra-SADC BIT has been terminated or is not applicable by operation of Article 30 or 59, especially considering the SADC Protocol? To answer this question, one can seek guidance from the ongoing saga of intra-EU claims. Eastern European states such as Slovakia and Hungary had concluded BITs with other EU states prior to their accession to the EU and had acceded to the ECT. However, after their accession to the EU, and in the face of investor-state claims filed by nationals of other EU states, a series of tribunals were asked to determine the relation between EU law and the respective BIT or the ECT that created the cause of action for these claims.[415] The specific issue at hand was whether accession to the EU treaties rendered the substantive rights provided in earlier treaties, namely the intra-EU BITs and the ECT, incompatible with EU law. In resolving this issue, the tribunal in *Electrabel v. Hungary* referred to Article 30 of the Vienna Convention to determine whether EU Treaties prevailed over the ECT and concluded that the EU treaties would prevail, should a material inconsistency arise.[416] It found no such inconsistency in the case before it.[417]

---

413. *Id.* art. 30(3).

414. ECOWAS Supplementary Act on Investment, *supra* note 28, art. 32.

415. *See* Jan Kleinheisterkamp, *The Next 10 Year ECT Investment Arbitration: A Vision for the Future—From a European Law Perspective*, 2–3 (London Sch. of Econ. & Political Sci., Law, Soc'y & Econ. Working Paper No. 07/2011, 2011), http://www.lse.ac.uk/collections/law/wps/WPS2011-07_Kleinheisterkamp.pdf (discussing problems of compatibility between EU law and Eastern European BITs that were agreed to before the countries entered the EU).

416. Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, paras. 4.190–91 (Nov. 30, 2012), http://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf.

417. *Id.* para. 4.191.

Conversely, the tribunal in *Summit v. Hungary* did not accept that the issue at hand was "a conflict between the EC Treaty or Community competition law and the ECT" and refrained from expressly determining the relation between these treaties.[418] Much earlier, the *Eastern Sugar v. Czech Republic* tribunal, constituted under the Czech Republic-Netherlands BIT, had opined that EU treaties and the former BIT do not cover "the same subject matter" and in any case were not incompatible.[419] The approach that intra-EU BITs are not incompatible with EU treaties also was accepted in *Eureko v. Slovakia*[420] and *Oostergetel v. Slovakia.*[421] Lastly, in *Micula v. Romania*, where the claim was filed prior to the accession of Romania to the EU, the tribunal found that EU law "must be taken into account when interpreting the [Romania-Sweden] BIT," according to Article 31(1) of the Vienna Convention which provides for the interpretation of a treaty in its context.[422] This does not, however, mean that the *Micula* tribunal regarded EU treaties as prevailing over the BIT. A careful look at its pronouncement reveals that it did not refer to EU treaties per se but rather found that "the overall circumstances of EU accession may play a role in determining whether the Respondent has breached some of its obligations under the BIT" and therefore "[t]he overall context of EU accession in general and the pertinent provisions of EU law in particular may be relevant to the determination of whether, *inter alia*, Romania's actions were reasonable in light of all the circumstances, or whether Claimants' expectations were legitimate."[423]

These cases show that while it would not be impossible to invoke Article 30 or 59 of the Vienna Convention, it is unlikely that an investor-state tribunal would accept that the most recent African multilateral investment treaties have terminated older BITs or other multilateral investment treaties between the same African countries. Again, the clauses inserted in the SADC Protocol, the COMESA Investment Agreement, and the ECOWAS Supplementary Act, which all favor parallelism, will play an important role in deciding this issue. Moreover, it is uncertain whether an arbitral tribunal called to decide upon a claim arising under an intra-Africa BIT can apply the provisions of an African multilateral investment treaty that may also be applicable between the same states. Such result could be achieved through the principle of systemic integration, but again, the specific conflict clauses in African multilateral investment treaties will most likely be regarded as evidence against such an integrated approach.[424] One may then wonder how the preservation of older

418. AES Summit Generation Ltd. v. Hungary, ICSID Case No. ARB/07/22, Award, paras. 7.6.7–9 (Sept. 23, 2010), http:www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf.

419. E. Sugar B.V. v. Czech Republic, SCC Case No. 088/2004, Partial Award, paras. 159, 168 (Mar. 27, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf (emphasis removed). From a temporal perspective, it is important to note that in this case, claimant had initiated amicable settlement consultations as provided for by the treaty in December 2003, the Czech Republic acceded to the EU on May 1, 2004, and the notice of arbitration was filed on June 22, 2004. *Id.* paras. 13–15.

420. Achmea B.V. v. Slovakia, UNCITRAL PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, paras. 274–77 (Oct. 26, 2010), http://www.pcacases.com/web/sendAttach/775.

421. Oostergetel v. Slovakia, UNCITRAL Ad Hoc Arb., Decision on Jurisdiction, paras. 72–109 (Apr. 30, 2010), http://www.italaw.com/sites/default/files/case-documents/ita1073_0.pdf.

422. Micula v. Romania, ICSID Case No. ARB/05/20, Award, paras. 322, 513 (Dec. 11, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf.

423. *Id.* paras. 327–28.

424. ICSID Convention, *supra* note 49, art. 42(1) (calling for the Tribunal to apply "such rules of international law as may be applicable"); Vienna Convention on the Law of Treaties, *supra* note 406, art. 31(3)(c); Panos Merkouris, *Debating the Ouroboros of International Law: The Drafting History of Article 31(3)(c)*, 9 INT'L COMM. L. REV. 1, 15 (2007). *See generally* Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279 (2005) (citing and analyzing several cases which discuss the systemic integration in treaty interpretation).

investment treaty layers helps African countries reshape international investment law or project an African investment treaty model. When taking into account that African multilateral investment treaties also co-exist with Arab and Muslim investment treaties, the picture of conflicting and overlapping standards becomes even more complex. Furthermore, one may wonder if another multilateral layer will be added in the near future if the negotiations between African RECs, the United States, and the EU prove fruitful.

All things considered, the true ramifications of parallelism should neither be overstated nor underestimated. In fact, states have the "freedom to accord different protections in different treaties."[425] Whether the accordance of different protections in different treaties between the same states seems idiosyncratic is another issue that may belie the difficulties associated with the projection of a new model of international investment law. In the context of African regionalism, it is still early to fully assess the impact of the multilateral investment treaties concluded by the SADC, COMESA, and ECOWAS along with the SADC 2012 Model BIT. The favorable attitude of African countries towards parallelism nevertheless reveals the difficulty of coordination among African RECs.

CONCLUSION

This Article cannot foresee the ultimate metamorphosis of international investment law in Africa. It acknowledges, however, that the internal and external dimensions of international investment law in Africa are starting to change, thus leading to the emergence of new trends and concepts. However, the impact of these emergent concepts is on the one hand premature and on the other hand crippled by the burgeoning parallelism. Non-ratification of treaties also hinders coherence and consistency—the COMESA Investment Agreement has still not been ratified after ten years. At the same time, the ever-evolving character of extra-African models and the current divide between the United States and the EU might influence the future evolution of international investment law in Africa. Last but not least, the lack of coordination among African RECs indicates that a further step towards greater synergies is imperative if African countries wish to project a coherent and unified approach toward international investment law. The recent launching of the COMESA-EAC-SADC free trade area and the promulgation of the PAIC may prove to be a decisive step toward that direction.[426]

425. Andrea K. Bjorklund, *Practical and Legal Avenues to Make the Substantive Rules and Disciplines of International Investment Agreements Converge*, *in* PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 175, 176 (Roberto Echandi & Pierre Sauvé eds., 2013).

426. *See* Agreement Establishing a Tripartite Free Trade Area Among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community art. 45 (June 10, 2015), http://www.eac.int/sites/default/files/docs/agreement_tripartite-fta_2015.pdf (obliging Eastern and Southern African countries to continue negotiating and conclude the set protocols within twenty four months).

The Illusion of Territorial Jurisdiction

PÉTER D. SZIGETI*

ABSTRACT

Common accounts of the development of territorial jurisdiction follow a "rise and fall" narrative. Territorial jurisdiction began in the mid-17th century, and declined due to technological revolutions in communications and transportation in the mid-20th century. Since then, the narrative claims, jurisdiction doctrine is in crisis: It is no longer legitimated by territoriality, but it cannot find another foundation that is neutral and mutually exclusive. This narrative, this Article claims, is wrong both historically and conceptually. The "rise" of territorial jurisdiction in fact was always partial, and thus the "fall" never happened. Rather, effects jurisdiction, the supposed nemesis of territoriality, has been alive and well since the mid-19th century. In fact, effects jurisdiction (also called passive territoriality), the doctrine of continuing acts, and "strict" territorial jurisdiction use the same methods and are easy to convert into one another, calling into question the entire territorial–extraterritorial divide. There is a general uncertainty in what counts as "territorial" and what counts as "extraterritorial" jurisdiction, and this is the result of the almost complete lack of geographical information in jurisdictional discourse. This phenomenon is demonstrated by the impossibility of the cartographic-mapping of jurisdiction. The lack of a geographical connection means that most jurisdictional conflicts are better described as conflicts between communities and their legal orders, without a territorial connection. Doctrines of jurisdiction in international law should be reformulated to reflect the illusory nature of the territorial–extraterritorial division.

TABLE OF CONTENTS

* Global Post-Doctoral Fellow, NYU (2017–2018); Assistant Professor, University of Alberta Faculty of Law (2018–). I would particularly like to thank David Kennedy, Daniel Halberstam, and Andrea Bjorklund for their guidance and generous comments. This Article also benefitted from comments at the Michigan Law School Third Annual Young Scholars' Conference (March 31, 2016) and the 2016 ICON-S Conference on Borders, Otherness and Public Law (June 17, 2016).

INTRODUCTION

According to the widely-received narrative about the rise and fall of territorial jurisdiction, territorial jurisdiction emerged in the 17th century alongside the territorial state. Territorial states created an interlocking territorial international order, often called the Westphalian order after the peace treaty that allegedly created it in 1648.[1] Territoriality remained the organizing concept of the international order until around 1945, when it began its decline due to technological progress, which intensified after 1990.[2] Before the 1920s, territorial jurisdiction "worked," but during the 20th century, "technical developments in the field of communications and of transmission of news and sound by telegram, telephone and wireless" disrupted the system by diminishing "the importance of mere physical distance—and therefore, of the territorial principle."[3] Friedrich Mann laments "[t]he complications of modern life are responsible for the steadily increasing reluctance to 'localise' facts, events or relationships."[4] Symeon Symeonides agrees: "With the advent of new transportation and communication means and the increased mobility of people, state boundaries became even less important, and Beale's insistence on territoriality as the dominant principle made even less sense than before."[5] According to Kal Raustiala's authoritative history of jurisdiction in U.S. law, "[b]y the 1960s the idea that United States law was limited to American territory would seem quaint, almost a relic from

1. Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20, 20 (1948). *See generally* Charles S. Maier, *Transformations of Territoriality, 1600–2000*, *in* TRANSNATIONALE GESCHICHTE: THEMEN, TENDENZEN UND THEORIEN 32, 36–41 (Gunilla Budde, Sebastian Conrad & Oliver Janz eds., 2006) (explaining the historical progress of territoriality with respect to the Westphalian order).

2. KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 108 (2009).

3. *Id.* at 107 (quoting Hersch Lauterpacht).

4. Friedrich A. Mann, *The Doctrine of Jurisdiction in International Law*, *in* 111 RECUEIL DES COURS 1, 36 (1964).

5. SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 386 (2006) (footnote omitted).

another era."[6] In this narrative tradition, the Internet is often portrayed as the pinnacle of this erosion of territory through technology.[7] In the wake of territoriality, we have effects jurisdiction: Instead of asking, "Where did X event take place?" we ask, "Does X event have a large enough effect on us to justify the assertion of jurisdiction?"

Parts of this narrative have been challenged and reinterpreted during the last few years. The Westphalian legal order may have little to do with the Peace of Westphalia; territoriality may be traced back as early as the late 15th century,[8] or it may have only become an accepted principle of political rule in the late 18th century.[9] The Internet may not present as big of a shift as techno-libertarians and legal academics thought in the 1990s, because it only expands pre-existing types of communications and legal relations, which lawyers have gotten used to during the 20th century.[10] This Article presents a different challenge, which uses both conceptual discussion and historical examples to display the illusory *logic* of territorial reasoning. Part I of this Article, relying primarily on late 19th-century case law, argues that territoriality is just as important today as it was in its alleged high point in the late 19th century—because *effects jurisdiction is just as territorial as "strict" territorial jurisdiction.* In fact, there is no meaningful difference between the two. Both effects jurisdiction and territorial jurisdiction utilize the same concepts, they just reach opposite conclusions. This is so because 19th-century decisions, while allegedly taking territoriality seriously, were in fact led to engage in similar metaphysical discussions on the location of the defendant's will or the place of her marital status, as modern courts are forced to do. Contemporary decisions no longer hold territoriality to be a sacrosanct principle but engage in the same thorny discussions about the place of abstract concepts, or wide-ranging physical ones such as "effects."

Territoriality is an unreliable guide to distributing jurisdictional competences not only because of the impossibility of determining the boundaries of events and actions but also because territoriality itself is a shifting concept that is easy to manipulate legally. Part II investigates how the rules of territorial jurisdiction in international law get into conflict with purportedly universal rights and universally recognized institutions, mobile and hypermobile entities, and "anomalous zones" with purposefully ambiguous statuses. Part III concludes that in many cases, ascertaining the geographic location of an entity, action, or event would not be enough, either, because legal territoriality itself is a shifting category. Geography and legal territoriality have little to no contact with each other: Jurisdiction is unmappable.

---

6. RAUSTIALA, *supra* note 2, at 95.

7. *See, e.g.*, David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) (arguing that cyperspace threatens "[t]erritorially based law-makers and law-enforcers").

8. *See generally* Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?*, 2 J. HIST. INT'L L. 148 (2000); JEREMY LARKINS, FROM HIERARCHY TO ANARCHY: TERRITORY AND POLITICS BEFORE WESTPHALIA 3–12 (2010).

9. Jordan Branch, *Mapping the Sovereign State: Technology, Authority, and Systemic Change*, 65 INT'L ORG. 1, 17–19 (2011).

10. *See generally* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD (2006); Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998); Richard Ford, *Against Cyberspace*, *in* THE PLACE OF LAW 147 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphry eds., 2003).

Territorial jurisdiction is a chimera; there are only two instances in which it "works." One is when the physical presence of an object or person, in and of itself, is enough to ground exclusive jurisdiction. This is quite rare: Only immigration law, customs law, and trespass focus on authorization for the presence of persons or objects in a place.[11] The second is a negative test, where we *disqualify* some assertions of jurisdiction through the lack of (any) physical links. This test only functions as a preliminary test, as there are almost always several fora leftover that have some links to the case in question. As such, territoriality never solves jurisdictional conflicts, but only rephrases them. Part IV argues that we should recognize this and abandon the misleading terminology of "territorial" versus "extraterritorial" jurisdiction. In the end, territoriality has very little to do with geography: It does not correspond to any natural geographical phenomena and is better thought of as a type of legal category that is independent of physical space.

Because of the meaninglessness of the territorial–extraterritorial duality, the doctrine of international jurisdiction should be reformulated. Instead of the general rule of territoriality with extraterritorial exceptions, we should talk about the general rule of genuine connections between a state and the affair it wishes to regulate or adjudge, with a few customary rules limiting jurisdiction.

I. QUESTIONING TERRITORIAL JURISDICTION: THE VANISHING DIFFERENCE BETWEEN STRICT TERRITORIALITY AND EFFECTS JURISDICTION

The standard historical narrative, as cited above from a number of monographs, recounts the history of jurisdiction as "the rise and fall of territoriality."[12] According to this view, territorial jurisdiction appeared in the late 17th century, gained exclusive acceptance by around 1800, and declined thereafter, with the turning point around 1945.[13] Today, at least in the United States and the European Union, territorial jurisdiction is arguably becoming the exception, not the rule.[14] In response to this trend, "[t]he modern view posits a nation-state system in decline and a corresponding need for shared and flexible jurisdiction to account for our increasingly interconnected, Internet-centric world."[15]

At the same time, other sources claim the continuing primacy of territorial jurisdiction, which should give us pause in reaffirming this narrative. The U.S. Restatement of Foreign Relations Law, in discussing the bases of prescriptive jurisdiction, puts territoriality first and mentions "territory" in all other bases of

11. *See, e.g.*, F. H. Newark, *The Boundaries of Nuisance*, 65 LAW Q. REV. 480, 481–82 (1949) (stating that a prerequisite of nuisance is trespass); CATHERINE DAUVERGNE, MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW 11, 16 (2008) (noting that one who enters a country by breaching the law or overstaying his permission to remain will be considered an "illegal" for purposes of immigration law).

12. *See generally* RAUSTIALA, *supra* note 2; Mann, *supra* note 4; SYMEONIDES, *supra* note 5.

13. RAUSTIALA, *supra* note 2, at 93–96; Maier, *supra* note 1.

14. Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 842–856 (2009).

15. Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 111 (2010).

jurisdiction as well.[16] Early 19th-century case law, such as the dicta from *The Schooner Exchange* from 1812, is still regularly cited in judgments.[17] Cedric Ryngaert gives an account of current state practice regarding jurisdiction with the following words: "In continental Europe, the territoriality principle, *while being the basic principle of jurisdiction*, is not endowed with the *almost sacrosanct status which it has in common law countries*."[18]

How can territoriality both be in decline and have an "almost sacrosanct status" at the same time? Without debating the enormous role that the telegraph, the telephone, the radio, television, automobiles, cheap air travel, and finally the Internet have played in increasing international contacts, this Article proposes an alternative narrative. The hugely increased mobility of billions of people has certainly done a lot to increase the number of jurisdictional conflicts in the world. Nevertheless, this has only been an increase in quantity, not a change in quality: The arguments and counterarguments that are made about effects jurisdiction have not changed since the 1870s.[19] Furthermore, as we shall also see, strict territoriality and a more relaxed effects jurisdiction coexisted, largely unremarked, during the late 19th century and early 20th century.[20] But "the rise and fall" narrative is incorrect not only—not even primarily—because its timeline is wrong, but because there is a basic uncertainty about what territorial jurisdiction means.

The philosophical reason for preferring territorial jurisdiction over other principles is the uniqueness of location, as opposed to, say, the dispersal of an action's effects. As Professor Steiner put it: "We're all familiar with the exasperated expression 'I can't be in two places at once.' This is inconveniently true. What is conversely true is that . . . I must necessarily be in one place at one time."[21] This is tautologically true for objects and people. But what does it mean to locate an *event* or a *concept*—do events, actions, motivations, will, responsibility, and all the other

16. Section 402 of the Restatement says:

> Subject to § 403, a state has jurisdiction to prescribe law with respect to
>
> (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
>
> (b) the status of persons, or interests in things, present within its territory;
>
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
>
> (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
>
> (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Restatement (Third) of the Foreign Relations Law of the United States, § 402 (1988).

17. *E.g.*, Société Nationale Industrielle Aérospatiale v. U.S. District Court, 482 U.S. 522, 556–57 (1986) (Blackmun, J., joined by Brennan, J., Marshall, J. and O'Connor, J., dissenting in part and concurring in part); Hudson v. Hermann Pfauter GmbH Co., 117 F.R.D. 33, 38 (N.D.N.Y. 1987).

18. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 43 (2008) (emphasis added) (citations omitted).

19. *See infra* notes 21–50 and accompanying text.

20. *See infra* notes 51–58 and accompanying text.

21. HILLEL STEINER, AN ESSAY ON RIGHTS 37 (1994).

abstract concepts that the law operates with have one specific place? When—and therefore where—does an event begin and end? The reply to the question, "did X take place within Y" depends on malleable definitions of both X (the act or event in question) and Y (the territory in question). In the end, this Article argues, it depends more on the definition of X than on anything else. This Part shall first illustrate this malleability with the particularly striking examples of *MacLeod v. Attorney-General for New South Wales*, a landmark Australian case from 1891,[22] and *R. v. Keyn*, a similarly important English case from 1876.[23] These two cases illustrate perhaps best how strict "strict territoriality" can become. It will then expand this analysis by reviewing all the standard rules and debates in international law where territorial uncertainty arises.

A. *Between Geography and Metaphysics:* MacLeod v. Attorney-General for New South Wales *and* R. v. Keyn

As Lord Halsbury began his opinion, "[t]he facts upon which this appeal arises are very simple:"[24]

> [Mr. MacLeod] was, on the 13th of July, 1872, at Darling Point, in the Colony of New South Wales, married to one Mary Manson, and, in her lifetime, on the 8th of May, 1889, he was married, at St. Louis, in the State of Missouri, in the United States of America, to Mary Elizabeth Cameron. He was afterwards indicted, tried, and convicted, in the Colony of New South Wales, for the offence of bigamy, under the 54th section of the Criminal Law Amendment Act of 1883 (46 Vict. No. 17).[25]

Mr. MacLeod appealed his conviction on the grounds that the New South Wales courts did not have jurisdiction to try him.[26] Lord Halsbury parsed the text of the criminal statute—"Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years"—to ascertain if that was the case.[27]

Lord Halsbery continued: "In the first place, it is necessary to construe the word 'whosoever'; and in its proper meaning it comprehends all persons all over the world, natives of whatever country. The next word which has to be construed is 'wheresoever.'"[28] The court found that "whosoever" cannot mean literally any person on Earth who commits bigamy and is caught in New South Wales: "the Colony can have no such jurisdiction, and . . . an effort to enlarge [New South Wales's] jurisdiction to such an extent . . . would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law."[29] That would mean a form of universal jurisdiction, clearly beyond the legislature's intentions.

22. *MacLeod v A-G* (PC) [1891] A.C. 455 (appeal taken from Austl.).
23. R. v. Keyn (The Franconia) [1876] 2 Ex. D. 63 (Eng.).
24. *MacLeod*, A.C. 455 at 456.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

Instead, the Court constructed "whosoever" to mean any person "who is amenable, at the time of the offense committed, to the jurisdiction of the Colony of New South Wales."[30]

Similarly, "wheresoever" was construed to mean "'Wheresoever in this Colony the offense is committed.'"[31] Given that Mr. MacLeod entered into his second marriage in Missouri, "it therefore appears to their Lordships that it is manifestly shewn, beyond all possibility of doubt, that the offence charged was an offence which, if committed at all, was committed in another country, beyond the jurisdiction of the Colony of New South Wales."[32] MacLeod was therefore free to leave.

To today's lawyers, these results may seem positively baffling. Despite Lord Halsbury's pronouncements in *MacLeod*, the results appear contrary to basic legislative intent: To punish and deter bigamists, and to prevent the New South Welsh from becoming victims of bigamy. Instead, the strict construction of the statute to cover the offense only if the second wedding itself was celebrated in New South Wales only encourages avoidance through forum shopping. But even if we disregard legislative intent and focus only on the meaning of the words of the statute, the construction of "whosoever" and "wheresoever" to include only the moment and place of the bigamous wedding is itself questionable. Rationally, bigamy is a continuing offense, a crime that "involves (1) an ongoing course of conduct that causes (2) a harm that lasts as long as that course of conduct persists."[33] In case of a continuing offense, "each day's acts bring a renewed threat of the substantive evil [the legislature] sought to prevent."[34] A court would therefore be justified in holding that as long as MacLeod is bigamously married and present in New South Wales, the courts there have jurisdiction over him regarding the offense. One can of course dispute whether bigamy is truly a continuing offense or not. Michael Akehurst wrote that holding bigamy "a continuing offence as long as the parties bigamously cohabit . . . is clearly a legal fiction and goes against the logic of the law; but it is relatively harmless."[35] By the same vein, however, holding theft to be a continuing offence can also be called fictitious,[36] and the same is true of forgery, false pretenses, conspiracy, and so forth.[37]

MacLeod v. A-G is not just a historical curiosity—it is valid case law cited in a number of English and Commonwealth cases.[38] Alongside a few other contemporary

30. *MacLeod*, A.C. 455 at 457.

31. *Id.*

32. *Id.* at 458.

33. United States v. Morales, 11 F.3d 915, 921 (9th Cir. 1999) (O'Scannlain, J., concurring in part and dissenting in part); *see also* Jeffrey R. Boles, *Easing the Tension Between Statutes of Limitation and the Continuing Offense Doctrine*, 7 NW. J.L. & SOC. POL'Y 219, 227–252 (2012) (discussing continuing offenses).

34. Toussie v. United States, 397 U.S. 112, 122 (1970).

35. Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 153 (1973).

36. *E.g.*, Commonwealth v. White, 265 N.E.2d 473, 475 (Mass. 1970) ("We assume, without deciding, that the alleged larceny in Canada and the continuing asportation in Massachusetts are so far separate offences as to permit two prosecutions."); Akehurst, *supra* note 35, at 153 n.5 (calling the *White* holding of theft to be a continuing offense "a rule of great antiquity").

37. *See generally* Edwin D. Dickinson et al., *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435, 486–90 (1935) [hereinafter Harvard Research].

38. *See, e.g.*, *State v. Jacobs*, 1974 (2) BLR 48 (HC) at 49–50 (Bots.) (describing *MacLeod v. A-G* as expressing the general jurisdictional rule).

landmark cases, such as *American Banana v. United Fruit*[39] and *R. v. Keyn*,[40] it is said to define an era of strict territoriality.[41] The cases are similar in that jurisdiction was the only question that prevented the conviction of the defendant. *American Banana* was a case between two fruit producing and importing corporations, wherein the U.S. Supreme Court found that "the defendant, with intent to prevent competition and to control and monopolize the banana trade," forced anticompetitive agreements on rival companies and influenced the governments of Costa Rica and Panama to hinder and harass its competitors.[42] Justice Holmes dismissed the case by saying that "it is surprising to hear it argued that [the illegal acts] were governed by the act of Congress," when "the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other states."[43]

R v. Keyn concerned the German steamship *Franconia*, which hit and sank the English steamship *Strathclyde* with deadly results.[44] The negligence of the German captain, Ferdinand Keyn, was proven; the only open question was whether the English court had jurisdiction over actions that happened over a mile from the English coast, on a German ship.[45] A majority of the Lords considering the case were convinced by Chief Justice Cockburn's arguments that coastal jurisdiction over the territorial sea only extended to defense, tax and customs fraud, and aid in navigation, but definitely not to criminal law.[46] Other Justices affirmed that since no counties existed in the sea, no English court can have jurisdiction over acts committed by foreigners, on foreign ships, taking place outside of harbors and ports.[47]

In *R. v. Keyn*, Chief Justice Cockburn engaged in a painstaking analysis of jurisdiction over transboundary criminal acts: "A person may be wounded on the sea, and may die on the shore, or vice versa. He may be wounded in England; he may die in Scotland. In which is the offence committed?"[48] His first, historically supported answer is—nowhere:

> As the blow was struck in the one [place], while the death, without which the offence is not complete, took place in the other, I answer, in neither; and the old authorities who held at common law . . . [that] the offender could be tried in neither, because in neither had the entire offence been committed-reasoned, in my opinion, logically, and, in point of principle, rightly.[49]

Cockburn then looked at the effects-centered approach, adopted in the case in the opinion of Justice Denman,[50] according to which the crime happened upon the

39. Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

40. *R. v. Keyn* (The Franconia) [1876] 2 Ex. D. 63 (Eng.).

41. *See, e.g.*, Libman v. The Queen [1985] 2 S.C.R. 178, para. 15 (citing *MacLeod* as an example of "strong expressions of the territorial principle, particularly in early times").

42. *Am. Banana*, 213 U.S. at 354.

43. *Id.* at 355.

44. *Keyn*, 2 Ex. D. at 64.

45. *Id.*

46. *Id.* at 206–07.

47. *Id.* at 149–52, 219–20, 229–32, 238–39.

48. *Id.* at 233.

49. *Id.*

50. *Keyn*, 2 Ex. D. at 106 (stating Justice Denman's argument that the location where the crime occurred should determine what tribunal has jurisdiction over it, and "that the law which makes foreigners

British ship where the passenger died. He finds this approach unconvincing.[51] According to Cockburn, territorial effects are only valid if committed intentionally: If, so to speak, the defendant's will accompanied the bullet or ship that struck the victim on English soil, then:

> In such a case the act, in lieu of taking effect immediately, is a continuing act till the end has been effected, that is, till the missile has struck the blow, the intention of the party using it accompanying it throughout its course. The act must be taken to be the act of the party in the effects it was intended to produce, till its agency has become exhausted and its operation has ceased.[52]

However, Ferdinand Keyn had acted negligently, not intentionally: "The negligence in running down a ship may be said to be confined to the improper navigation of the ship occasioning the mischief; the party guilty of such negligence is neither actually, nor in intention, and thus constructively, in the ship on which the death takes place."[53]

Finally, Cockburn dismisses concurrent jurisdiction by considering for the sake of argument that Keyn's actions took place both on the *Franconia* and the *Strathclyde*.[54] He finds that this leads to impossible results, because even if the criminal act takes place in two jurisdictions, the accused herself can only be in a single one:

> A man who, being in field A, throws a stone at another, who is in field B, does not thereby transfer himself to the latter. A man who fires a shot from the shore at one who is on the sea still remains on the shore, and vice versa .... But, in order to render a foreigner liable to the local law, he must, at the time the offence was committed, have been within British territory if on land, or in a British ship if at sea.[55]

Cockburn's single conclusion is that there is no jurisdiction to convict Ferdinand Keyn. Just as in *MacLeod,* it is quite unclear in Cockburn's reasoning why a sort of "straddling" presence over two jurisdictions by the defendant is impossible if the defendant uses technical means to extend his reach into a neighboring territory. The technical means could be a stone, a rifle, a cellphone, or a computer—her concurrent presence, not in two places, but in one place that spans across a boundary, is quite reasonable. Cockburn defended his conclusions by stating that "[i]f the conviction and punishment of the offender can only be obtained at the sacrifice of fundamental principles of established law, I, for one, should prefer that justice should fail in the individual case, than that established principles . . . should be wrested and strained to meet it."[56] But this only calls attention to the mismatch between the legal principles

---

liable for the violation of our criminal law for offences committed by them when bodily on our soil, whether there by their own desire or not, is not so restricted as to leave them unpunishable because they may have been on a foreign ship at the time of the commission of the offence").

51. *See id.* at 233 ("He may be wounded in England; he may die in Scotland. In which is the offence committed? . . . I answer, in neither . . . .").

52. *Id.* at 234.

53. *Id.* at 235.

54. *Id.*

55. *Id.* at 235–36.

56. *Keyn*, 2 Ex. D. at 237.

and the principles of justice. If the revered fundamental principles of established law lead to injustice in this specific case, what is to prevent them from giving birth to unjust results in every other case?

Cockburn's spurious distinction between the concurrent presence of actions and the dot-like presence of actors[57] likewise does little to separate "true" territoriality from constructive or fictitious territoriality. An even earlier counterexample is the case of *United States v. Davis*,[58] which concerned the captain of an American whaling ship, the *Rose*, that was anchoring in the Society Islands (today a part of French Polynesia). Davis, while aboard his ship, shot a native sailor standing aboard a Society Islands schooner anchoring next to the American ship.[59] The facts are quite similar to *R. v. Keyn*, but Justice Joseph Story's decision is exactly the opposite. Despite the criminal act happening aboard the American ship, Story decided that the United States had no jurisdiction in the matter, only the Society Islands.[60] His reasoning was the following: "I say the offence was committed on board of the [foreign] schooner; for although the gun was fired from the ship Rose, the shot took effect and the death happened on board of the schooner; and the act was, in contemplation of law, done where the shot took effect."[61] Curiously enough, Cockburn cited *U.S. v. Davis* several times in his opinion in *R. v. Keyn*, but only to the effect that "[b]oth ships were in the harbour, and therefore in the water of the local state, and the defendant was consequently amenable to the local law."[62]

Most curiously, the misgivings that contemporary lawyers may feel towards the strict territorial approach exhibited above seem to have been shared by judges in a host of jurisdictions, without any great public debate. Judging from the commentary accompanying the Harvard Draft Convention on Jurisdiction with Respect to Crime, territorial jurisdiction in criminal law included continuing offences and effects jurisdiction was well-recognized in most U.S. states, Argentina, Mexico, Norway, Brazil, Denmark, Austria, Germany, France, and the UK in early 20th century, as reflected in national legislation and case law.[63] Bigamy was also accepted as a continuing offense for this purpose.[64] The Harvard Draft Convention's commentary explains that

> [t]he territorial principle has not only been universally accepted by States, but it has had a significant development in modern times. This development has been a necessary consequence of the increasing complexity of the "act or omission" which constitutes crime under modern penal legislation . . . . Not infrequently it appears as an event consisting of a series of separate acts or omissions . . . [which] need not be simultaneous with respect to time or restricted to a single State with respect to place. Indeed, with the increasing facility of communication and transportation, the

57. *See generally id.* at 159–238.

58. United States v. Davis, 25 F. Cas. 786 (C.C.D. Mass. 1837) (No. 14,932).

59. *Id.* at 786.

60. *Id.* at 788.

61. *Id.* at 787.

62. *Keyn*, 2 Ex. D. at 237.

63. *See* Harvard Research, *supra* note 37, at 486–94 (enumerating the various codes and decisions of U.S. states and nations that have recognized the idea of territorial jurisdiction in criminal law).

64. *See id.* at 492 (listing the states that have adopted relevant bigamy jurisdiction law).

> opportunities for committing crimes whose constituent elements take place in more than one State have grown apace.[65]

While deriving its conclusions primarily from a thorough compilation of case law and statutory law mostly from between 1885 and 1930, the editors of the commentary remark upon no contradiction between strict territoriality and the "developed" territoriality they presented.[66] This would change drastically a decade later.[67]

B. Extending Territoriality: The Ambivalences of Effects Jurisdiction

Continuing offenses are a minor doctrine in criminal law; effects jurisdiction, also known as the objective territorial principle, is the subject of long-lasting debates and the basis of extraterritorial jurisdiction in antitrust law, securities law, and transnational economic regulation more generally.[68] Effects jurisdiction relies on a distinction between active and passive territoriality (also referred to as the distinction between subjective and objective territoriality). Active or subjective territoriality refers to an act or event *taking place within* the territory of a state. Passive or objective territoriality refers to an act or event *taking place outside* state territory, *but having effects* within the state. The Restatement's definition is "conduct outside [the state's] territory that has or is intended to have substantial effect within its territory."[69] As we can see, this definition of effects jurisdiction can be applied quite straightforwardly to continuing offences. A thief who transports stolen goods from state A to state B most certainly intends the effects of her illegal acts, that is, her enjoyment of the stolen property, to continue in state B.[70]

Even in late 19th-century cases, the distinction was not always easy to make. *Queen v. Nillins*,[71] decided in 1884, used a combination of effects jurisdiction and the doctrine of the continued offence to extradite the defendant to Germany for using false documents created in England to fraudulently obtain goods in Germany.[72] In a case regarding bribery and false pretenses decided in 1911, the U.S. Supreme Court ruled similarly: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if [the perpetrator] had been present at the effect, if the state should succeed

---

65. *Id.* at 484.

66. *See generally id.* at 484–94 (explaining that the territorial principle has been developed through legislation and jurisprudence).

67. *See* Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 636 (2009) (describing the evolution from strict territoriality to its expanded modern meaning).

68. *See generally* Joseph Jude Norton, *Extraterritorial Jurisdiction of U.S. Antitrust and Securities Laws*, 28 INT'L & COMP. L.Q. 575, 576–79 (1979).

69. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402(1)(c) (AM. LAW INST. 1988).

70. *Cf.* Akehurst, *supra* note 35, at 154 ("Once we abandon the 'constituent elements' approach in favour of the 'effects' approach, we embark on a slippery slope which leads away from the territorial principle towards universal jurisdiction.").

71. Queen v. Nillins [1884] 53 L.J.M.C. 157.

72. *See* Harvard Research, *supra* note 37, at 489 (describing the use of the objective territorial principle in the decision).

in getting [the perpetrator] within its power."[73] It is important to note that all of these opposing viewpoints on what is "truly" territorial are contemporaneous. Effects jurisdiction comes up in the minority opinion of *Keyn* as well as *Nillins* and *Strassheim*; it is vigorously denied in the majority opinion of *Keyn*, *MacLeod,* and *American Banana.*[74]

Effects jurisdiction only attracted wider controversy following the principle's transposition from criminal law to antitrust adjudication.[75] The starting point was the *Alcoa* decision in 1945, which declared that a cartel arranged in Switzerland between the Aluminum Company of America (known collectively with its subsidiaries as Alcoa) and Aluminum Limited was punishable under the Sherman Act.[76] Judge Learned Hand's opinion in *Alcoa* simply stated that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[77] To back this claim up, Judge Hand cited *Strassheim*, the 1911 U.S. Supreme Court case that established effects jurisdiction in U.S. criminal law,[78] and *Ford v. United States*, a U.S. Supreme Court case from 1927 regarding a conspiracy to smuggle liquors into the United States—*Ford* itself relied on *Strassheim.*[79] Whether effects jurisdiction was settled law in 1945 is questionable—only 35 years before, Justice Oliver Wendell Holmes, Jr. had dismissed a similar allegation as a "rather startling proposition[]" in *American Banana.*[80] But very soon after *Alcoa*, the effects test, tempered by a balancing test regarding the interests of foreign sovereigns, did in fact become undisputed in U.S. case law.[81]

The effects test in U.S. antitrust law requires the illegal foreign conduct to have a "direct, substantial, and reasonably foreseeable effect on trade or commerce"[82] and the application of U.S. law only in cases which "avoid unreasonable interference with the sovereign authority of other nations."[83] Instead of the absolute respect that territorial sovereignty was traditionally accorded in public international law, U.S.

---

73. Strassheim v. Daily, 221 U.S. 280, 285 (1911).

74. *See generally id.*; *R. v. Keyn* (The Franconia) [1876] 2 Ex. D. 63 (Eng.).; *Nillins*, 53 L.J.M.C. 157; *MacLeod v A-G* (PC) [1891] A.C. 455 (appeal taken from Austl.); Am. Banana v. United Fruit Co., 213 U.S. 347 (1909).

75. RAUSTIALA, *supra* note 2, at 93–96; Buxbaum, *supra* note 67, at 637–39.

76. United States v. Aluminum Co. of Am. (*Aloca*), 148 F.2d 416, 443–45 (2d Cir. 1945).

77. *Id.* at 443.

78. *Strassheim*, 221 U.S. 285.

79. Ford v. United States, 273 U.S. 593, 620 (1927).

80. *Am. Banana*, 213 U.S. at 355; *see also* RAUSTIALA, *supra* note 2, at 96–100. Remarkably, the majority opinion in *Strassheim* was also penned by Justice Holmes, and *Strassheim* actually cites *American Banana* as authority for its claims about effects jurisdiction. *Strassheim*, 221 U.S. at 285.

81. RAUSTIALA, *supra* note 2, at 96–103. Hannah Buxbaum cites the following line of landmark cases that adopted or adapted the Alcoa approach to jurisdiction: Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976); Laker Airways Ltd. v. Sabena, 731 F.2d 909 (D.C. Cir. 1984); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (5th Cir. 1979); Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004). *See* Buxbaum, *supra* note 67, at 646–52.

82. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a(1) (2012).

83. *Hoffmann-La Roche*, 542 U.S. at 164. Nevertheless, "despite the prevalence of the jurisdictional balancing test, U.S. courts in virtually every case found the balance tipped in favor of asserting jurisdiction over the foreign entity except where the court found no cognizable adverse impact on U.S. competition interests whatsoever." Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 12 (1992).

courts used the softer notion of comity, originating in private international law and conflicts of law doctrines, to weigh the comparative interests that foreign states may have in the case at hand.[84] A similar approach to extending jurisdiction was applied to U.S. securities fraud law.[85]

The abandonment of traditional territorial jurisdiction and the extension of U.S. law to ban anticompetitive action taking place abroad caused an uproar in the United Kingdom and continental Europe, particularly in the 1970s and 1980s.[86] Yet at roughly the same time, the European Commission and the European Court of Justice (ECJ) applied EU competition law in a manner very similar to the U.S. approach. The European Commission's approach was a simple effects test, without any balancing of sovereign interests, similar to the reasoning in *Alcoa*.[87] Upon an appeal to the ECJ in the landmark *Wood Pulp* case, the ECJ modified the basis of jurisdiction without in effect changing it.[88] The ECJ stated that:

> [A]n agreement which has had the effect of restricting competition . . . consists of conduct made up of two elements, the formation of the agreement . . . and the implementation thereof. If the applicability of prohibitions . . . were made to depend on the place where the agreement . . . was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.[89]

In essence, the ECJ used the same analysis as the European Commission and the U.S. Supreme Court, but substituted "implementation" for "effects."[90] The ECJ

---

84. Buxbaum, *supra* note 67, at 646

85. RYNGAERT, *supra* note 18, at 77–78. "Disquietingly, [however,] U.S. courts, in particular in private suits, do not usually rely on comity or reasonableness . . . to limit U.S. jurisdiction over securities transactions." *Id.* at 78.

86. *See generally* British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd. [1954] 71 RPDTMC 327 (Eng.); Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. (HL) [1978] A.C. 547 (appeal taken from Eng.); Otto Kahn-Freund, *English Contracts and American Antitrust Law: The Nylon Patent Case*, 18 MOD. L. REV. 65 (1955); *Foreign Proceedings Act 1976* s 121 (Austl.); Foreign Extraterritorial Measures Act, R.S.C. 1865, c. F-29, (Can.); Loi 80-538 du 16 juillet 1980 relative à la communication de documents ou reseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales etrangères (1) [Law 80-538 of July 16, 1980 Relating to the Communication of Economic, Commercial, or Technical Documents and Information to Natural Legal Persons from Abroad (1)], JOURNAL OFFICIEL DE LA RÉPUBLICIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 17, 1980, p. 1799; Protection of Businesses Act 99 of 1978 (S. Afr.); Protection of Trading Interests Act 1980, 28 Eliz. 2 c. 11 (Eng.); P.C.F. Pettit & C.J.D. Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. L. 697 (1982).

87. Decision of the Commission of the European Economic Community No. 64/233/CEE, 1964 O.J. (58) 915; Decision of European Community No. 64/344/CEE, 1964 O.J. (92) 1426.

88. Joined Cases 89/85, 104/86, 114/86, 116/85, 117/85, 125/85, 126/85, 127/85, 128/85, 129/85, Ahlström v. Comm'n (*Wood Pulp*), 1988 E.C.R. 5193, 5243.

89. *Id.*

90. James J. Friedberg, *The Convergence of Law in an Era of Political Integration: The* Wood Pulp *Case and the* Alcoa *Effects Doctrine*, 52 U. PITT. L. REV. 289, 291 (1991); RYNGAERT, *supra* note 18, at 77. *But see* Alford, *supra* note 83, at 35 ("[T]here will continue to arise a class of anticompetitive activities that adversely impact the Common Market, but that are beyond the reach of *Wood Pulp*'s implementation approach. Examples of such activities include, *inter alia*: extraterritorial export boycotts (refusals to buy), refusals to sell to Community purchasers, and extraterritorial agreements to restrict output . . . where certain

nevertheless insisted that "the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law."[91]

Like the fictitious territoriality principle, passive territoriality, or effects jurisdiction, blurs the distinction between territorial and extraterritorial jurisdiction. Learned Hand, the ECJ, and Cedric Ryngaert treat effects jurisdiction as a form of territorial jurisdiction,[92] while most U.S. scholars consider it to be a form of extraterritorial jurisdiction.[93] The reason for this ambivalence regarding the territoriality of effects jurisdiction is that identifying the place of a complex event or series of events is an arbitrary exercise. The "place" of antitrust infringements depends on what counts as the beginning and end of "one" illegal act, event, or intention. Courts attempt to locate and delimit metaphysical entities, and territoriality becomes a question of philosophical classification.

II. THE GROUND THAT MOVES UNDER US: MANIPULATING LEGAL TERRITORIALITY

The vanishing difference between "territorial" jurisdiction over continuing offenses and "extraterritorial" jurisdiction over territorial effects is not the only instance in which territoriality is uncertain, constructive, or fictitious. If territoriality is not the unquestionable truth of necessarily being in one place at one time, but a policy preference that can be modified at the stroke of a pen, then most arguments for preferring territorial jurisdiction to other grounds of jurisdiction disappear.

The following issues and examples will be familiar to most international lawyers. Firstly, some rights and obligations are attached to persons and organizations by their existence, legal personhood, or nationality, while other rights "don't travel," but change in accordance with the territorial presence of the person or organization.[94] As opposed to private international law, there is little principled discussion on which rights should be territorial and which rights should be personal. Secondly, territoriality ostensibly applies to entities that are incorporeal (e.g., corporations and other organizations) and objects that are hypermobile (e.g., airplanes and ships).[95] To make their legal treatment easier, we assign to these entities their own territoriality based on their flags or places of incorporation.[96] This fictitious or constructive territorialization is part of the strict territorial tradition. Thirdly, states are free to create and modify

---

parties are manufacturing products outside the Community in the hopes of raising prices within the Community.").

91. *Wood Pulp*, 1988 E.C.R. at 5243.

92. *Id.*; United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2nd Cir. 1945); RYNGAERT, *supra* note 18, at 76–77.

93. Alford, *supra* note 83, at 4–5; Friedberg, *supra* note 90, at 318–22; Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 L. & POL'Y INT'L BUS. 1, 33, 66–67 (1992); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 121–27 (1998); Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1474–76 (2008).

94. *See generally infra* notes 130–33 and accompanying text.

95. *See* Willis L. M. Reese & Edmund M. Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1121 (1958) (stating that the original source of a corporation's legal capacity is afforded by the state of incorporation).

96. *Id.*

territorial entities through legislation. Finding laws with the structure, "for purposes of X, this area shall be treated as (not) part of another area," is both commonplace and unremarkable. The only times when commentators bat an eyelid is when the fictitious or exempted territory concerns immigration or threatens human rights.

A. Universality of Rights and Organizations

Perhaps the most widely-disputed aspect of territoriality is "the reach of rights:" Are constitutional rights or basic human rights guaranteed by an international treaty only applicable within the territory of the state in question or the ensemble of states party to the treaty?[97] This question is different from the reach of ordinary statutory provisions because, under modern human rights doctrine, fundamental rights should be a concomitant of personhood, universally-guaranteed regardless of geographical position.[98] In its modern form, the question arose with U.S. imperialism at the beginning of the 20th century, asked at the time as "Does the Constitution follow the Flag?"[99] Do constitutional protections apply beyond the territory of the state, in colonies, in occupied or unincorporated lands, or regarding state actions in foreign territory?

The authoritative answers to this question have spanned the full range of possibilities. At the one extreme are assertions that the U.S. Constitution can have no operation in another country[100] and that the European Court of Human Rights (ECHR) was not "designed to be applied throughout the world, even in respect of the conduct of Contracting States."[101] At the other extreme are statements that no country can "perpetrate violations [of basic rights] on the territory of another State, which violations it could not perpetrate on its own territory,"[102] and that states have an obligation to provide "equal justice not for citizens alone, but for all persons coming within the ambit of [their] power."[103] Over the last two centuries, the U.S. Supreme Court has articulated quite a few in-between positions, such as that there is a presumption against applying U.S. law extraterritorially;[104] that U.S. constitutional

97. *See generally* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005); Jacco Bomhoff, *The Reach of Rights: "The Foreign" and "the Private" in Conflict-of-Laws, State-Action, and Fundamental-Rights Cases with Foreign Elements*, 71 L. & CONTEMP. PROBS. 39 (2008).

98. *See* Benjamin Gregg, *Human Rights as Metaphor for Political Community Beyond the Nation State*, 43 CRITICAL SOC. 1, 3 (2015) (endorsing the view that human rights "operates with a *logic of inclusion*: inclusion regardless of a person's citizenship status . . . despite his or her territorial location").

99. RAUSTIALA, *supra* note 2, at 76–79. In a deeper sense, the question had been present since the beginnings of the United States, regarding its relations with Native Americans. *Id.* at 72; Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 196 (1984).

100. "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction." The Apollon, 22 U.S. 362, 370 (1824); *see also* Ross v. McIntyre, 140 U.S. 453, 464 (1891) (arguing that the Constitution and laws are "'for the United States of America,' and not for countries outside of their limits").

101. Banković v. Belgium, App. No. 52207/99, 44 Eur. Ct. H.R. para. 80 (2001).

102. Sergio Rubén López Burgos v. Uruguay, Communication No. 12/52, Human Rights Committee, U.N. Doc. Supp. No. 40 A/36/40, para. 12.3.

103. Johnson v. Eisentrager, 339 U.S. 763, 791 (1950) (Black, J., dissenting).

104. "A statute will, as a general rule, be construed as intended to be confined in its operation and effect

safeguards do not apply to U.S. citizens abroad;[105] that they do apply to U.S. citizens abroad;[106] that they apply even to unlawfully-present foreigners on U.S. soil;[107] and that they apply only to foreigners with a sufficient link to the United States.[108] Jacco Bomhoff calls these recurring statements "rhetorically powerful, but ultimately indeterminate and contradictory, slogans"[109] that reveal widely disparate approaches to the role of territoriality in human rights protection.

This question first arose in the U.S. Supreme Court in 1891, regarding the trial of a British seaman, Mr. John M. Ross, serving aboard the American ship *Bullion*.[110] Ross was tried for the murder of a crewmate in Yokohama, before the U.S. consul for Japan, without a jury.[111] His appeal was rejected by the U.S. Supreme Court, which held that "[b]y the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits."[112] Nor was the U.S Supreme Court convinced by the fictitious territory doctrine: "The deck of a private American vessel, it is true, is considered . . . constructively as territory of the United States; yet persons on board of such vessels . . . cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States."[113] It only gave policy reasons for this ruling, citing the impracticability of holding jury trials abroad and the positive aspects of consular jurisdiction compared to local tribunals, which are "often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture."[114]

This "strict" construction of territory may be called traditional, but in fundamental-rights case law it is definitely not outmoded. In 1990, the U.S. Supreme Court also held that "it is not open to us . . . to endorse the view that every constitutional provision applies wherever the United States Government exercises its power."[115] And in 2001, the ECHR also interpreted the European Convention on Human Rights to be "a multi-lateral treaty operating . . . in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States . . . . The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."[116]

There is nevertheless a sense of shock and confusion among the same judges when confronting decisions that interpret "the equal and inalienable rights of all

---

to the territorial limits within the jurisdiction of the lawmaker, and words of universal scope will be construed as meaning only those subject to the legislation." *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 348 (1909).

105. *Ross*, 140 U.S. at 464.

106. Reid v. Covert, 354 U.S. 1, 5–6 (1957).

107. Wong Wing v. United States, 163 U.S. 228, 237 (1896).

108. *Johnson*, 339 U.S. at 770–71.

109. Bomhoff, *supra* note 97, at 44.

110. *Ross*, 140 U.S. at 454. The U.S. Supreme Court notes that although Ross was a native of Great Britain, due to his enlistment on the American ship, he was an American seaman, subject to all protections and obligations that the position entailed. *Id.*

111. *Id.* at 454, 458.

112. *Id.* at 464.

113. *Id.*

114. *Id.* at 465.

115. United States v. Verdugo-Urquidez, 494 U.S. 259, 268–269 (1990).

116. Banković v. Belgium, App. No. 52207/99, 44 Eur. Ct. H.R. para. 80 (2001).

members of the human family"[117] as applying only within a geographically defined territory.[118] Instead of consistently sticking to strict territoriality, the same courts differentiate between *de jure* and *de facto* sovereignty and apply "sovereignty" functionally to a military base operating abroad where the state in question has full control.[119] Or they apply a sliding scale of protections dependent on the length and intensity of contacts (assumed to be primarily territorial) the applicant had with the state from which it expects protection.[120] Or they hold states responsible for acts committed in their territory that are not illegal in themselves, but contribute to human rights violations by other states.[121] Finally, the ECHR in particular has declared that the responsibility of Contracting Parties can be involved by acts and omissions of their authorities which produce effects outside their own territory.[122] These last two considerations amount to a sort of reverse effects jurisdiction in human rights.[123]

Taken together, these doctrines can be described as a jurisdictional "Midas touch:" Whatever the state does and wherever the state acts, it does so with the responsibility to uphold its basic values.[124] This doctrine is coherent in itself, but as we have seen, it is not applied consistently. Furthermore, despite its claims that "acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction . . . only in exceptional cases,"[125] these exceptions seem to overwhelm the rule. In general, if state actions establish state responsibility regardless of place, the significance of territory for statehood or jurisdiction becomes

---

117. G.A. Res. 217A (III), Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948).

118. *See* Boumediene v. Bush, 553 U.S. 723, 765 (2008) (noting that there is a difference between "[a]bstaining from questions involving formal sovereignty and territorial governance" and "[t]o hold the political branches have the power to switch the Constitution on or off at will is quite another").

119. *Id.* at 748–56.

120. Johnson v. Eisentrager, 339 U.S. 763, 770 (1950). "[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez*, 494 U.S. at 271; *cf.* Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A), paras. 61–64 (Mar. 23, 1995) (noting the court's discretion in answering questions of jurisdiction since several acts are "capable of falling within the 'jurisdiction'" of the nation in question); Neuman, *supra* note 97, at 919–20 ("[S]trict territoriality and broader municipal law models can be derived from a social contract understanding of constitutionalism .... [The] linkage of obligation and rights does not necessarily guarantee the full package of constitutional rights, however . . . certain rights may have been reserved to particular categories of persons or places.").

121. There is a

> limit, notably territorial, on the reach of the Convention .... Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States .... These considerations cannot, however, absolve the Contracting Parties from responsibility . . . for all and any foreseeable consequences of extradition suffered outside their jurisdiction.

Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A), para. 86 (July 7, 1989).

122. *Loizidou*, 310 Eur. Ct. H.R. (ser. A), para. 62.

123. *Cf.* Bomhoff, *supra* note 97, at 47 (noting that the European Court of Human Rights did not follow the European Commission on Human Rights' approach to jurisdiction).

124. *See generally* Al-Skeini v. United Kingdom, 53 Eur. Ct. H.R. 589, paras. 130–42 (July 7, 2011); *cf. Verdugo-Urquidez*, 494 U.S. at 282 (Brennan J., dissenting) ("[T]he Constitution authorizes our Government to enforce our criminal laws abroad, but when Government agents exercise this authority, the Fourth Amendment does not travel with them. This cannot be. At the very least, the Fourth Amendment is an unavoidable correlative of the Government's power to enforce the criminal law.").

125. *Al-Skeini*, 53 Eur. Ct. H.R. 589, para. 131.

unclear, even superfluous. Without territoriality, the limits of legislation are either set by a social contract theory or they are non-existent—every polity legislates for the entire world.[126]

Effects jurisdiction has cropped up in fundamental rights litigation as well, as a way of avoiding the conclusion that U.S. constitutional law is valid around the globe. In a taxpayer's challenge to U.S. foreign aid sent to religious schools abroad, the Second Circuit established the relevance of the First Amendment of the U.S. Constitution in the following way:

> [B]ecause religion transcends national boundaries, ASHA [the "American Schools and Hospitals Abroad" program] aid to a Catholic school in the Philippines may strengthen not only that school, but also the Catholic Church worldwide, and, in particular, the Catholic sponsor in the United States and its domestic constituency. Moreover, . . . the grants challenged in this case, if violative of the Establishment Clause, impose a cognizable injury on every citizen who files a federal tax return.[127]

Just as in the criminal law cases examined above, the Second Circuit found jurisdiction by broadening the presence of the injurer as well as the injured.[128] The beneficiaries of the foreign aid were no longer a few Catholic schools in the Philippines, but the entire Catholic Church; the injured became every taxpayer (and not, say, other foreign schools who did not benefit from the foreign aid sent to the Philippines).[129]

The Transatlantic debate on "the reach of rights" has no conclusion so far, as every new judicial decision adds to the roster of opinions. At the same time, it is instructive to contrast the debate about the reach of constitutional rights with the utter lack of a debate on the reach of constitutions' institutional provisions. It is taken for granted that "[c]ertain constitutional provisions apply everywhere:"[130]

> For instance, if the President visits the Queen of England in Buckingham Palace, he is still the President. He retains his Article II powers (the military must follow his lawful orders even if he issues them while in England), and he cannot use his presence beyond the United States as an excuse to act contrary to Article II's limits (for example, by appointing a Supreme Court Justice without Senate consent while the Senate is in session).[131]

But why need this be so? If one were to take territorial jurisdiction seriously, then the President exercising war powers while staying in Buckingham Palace may implicate the state responsibility of the United Kingdom, as the United Kingdom would be "aid[ing] or assist[ing] another State in the commission of an internationally

126. *Cf.* Neuman, *supra* note 97, at 916–17 (arguing that universal jurisdiction is a circular rule); Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 487–89 (1987) (arguing against universal jurisdiction).

127. Lamont v. Woods, 948 F.2d 825, 834–35 (2d Cir. 1991).

128. *Id.* at 830.

129. *Id.*

130. Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1182 (2011).

131. *Id.*

wrongful act."[132] What if an ambassador or lower-ranking state official was involved in international crimes while acting in a foreign country? After all, states have an international obligation to stop their territory from being used for illicit acts, even if the organs or representatives of the state in question did not do anything wrong themselves.[133]

In fact, most of these issues are avoided through diplomatic immunity, which operates through the creation of "fictitious space[s], designated 'extraterritoriality.'"[134] The site of a foreign mission, its archives and documents, and the ambassador's residence are inviolable and exempt from "search, requisition, attachment or execution,"[135] taxes and other dues, and any other forms of criminal or civil jurisdiction.[136] The extraterritoriality of diplomatic premises is viewed as necessary for the coexistence of territorial sovereignty with foreign relations. Thus, "[b]y arrogating to themselves supreme power over men's consciences, the new [early-modern] states had achieved absolute sovereignty. Having done so, they found they could only communicate with one another by tolerating within themselves little islands of alien sovereignty."[137]

B. Mobile and Virtual Territoriality: Ships and Corporations

Analogizing vehicles to territory is an ancient practice; sources dating back as far as the 13th century view the ship as a floating piece of state territory (also taking into consideration the hierarchical order on board a ship).[138] The same fictitious territory approach has also been adopted for the regulation of commercial aircraft.[139]

A similar track has been taken regarding jurisdiction over corporations. Whether corporations are essentially forms of common property, organizations of production,

---

132. *See* Int'l Law Comm'n, *Rep. on the Work of Its Fifty-Third Session*, U.N. Doc. A/56/10, at 155 (2001). (detailing that the state would need to knowingly provide facility or financing of the activity).

133. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, at 22 (Sept. 30). "Territorial sovereignty . . . has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war . . . ." Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928). *See generally* Péter D. Szigeti, *Territorial Bias in International Law: Attribution in State and Corporate Responsibility*, 19 J. TRANSNAT'L L. & POL'Y 311 (2010).

134. John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 165 (1993).

135. Vienna Convention on Diplomatic Relations art. 22(3), Apr. 18, 1961, 500 U.N.T.S. 95.

136. *See id.* arts. 23–25, 27–31 (describing diplomatic immunity for certain civil and criminal intrusions).

137. GARRETT MATTINGLY, RENAISSANCE DIPLOMACY 244 (1955).

138. PHILIP E. STEINBERG, THE SOCIAL CONSTRUCTION OF THE OCEAN 50–51 (2001); *cf., e.g.*, United States v. Flores, 289 U.S. 137, 155–56 (1933) (noting that "for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, [a merchant vessel] is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters . . . of another sovereignty"); United Nations Convention on the Law of the Sea art. 94, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS]. The analogy goes both ways in fact: Viewing the state as a ship which the good ruler must guide through storms is a poetic trope that was already well-established in ancient Roman literature. *See* Szabó Etelka, *Egy allegória alakváltozásai* [Transformations of an Allegory], 3 ARGUMENTUM 85, 92 (2007) (citing Horace, *Odes* 1.14; Cicero, *In Pisonem* IX, 20; Dante Alighieri, *Purgatory* VI, 69–70).

139. Convention on International Civil Aviation art. 17, Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter ICAO Conv.].

or "nexuses of contracts" is debated by corporate lawyers today[140]—but they are certainly not territorial or easily localizable. Corporations nevertheless have nationality and domicile, which are tied to the place of incorporation and/or the corporation's principal offices or place of business.[141] Through the place of incorporation and the registered office, corporations are also territorialized.

Felix Cohen famously called the question, "Where is a corporation?" to be nothing more than "transcendental nonsense."[142] He argued that the link between a corporation and the legal order that governs it should depend on the factual circumstances of commercial contacts, incorporation, employment, et cetera, and our value judgments about the rightness of establishing jurisdiction over the corporation in question.[143] The U.S. Supreme Court, in what can be construed as a response to Felix Cohen,[144] simply stated that "the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process."[145] The territorialization of corporations, through the intervention of conflicts of law reformers and the acquiescence of the U.S. Supreme Court, has not been abandoned but instead became more specific and intense.[146] Corporations have nevertheless retained a basic "home jurisdiction," termed as the "nationality" of the corporation but allocated based on the place of incorporation.[147]

Jurisdiction over ships, aircraft, and corporations share four significant characteristics. First, it splits the difference between territorial and personal jurisdiction. Sources talk about the *nationality* of ships and corporations,[148] but this nationality is based on a formal act of incorporation, or assimilation to state territory. Most of today's international lawyers regard the "floating territory" (or "flying territory") fiction to be quaint and outdated, but the exclusivity of the flag state's jurisdiction is still most reminiscent of territoriality. Second, all three types of entities are self-contained, partly autonomous hierarchical organizations, which would make pure nationality-based jurisdiction unwieldy. As the U.S. Supreme Court remarked on maritime jurisdiction, "the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by

140. *See generally* Michael C. Jensen & William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757 (1989); Melvin A. Eisenberg, *The Conception that the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819 (1999).

141. PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 171 (1993).

142. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811 (1935).

143. *See id.* at 810 (discussing Cohen's suggestion that a competent legislature should have formulated some rule as to when a foreign corporation should be subject to a suit).

144. Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1164–65 (1989).

145. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945).

146. *See* SYMEONIDES, *supra* note 5, at 388–89 (noting territoriality, not personal contacts, is still the decisive factor in the majority of cases).

147. "The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office." Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Sp.), 1970 I.C.J. 3, para. 70 (Feb. 5).

148. *See supra* notes 113–14 and 119–21 and accompanying text.

the more constant law of the flag."[149] Thirdly, all three entities are *highly mobile*, not just in the physical sense of ships and aircraft moving around the globe, and corporations transferring assets and concluding contracts anywhere, but in the *legal* sense of changing flags and incorporation so as to rapidly become the subjects (and the quasi-territory) of another sovereign.[150] Fourthly, the fictitious territory approach does not displace, but is concurrent with, ordinary territorial jurisdiction over airspace and territorial waters. Host states have extensive jurisdictional rights over ships in their territorial and inland waters,[151] and over aircraft in their airspace.[152] Corporations, being likened to nationals of a state, are concurrently under the ordinary territorial jurisdiction of any other state where they are "found."[153]

To conclude, territoriality also becomes a slippery concept when dealing with highly mobile or ambiguously localizable entities. It is unclear whether "fictitious territory" is a form of concurrent territorial jurisdiction or an extension of personal jurisdiction. In any case, the legal system of a state constitutes both the territory and the personality of a ship or corporation. Current location, place of creation, or other factual—geographical—circumstances become quite meaningless.

C. Anomalous Zones: Territories with Double Characteristics

Finally, the "where" itself can be questionable because the same geographical place can have different territorial statuses depending on the type of legal question asked. In international law, we are accustomed to territoriality being an either/or question. The hypothetical bullet flying over the border is at any one point either in State A or State B, never in both or neither. But clever domestic legislation can give territories such double characteristics, so that locating an action will not entail standard answers of responsibility or jurisdictional power. Gerald Neuman coined the concept of the "'anomalous zone,' a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended."[154] This Article uses the expression "anomalous zone" while adding a slight twist to its meaning: It is a geographical area that purports to have two or more different statuses under international law, for different purposes, often in such a way as to minimize international legal responsibility.

For Neuman, the historical existence of a red light district in Storyville, New Orleans is an example of an anomalous zone.[155] In other times and places, there is nothing anomalous about creating red light districts—the prohibition of prostitution is

149. Lauritzen v. Larsen, 345 U.S. 571, 584 (1953).

150. *See* MARITIME & PORT AUTHORITY OF SINGAPORE, *Provisional Registration*, http://www.mpa.gov.sg/web/portal/home/singapore-registry-of-ships/register-with-srs/types-of-registration/provisional-registration (last visited June 5, 2017) (noting provisional (re)registration of a ship in an open registry can take as little as one day, while the more conservative Singapore Maritime and Port Authority requires five working days).

151. United States v. Flores, 289 U.S. 137, 146–50 (1933); UNCLOS, *supra* note 138, arts. 18–19, 21–22, 25–28.

152. ICAO Conv., *supra* note 139, arts. 1–2, 5–6, 9–11.

153. Barcelona Traction, *supra* note 147, para. 38.

154. Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996).

155. *Id.* at 1208.

not a fundamental policy of the legal system.[156] In those cases, red light districts only reflect the rationality of ordinary zoning. Private property itself forms a protected and spatially-separate zone for property owners, where some fundamental policies of the larger legal system (e.g., non-discrimination, freedom of speech, freedom of movement, etc.) exist only at the discretion of the owners—but to call private property anomalous or an exception to laws might be a bit too much.[157] In this Article's sense of the phrase, an anomalous zone is *both* exceptional *and* ordinary at the same time, depending on who is doing the asking and for what purpose.

In international law, the most infamous example is Guantánamo Bay, the U.S. Navy and Marine Corps base that was founded on territory that leased in perpetuity by the United States from Cuba. Pursuant to Article III of the Cuban-American lease agreement, the "United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water," but "the Republic of Cuba consents that . . . the United States shall exercise complete jurisdiction and control over and within said areas."[158] The incongruity between ultimate Cuban sovereignty and complete U.S. jurisdiction has allowed the U.S. government and U.S. federal courts to claim at times that Guantánamo is Cuban territory where U.S. law does not apply and at other times that it is like any other U.S. territory.[159] This double character has made the base useful as the holding ground for Haitian and Cuban refugees between 1991 and 1995 who were thus denied protected communication with attorneys under the First Amendment.[160] Most infamously, the base has been used since 2002 as a detention center for people whom the United States deemed "unlawful combatants" in its operations in Afghanistan and Iraq.[161] Until the U.S. Supreme Court's judgment in *Boumediene v. Bush* in 2008,[162] Guantánamo has been claimed to be outside the reach of Cuban law, U.S. law, and international law, both by the U.S. government and by critical commentators—a "legal black hole" in popular parlance.[163] More careful analysis by Fleur Johns showed that parallel to

156. *Id.* at 1213.

157. The question is of course usually discussed from the opposite perspective, i.e., whether limiting private property through laws is legitimate. *See generally* J. W. HARRIS, PROPERTY AND JUSTICE (2002); JAMES PENNER, THE IDEA OF PROPERTY IN LAW (2000); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2007).

158. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations art. III, Feb. 23, 1903, http://avalon.law.yale.edu/20th_century/dip_cuba002.asp.

159. *See* Bird v. United States, 923 F. Supp. 338, 343 (D. Conn. 1996) (finding Guantanamo is a "foreign country" under the Federal Tort Claims Act); United States v. Rogers, 388 F. Supp. 298, 301 (E.D. Va. 1975) (holding U.S. criminal law is applicable in Guantanamo); Cuban American Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1424 (11th Cir. 1995) (finding leased foreign military bases are not functionally equivalent to U.S. territory or ports of entry, and therefore the U.N. Refugee Convention is not applicable in Guantanamo).

160. *See generally* Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498 (11th Cir. 1992); *Christopher,* 43 F.3d 1412; Neuman (Anomalous Zones), *supra* note 1, at 1198–200.

161. Dianne Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L. L. 263, 267 (2004).

162. "[W]e would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction. This premise, however, is unfounded." Boumediene v. Bush, 553 U.S. 723, 755 (2008).

163. "At times the American government appeared to argue that no law whatsoever applied, at least with regard to the treatment of the foreign detainees held there." RAUSTIALA, *supra* note 2, at 190. For more information on Guantanamo as "legal black hole," see generally Johan Steyn, *Guantánamo Bay: The Legal Black Hole*, 53 INT'L COMP. L.Q. 1 (2004); George P. Fletcher, *Black Hole in Guantanamo Bay*, 2 J. INT'L CRIM. JUST. 121 (2004); Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and*

claims that no law is applicable in Guantánamo Bay and only necessity rules, there was also a lot of juridical discourse.[164] There is no question that U.S. military law is applicable in Guantánamo Bay.[165] Quasi-judicial institutions were created to permit and indeed normalize the "lawless" behavior the camps were designed for (without exceptions and without excess): "The detention camps of Guantánamo Bay are above all works of legal representation and classification. They are spaces where law and liberal proceduralism speak and operate *in excess*."[166]

Another lesser-known example is Australia, where a zone that is "excised from migration" means that "immigration officials [are entitled] to remove asylum seekers that have reached the country's 'excised' territories as if they never reached Australia, although they physically landed on its shores. It further eliminates the possibility of judicial review 'in relation to the entry, status, detention and transfer of a person arriving unlawfully . . . .'"[167] In other cases, the immigration boundary stretches far beyond the regular international boundary. If we look at the "immigration boundary" as the point where would-be travelers have to present their passports to enter a certain country, then the U.S. immigration border is present in Toronto Pearson International Airport,[168] and the British border at the Gare du Nord in Paris.[169] To the extent that private airline companies are required to pay compensation to the destination state after passengers who are later deemed inadmissible, every international airport is already a boundary point for every foreign state.[170] At the same time, it is also unquestionably national territory. To call even parts of the Gare du Nord British territory would certainly raise eyebrows.

Even unexceptionable "anomalous zones" create plenty of jurisdictional confusion. Foreign trade zones (also known as free trade zones, special economic zones, or free ports) create similar excised zones for customs purposes. A foreign trade zone is a designated area within an official port of entry, where

---

Detentions Abroad in the "War on Terror", 87 INT'L REV. RED CROSS 39 (2005); Robert Verkaik, *Exclusive: Caught in America's Legal Black Hole*, INDEPENDENT, Oct. 23, 2011, 11:00 PM, http://www.independent.co.uk/news/world/americas/exclusive-caught-in-americas-legal-black-hole-2047307.html.

164. Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613, 629–31 (2005).

165. Joseph C. Sweeney, *Guantanamo and U.S. Law*, 30 FORDHAM INT'L L.J. 673, 728–39 (2007).

166. Johns, *supra* note 164, at 614.

167. Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 165, 186–87 (2007) (citations omitted).

168. *Departure Guide*, TORONTO PEARSON AIRPORT, http://www.torontopearson.com/Departing_to_usa.aspx# (last visited June 5, 2017) ("For the majority of U.S. flights, guests leaving Toronto will go through U.S. Customs and Border Protection in Toronto.").

169. Additional Protocol to the Sangatte Protocol art. 2, U.K.-Fr., May 24, 2000, 226 U.N.T.S. 197, http://www.official-documents.gov.uk/document/cm23/2366/2366.pdf.

170. The enlisting of carrier companies as bondsmen for their passengers goes back to 19th century U.S. immigration rules. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1848–59 (1993). *See generally* DOROTHEE SCHNEIDER, CROSSING BORDERS: MIGRATION AND CITIZENSHIP IN THE TWENTIETH-CENTURY UNITED STATES 10–60 (2011). Today, that practice is used at least by the United States and Canada. Gallya Lahav, *Mobility and Border Security: The U.S. Aviation System, the State, and the Rise of Public-Private Partnerships*, *in* POLITICS AT THE AIRPORT 77–104 (Mark B. Salter ed., 2008); Shachar, *supra* note 167, at 183–86.

> [f]oreign and domestic merchandise of every description . . . may, *without being subject to the customs laws of the United States*, . . . be brought into a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed, . . . or be manufactured . . . , [and [then] be exported.[171]

Foreign trade zones need not be one contiguous territory; sub-zones may be established specifically in and for a certain qualifying company.[172] For example, "[a] qualifying business need not physically relocate to an existing zone. Instead, the business simply designates that part of its facilities which will comprise the sub-zone. Indeed, sub-zones were specifically designed for companies wishing to utilize the zone concept but unable to relocate to an existing zone."[173] The purposes of foreign trade zones are to eliminate customs on goods that are imported into the U.S. only to be re-exported (transshipment) and to avoid higher customs on raw materials when those materials will be transformed before reaching any domestic U.S. market.[174]

Foreign trade zones are outside of the United States for customs purposes, but inside for all other purposes.[175] Predictably, this situation brought up a host of jurisdictional questions, especially regarding federal jurisdiction. Under the U.S. Constitution, interstate and foreign commerce are under exclusive federal jurisdiction.[176] Are foreign trade zones thereby "federal enclaves," subject only to U.S. federal law, or are they under the jurisdiction of the U.S. state in which they are located? In the case of an employee in a foreign trade zone who died of a workplace accident, the federal court held that it did not have jurisdiction, as "[t]he statute in question nowhere in terms confers jurisdiction upon U.S. District Courts."[177] On the other hand, in a case regarding the theft of a trailer full of Scotch whiskey, the federal court found jurisdiction because the object of the theft was in foreign commerce while stationing at the federal trade zone within Ohio.[178] For a long period, it was also uncertain whether states and municipalities had the right to impose *ad valorem* property taxes to merchandize stored in such a zone.[179] Congress clarified the matter in 1984 by exempting tangible personal property from such property taxes,[180] but courts have interpreted this to apply only to merchandise in transshipment.[181]

Plenty of other questions have come up as well. If a foreign product, produced under a foreign patent, is held in a U.S. foreign trade zone exclusively for transshipment, does that infringe the U.S. patent on the same product?[182] Does the

---

171. 19 U.S.C. § 81c (a) (Westlaw through Pub. L. No. 115–30).

172. Mark B. Bader, *Jurisdictional Uncertainty: The American Foreign Trade Zone*, 8 N.C. J. INT'L L. & COM. REG. 239, 241 (1982).

173. *Id.*

174. *Id.* 240–41.

175. MARY JANE BOLLE & BROCK R. WILLIAMS, CONG. RESEARCH SERV., U.S. FOREIGN-TRADE ZONES: BACKGROUND AND ISSUES FOR CONGRESS 2 (2013).

176. U.S. CONST. art. I, § 8, cl. 3.

177. Fountain v. New Orleans Pub. Serv., Inc., 387 F.2d 343, 344 (5th Cir. 1967).

178. United States v. Yoppolo, 435 F.2d 625, 625 (6th Cir. 1970).

179. Bader, *supra* note 172, at 254–58.

180. 19 U.S.C. § 81o(e) (Westlaw through Pub. L. No. 114–316).

181. R. J. Reynolds Tobacco Co. v. Durham City, 479 U. S. 130, 140–52 (1986); United States v. 4,432 Mastercases of Cigarettes, More or Less, 448 F.3d 1168, 1192 (9th Cir. 2006).

182. *See* G. D. Searle & Co. v. Byron Chem. Co., 223 F. Supp. 172, 174 (E.D.N.Y. 1963) (holding that

same apply to trademarks?[183] Does the Pure Food and Drug Act apply to products held for transshipment?[184] Do federal anti-gaming statutes?[185]

Once an area is both inside and outside the jurisdiction in question, the judge has to evaluate legislative intent and associated policy goals to decide whether the conduct under judgment activates the "internal" or the "external" aspects of the area. Territorial jurisdiction, in the sense of looking *where* an action happened, is just as useless in these cases as in the previously discussed ones.

III. OF RULES AND EXCEPTIONS, OR THE LACK OF GEOGRAPHICAL INFORMATION IN LAW

The range of cases described above, disparate and wide-ranging as they are (involving ships, corporations, constitutional rights, antitrust violations, and state officials), are often taken for "exceptions" to an otherwise well-functioning system of territorial jurisdiction. Ordinary civil and criminal issues are served well by territorial jurisdiction, it may be argued, and what this Article has listed are just exceptions. This is how principles of jurisdiction are often presented in casebooks and textbooks: Territoriality is first described as a baseline rule, and other principles (nationality, universality, the protective principle, and treaty-based *lex specialis*) are then added as exceptions.[186] International legal history thus supports a more established historical narrative on the transformation from "[m]edieval territorial authority over a collection of locations, such as towns" to "modern authority over a uniform, linearly bounded space."[187] *Au contraire*, this Article argues that the "territorial rule/extraterritorial exception" misconception is the result, on the one hand, of glossing over some historical facts about the international system at the time of exclusive territorial jurisdiction, and, on the other hand, of the illusion that territorial boundaries are at least theoretically capable of separating legal systems.

First, exclusively territorial jurisdiction in the 19th and early 20th centuries was facilitated by two aspects of international politics that are no longer valid, and in fact are widely condemned today. One of these is the conquest, colonization, annexation, and partial incorporation of foreign territories.[188] In 1900, the number of sovereign states in the world was slightly above 50, with France and Britain controlling close to 30% of the globe; in 1950, the number of sovereign states was still under 100.[189] The other is the mechanism of consular jurisdiction, which disguised extraterritorial

this would infringe on the U.S. patent).

183. *See* A. T. Cross Co. v. Sunil Trading Corp., 467 F. Supp. 47, 50–51 (S.D.N.Y. 1979) (holding that trademarks also receive protection).

184. *See* United States v. Yaron Labs., Inc., 365 F. Supp. 917, 919 (N.D. Cal. 1972) (holding that the Pure Food and Drug Act does apply).

185. United States v. Prock, 105 F. Supp. 263, 264 (S.D. Tex. 1952) (holding that the act prohibited only *interstate* commerce of gaming machines, and the machines were in *foreign* commerce; the ruling was later made obsolete by the entry into force of a Texas anti-gaming statute).

186. *E.g.*, MALCOLM SHAW, INTERNATIONAL LAW 409–62 (2003); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 456–71 (2012).

187. Branch, *supra* note 9, at 2.

188. *See generally* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2007).

189. WILLIAM R. SHEPHERD, HISTORICAL ATLAS 224–25 (1964).

jurisdiction by embedding it into bilateral treaties, which could then become a "consensual exception" to territoriality.[190] Consular jurisdiction avoided jurisdictional conflicts by prescribing the consular courts and their legal systems in all cases with foreign elements.[191] It is not only that there was less travel and technology in the late 19th century—there was objectively less law and fewer jurisdictions, therefore fewer legal possibilities for jurisdictional conflicts.

Secondly, and even more crucially, there is a general misconception that territorial jurisdiction conforms to geographic boundaries, and it is thus possible to cartographically map legal systems. Political maps of the world are thought to also depict the reach of legal systems. But maps contain assumptions about jurisdiction that we know are unwarranted: That all law is state law, that one jurisdictional area is subject to only one law, and that all law essentially conforms to the limits provided by international boundaries. The falsity of these assumptions is clear to all comparative lawyers.[192] Maps fail to depict "overlapping," non-territorial laws such as public international law or federal Canadian, Australian, or U.S. law.[193] They also miss non-state laws, including religious law with global implications (e.g., the laws of Islamic finance practiced all over the world) or the extension of state laws by private actors (e.g., the omnipresence of English law and New York law in the choice-of-law clauses of financial contract forms and the associated international arbitration regimes).[194] Yet these assumptions are hard to overcome using regular cartographic tools, even on relevant and cartographically accurate maps. Only a small number of overlapping jurisdictions can be illustrated using cross-shading, while the number of overlapping legal regimes in any one place is huge. And the maps could only cover "mobile jurisdiction" over ships, aircraft, nationals abroad, et cetera, using some form of real-time global tracking.[195] This loss of geographical information reinforces the senselessness of distinguishing territorial and extraterritorial jurisdiction and of setting a preference for the "territorial" legal order. Instead, we should seek to reconfigure jurisdictional conflict principles without recourse to the illusion of geographical coherence.

IV. TOWARD RECONSTRUCTING INTERNATIONAL JURISDICTION

How can we accurately describe contemporary jurisdictional practice, without resorting to the discredited "territorial/non-territorial" ("regular"/"exceptional") categorization? There are three starting points that I believe might be useful on the path to a reconstructed discourse of jurisdiction.

First, when attempting to describe the limits of jurisdiction in general terms, both current scholarship and judicial practice talks about "connection," "ties," "contacts,"

190. *See generally* RAUSTIALA, *supra* note 2, at 59–91, 223–47; Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China*, 71 L. & CONTEMP. PROBS. 217, 219–20 (2008).

191. *See generally* Maarten Bavinck & Gordon R. Woodman, *Can There Be Maps of Law?*, *in* SPATIALIZING LAW: AN ANTHROPOLOGICAL GEOGRAPHY OF LAW IN SOCIETY 195 (Franz von Benda-Beckmann et al. eds., 2009).

192. *Id.*

193. Alternatively, it misses local municipal laws such as the laws of German *Länder*.

194. *Id.*

195. *Cf.* WILLIAM TWINING, GLOBALIZATION AND LEGAL THEORY 150–52 (2000) (arguing that legal maps, when assembled correctly, have utility).

or "community."[196] This is one way to escape references to territoriality and instead focus on relationships between people. Such relationships often involve territorial proximity, but don't necessarily have to. The language of contacts thus avoids the difficulties that the language of boundaries brings. This shift towards contacts has taken place across the spectrum of legal domains. With regard to jurisdiction over corporations, *International Shoe Co. v. Washington* equated "presence" with "minimum contacts."[197] Contemporary shifts in citizenship law—the granting of voting rights to non-resident citizens and resident non-citizens—have also been legitimized based on "social attachment" or "genuine connection" with the host state and the home state.[198] Paul Schiff Berman has synthesized contemporary international jurisdictional practice into a cosmopolitan pluralist framework, which he summarizes as "jurisdiction must be based on whether the parties before the court are appropriately conceptualized as members of the same community, however that community is defined."[199] Territory is only present as the site for the possibility of "rubbing elbows at corner stores,"[200] not as a decisive factor in itself.

Second, the lack of boundaries means that prohibitions on exercising jurisdiction are few and far between. The debate over whether the current principles of jurisdiction are permissive or prohibitive has a long pedigree: "Either one allows States to exercise jurisdiction as they see fit, unless there is a prohibitive rule to the contrary, or one prohibits States from exercising jurisdiction as they see fit, unless there is a permissive rule to the contrary."[201] The *S.S. Lotus* case famously promoted the first approach[202] but is usually portrayed to have been superseded by later judgments.[203] In practice, there is little difference between the approaches and "[the] shift in focus is . . . largely cosmetic."[204] This is because several principles of jurisdiction can be, and are, invoked to support the same case. The *S.S. Lotus* case affirmed Turkey's jurisdiction over the collision of the S.S. Lotus with the S.S. Boz-Kourt by stating that "all or nearly all . . . systems of law extend their action to offences

196. *See infra* notes 198–201 and accompanying text.

197. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (stating that "if he be not present within the territory of the forum, he have certain minimum contacts with it").

198. AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 166–170 (2009); Rainer Bauböck, *Recombinant Citizenship*, *in* INCLUSIONS AND EXCLUSIONS IN EUROPEAN SOCIETIES 38–58 (Martin Kohli & Alison Woodward eds., 2001); *cf.* Nottebohm (Liech. v. Guat.), Judgment, 1955 I.C.J. 4, 23 (Apr. 6) (holding that a state must act in conformity with the "genuine connection" doctrine for its rules to be recognized by other states).

199. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 496 (2002); *see also* Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism*, 38 CONN. L. REV. 929, 934–38 (2006) (discussing the "deterritorialization" of communities). *See generally* PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS (2012).

200. SHACHAR, *supra* note 198, at 167.

201. RYNGAERT, *supra* note 18, at 21.

202. S.S. Lotus (Fr./Turk.), Judgment, 1927 P.C.I.J. (Ser. A) No. 10, at 19 (Sept. 7).

203. Crawford argues:

> [The Lotus case's] emphasis on plenary state discretion is contradicted by the approach of the Court in *Anglo-Norwegian Fisheries* and *Nottebohm*, which concerned comparable competences of states . . . . Following *Arrest Warrant*, there are hints that it has been reversed: if a state wishes to project its prescriptive jurisdiction extra-territorially, it must find a recognized basis in international law for doing so. CRAWFORD, *supra* note 186, at 458.

204. *Id.*

committed outside the territory of the State which adopts them,"[205] but also by holding that jurisdiction over national ships are a type of territorial jurisdiction.[206] In the *Eichmann* judgment, the Israeli Supreme Court relied on universal jurisdiction, protective jurisdiction, and the passive territorial principle concurrently to ground its powers.[207] In a number of U.S. criminal cases, effects jurisdiction and protective jurisdiction were used interchangeably.[208] And when grounds for exercising jurisdiction in criminal law are so easy to find, asserting jurisdiction in private law needs almost no justification.[209]

Third, contemporary jurisdiction is overlapping and non-exclusive as a matter of course. In domains where states' interests are generally concordant, such as criminal law, this does not pose a problem. Overlapping concurrent criminalization allows for a greater likelihood of apprehension and punishment of crimes, if the criminality in question is universally considered antisocial—murder, theft, fraud, rape, and the like.[210] The exceptions are crimes where moral support of criminalization falls along a wide global spectrum, such as "political" crimes (like the criminalization of proselytization or political speech) or "cultural" crimes (like sexual and family-related crimes, such as female genital cutting, abortion, homosexual acts, and marital rape).[211] In economic law, overlapping jurisdiction is more contentious and the effects of it remain hotly debated.[212] Nevertheless, after its large-scale adoption by the United States and the European Union, the practice is slowly becoming universal.[213]

Can we synthesize these three observations into any rules on the exercise of jurisdiction? I believe some points can be made. One: The assertion of state jurisdiction is basically untrammeled by international legal principles. In the last 40

---

205. *S.S. Lotus*, 1927 P.C.I.J. at 20.

206. *Id.* at 25.

207. CrimA 336/61 Attorney-Gen. v. Eichmann (1962) (Isr.), http://www.internationalcrimesdatabase.org/Case/185/Eichmann/.

208. *See, e.g.*, United States v. Rodriguez, 182 F. Supp. 479, 489 (S.D. Cal. 1960) (discussing effects jurisdiction and protective jurisdiction interchangeably); United States v. Pizzarusso, 388 F. 2d 8, 10 (2d Cir. 1968) (describing protective jurisdiction as effects jurisdiction); United States v. Keller, 451 F. Supp. 631, 635 (D.P.R. 1978) ("The planned invasion of the customs territory of the United States is sufficient basis for the invocation of jurisdiction under the protective theory . . . ."); United States v. Newball, 524 F. Supp. 715, 716 (E.D.N.Y. 1981) ("Drug smuggling threatens the security and sovereignty of the United States by affecting its armed forces, contributing to widespread crime, and circumventing federal customs laws.").

209. SHAW, *supra* note 186, at 651 ("In general it is fair to say that the exercise of civil jurisdiction has been claimed by states upon far wider grounds than has been the case in criminal matters, and the resultant reaction by other states much more muted."); Akehurst, *supra* note 35, at 170 ("[Apart from] rules about sovereign, diplomatic, and other immunities . . . are there any rules of public international law which limit the jurisdiction of a State's courts in civil trials?").

210. *See* Akehurst, *supra* note 35, at 153 (stating that the characterization of bigamy as "a continuing offence as long as the parties bigamously cohabit . . . is clearly a legal fiction and goes against the logic of the law; *but it is relatively harmless*") (emphasis added).

211. *See generally* I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309 (2012).

212. *See generally* DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1995); OREN PEREZ, ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM: RETHINKING THE TRADE AND ENVIRONMENT CONFLICT (2004); Dan Danielsen, *Local Rules and a Global Economy: An Economic Policy Perspective*, 1 TRANSNAT'L LEG. THEORY 49 (2010).

213. *See* Parrish, *supra* note 14, at 852–53 ("While the United States remains the most active promulgator of extraterritorial measures in the competition/antitrust law field, other states and regional organizations such as the European Union, France, Germany, the Republic of Korea, and most common law countries have adopted laws of extraterritorial application.").

years, we have gone from shocked rejections of effects jurisdiction in U.S. antitrust law[214] to the widespread adoption of the same type of effects jurisdiction.[215] The U.S. Supreme Court has asserted that international conventions for the gathering of evidence from abroad lay down purely optional procedures, and U.S. courts have well-nigh unconstrained power to issue discovery orders from foreign parties in litigation in U.S. courts, even if residing outside the United States.[216] Perhaps, though, this is not as frightening as it may seem to some. After all, even when exclusive territoriality was doctrinally hegemonic, extending jurisdiction was easy through treaties imposed by powerful states,[217] or through choice-of-law clauses and arbitration.[218]

Two: The only fundamental limiting principle to jurisdiction is a "no-connection" limit. This limit is both territorial and non-territorial. Given that territorial connections exist wherever social connections exist, and also given that contemporary jurisdiction is "community-focused," this principle would simply bar the assertion of jurisdiction if a court can find no presence or effects connecting the case to the state of the court. For instance, in the famous textbook example of the Frenchman shooting a German who is present in Belgian territory from across the Dutch border with a gun illegally purchased in Britain at the instigation of a Danish gangster, all of the referenced states would be able to assert jurisdiction.[219] The remaining 180-plus states in the world would not. This principle is self-evident in many ways, and thus close to superfluous: If a state has no connection with an action, why would it want to assert jurisdiction in the first place?

Three: Some more specific limits to asserting jurisdiction exist, but in the form of a modest number of (prohibitive) rules, not (allocative) general principles. We could therefore talk about *anti-jurisdictional rules* instead of jurisdictional principles. Some of these prohibitive rules concern the truly geographic core of territorial jurisdiction: The physically verifiable presence of persons or objects. Most notable is the prohibition of extraterritorial enforcement jurisdiction, that is the unconsented presence of state officials performing their duties beyond their national territory.[220] Exclusive local jurisdiction over real estate is also universally recognized.[221] Another, unrelated prohibition would be the unlawfulness of secondary boycotts (sanctions

214. Akehurst, *supra* note 35, at 53 (stating how U.S. courts over time were willing to accept and expand effects jurisdiction).

215. *See, e.g.*, Parrish, *supra* note 14, at 820 ("The rise of extraterritorial domestic law (law unilaterally applied to the conduct of foreigners abroad) poses a greater threat to democratic sovereignty than traditional sources of international law."). *Cf.* Akehurst, *supra* note 35, at 153 (finding effects jurisdiction to be "relatively harmless").

216. Société Nationale Industrielle Aérospatiale v. U.S. District Court, 482 U.S. 522, 547 (1986); Buxbaum, *supra* note 67, at 670–72.

217. RYNGAERT, *supra* note 18, at 193–204; RAUSTIALA, *supra* note 2, at 59–91, 223–47; Ruskola, *supra* note 190, at 219–20.

218. Horatia Muir Watt, *"Party Autonomy" in International Contracts: From the Makings of a Myth to the Requirements of Global Governance*, 6 EUR. REV. CONTRACT L. 250, 267 (2010); Robert Wai, *The Interlegality of Transnational Private Law*, 71 L. & CONTEMP. PROBS. 107, 121–23 (2008).

219. *E.g.*, SHAW, *supra* note 186, at 654; Born, *supra* note 93, at 21; CRAWFORD, *supra* note 186, at 458–59.

220. Dan E. Stigall, *Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law*, 3 NOTRE DAME J. INT'L & COMP. L. 1, 8 (2013).

221. *See, e.g.*, Council Regulation 44/2001, art. 22, 2001 O.J. (L 12) (establishing exclusive jurisdiction, regardless of domicile, over immovable property).

directed against the foreign trading partners of a boycotted nation), except for in times of war.[222] There is arguably a prohibition on *in absentia* trials of foreign nationals for international crimes.[223] And so forth. There is in fact no need to try to connect these prohibitions and derive general rules or principles from them, as brilliant lawyers have tried and failed.[224] Additionally, there is little difference between these anti-jurisdictional rules and more traditional discussions of sovereign immunity, which also concern balancing respect for foreign nations with enforcing the rules of the forum state and are valid without any geographical focus.[225]

Finally, one may speak *de lege ferenda* about the justice of international jurisdiction as a system. Principles of jurisdiction "only take into account [States'] own interests, and not the interests of other States, or of the international community. They are only concerned with the maximization of their own national welfare, and not with the maximization of global welfare."[226] As Ryngaert further observes, "[a]n unqualified effects doctrine . . . only lead[s] to a . . . level of *over*regulation, since *any* State that is adversely affected by a foreign restrictive practice will tend to assert its jurisdiction over this practice without due regard for global regulatory efficiency."[227] Exercising jurisdictional power in the global interest (whether determined through economic analyses of efficiency or other means) should be encouraged—as well as critical thinking about power politics disguised in jurisdictional altruism, of course.

CONCLUSION

Territorial jurisdiction has a widely-accepted history, according to which it was invented in the 17th century, became dominant or even exclusive by the 19th century, and declined during the second half of the 20th century. According to this history, before the 16th century, personal jurisdiction reigned, and following 1945, effects jurisdiction took over. The reasons for the rise and fall of territoriality, according to this account, are technological: Territoriality emerged through advances in cartography and declined because of the invention of the revolution in communications and transport technologies. However, this narrative sits uneasily with other doctrinal accounts which assert the continuing primacy of territorial jurisdiction and with legal analyses that continuously fail to set any consistent and geographically-locatable boundary to state jurisdiction.

A closer look at the rulings which are cited as evidence of both the triumph and the fall of territorial jurisdiction shows an altogether different picture about territorial jurisdiction. The reasoning used in both "strict territorial" decisions and "extraterritorial effects" decisions are identical. It involves making essentially metaphysical decisions, without geographic substance, about whether an event, a mental state, or a quality "takes place" within or beyond an international boundary.

---

222. RYNGAERT, *supra* note 18, at 100.

223. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 37–38, 55–57, 94, 121–26 (Feb. 14). *But see* Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 749–52 (2004).

224. *See, e.g.*, RYNGAERT, *supra* note 18, at 178–84 (acknowledging that the current jurisdictional system is "satisfactory").

225. SHAW, *supra* note 186, at 697.

226. RYNGAERT, *supra* note 18, at 219–20.

227. *Id.* at 220–21 (emphases in the original).

Coupled with the large number of acknowledged legal fictions used to sustain territorial jurisdiction, and supported by a look into why jurisdiction is hard to map, this Article claims that this shows the lack of connection between geography and territoriality. In other words, the discourse of territorial–extraterritorial jurisdiction has been bleached of geographical information, and works essentially as an abstract categorization scheme between legal orders. Jurisdiction has little to do with territoriality, whether now or in the past. Accordingly, jurisdictional discourse in international law should be reimagined and reformulated, possibly following the descriptions of global legal pluralism scholars, to form a "community-centered" system which has no need for obfuscating territorial language and the illusion of separate "natural domains" for different states.

iTaxes: The European Commission's Apple Ruling Exposes Repatriation Pitfalls

*Jonathan R. Bodle**

ABSTRACT

The European Commission recently ordered Apple Inc. to pay roughly ¬13 billion to Ireland, declaring that Apple failed—albeit, with Ireland's blessing—to pay proper taxes on previously earned income. Meanwhile, President Donald Trump has proposed a 10% deemed repatriation tax on a similar tax base, corporate offshore earnings. Taken together, the Commission's remedy and Trump's proposal signal a trend toward a focused approach to taxing corporate offshore earnings. But when taken separately from tax reform, such an isolated tax is a bad idea because it may: (1) Provoke litigation over constitutional and international tax treaty authority for the imposition of retroactive taxation; (2) provide perverse incentives for domestic and international corporations to modify their operations; and (3) encourage other countries to implement tax reform designed to attract targeted corporations.

TABLE OF CONTENTS

* Jonathon R. Bodle is a Spring 2017 graduate of the University of Texas School of Law.

INTRODUCTION

Should the United States change their approach to taxing the offshore earnings of U.S.-based Multinational Corporation's (MNCs)? The 2016 presidential candidates—and indeed, former President Barack Obama—have provided conflicting answers of their own.[1] One piece of the puzzle is the taxation of already-earned, untaxed corporate offshore earnings.

MNCs have invested significantly in tax avoidance practices, shielding themselves from unfriendly U.S. corporate tax rates.[2] The 2016 presidential candidates expressed serious concern about this. In fact, the juxtaposition of corporate tax avoidance and the concept of fairness in the American income tax system was repeatedly highlighted during the 2016 election cycle.[3] Yet even where their model of tax-related fairness

1. *Compare Trump: Tax Reform That Will Make America Great Again*, TRUMP PENCE 2016, https://assets.donaldjtrump.com/trump-tax-reform.pdf [https://perma.cc/3WNK-6NZP] (last visited June 2, 2016) (proposing a "one-time deemed repatriation of corporate cash held overseas at a significantly discounted 10% tax rate"), *with* Hillary Clinton, *A Fair Tax System*, HILLARY KAINE 2016 (Jan. 11, 2016), https://www.hillaryclinton.com/issues/a-fair-tax-system/ [https://perma.cc/Z74T-LSZ9] (stating that Mrs. Clinton would like to "charge an 'exit tax' for companies leaving the U.S. to settle up on their untaxed foreign earnings"), *with* THE WHITE HOUSE & THE DEP'T OF THE TREASURY, THE PRESIDENT'S FRAMEWORK FOR BUSINESS TAX REFORM: AN UPDATE 29 (Apr. 2016), https://www.treasury.gov/resource-center/tax-policy/Documents/The-Presidents-Framework-for-Business-Tax-Reform-An-Update-04-04-2016.pdf [https://perma.cc/C8FY-SWVS] ("President[Obama]'s plan would impose a one-time toll charge of 14 percent on the more than $2 trillion of untaxed foreign earnings that U.S. companies have accumulated overseas.").

2. *See* Jim Puzzanghera, *Apple's $14.5 Billion EU Tax Bill Highlights Overseas Earnings Hoard*, L.A. TIMES (Aug. 30, 2016), http://www.latimes.com/business/la-fi-apple-ireland-20160830-snap-story.html [https://perma.cc/M68G-SQYV] (quoting USC professor Edward Kleinbard as saying that "[Apple, Inc.] put as much energy into tax avoidance policies as they did into industrial design"); *see also* LEONARD E. BURMAN & JOEL SLEMROD, TAXES IN AMERICA: WHAT EVERYONE NEEDS TO KNOW 83 (2013) (noting that "[t]he United States has the highest statutory corporate tax rate among developed countries").

3. *See* Tim Cook, *A Message to the Apple Community in Europe*, APPLE (Aug. 30, 2016), http://www.apple.com/ie/customer-letter/ [https://perma.cc/4ZCB-EG2N] ("In Ireland and in every country where we operate, Apple follows the law and we pay all of the taxes we owe."); Teresa Berenson, *Read Donald Trump's Speech on Jobs and the Economy*, TIME (Sept. 15, 2016), http://time.com/4495507/donald-trump-economy-speech-transcript/ [https://perma.cc/XR95-U63F] [hereinafter *Trump's Economic Speech*] ("On top of that, we will bring back trillions in business wealth parked overseas and tax it at a 10% rate.").

may differ, each party's presidential nominee appreciated the value of a corporate tax base that included offshore earnings.[4]

Meanwhile, U.S.-based MNCs continue to boost offshore earnings.[5] U.S.-based MNCs boost those earnings by taking advantage of deferral provisions in the U.S. tax code that permit MNCs to delay paying taxes on foreign earnings until those earnings are brought back to the U.S.[6] Recent estimates suggest that over $2 trillion dollars in corporate offshore earnings belonging to foreign subsidiaries of U.S.-parented MNCs have gone untaxed by the U.S.[7] This monumental figure constitutes a highly coveted U.S. tax base.[8] However, since a repatriation holiday in 2004, few earnings have made their way stateside. This indicates insufficient incentive for those MNCs to bring offshore earnings home.[9] Among those MNCs amassing stockpiles of cash overseas is Apple, Inc., and despite Tim Cook's public statements suggesting that some portion of the money may come into the U.S., there is no timetable for when, if ever, the vast majority of Apple's untaxed offshore earnings will be repatriated.[10]

Instead of waiting for MNCs to repatriate earnings, or for Congress to authorize another repatriation holiday, President Donald Trump has proposed a 10% deemed repatriation tax.[11] The tax is designed to raise revenue from the currently untouchable tax base.[12] While Mr. Trump's proposal is vague, public comments from the campaign trail suggest that he seeks to tax all existing offshore earnings.[13] "Deemed"

4. *See Trump*, *supra* note 1 (outlining his plan to access MNCs' offshore earnings); Clinton, *supra* note 1 (outlining her plan to do the same).

5. *See Fortune 500 Companies Hold a Record $2.4 Trillion Offshore*, CITIZENS FOR TAX JUST. (Mar. 4, 2016, 9:00 AM), http://ctj.org/ctjreports/2016/03/fortune_500_companies_hold_a_record_24_trillion_offshore.php [https://perma.cc/TSM3-8EUU] [hereinafter *Fortune 500*] (indicating that 28 US-based MNCs increased their offshore profits between 2014 and 2015, and in particular Apple's unrepatriated income increased more than 25% between 2014 and 2015).

6. Deferral of U.S. income tax on offshore earnings is contingent upon successful navigation of Subpart F of the I.R.C. Subpart F was enacted to make it more difficult for taxpayers to reduce tax liability by shifting income offshore. *See* U.S. DEP'T OF THE TREASURY, DPL/CU/V_2_01(2013), LB&I INTERNATIONAL PRACTICE SERVICE CONCEPT UNIT (2014), https://www.irs.gov/pub/int_practice_units/DPLCUV_2_01.PDF [https://perma.cc/9UQ4-RRFB] (providing a general overview of Subpart F).

7. *Fortune 500*, *supra* note 5.

8. Richard Rubin, *EU Apple Tax Ruling Stirs Fears of Revenue Loss in U.S.*, WALL ST. J. (Aug. 30, 2016, 7:57 PM), http://www.wsj.com/articles/eu-apple-tax-ruling-stirs-fears-of-revenue-loss-in-u-s-1472576439 [https://perma.cc/3REV-JB7D] ("American politicians have spent years salivating over U.S. companies' stockpile of untaxed foreign profits.").

9. *See* Paul Barton, *Candidates Seek High Return from Repatriation Policies*, TAX ANALYSTS (Nov. 19, 2015), http://www.taxhistory.org/www/features.nsf/Articles/47A649340BBB06D585257F020068FF4D?OpenDocument [https://perma.cc/U2XR-7SFC] (explaining that the 2004 repatriation holiday brought back less than half of the then available offshore earnings available for repatriation, much of which qualified for "special rate[s]").

10. Alex Webb, *Apple May Repatriate At Least $5 Billion in 2017, Cook Suggests*, BLOOMBERG (Sept. 1, 2016, 3:45 PM), https://www.bloomberg.com/news/articles/2016-09-01/apple-may-repatriate-at-least-5-billion-in-2017-cook-suggests [https://perma.cc/U3N9-G6A9] (citing Tim Cook suggesting that Apple would relocate "several billion" of the $215 billion worth of offshore earnings to the United States sometime "next year").

11. *Trump*, *supra* note 1.

12. *Id.*

13. *Trump's Economic Speech*, *supra* note 3.

repatriation, after all, treats offshore earnings as though they are in the United States, "whether or not they come home."[14]

A recent ruling by the European Commission (EC) regarding taxes paid (or not) by Apple, Inc. to Ireland addresses a similar issue.[15] The EC seeks to force Apple to pay back taxes on earnings stashed in Ireland, where Apple paid an effective tax rate of .005%.[16] The EC's ruling has come under fire from the U.S. government.[17] Any back payment would presumably, through the mechanism of the foreign tax credit, be counted against, and thereby reduce, the U.S. tax base.[18] Concern that the EC's ruling against Apple is only the first of many against U.S.-based MNCs hastens the need for some mechanism to recoup a percentage of those MNC's offshore earnings for the U.S.[19]

Both Trump's deemed repatriation proposal and the EC's Apple ruling suggest a trend towards targeting MNCs' accumulated offshore earnings with an isolated tax. While targeted efforts may appear just to ordinary taxpayers and appetizing to politicians, implementation poses several problems. This Note argues that, in isolation, imposition of a deemed repatriation tax may (1) provoke litigation over constitutional and international tax treaty authority to impose retroactive taxes; (2) provide perverse incentives for domestic and international corporations to modify their operations; and (3) encourage other countries to implement tax reform to attract disgruntled MNCs.

Part I will briefly describe how MNCs are taxed on offshore earnings, explain how Apple's untaxed offshore earnings ended up in Ireland, and examine the U.S. tax base looming overseas.

Part II will analyze Apple's response to the EC's decision, specifically addressing Apple's litigious response to the ruling, Apple's options should the ruling be upheld on appeal, and the incentives that such a ruling provides for other, non-EU regulated countries to craft Apple-friendly tax laws of their own.

---

14. Jonathan Weisman, *Plan to Curb U.S. Taxation of Overseas Profit Finds Bipartisan Support*, N.Y. TIMES (July 8, 2015), http://www.nytimes.com/2015/07/09/business/end-to-us-taxation-of-overseas-profit-finds-bipartisan-support.html [https://perma.cc/222J-XNBT].

15. European Commission Press Release IP/16/2923, State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth Up to ¬13 Billion (Aug. 30, 2016) [hereinafter EC Ruling]; *see* U.S. DEP'T OF THE TREASURY, WHITE PAPER ON THE EUROPEAN COMMISSION'S RECENT STATE AID INVESTIGATIONS OF TRANSFER PRICING RULINGS 1 (2016) [hereinafter WHITE PAPER] (noting that the European Commission's decision was based on the concern of "tax avoidance by multinational firms").

16. *See* EC Ruling, *supra* note 15 ("Apple only paid an effective corporate tax rate that declined from 1% in 2003 to 0.005% in 2014 .... Ireland must now recover the unpaid taxes in Ireland from Apple for the years 2003 to 2014 of up to ¬13 billion, plus interest.).

17. *See* WHITE PAPER, *supra* note 15, at 25 (arguing that "the Commission is charting a course that sets aside years of multilateral efforts to develop workable transfer pricing rules and combat BEPS—an effort that can succeed only if pursued multilaterally").

18. *See id.* at 1 (noting the "potential lost tax revenue" resulting from the EC's ruling).

19. Daniel N. Shaviro, *Friends Without Benefits? Treasury and EU State Aid*, 83 TAX NOTES INT'L 1681, 1690–91 (2016) (detailing the Treasury's concern that forcing Apple to pay back taxes may result in large foreign tax credits, thereby allowing Apple to bring back large chunks of offshore earnings while avoiding tax payments to the United States—note that Shaviro goes on to suggest that this result is unlikely, largely due to "planning issues" and Apple's expectation that Congress will eventually permit heavily discounted, if not tax-free, repatriation).

Part III will examine Trump's deemed repatriation tax proposal. The analysis will draw on the fallout from the EC's ruling. It will argue that a deemed repatriation tax should not be isolated from broader tax reform.

I. UNDERSTANDING UNTAXED CORPORATE OFFSHORE EARNINGS

A. International Corporate Taxation

The top U.S. corporate tax bracket, at the rate of 35%, is the highest of any developed country.[20] U.S. corporate tax rates are progressive, in the same way that ordinary income and capital gains rates are progressive for individual taxpayers.[21] Thus, while rates on relatively small amounts of corporate earnings are currently as low as 15%, those corporate earnings exceeding $10 million are taxed at a rate of 35%.[22] Most U.S.-parented MNCs, especially those MNCs that invest significantly in tax avoidance, are subject to the top rate of 35%.[23]

Also unlike most other developed countries, the U.S. administers a worldwide tax regime, meaning that the U.S. federal government has jurisdiction to tax income earned by Americans anywhere in the world.[24] This concept also applies to "corporations organized under the laws of the United States."[25] In the corporate context, the worldwide tax regime accepts the reality that many U.S.-based corporations choose to operate both domestically and overseas, typically through subsidiaries.[26]

Foreign subsidiaries of U.S.-parented MNCs, while subject to U.S. taxes, enjoy deferral of tax on their income.[27] That is, U.S. taxes are not levied on the income generated by those foreign subsidiaries until "the income is distributed as a dividend to the domestic corporation."[28] Moreover, "a domestic corporation is allowed to claim a credit for foreign income taxes it pays," this is known as a foreign tax credit (FTC).[29]

---

20. *See* BURMAN & SLEMROD, *supra* note 2, at 83 (noting that after Japan cut its corporate tax rate in 2012, the U.S. corporate tax rate became the highest of any developed nation).

21. 26 I.R.C. § 11(b) (2016).

22. 26 I.R.C. § 11(b)(1)(D) (2016).

23. *See Fortune 500*, *supra* note 5 (noting many U.S.-parented companies with large amounts of offshore holdings).

24. *See* Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 717 (2011) ("The U.S. tax system is conventionally described as employing a worldwide tax base, with the important exception that the net income . . . of a foreign subsidiary is includible in the taxable income of its U.S. parent company only when directly or indirectly made available to the U.S. parent.").

25. JOSEPH M. DODGE ET AL., FEDERAL INCOME TAX: DOCTRINE, STRUCTURE, AND POLICY 15 (2012).

26. *See* BURMAN & SLEMROD, *supra* note 2, at 75 (citing Nike and McDonalds as examples of corporations with substantial foreign operations).

27. U.S. DEP'T OF THE TREASURY, *supra* note 6, at 3.

28. STAFF ON JOINT COMM. ON TAXATION, 110TH CONG., ECONOMIC EFFICIENCY AND STRUCTURAL ANALYSES OF ALTERNATIVE U.S. POLICIES FOR FOREIGN DIRECT INVESTMENT 3 (2008), http://www.jct.gov/x-55-08.pdf [https://perma.cc/8932-KAZP] [hereinafter STAFF ON JOINT COMM.].

29. *Id.* at 5.

The combination of these benefits incentivizes, and likely increases, foreign operations.[30]

B. Transfer Pricing and Organization Structure

Profitable offshore subsidiaries are different from their U.S. parents. Even though they are owned by the U.S. parent, profit earned by non-U.S. subsidiaries is not immediately taxed. Instead, U.S.-parented MNCs can defer paying tax on the profit of their non-U.S. subsidiaries.[31] These subsidiaries do not typically grow in the way that we imagine startups do—as their U.S. parent corporations did. Often, MNCs undertake tax avoidance maneuvers, the most popular of which is transfer pricing.[32]

Transfer pricing allows MNCs to minimize taxable income in high-tax jurisdictions in several ways. For instance, it allows an MNC to move valuable intellectual property (IP) from a U.S.-based parent company to a foreign subsidiary.[33] As an oversimplification, the tactic involves the sale, at a low price, of IP by the U.S. parent to the foreign subsidiary, and the low-priced sale allows the selling U.S. parent to report little income in the U.S. tax jurisdiction.[34] The subsidiary acquiring the IP uses it to generate profit—profit that is taxed in the acquirer's low tax jurisdiction.[35] The profits held by the foreign subsidiary remain subject to U.S. taxes, but those U.S. taxes may be deferred until the foreign subsidiary sends the profits back to the U.S. parent.[36] Once the foreign subsidiary sends money back to the U.S. parent, the parent can take FTCs equal to the amount of taxes the subsidiary paid to foreign governments.[37]

To further frustrate tax collectors, MNCs may structure their foreign operations in ways that allow them to funnel income from multiple countries outside of the United

30. *Id.* at 10 ("If not all countries choose the same effective tax rate, and if not all countries choose a worldwide system of income taxation, a taxpayer seeking to maximize its after-tax return on investment may choose its residence to increase the after-tax returns on investments.").

31. *See* J. Clifton Fleming, Jr. et al., *Worse than Exemption*, 59 EMORY L.J. 79, 85 (2009) (explaining that the "deferral privilege" allows U.S. taxes to be deferred until repatriation of income to the United States).

32. *See* Andrew Soergel, *Ask an Economist: What the Heck is a Corporate Inversion?*, U.S. NEWS & WORLD REPORT (Feb. 16, 2016, 6:00 AM), https://www.usnews.com/news/the-report/articles/2016-02-16/ask-an-economist-what-the-heck-is-a-corporate-inversion [https://perma.cc/PQ8Y-RH4K] (discussing the rise in transfer pricing among U.S. companies); PRICEWATERHOUSECOOPERS, INTERNATIONAL TRANSFER PRICING 13 (2013), https://www.pwc.com/gx/en/international-transfer-pricing/assets/itp-2013-final.pdf [https://perma.cc/2W5X-7876] (describing transfer pricing as "an everyday necessity for the vast majority of businesses").

33. *See Offshore Profit Sharing and the U.S. Tax Code—Part 2 (Apple Inc.): Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Security & Governmental Affairs*, 113th Cong. 1–8 (2013) [hereinafter *Hearing*] (discussing Apple's approach to moving their IP offshore to avoid tax liability in the opening statement of Sen. Carl Levin).

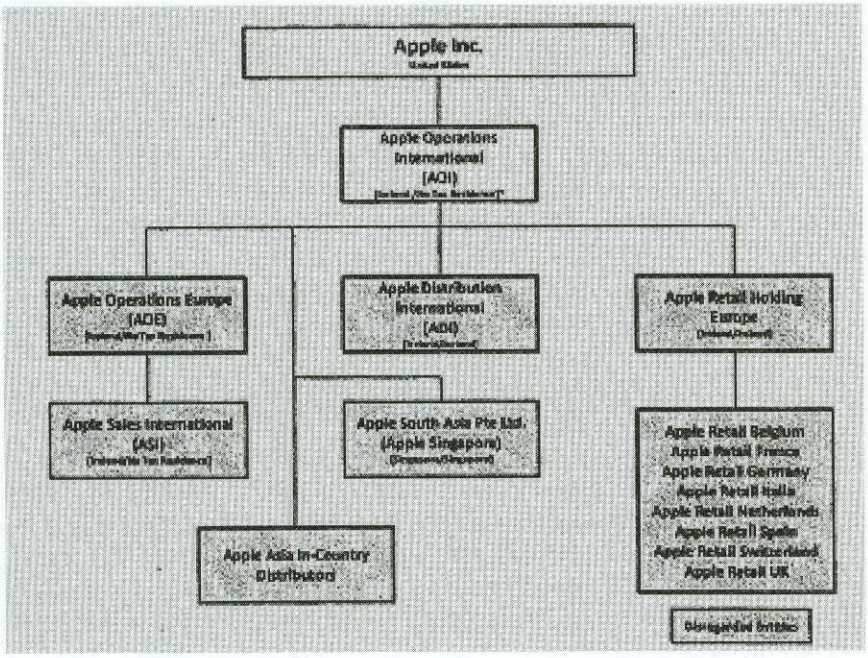
34. BURMAN & SLEMROD, *supra* note 2, at 79.

35. *Id.*

36. Fleming, Jr., *supra* note 31, at 85.

37. STAFF ON JOINT COMM., *supra* note 28, at 6 ("The foreign tax credit generally is limited to a taxpayer's U.S. tax liability on its foreign-source taxable income . . . to ensure that the credit serves its purpose of mitigating double taxation of foreign-source income without offsetting U.S. tax on U.S.-source income.").

States into their desired low-tax jurisdiction.[38] Below is a chart illustrating how Apple redirects income from foreign countries into Ireland:[39]



Apple Inc. is the sole owner of multiple subsidiaries located in Ireland, including Apple Operations International (AOI), Apple Sales International (ASI), and Apple Operations Europe (AOE).[40] These three entities collectively hold the rights to Apple Inc.'s IP outside of the U.S., and all profits derived from that IP are funneled from other subsidiaries (including Apple Retail subsidiaries) into AOI, ASI, and AOE.[41] Up until loopholes were closed in Ireland, Apple went one step beyond shifting income to a low tax jurisdiction. Senator Carl Levin described Apple's offshore organization structure as "the Holy Grail of tax avoidance, offshore corporations that [Apple] argues are not, for tax purposes, resident in any nation."[42]

Without incorporation in the U.S., and lacking requisite control and management in Ireland, AOI, ASI, and AOE avoided tax liability in both countries.[43] Apple's tax liability to the United States was postponed via deferral of taxes on Apple's offshore

38. *Hearing*, *supra* note 33, at 5.

39. *Id.* at 192, exhibit 1b.

40. *Id.* at 3.

41. *Id.* at 3–4 (explaining that "AOI . . . directly or indirectly owns most of Apple's other offshore entities"; that "ASI . . . holds the economic rights to Apple's valuable intellectual property in Europe, the Middle East, Africa, India, and Asia;" and that AOE escapes tax liability by "using the same claims about Irish and U.S. standards on tax residency" as AOI and ASI).

42. *Hearing*, *supra* note 33, at 3.

43. *Id.* at 40 (explaining that management and control in Ireland as prerequisites to Irish tax residence, and incorporation in the United States as a prerequisite to U.S. tax residence).

earnings, leaving the United States with a stake in the tax base indefinitely.[44] Ireland, on the other hand, did eventually impose taxes on the earnings that Apple directed into AOI, ASI, and AOE—albeit at a substantially discounted rate, at times as little as .005%.[45] As part of the ruling forcing Apple to remit payment of back taxes to Ireland, discussed *infra*, the European Commission acknowledges that Ireland, too, has a continued stake in the tax base.[46]

C. The Offshore Tax Base

It is fundamental to tax policy that increasing a tax base, increasing rates, or some combination of the two are basic means for increasing tax revenue.[47] However, there are good reasons for some deductions and exclusions to keep certain income items out of a tax base. For instance, deductions for the costs of earning income help to "properly measure income."[48] The foreign taxes paid by MNCs might be allowed as a deduction, or alternatively (as under existing law) support a credit.[49] But there is no reason for MNCs' offshore earnings to be excluded from the definition of taxable income.

MNCs' offshore earnings fit squarely into the definition of income. After all, had those earnings been made on American soil, ordinary corporate income tax would apply.[50] It is estimated that U.S.-based MNCs had accrued $2.5 trillion in corporate offshore earnings in 2015.[51] Because of the U.S.' worldwide taxation regime, that $2.5 trillion represents a massive income tax base; a tax base just outside of the United States' reach due to existing deferral provisions in the corporate tax code.[52]

Congress is not oblivious to the money, either.[53] Lawmakers have tried at least once before to lure MNCs' offshore earnings back to the United States by offering a substantially reduced tax rate.[54] While the 2004 repatriation holiday attracted $360

---

44. *Id.* at 18–19; *see* Fleming, Jr. et al., *supra* note 31, at 85 (explaining that U.S. taxes on corporate income earned overseas, by American companies, are deferred, rather than exempted).

45. *Hearing*, *supra* note 33, at 29–30.

46. *See* EC Ruling, *supra* note 15 (acknowledging that Ireland appropriately collected taxes from Apple, but that Ireland collected too little via "undue tax benefits" granted to Apple).

47. BURMAN & SLEMROD, *supra* note 2, at 223 ("The broader the base . . . the lower tax rates can be to raise a given amount of revenue.").

48. *See id.*

49. *See* Daniel Shaviro, *The Case Against Foreign Tax Credits*, 3 J. LEGAL ANALYSIS 65, 70–71 (2011) (exploring the current state of the law with respect to FTCs as well as policy rationales commonly cited in support of FTCs; ultimately, Shaviro finds FTCs too generous and suggests that deductions may be more appropriate).

50. 26 U.S.C. § 11 (2012).

51. Bob Bryan, *US Companies are 'Hoarding' a Record $2.5 Trillion in Cash Overseas*, BUSINESS INSIDER (Sept. 19, 2016, 11:15 AM), http://www.businessinsider.com/us-companies-hoarding-25-trillion-of-cash-overseas-2016-9 [https://perma.cc/CTE2-2A3K].

52. E. Ray Beeman et al., *Possible Legislative Changes to U.S. International Tax Rules*, *in* BASICS OF INTERNATIONAL TAXATION 479, 485 (Linda E. Carlisle ed., 2011) ("All income of U.S. firms and branches is subject to U.S. tax, with a foreign tax credit provided to eliminate double taxation . . . . U.S. tax is deferred until income is distributed to the U.S. parent as a dividend.").

53. WHITE PAPER, *supra* note 15, at 1 (acknowledging that the Treasury has concerns about MNC tax avoidance).

54. *See* Thomas J. Brennan, *What Happens After A Holiday?: Long-Term Effects of the Repatriation Provision of the AJCA*, NW. J.L. & SOC. POL'Y 1, 1 (2010) ("The American Jobs Creation Act of 2004

billion of offshore earnings, the effort has been widely considered a failure.[55] A large figure on its own, the $360 billion of repatriated earnings represents less than half of what was believed to have accumulated offshore at the time.[56] More importantly, some have concluded that the 2004 tax holiday has created an expectation for MNCs that offshore earnings should be parked overseas until Congress authorizes another repatriation holiday.[57] In fact, one study showed "a dramatic increase in the rate at which firms add to their stockpile of foreign earnings" since the repatriation holiday.[58] The amount of money at stake has had U.S. and European legislators alike considering ways to offset MNCs' corporate tax avoidance strategies.[59]

II. EUROPEAN COMMISSION RULING

A. Apple Ruling

Like Congress, the European Commission (EC) has recognized the implicit revenue potential of a larger tax base.[60] U.S.-parented MNCs' efforts to shift income out of the United States have brought large cash reserves into Europe, where Margrethe Vestager, the European Commissioner for Competition, has been outspoken about disrupting MNCs' perceived abuse of loopholes in global tax

(AJCA) granted a tax holiday to U.S. corporations with foreign subsidiaries, allowing the subsidiaries to remit certain funds to their parents at a much lower tax rate than previously possible.").

55. *See* Kristina Peterson, *Report: Repatriation Tax Holiday a 'Failed' Policy*, WALL ST. J. (Oct. 10, 2011, 9:41 PM), http://www.wsj.com/articles/SB10001424052970203633104576623771022129888 [https://perma.cc/JH58-56WK] (noting that a relatively small number of MNCs benefited from the holiday, many of those MNCs cut jobs, and that the experiment "cost the U.S. Treasury $3.3 billion in estimated lost revenues over 10 years").

56. Melissa Redmiles, *The One-Time Received Dividend Deduction*, IRS STATISTICS OF INCOME BULLETIN 102, 103 (2008), https://www.irs.gov/pub/irs-soi/08codivdeductbul.pdf [https://perma.cc/D4E8-YVRW].

57. *See, e.g.*, Chuck Marr & Chye-Ching Huang, *Repatriation Tax Holiday Would Lose Revenue and Is a Proven Policy Failure*, CTR. ON BUDGET & POL'Y PRIORITIES (June 2014), http://www.cbpp.org/research/repatriation-tax-holiday-would-lose-revenue-and-is-a-proven-policy-failure [https://perma.cc/4N2P-HECM] ("If the President and Congress enact a second tax holiday, corporate executives will likely conclude that more such tax holidays will come down the road.").

58. Brennan, *supra* note 54, at 4; *see also* Martin A. Sullivan & Lee A. Sheppard, *News Analysis: Multinationals Accumulate to Repatriate*, TAX NOTES (Jan. 21, 2009), http://www.taxnotes.com/tax-notes-today/corporate-taxation/news-analysis-multinationals-accumulate-repatriate/2009/01/21/4813411 [https://perma.cc/75FP-TUVR] (noting that the repatriation holidays "have the effect of encouraging the very behaviors they were intended to reverse").

59. James Anderson, Alex Jupp, Sally A. Thurston, & Robert C. Stevenson, *Business Tax Reform All but Certain in US, Europe*, SKADDEN INSIGHTS (Jan. 30, 2017), https://www.skadden.com/insights/business-tax-reform-all-certain-us-europe [https://perma.cc/V3SR-P2A3]; *see Hearing*, *supra* note 33, at 2 ("Our purpose with these hearings is to shine a light on practices that have allowed U.S.-based multinational corporations to amass an estimated $1.9 trillion in profits in offshore tax havens"); EC Ruling, *supra* note 15 ("All of our work rests on the simple principle that all companies, big and small, must pay tax where they make their profits.").

60. *See* Mark Scott, *Dublin Appeals $14.3 Billion Tax Charge Against Apple*, N.Y. TIMES (Nov. 9, 2016), http://www.nytimes.com/2016/11/10/technology/ireland-apple-tax-vestager.html [https://perma.cc/ SS9M-WZPQ] ("We need a change in corporate philosophies and the right legislation to address loopholes and ensure transparency.").

systems.[61] But the EC's recent ruling against Apple presupposes Europe's (specifically, Ireland's) failure to appropriately tap into the enlarged tax base.[62] The EC has stressed that its ruling does not condemn Irish corporate tax laws.[63] Yet the ruling requires, effectively, that Apple pay back taxes on corporate earnings, which presents an interesting model for U.S. legislators to explore in an effort to gain access to their own offshore tax base.[64] The timing and details of the EC's ruling are noted below.

The EC began investigating Apple's tax status in Ireland after a U.S. Congressional hearing in 2013 exposed the peculiar allocation of Apple's offshore profits.[65] Testimony from that hearing repeatedly suggested that Apple was using complex loopholes, built into both American and international tax systems, to "evade paying taxes around the world."[66] According to Vestager, it was Congress' investigation that "tipped off" the EC to Apple's tax avoidance practices in Europe.[67]

After concluding its investigation this year, the EC determined that Apple had arranged for special tax treatment with the Irish government, in violation of European anti-competition laws.[68] Notably, and as stressed by the EC's ruling, the EC's findings rest on the financial advantage that Ireland extended to Apple, which it allegedly withheld from Apple's competitors in the country.[69] The EC's findings track well with Congress' 2013 findings regarding Apple's tax avoidance scheme. As demonstrated by the chart below, Apple funneled profits from other European subsidiaries into Apple Sales International (ASI) in Ireland.[70] From there, Apple either sent profits to a "head office" without any tax residency (avoiding taxes altogether), sent profits back to Apple's U.S. operations in the form of short-term loans for R&D (thereby avoiding

61. *Id.*

62. *See* EC Ruling, *supra* note 15 (noting that Ireland granted special treatment to Apple, and perhaps other MNCs, thereby failing to extract appropriate benefit from Apple's presence in the country and further noting that other European countries where Apple derived profit that was ultimately funneled back to Ireland might have a claim to tax revenue).

63. *Id.* ("This decision does not call into question Ireland's general tax system or its corporate tax rate.").

64. The EC's ruling is based on European competition law, and the Irish taxes that Apple avoided paying—via Apple's tax arrangement with Ireland—amounted to illegal state aid. *See id.* ("EU state aid rules require that incompatible state aid is recovered in order to remove the distortion of competition created by the aid.").

65. Peter Chapman, *EU's Apple Tax Case Prompted by Senate Tip Off, Vestager Says*, BLOOMBERG (Sept. 9, 2016, 4:58 AM), https://www.bloomberg.com/news/articles/2016-09-09/eu-s-apple-tax-case-prompted-by-senate-tip-off-vestager-says [https://perma.cc/RJ5F-VXP3].

66. *Hearing*, *supra* note 33, at 9 (opening statement of Sen. John McCain).

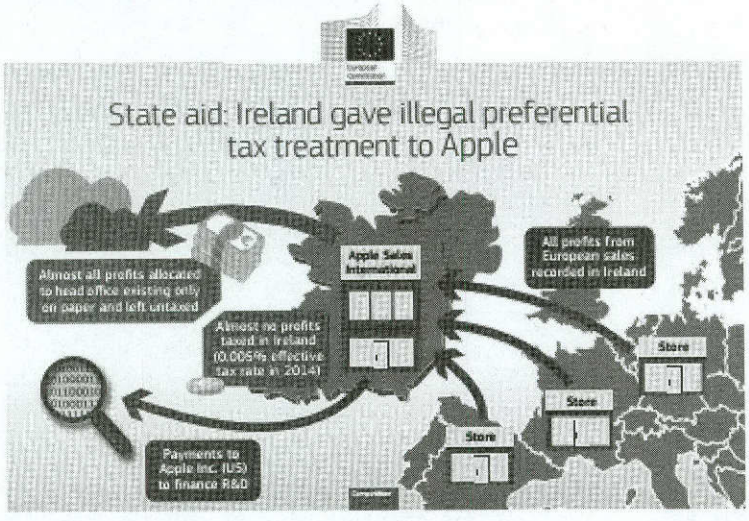
67. Chapman, *supra* note 65.

68. EC Ruling, *supra* note 15 ("[T]he European Commission has concluded that two tax rulings issued by Ireland to Apple have substantially and artificially lowered the tax paid by Apple in Ireland since 1991.").

69. *Id.*

70. *Id.*

U.S. taxation via careful navigation of I.R.C. 956[71]), or kept profits in ASI (resulting in a miniscule effective tax rate, as low as .005%):[72]



Consequently, the EC ordered Apple to pay ¬13 billion ($14.5 billion USD), plus interest, in back taxes to Ireland.[73] While the EC's decision is rooted in European anti-competition law, the effect is the imposition of an unexpected tax, unaccompanied by any sort of international tax reform.

B. Apple's Response

Tim Cook, Apple's CEO, has since written an open letter decrying the EC's ruling; Cook alleged that the EC's ruling would "upend the international tax system," and proclaimed that Apple has "become the largest taxpayer in Ireland, the largest taxpayer in the United States, and the largest taxpayer in the world."[74] For his part, the U.S. Secretary of Treasury, Jacob Lew, sent a letter to the President of the EC, Jean-Claude Juncker, in which Lew claimed that enforcing the EC's ruling could "undermine the well-established basis of mutual cooperation and respect that many countries have worked so hard to develop and preserve."[75] Lew's letter likely reflects

71. I.R.C. 956 was enacted to prevent disguised repatriation of foreign earnings from escaping U.S. taxation, but there are several exemptions that may permit short-term lending transactions. *See* ALLISON CHRISTIANS ET AL., UNITED STATES INTERNATIONAL TAXATION 280 (2011) (stating that the Code section is necessary "because these kinds of investments are, in effect, indirect repatriations" of U.S.-parented foreign subsidiaries' offshore earnings); *see also* Don J. Lonczak & Jon Lobb, *The 'Deemed Dividend' Dilemma: Obstacles in Obtaining Credit Support from Foreign Subsidiaries of U.S. Borrowers*, 20 WESTLAW J. BANK & LENDER LIABILITY 3, 3–4 (2014) (discussing the role of § 956 and the exceptions permitting short-term loans).

72. EC Ruling, *supra* note 15.

73. *Id.*

74. Cook, *supra* note 3.

75. Letter from Jacob J. Lew, Sec'y of Treasury, to Jean-Claude Junker, President of the European Comm'n (Feb. 11, 2016), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Letter-State-Aid-Investigations.pdf [https://perma.cc/BVF5-HQFH].

the United States' overarching concern that the EC's actions will result in erosion of a large U.S. tax base.[76]

1. Litigation

Almost immediately following the EC's ruling, Apple confirmed that it would, along with Ireland, appeal to the European Union's court system.[77] Confidently, Apple stated that they "do not currently expect [the EC's] decision to have an impact on [Apple's] tax rate going forward."[78]

Prior to filing an appeal, Ireland's Finance Minister, Michael Noonan, voiced concerns over the EC's ruling and suggested that retroactivity would be at the heart of any appeal. During a September 2016 news conference, Noonan asked "[h]ow could any foreign direct investor come into Europe if they thought the valid arrangements they made under law could be overturned a generation later and they be liable to pay back money"?[79]

On November 10, 2016, Ireland formally appealed the EC's ruling in the European General Court (EGC).[80] While the appeal is not publicly available, Noonan has suggested that Ireland claims that it properly applied Irish law, that Ireland did not provide favorable treatment to Apple, and that Apple already paid Ireland all taxes legally required under Irish law.[81] Noonan also noted that the EC's ruling could be detrimental to Ireland's international reputation, that it encroaches on Ireland's sovereignty, and that the EC "is undermining the fundamental principle of international tax, which is tax should be paid where the value is created—in this case, the United States."[82]

The U.S. Treasury's White Paper tracks Noonan's concerns. Chief among them, the White Paper notes that "[n]one of the companies under investigation had

---

76. *See* WHITE PAPER, *supra* note 15, at 4 (reasoning that taxes paid to Ireland, and other European countries, would result in FTCs for Apple, and "effectively constitute a transfer of revenue to the EU from the U.S. government and its taxpayers").

77. EUROPEAN COMMISSION OPINION OF AUGUST 30, 2016: INVESTOR FAQ, APPLE, INC. (Sept. 1, 2016), http://files.shareholder.com/downloads/AAPL/1744415757x0x906369/ED9C94CE-ACC4-42CA-8CC6-28E54A419796/EC_Opinion_Investor_FAQ.pdf [https://perma.cc/894P-DTZN] [hereinafter FAQ].

78. *Id.*

79. Padraic Halpin & Conor Humphries, *Ireland to Join Apple in Fight Against EU Tax Ruling*, REUTERS (Sept. 2, 2016, 12:57 PM), http://www.reuters.com/article/us-eu-apple-taxavoidance-ireland-idUSKCN1180WR [https://perma.cc/G8RY-WJWB]. Note Ireland's curious position: The country surely derives benefits from hosting Apple and other MNCs within their borders, but to retain that benefit the country will spend money to appeal an EC ruling that, if upheld, would grant the country an enormous windfall—the award is more than Ireland's "annual government spending on the Irish health service and nearly one-third of Ireland's total government tax revenue in 2015." Simon Bowers, *The Apple Tax Ruling–What this Means for Ireland, Tax and Multinationals*, GUARDIAN (Aug. 30, 2016, 7:47 AM), https://www.theguardian.com/business/2016/aug/30/eu-apple-ireland-tax-ruling-q-and-a [https://perma.cc/LWZ2-NG6V].

80. Daniel McConnell, *Ireland Lodges Appeal Against Apple Tax Ruling*, IRISH EXAMINER (Nov. 10, 2016), http://www.irishexaminer.com/ireland/ireland-lodges-appeal-against-apple-tax-ruling-429878.html [https://perma.cc/8XL7-39WP].

81. Rob Trammell, *Ireland Outlines its Appeal of EC's Apple Tax Ruling*, ABBOTT, STRINGHAM & LYNCH, http://aslcpa.com/tax-articles/ireland-outlines-appeal-ecs-apple-tax-ruling/ [https://perma.cc/7HP7-MXZF] (last visited June 13, 2017).

82. *Id.*

identified the risk of State aid investigations in audited financial disclosures," demonstrating that the EC's decision deprives Apple of reasonable reliance that informed its expectations upon opening a subsidiary in Ireland.[83] The Treasury also suggests that the EC, to support its findings, is required to "show that other multinational companies would have been denied comparably favorable treatment by Ireland," not merely that Apple received such treatment.[84]

The Irish Prime Minister, Enda Kenney, has expressed confidence that the EGC will overturn the EC's ruling.[85] But the strength of Ireland's appeal is not immediately clear—in large part because the appeal is not publicly available, and also because the EC appears to have waded into uncharted territory. While awaiting an EGC decision, Ireland must be wondering if the damage to their MNC-friendly tax system has already been done. A British tax partner, Joylon Maugham, for instance, commented that even if the EC's ruling is reversed, "U.S. multinationals [will] think twice about engaging in aggressive tax avoidance strategies in Europe."[86]

2. Apple's Other Options

Pending successful appeal of the ruling, the EC's decision requires Apple to set aside the ¬13 billion, plus interest, in escrow.[87] Apple anticipates setting aside the money and remains confident that doing so will not significantly impact its bottom line.[88] Considering the relative insignificance of the sum, Apple could, of course, pay the back taxes and lobby the EC for more favorable rules going forward. Lobbying could prove to be an effective strategy; a 2009 empirical study of lobbying efforts conducted in advance of the U.S. repatriation holiday in 2004 indicated that those efforts provided "a rate of return on lobbying expenditures of 220:1."[89] Admittedly, the return on investment for Apple in Ireland, to this point, has been even better.[90]

Apple—Tim Cook in particular—has expressed concern regarding the message that payment could send.[91] Paying the fine without a fight might be viewed as a concession that the EC has the authority to, effectively, impose new taxes at will,

---

83. WHITE PAPER, *supra* note 15, at 15.

84. Shaviro, *supra* note 19, at 1069.

85. *See* Katy Barnato, *Ireland 'Confident' of Winning Appeal Against Apple Tax Ruling: PM*, CNBC (Sept. 7, 2016, 12:14 PM), http://www.cnbc.com/2016/09/07/ireland-confident-of-winning-appeal-against-apple-tax-ruling-pm.html [https://perma.cc/9894-R4WD] (reporting on statements from Irish Prime Minister Enda Kenny and Apple CEO Tim Cook on Irelands appeal from the European Union's ruling that Ireland granted Apple undue tax benefits).

86. Nate Lanxon, *Apple's $14.5 Billion EU Tax Ruling: What You Need To Know*, BLOOMBERG (Aug. 30, 2016, 6:39 AM), https://www.bloomberg.com/news/articles/2016-08-30/apple-s-14-5-billion-eu-tax-ruling-what-you-need-to-know [https://perma.cc/SGR2-R2JF].

87. EC Ruling, *supra* note 15.

88. *See* FAQ, *supra* note 77 ("Our cash balance will not change as a result of this decision, but we anticipate we will set aside some amount of cash in an escrow account.").

89. Raquel Alexander et al., *Measuring Rates of Return for Lobbying Expenditures: An Empirical Case Study of Tax Breaks of Multinational Corporations*, 25 J.L. & POL. 401, 451 (2009).

90. *Hearing*, *supra* note 33, at 4 (estimating Apple's effective tax rate in Ireland as low as "five-hundreds of 1 percent").

91. Cook, *supra* note 3.

regardless of an MNC's expectations or reassurances that the MNC may have garnered from the host government.

Failed litigation, though, might also confirm that the EC has precisely that type of authority. The best way to avoid the authority of the EC, then, might be to escape or minimize its jurisdiction. In other words, Apple might tax plan to minimize its exposure to the EC in the future. An option worth exploring for Apple might be corporate inversion.

Corporate inversions "allow participating entities to alter their corporate structure, by which a new foreign corporation, located in a country with no or low corporate income tax, replaces the existing U.S.-based multinational corporation as the parent of the group."[92] Apple, pursuing this option, would be seeking to escape the jurisdiction of the EC while continuing to defer U.S. taxes indefinitely. But uncertainty surrounding inversion regulations might make Apple less likely to pursue inversion.[93]

Apple might also consider shifting its business operations out of Ireland, and any other EC jurisdiction, without inverting—surely, concern that Apple might consider such a solution has at least in part motivated Ireland's appeal of the EC's ruling.[94] The real concern for all European tax shelters must be that Apple, other MNCs, and even startups weighing formation options would choose to set up shop outside of the EC's reach in the first place.

As with inversion, though, there are risks involved with formation in unfamiliar jurisdictions. Chief among those risks is adaptation to new legal regimes.[95] Delaware, a common place for MNCs to incorporate in the U.S., for instance, has a "predictable legal system," whereas tax shelters, particularly those located outside of the EC's jurisdiction, might be much more unpredictable.[96] Uncertainty regarding how new host countries might enforce current and future tax laws and arrangements reached by incoming MNCs and the host country could create a Groundhog Day situation for those MNCs, where no matter where an MNC exists, it will eventually be forced to pay some taxes that it intended to avoid.[97]

---

92. Orsolya Kun, *Corporate Inversions: The Interplay of Tax, Corporate, and Economic Implications*, 29 DEL. J. CORP. L. 313, 313 (2004).

93. Jefferson P. VanderWolk, *Inversions Under Section 7874 of the Internal Revenue Code: Flawed Legislation, Flawed Guidance*, 30 NW. J. INT'L L. & BUS. 699, 717 (2010) (noting that §7874 of the I.R.C. provides for "deemed domestication of a foreign corporation not managed and controlled in the United States, under the 80% ownership change test," meaning that the inversion would likely not reduce the MNCs U.S. tax liabilities).

94. *See* Halpin & Humphries, *supra* note 79 (quoting Noonan's concern that foreign investment would fear entry into Europe if the EC could invalidate agreed-upon tax arrangements).

95. James Mann, *Corporate Inversions: A Symptom of a Larger Problem, The Corporate Income Tax*, 78 S. CAL. L. REV. 521, 534–37 (2005) (comparing the differences in legal regimes between Delaware and Bermuda to illustrate problems that MNCs might encounter upon inversion to tax shelters).

96. *Id.* at 537.

97. Just as Bill Murray was forced to fundamentally change his personality to stop February 2 from repeating and to win over Andie MacDowell, his character's love interest, MNCs, too, might be forced to cooperate with some fair level of taxation to avoid endless relocation for tax avoidance purposes. GROUNDHOG DAY (Columbia Pictures 1993).

3. Incentives for Other Countries

Countries outside of the EC may be inclined to accommodate Apple's desire to relocate. A country that offers "no or only nominal taxes, a lack of effective exchange information, a lack of transparency, and no substantial activity (for example, investments that are purely tax driven)" are characteristics of a "tax haven."[98]

One study has suggested that tax competition was the main motivator for countries to lower corporate tax rates to become tax shelters.[99] But since MNCs have reacted to the availability of tax shelters, countries left with higher tax rates have simply loosened regulations on tax avoidance to encourage MNCs to maintain some residency within their borders.[100] Indeed, smaller countries with lower tax rates can "use their tax laws to attract capital by exploiting policies adopted by wealthier countries."[101]

Beyond that, the desire for a country to become a tax haven is as obvious as it is practical: "Tax haven countries receive extensive foreign investment, and, largely as a result, have enjoyed very rapid economic growth over the past 25 years."[102] For MNCs, the advantage of relocating to a tax haven extends beyond lower tax rates in the host country, "tax haven activities facilitate the avoidance of taxes that might otherwise have to be paid to other countries," too.[103]

It would seem, then, that the EC's ruling would provide greater incentive for countries outside of the EC's jurisdiction to act as tax havens for MNCs.

III. TRUMP'S PROPOSAL

A. Deemed Repatriation

President Donald Trump has proposed a 10% deemed repatriation tax on corporate offshore earnings.[104] The tax proposed by Trump would be mandatory.[105] The obligatory nature of the tax distinguishes Mr. Trump's proposal from the 2004 repatriation holiday.[106] While the repatriation holiday permitted MNCs to bring

98. Timothy V. Addison, *Shooting Blanks: The War on Tax Havens*, 16 IND. J. GLOB. LEGAL STUD. 703, 705–706 (2009) (citing the OECD's criteria for defining a tax haven) (internal citations omitted).

99. *See* Rosanne Altshuler & Harry Grubert, *The Three Parties in the Race to the Bottom: Host Governments, Home Governments and Multinational Companies*, 7 FLA. TAX REV. 153, 163 (2005) (indicating that between 1992 and 1998, countries that had lost the most market share cut corporate tax rates to become more competitive).

100. *Id.* at 167 ("High-tax host countries may have reacted to the increasing tax sensitivity of investment by easing up on their transfer pricing and thin capitalization rules in order to attract mobile corporations.").

101. Adam H. Rosenzweig, *Why Are There Tax Havens?*, 52 WM. & MARY L. REV. 923, 951 (2010).

102. Dhammika Dharmapala & James R. Hines, *Which Countries Become Tax Havens?* 1 (Nat'l Bureau of Econ. Research Working Paper No. 12802, 2006) (internal citation omitted).

103. *Id.* at 4.

104. *Trump*, *supra* note 1.

105. *Id.*; Richard Phillips, *Taxing the $2.5 Trillion in Offshore Profits: What's Ahead for Repatriation?*, TAX JUSTICE BLOG (Nov. 28, 2016, 11:44 AM) (describing Trump's repatriation proposal and defining deemed repatriation as a "[o]ne-time tax [that] would be levied on all permanently reinvested earnings").

106. Tory Newmyer, *Corporate Tax Dodgers Will Love Trump's Plan to Crack Down on Corporate Tax*

offshore earnings stateside at a discount, deemed repatriation requires treating offshore earnings as though they have been repatriated, even if ownership of the earnings has not been transferred from foreign subsidiary to U.S. parent.[107]

It remains unclear whether Trump's proposal would be accompanied by broader tax reform.[108] This Note seeks to analyze Trump's proposal isolated from any potential broader tax reform. Accordingly, the EC's Apple ruling is a terrific analog for examining the effects of Trump's deemed repatriation proposal.

B. Response to Deemed Repatriation

1. Litigation

Just as Apple appears determined to appeal the EC's ruling in Ireland, Trump's deemed repatriation proposal is sure to induce litigation on American soil. Tim Cook's open letter in response to the EC ruling expressed disapproval of perceived retroactive taxation.[109] Should the United States impose deemed repatriation, it seems likely that Apple would feel equally slighted and litigate to avoid potentially huge tax bills on Apple's billions in offshore earnings.

One glaring difference between Apple's appeal of the EC decision and any potential litigation regarding a deemed repatriation tax in the United States, though, is expectation. While the Treasury's White Paper, for example, indicated that Apple did not expect different, let alone retroactive, taxes to be imposed on their earnings in Ireland,[110] an analysis of Apple's 10-k disclosure from 2008 recognizes that tax laws are dynamic.[111] And Cook's testimony to Congress in 2013 seemed to indicate that Apple had considered that changes to the Internal Revenue Code could result in a larger tax bill for Apple.[112]

Dodgers, FORTUNE (Aug. 21, 2015), http://fortune.com/2015/08/21/trump-goes-easy-on-tax-dodgers [https://perma.cc/GF8D-NRMS]; Chye-Ching Huang, *Three Types of "Repatriation Tax" on Overseas Profits: Understanding the Differences*, CTR. ON BUDGET AND POL'Y PRIORITIES (Oct. 7, 2016), http://www.cbpp.org/research/federal-tax/three-types-of-repatriation-tax-on-overseas-profits-understanding-the [https://perma.cc/6GNA-8kSR] (noting that a repatriation holiday, like the one enacted in 2004, merely "offer[s] [U.S.-parented MNCs] a temporary, sharply reduced U.S. tax rate" on foreign earnings).

107. Huang, *supra* note 106 (comparing a stand-alone deemed repatriation tax to a transition tax and noting that such a deemed repatriation tax would be "compulsory and deem overseas profits to have been repatriated and subject to U.S. tax").

108. *See generally Trump*, *supra* note 1.

109. Cook, *supra* note 3 (noting that changes to existing law "should come about through the proper legislative process" and apply "going forward—not retroactively").

110. WHITE PAPER, *supra* note 17, at 15.

111. Apple adopted Financial Accounting Standards Board Interpretation No. 48, *Accounting for Uncertainty in Income Taxes—An Interpretation of FASB Statement No. 109*. The latter is an accounting standard that, among other things, seeks to account for changes in tax laws or rates Apple, Inc., Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended Sept. 27, 2008 (Nov. 4, 2008), http://investor.apple.com/secfiling.cfm?filingid=1193125-10-12091&cik=320193 [https://perma.cc/MAT6-XZ6U] [hereinafter 2008 Annual Report].

112. *See Hearing*, *supra* note 33, at 38 (acknowledging that recommendations for tax reform were made "fully recognizing that [those changes] would likely result in an increase in Apple's U.S. taxes").

Further, even if Cook's testimony was merely contemplating substantial tax reform, as opposed to alluding to retroactive application of new policies, the United States' worldwide tax system permits *deferral* of offshore earnings, not exclusion.[113] Apple should have expected to pay taxes on those earnings eventually.

While it is difficult to say how strong of a case either Apple or Ireland have in appealing the EC's ruling, particularly without access to either Apple or Ireland's formal appeal, the picture regarding any litigation that Apple might pursue in the United States in response to a deemed repatriation policy is a bit clearer. Litigation over the retroactivity of a deemed repatriation tax might be a steeper hill to climb for Apple than litigation over the merits of the EC's ruling. The U.S. Supreme Court has largely confirmed that Congress has the authority to impose retroactive taxation.[114] Moreover, the deemed repatriation tax proposal would provide a steep discount over the taxes that Apple should have anticipated.[115]

2. Apple's Other Options

MNCs have perhaps even more incentive to seek relief from a deemed repatriation tax than they would a ruling like the EC's. In a worldwide tax regime, a deemed repatriation tax renders deferral impossible, and U.S. corporate income taxes could only be avoided by escaping the system entirely.[116]

One way to escape U.S. jurisdiction is via corporate inversion into a tax-haven-based entity. Corporate inversions under American law happen in three forms.[117] Under the "substantial business presence" form, a U.S. parented company creates a foreign subsidiary and the parent and subsidiary share some of each other's stock.[118] Another type of inversion happens when a U.S. corporation is acquired by a larger foreign corporation, thereby removing the U.S. corporation from the U.S. tax base.[119] Finally, a U.S. corporation may acquire a smaller foreign corporation to "bolster [the U.S. corporation's] foreign operations and lower its U.S. tax."[120] All three methods impact the U.S. tax base, and U.S. case law frowns deeply upon inversions motivated

113. *See* STAFF ON JOINT COMM., *supra* note 28, at 10 (discussing the deferral regime and resultant "economic distortions").

114. After an amendment to the IRC invalidated a deduction the taxpayer had taken less than a year before the amendment, the taxpayer sued, alleging that imposing retroactive taxes violated his due process rights. The court ultimately applied a rational basis test to the question, and found that the retroactive application of the tax was not a due process violation. United States v. Carlton, 512 U.S. 26, 27, 33 (1994). Note that the Court stopped short of suggesting that retroactive taxation would always be permissible. *See id.* at 38 (O'Connor, J., concurring) (indicating that retroactivity that extended beyond one year could raise "serious constitutional questions").

115. Repatriated earnings are taxed at ordinary corporate income tax rates, in Apple's case 35%. *See* U.S. DEP'T OF THE TREASURY, *supra* note 6, at 3 (stating that "generally, U.S. tax on the income of a foreign corporation is deferred until the income is distributed as a divided or otherwise repatriated by the foreign corporation to its U.S. shareholders").

116. Huang, *supra* note 106, at 5.

117. DONALD J. MARPLES & JANE G. GRAVELLE, CONG. RESEARCH SERV., R43568, CORPORATE EXPATRIATION, INVERSIONS, AND MERGERS: TAX ISSUES 3 (2016).

118. *See id.* at 4 ("As this form of inversion does not require any change in the effective control of the corporation, it is referred to as a 'naked inversion.'").

119. *Id.*

120. *Id.*

primarily by tax advantages.[121] Therefore, a careful navigation of U.S. inversion regulations is necessary for successful use of these options.

Even if it turns out that existing U.S.-based MNCs could not escape the U.S. tax system, the limitless extension of the U.S. tax system abroad, achieved through the mechanism of deemed repatriation, could plausibly discourage new businesses from incorporating in the United States in the first place.[122] Just as Apple might seek refuge in a new tax shelter if Ireland can no longer provide significant tax benefits post-EC ruling, new businesses might seek initial incorporation in more tax-friendly countries, either with lower statutory tax rates or at least without a worldwide taxation system.

3. Incentives for Other Countries

Incentives for other countries with respect to a U.S. deemed repatriation tax are like those presented by the EC's Apple ruling. The tax incentives that would have Apple considering inversion to new tax shelters would encourage countries outside of the United States to make themselves attractive options for Apple. Indeed, one study has shown that MNCs respond to increased tax bills by seeking tax shelters, and that foreign countries accommodate MNCs' need for tax shelters.[123]

If the United States sought to eliminate the possibility of income shifting, then MNCs would be encouraged to relocate operations to tax-friendlier countries, and countries in need of capital and employment could simply exploit unfriendly U.S. tax laws by changing their own.[124]

C. Part of Broader Reform

This Note has already pointed out that MNCs have shown a willingness to repatriate funds to the United States when that opportunity presents a discount.[125] Yet, it has also discussed MNCs' expectations regarding future tax repatriation holidays creating an incentive for MNCs to store profits overseas.[126] A deemed repatriation tax efficiently addresses this issue by doing two things: It provides the discount that appeals to MNCs regarding repatriated funds, but it also shuts the door on the possibility that MNCs wait for another, better tax holiday.[127] And while the EC's ruling against Apple may demonstrate MNCs' healthy appetite for litigation when faced with isolated tax penalties, deemed repatriation accompanied by broader, more corporation-favorable tax reform makes litigation less likely.

---

121. *See* Doron Narotzki, *The True Economic Effects of Corporate Inversions*, 151 TAX NOTES 1819, 1828–29 (2016) (noting that for an inversion to be legally recognized in the United States, "the transaction has to be motivated by strong reasons other than the desire to minimize U.S. tax liability").

122. *See* Susan C. Morse, *A Corporate Offshore Profits Transition Tax*, 91 N.C.L. REV. 549, 561 (2009) (noting "concern that a worldwide consolidation reform would incentivize U.S.-headquartered firms to adopt non-U.S.-parented ownership structures").

123. Altshuler & Grubert, *supra* note 99, at 169.

124. Rosenzweig, *supra* note 101, at 951.

125. Barton, *supra* note 9, at 679.

126. *See* 2008 Annual Report, *supra* note 111, at 40.

127. Weisman, *supra* note 14.

Deemed repatriation of accrued offshore earnings would likely not be "escapable," whether the repatriation tax was implemented in isolation or as part of broader tax reform. However, should deemed repatriation be implemented independent of tax reform, MNCs will be incentivized to make the necessary deemed repatriation payment and then quickly escape U.S. jurisdiction. Conversely, should a deemed repatriation tax be imposed through broader tax reform, MNCs would likely view the tax as a favorable transfer tax. Again, taxes on MNCs' offshore earnings were deferred under the U.S. tax code, not excluded.[128] Thus, if MNCs can get a discount now, and operate under new, lower corporate tax rates going forward, then the MNCs would likely lose (or at least significantly reduce) the incentive to spend so much money on avoidance of U.S. taxes, while also losing any desire to escape U.S. jurisdiction.[129]

This Note has also considered empirical evidence that worldwide corporate tax rates and corporate tax regimes have been heavily influenced by MNCs' tax avoidance efforts.[130] That evidence suggests that MNCs shift profits from the United States to foreign subsidiaries located in tax shelters in part because of U.S. "acquiesc[ence]," embodied by permissive rules in the Internal Revenue Code.[131] Broader tax reform that might include lowering of corporate tax rates or a shift to a territorial tax system, for instance, could allow for a tightening of regulations regarding income shifting while providing a tax-friendly environment for U.S.-based MNCs on American soil.[132]

CONCLUSION

Some have suggested that Congress should not wait for substantial tax reform to address MNCs' abuse of the existing corporate tax regime, but instead should take steps to curb that abuse now.[133] Still others have called for a more competitive corporate tax regime.[134]

This Note suggests that implementation of a deemed repatriation tax, in isolation, would likely fail to achieve long-lasting benefits. A deemed repatriation tax would

128. Fleming, Jr. et al., *supra* note 31, at 85–89.

129. The incentive to avoid taxes by shifting profits overseas may be reduced; so long as a corporate tax exists, MNCs will have a monetary incentive to practice tax avoidance to the extent that the cost of tax avoidance is lower than the tax bill that would otherwise come due.

130. Altshuler & Grubert, *supra* note 99, at 172.

131. *Id.*

132. *See* Reuven S. Avi-Yonah, *Proposals for International Tax Reform: Is There a Middle Road?*, 153 TAX NOTES 1169, 1169, 1172–73 (2016) (discussing proposals to "[r]educe the corporate rate, broaden the base by taxing offshore profits," as well as Obama's plan to reduce the corporate tax rate while imposing a transition tax on accumulated offshore earnings); *see also* Kyle Pomerleau, *Details and Analysis of the 2016 House Republican Tax Reform Plan*, TAX FOUNDATION (July 5, 2016), http://taxfoundation.org/article/details-and-analysis-2016-house-republican-tax-reform-plan [https://perma.cc/96KH-PWE4] (discussing Republicans' plans to lower the corporate tax rate and create "a fully territorial tax system").

133. *Hearing*, *supra* note 33, at 19 ("Should Congress wait for tax reform to address income shifting? The short answer is no.") (testimony of Stephen E. Shay, Professor, Harvard Law School).

134. *See* Cook, *supra* note 3 (explaining that Apple has long supported international tax reform with the objectives of clarity and simplicity); *see also* Letter from Ginni Rometty, CEO, IBM, Inc. to Donald J. Trump, President, U.S. (Nov. 14, 2016), https://www.ibm.com/blogs/policy/ibm-ceo-ginni-romettys-letter-u-s-president-elect/ [https://perma.cc/8YBF-ZKUJ] (supporting Trump's "proposal to make American's [sic] tax system more competitive").

merely act as a Band-Aid on a bullet wound. Deemed repatriation in isolation could also potentially lead to years of litigation and a flocking of corporate operations away from the reach of American tax collectors and into other, friendlier tax shelters.

Yet deemed repatriation, as part of a broader reform package, is an important and effective piece of legislation because deemed repatriation allows a one-time boost to tax revenue while broader reform can incentivize MNCs to increase business activity inside U.S. borders and mitigate other countries' efforts to attract MNCs.

It will be important to closely monitor the way that the EGC responds to the appeals from Ireland and Apple. Should the EC's decision be upheld, there will be a genuine opportunity to test the hypothesis in this Note—that Apple will seek more cost-effective operating headquarters than those inside the EC's jurisdiction. In fact, should the ruling be upheld, there may be an even stronger incentive for substantial tax reform in the United States—to become the shelter that Apple seeks. In any case, Trump's repatriation proposal should be wary of the consequences that the EC's ruling may have to Ireland's tax base, and should strongly consider incorporating the proposal as part of broader overall reform.

"I Can Resist Everything Except Temptation."[1] An International Solution to African Resource Corruption

Michael R. Darling[*]

TABLE OF CONTENTS

1. OSCAR WILDE, LADY WINDERMERE'S FAN act 1, sc. 1.

* J.D., The University of Texas School of Law 2017.

INTRODUCTION

Grand corruption[2] is a massive issue throughout the world, exhibited with particularly-gruesome clarity in Africa.[3] This corruption persists despite many disparate efforts aimed at ameliorating it in nations throughout Africa, which have been undertaken on national,[4] regional,[5] and international[6] scales. Due to the apparent entrenchment of corruption within governments around the world, particularly in Africa, some commentators have called for the establishment of an International Anti-Corruption Court ("IACC"), which would operate either as part of, or alongside, the International Criminal Court ("ICC") in The Hague, Netherlands.[7]

---

2. Transparency International, a leading anti-corruption organization, defines "corruption" as "the abuse of entrusted power for private gain," and defines "grand corruption" as "acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good." *What Is Corruption?*, TRANSPARENCY INT'L, http://www.transparency.org/what-is-corruption/ (last visited June 14, 2017, 1:27 PM).

3. By the count of the Transparency International 2015 Corruption Perceptions Index, the international corruption watchdog group's annual index which "measures the perceived levels of public sector corruption worldwide," four of the six lowest-scoring nations—in terms of "bloody and entrenched conflict"—are located in Sub-Saharan Africa. *Corruption Perceptions Index 2015*, TRANSPARENCY INT'L (Feb. 1, 2016), http://www.transparency.org/cpi2015. Moreover, 40 out of 46 countries in Sub-Saharan Africa showed "a serious corruption problem," according to the 2015 Corruption Perceptions Index. Chantal Uwimana, *Sub-Saharan Africa: Achieving 'The Africa We Want' Starts with the Rule of Law*, TRANSPARENCY INT'L: SPACE FOR TRANSPARENCY (Jan. 27, 2016), http://blog.transparency.org/2016/01/27/sub-saharan-africa-achieving-the-africa-we-want-starts-with-the-rule-of-law/.

4. *See, e.g.*, Marie Chêne, *Overview of Corruption and Anti-Corruption in the Democratic Republic of Congo (DRC)*, TRANSPARENCY INT'L: ANTI-CORRUPTION HELPDESK 6–8 (Mar. 11, 2014), https://www.transparency.org/files/content/corruptionqas/Country_Profile_DRC_2014.pdf (detailing DRC President Kabila's "zero tolerance" corruption policy, which commentators have identified as a tool "against governors that the regime seeks to oust"; provisions in the DRC's 2006 constitution regarding anti-corruption, which "are poorly implemented to date" of the publication; multiple pieces of legislation that have failed to make a significant impact on the level of corruption in the DRC; the *Commission de l'Ethique et de la Lutte contre la Corruption* ("CELC"), a citizen institution designed "mainly to raise awareness of the ethical issues [associated with] the fight against corruption" and implemented in 2003 as part of the country's "transitional constitution," which "faced major resource and logistical problems," and was ultimately not included in the nation's new constitution; and two government entities, the "DRC's financial intelligence unit" and "state auditor").

5. *See, e.g.*, *id.* at 7 (identifying the DRC's membership in the African Union Convention on Preventing and Combating Corruption and a "protocol agreement with the Southern African Development Community on fighting corruption"); *see also* African Union Convention on Preventing and Combating Corruption pmbl., July 11, 2003, 43 I.L.M. 5, https://www.au.int/web/sites/default/files/treaties/7786-file-african_union_convention_preventing_combating_corruption.pdf [hereinafter "AU Convention on Corruption," "AU Convention," or "Convention"] (identifying the Convention as applying to the "Member States of the African Union," which includes, at the time of this writing, all sovereign nations in Africa).

6. *See, e.g.*, Chêne, *supra* note 4, at 7 (pointing out that "[t]he DRC has been a member of the UN Convention against Corruption (UNCAC) since 2010"); *see also United Nations Convention Against Corruption Signature and Ratification Status as of 12 December 2016*, UNITED NATIONS OFF. ON DRUGS AND CRIME (Dec. 12, 2016), https://www.unodc.org/unodc/en/treaties/CAC/signatories.html (providing the most up-to-date list of signatories to the United Nations Convention against Corruption, which includes all but four African nations; incidentally, one of them is Equatorial Guinea, perhaps the nation with the most-corrupt regime on the African continent, as will be explored throughout this Note).

7. The most thoroughly-researched, and developed, vision of the proposed IACC is given form in an article penned by district judge—and former Massachusetts chief federal corruption prosecutor—Mark Wolf. *See generally* MARK WOLF, BROOKINGS INST., THE CASE FOR AN INTERNATIONAL ANTI-CORRUPTION COURT (2014), http://www.brookings.edu/~/media/research/files/papers/2014/07/

This Note will explore the architecture and mechanisms of the IACC in the context of African resource corruption, and evaluate the IACC's potential to reduce corruption in Africa. In order to appropriately narrow the analytical focus of this Note, two resources closely tied to corruption in Africa will be examined: oil and coltan.[8] In fleshing out the analysis of the IACC and its application to resource corruption in Africa, this Note will be organized as follows: (I) Overview of Resource Corruption in Africa; (II) Failure of Existing Anti-Corruption Efforts; (III) Overview of the Proposed IACC; (IV) Detailed Architecture of the IACC: Jurisdiction and International Civil Statute; (V) International Law Issues Raised by the IACC and Potential Solutions; and (VI) Conclusion.

I. OVERVIEW OF RESOURCE CORRUPTION IN AFRICA

In order to understand the necessity of an IACC, this Note will first provide an overview of the corruption associated with the extraction of minerals and natural resources that persists in Africa despite national, regional, and international anti-corruption efforts which appear facially robust. In particular, this Part of the Note will address, first, the corruption surrounding the mineral resource known as coltan in the Democratic Republic of the Congo (DRC), and, second, the corruption surrounding the vast oil reserves underlying Sub-Saharan Africa. The second subsection of this Part focuses, specifically, on oil reserves in Equatorial Guinea and Nigeria.

A. Coltan Corruption

From a high-altitude perspective, the DRC is an extremely mineral-rich nation, and it contains a majority of the world's supply of coltan.[9] Despite this mineral wealth, however, the DRC is among the top three most resource-poor nations in the world; the country had a "$434 nominal GDP per capita in 2015" and, in the same year, "a mere 52 percent of the DRC's population had access to clean water, while Africa's average was 76 percent."[10] The massive disparity between the nation's wealth as measured by mineral deposits and the economic status of its citizens begs a closer examination of the power structures that keep this disparity in place.

By way of an introductory illustration of the scope of resource corruption surrounding coltan in the DRC, a 2002 UN Security Council Panel of Experts found that 60 to 70 percent of coltan had "been mined under the direct surveillance of [Rwandan Patriotic Army] mining *détachés*."[11] Military groups like the Rwandan

international-anti-corruption-court-wolf/anticorruptioncourtwolffinal.pdf.

8. Coltan, a popular ore, is defined as "a portmanteau of tantalum and columbium (the element contemporaneously known as niobium," and is used in the ubiquitous "electrolytic capacitors" that populate numerous types of electronic devices. Sy Taffel, *Towards an Ethical Electronics? Ecologies of Congolese Conflict Minerals*, 10 WESTMINSTER PAPERS IN CULTURE & COMM. 18, 20 (2015).

9. According to an article in the Harvard International Review, "[t]he Congo has 70 percent of the world's coltan, a third of its cobalt, more than 30 percent of its diamond reserves, and a tenth of its copper." Marian Tupy, *Rule of Law and the Future of the Congo*, HARV. INT'L REV. (Nov. 25, 2015), http://hir.harvard.edu/rule-law-future-congo/.

10. *Id.*

11. Final Rep. of the Panel of Experts on the Illegal Exploitation of Nat. Resources and Other Forms of Wealth of the Dem. Rep. Congo, U.N. Doc. S/2002/1146, at 15 (2002).

Patriotic Army benefitted from international-market speculation for tantalum, which caused the value of the mineral to spike roughly tenfold, during the year 2000.[12] This exploitation of coltan by military factions has now become a feature of the conflict-ridden landscape that currently pervades the DRC.[13] The war in Eastern Congo began in the early 1990s and continues to the present; it is the "deadliest war in the world."[14]

Delving deeper into an exploration of the link between corruption and coltan in the DRC, the genesis of the Second Congo War was marked by eight African countries and 25 rebel groups battling over both mineral resources and age-old ethnic contentions and strife.[15] The conflict, which some refer to as the African World War, involved the DRC as one of its main focal points; within the Central African nation, neighboring nations looted the land for coltan in order to fund and supply their military endeavors.[16] As a virtually-limitless supply of labor, groups of combatants fighting in the DRC—often composed in significant part of child soldiers forced to fight on behalf of particular rebel factions[17]—have gathered groups of slaves to mine coltan, ravaging and pillaging villages along the way.[18] The practice of utilizing funds from coltan mines to bankroll military operations has generated a hostile, survival-of-the-fittest form of government.[19] Paired with the impact on the political legitimacy of contested elections in 2011 and the violent rule in the eastern portion of the DRC, the government's failure to properly handle its vast mineral reserves continues to fuel a period of extreme violence and violations of human rights.[20] As of 2015, the DRC was described as a nation plagued by extensive corruption penetrating deeply into all areas of society.[21]

---

12. Colin Kinniburgh, *Beyond "Conflict Minerals": The Congo's Resource Curse Lives On*, DISSENT MAG., Spring 2014, https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on.

13. *See* JOHN PRENDERGAST & NOEL ATAMA, ENOUGH PROJECT, EASTERN CONGO: AN ACTION PLAN TO END THE WORLD'S DEADLIEST WAR 1 (2009), http://enoughproject.org/files/eastern_congo.pdf (describing the trade in conflict minerals as "a principal driver of conflict in Congo").

14. *Id.* at 5.

15. Nadira Lalji, *The Resource Curse Revised*, HARV. INT'L REV. (Dec. 31, 2007), http://hir.harvard.edu/economics-of-national-securitythe-resource-curse-revised/.

16. *See id.* (detailing that the governments of neighboring countries looted eastern Congo).

17. As of late October, 2013, the UN remained exceedingly concerned about the usage of child soldiers by groups involved in the DRC conflict. *See Child Recruitment Remains 'Endemic' in DR Congo, UN Says in New Report*, UNITED NATIONS NEWS CTR. (Oct. 24, 2013), http://www.un.org/apps/news/story.asp?NewsID=46330#.Vw0uwiQx_FI (discussing the UN report, recent at the time of publication, on the use of child soldiers in the DRC conflict, and stating that children recruited to fight in the conflict also suffered the horrors of "rape, abduction, killing and maiming").

18. *See DR Congo: Cursed by its Natural Wealth*, BBC NEWS MAG. (Oct. 9, 2013), http://www.bbc.com/news/magazine-24396390 (describing the process by which child soldiers, who have themselves been forced into combat, overtake communities as they gather slaves to dig for coltan, rape women in the communities, and drive individuals who survive the initial attacks out of the communities and into the wilderness, where they starve to death or perish after contracting diseases). The violent sexual atrocities committed against women rose to the level that warranted at least one commentator's reference to the South Kivu province of the DRC as the "rape capital of the world"; at least 100 women were attacked in the province in a single week in May of 2015. Preethi Nallu, *Rape Is Being Used to Terrorise the Population, Says DRC Gynaecologist*, GUARDIAN (May 22, 2015, 2:00 PM), http://www.theguardian.com/world/2015/may/22/rape-congo-doctor-denis-mukwege.

19. *See* Chêne, *supra* note 4, at 2 (explaining that mining revenues have "nurtured the rise of a predatory system of governance" and caused "[d]ecades of mismanagement and authoritarian rule").

20. *Id.*

21. *See id.* (describing the corruption in the DRC, measured by indicators of international governance,

B. Oil Corruption

Like corruption surrounding the extraction of coltan, oil-related corruption in Africa is associated with increased conflict and poverty in the nations with the largest oil reserves, including Equatorial Guinea and Nigeria. In Equatorial Guinea, corruption related to oil has contributed to three-quarters of the small coastal nation's citizens living in poverty, while the nation's elite—those closely affiliated with President Teodoro Obiang—live lavish lifestyles of extreme excess.[22] Nigeria reflects a similar disparity between wealth generated by the nation's vast oil reserves and the economic status of the bulk of the populace.[23] The quantum of oil revenues appropriated via corrupt practices by government officials or stolen by rebel groups, through a practice known as "bunkering," is staggering.[24] Exemplary of the entrenched politics of corruption, Nigerian president Goodluck Jonathan "dismissed the country's bank governor after the governor informed the Nigerian Senate that the treasury was missing billions of dollars in expected oil revenue."[25]

Regarding recent incidences of corruption in Nigeria in relation to the nation's vast oil reserves, the Nigerian National Petroleum Corporation ("NNPC") is currently in deep water for failing to pay roughly $16 billion of oil revenues to the treasury.[26] Significantly, the NNPC is state-owned, as are most of the largest oil companies outside the United States,[27] and is thereby legally required to pay revenues to the treasury of

---

as "persistent, widespread and endemic," and stating that corruption "permeat[es] all sectors of society").

22. *See* PETER MAASS, CRUDE WORLD: THE VIOLENT TWILIGHT OF OIL 26 (2009) ("Obiang, whose salary was reportedly $60,000 a year, had recently been discovered to control bank accounts exceeding $700 million."); *see also Equatorial Guinea*, GLOBAL WITNESS, https://www.globalwitness.org/en/countries/equatorial-guinea/#more (last visited May 24, 2017) (explaining that "[Equatorial Guinea] is one of the biggest producers of oil in Africa and has a higher GDP per capita than Poland," but "three-quarters of Equato-guineans live below the poverty line").

23. *See* J. P. Afam Ifedi & J. Ndumbe Anyu, *"Blood Oil," Ethnicity, and Conflict in the Niger Delta Region of Nigeria*, 22 MEDITERRANEAN Q. 74, 76 (2011) ("Despite the fact that the [Niger Delta] region is the main source of Nigeria's external revenue that ensures huge petrol dollar receipts, little returns to local development. Thus, there is persistent discontent and a conflict fuelled mainly by economic deprivation and underdevelopment as well as environmental degradation and acute pollution."). Obiang's own son was forced to return $30 million worth of assets, which were the proceeds of corruption, to the U.S. government and a charity, to benefit the citizens of Equatorial Guinea in 2014; before federal prosecutors were able to act, Obiang's son removed roughly half of his property from the U.S., placing it outside the prosecutors' reach. Timothy M. Phelps, *Foreign Official Gives up Malibu Home in Federal 'Kleptocracy' Probe*, L.A. TIMES (Oct. 10, 2014, 8:55 PM), http://www.latimes.com/local/crime/la-me-malibu-kleptocrat-20141011-story.html.

24. *See Stop Watering Down Anti-Corruption Legislation – Part Two*, TRANSPARENCY INT'L (July 4, 2013), https://www.transparency.org/news/feature/stop_watering_down_anti_corruption_legislation_part_two (noting Nigeria, "Africa's top oil producer," estimated that roughly 300–400 billion USD in oil revenues "has been stolen or wasted in the last 50 years"); *see also Buhari's Battle to Clean up Nigeria's Oil Industry*, BBC NEWS (Mar. 15, 2016), http://www.bbc.com/news/world-africa-35754777 (detailing the extent of oil-related corruption in Nigeria in terms of "[t]he revelation by Nigeria's auditor general that $16bn (£11bn) of oil revenue went missing in 2014," and explaining that "[t]he influence of oil on Nigeria . . . encourages corruption and organised crime to such an extent that other African governments warn of the need to avoid becoming 'another Nigeria'").

25. WOLF, *supra* note 7, at 5.

26. Nshira Turkson, *The Nigerian Oil Company's Missing Billions*, ATLANTIC (Mar. 18, 2016), http://www.theatlantic.com/international/archive/2016/03/nigeria-oil-corruption-buhari/473850/.

27. *See Largest Oil and Gas Companies*, AM. PETROLEUM INST., http://www.whoownsbigoil.com/#/?section=largest-oil-and-gas-companies (last visited May 24, 2017) (listing the top 10 oil companies, and top

the Nigerian government.[28] Compared with some claimed figures associated with NNPC revenues, this figure may be conservative; the former central-bank governor of Nigeria alleged that the NNPC withheld $20 billion that it owed to Nigeria, and was subsequently removed from office for this statement.[29]

Not all individuals within the Nigerian body politic are having their palms greased by the machinations of oil production, however; in fact, the Nigerian people elected current President Buhari in March of 2015, on his anti-corruption platform.[30] Under his presidency, the Nigerian government recently announced that it plans to break the NNPC into multiple companies to operate commercially, despite being owned by the Nigerian government.[31] However, the rose-colored visions of Nigeria's future painted by President Buhari are not likely to materialize as a result of anti-corruption measures adopted at a purely-national level, particularly in light of perverse incentive structures generated by the recent drop in oil prices.[32] Walter Lamberson, a senior project manager who advises emerging-market businesses and governments with Dalberg Global Development Advisors, argued that President Buhari's economic policy "is a petri dish for corruption."[33] According to Lamberson, President Buhari's refusal to devalue the naira, Nigeria's national currency, has led savvy businessmen to leverage political clout as a means of coercing the central bank into selling them dollars for naira at the low, official exchange rate, rather than the prevailing, unofficial rate; the unofficial rate is nearly double the unwavering, official peg of roughly 198.5 naira to one dollar.[34] To further gain a competitive advantage, these businessmen draw on their political connections to force the central bank to refuse sale of dollars at the low official rate to competitors of their businesses.[35]

As a timely corollary to these perverse incentive structures, which have cropped up due to the unfortunate pairing of the drop in oil prices and President Buhari's refusal to allow the naira's natural devaluation, the former governor of the Nigerian state Delta, James Ibori, was implicated in the recent release of documents—popularly known as the Panama Papers leak—from the law firm Mossack Fonseca.[36] In fact, Ibori was connected to four offshore companies for which Mossack Fonseca was the agent. Although Ibori is currently serving a prison sentence for money laundering and fraud, it is notable that he was sentenced in a London court under UK law.[37] One

14 gas companies, by size; all are state-owned).

28. *Id.*

29. *Id.*

30. *Buhari's Battle to Clean up Nigeria's Oil Industry*, *supra* note 24.

31. *Id.*

32. *See* Walter Lamberson, *How to Save Nigeria's Economy and Stop Corruption*, N.Y. TIMES (Apr. 12, 2016), http://www.nytimes.com/2016/04/12/opinion/how-to-save-nigerias-economy-and-stop-corruption.html (stating that Nigeria is likely to be hit hardest out of the world's major oil-producing states, due to its lack of stockpiled oil revenues, and arguing that President Buhari's desire to maintain its exchange rate peg at its current rate is both imposing severe limitations on potential production and establishing an environment where corruption is likely to flourish).

33. *Id.*

34. *Id.*

35. *Id.*

36. Morgan Winsor, *Panama Papers Highlights Links Between Oil and African Leaders, Businessmen*, INT'L BUS. TIMES (Apr. 4, 2016, 5:37 PM), http://www.ibtimes.com/panama-papers-highlights-links-between-oil-african-leaders-businessmen-2348202.

37. Mark Tran, *Former Nigeria State Governor James Ibori Receives 13-Year Sentence*, GUARDIAN (Apr. 17, 2012, 11:35 PM), http://www.theguardian.com/global-development/2012/apr/17/nigeria-governor-

might logically ask the question, why is corruption so endemic despite the existence of several levels of anti-corruption measures? To that question this Note now turns.

II. FAILURE OF EXISTING ANTI-CORRUPTION EFFORTS

This Part of the Note will attempt to present a reasoned argument in favor of the proposition that the most-plausible, most-practical solution to the corruption problem must be international in scope. To coherently structure the multifaceted answer to this question,[38] the overview will begin by exploring existing anti-corruption structures and national efforts against corruption, followed by an examination of regional anti-corruption measures, and capped off with an overview of two American legislative efforts in the anti-corruption vein: The U.S. Foreign Corrupt Practices Act ("FCPA"), and the Dodd-Frank Act.

A. African National Anti-Corruption Efforts

Proceeding from the empirical reality that almost all African nations condemn corruption to some degree in the form of constitutional provisions—at a minimum[39]—this subsection will now explain why ostensibly-robust, idyllic measures against corruption have, to date, failed African nations.[40] By way of doing so, this subsection will explore anti-corruption measures in place at the national level in the DRC and Nigeria.

Turning to existing anti-corruption structures in DRC, as of August 2015, although current president Kabila and his anti-corruption declarations[41] have been unable to overcome the deleterious incentive structures that discourage elites from fighting corruption, this failure is not for lack of effort.[42] In Nigeria, an African nation with ostensibly-extensive anti-corruption measures, the major problem appears to lie in enforcement of these measures as a practical matter.[43] In his book, *Corruption and Human Rights Law in Africa*, Kolawole Olaniyan analyzes the legal frameworks of African nations to examine significant anti-corruption measures the nations have in

---

james-ibori-sentenced.

38. The answer is multifaceted, simply by virtue of the multifaceted nature of the resource-corruption problem in Africa. *See* KOLAWOLE OLANIYAN, CORRUPTION AND HUMAN RIGHTS LAW IN AFRICA 51–52 (2014) (listing 10 causal factors leading to the development of corruption, and, subsequently, noting that "many other reasons" are provided, based on studies on corruption of an "economic and statistical" nature).

39. *See id.* at 133 (stating that almost every African nation includes anti-corruption provisions in its constitution).

40. Though now somewhat dated, William De Maria puts it best when he describes Africa's anti-corruption failure as "one of the great public policy narratives of modern Africa." William De Maria, *The Failure of the African Anti-Corruption Effort: Lessons for Managers*, 27 INT'L J. MGMT. 1, 4 (2010).

41. Chêne, *supra* note 4, at 5.

42. *See id.* at 4–5 (discussing the lack of incentives for Congolese elites to attempt to cut down on corruption in the DRC and the ostensibly-workable anti-corruption framework in the DRC).

43. *See id.* at 6 (detailing a Nigerian constitutional provision that allows the national Code of Conduct Bureau to publicize asset declarations, which would presumably increase budget transparency, and noting, subsequently, that the Nigerian National Assembly has not taken the predicate steps to allow the Bureau to make asset declarations available to Nigerian citizens).

common.[44] In terms of constitutional provisions, Nigeria stands out as having robust anti-corruption efforts, as measured by the metrics of oath-taking provisions,[45] conduct codes,[46] asset-declaration provisions,[47] established objectives of anti-corruption,[48] and provisions relating to transparency and accountability.[49]

After examining constitutional anti-corruption provisions, Olaniyan addresses African legislative efforts aimed at combating corruption.[50] Again, Nigeria comes out ahead of other African constitutions examined in Olaniyan's analysis, with 71 articles in its Independent Corrupt Practices and Other Related Offences Act 2000.[51] With an Independent Corrupt Practices and Other Related Offences Commission ("ICPC"),[52] Nigeria's regulatory regime is undergirded—in significant capacity—by a philosophical stance opposed to corruption.[53] Substantive measures within the regime include whistleblower mechanisms with informant protections;[54] criminalization measures, including burden-shifting[55] and eliminating the possibility of corrupt officials to conveniently use custom and practice as a defense to their corrupt actions;[56] and ICPC Act provisions designed to ensure the independence and composition of the Corrupt Practices and Other Related Offences Commission.[57]

Although the Nigerian constitutional and legislative frameworks against corruption appear to be some of the more robust anti-corruption frameworks in

---

44. OLANIYAN, *supra* note 38, at 121–39.

45. *Id.* at 121–22.

46. *See id.* at 125 (stating that the Nigerian constitution's code of conduct provision is significant, in that it prohibits foreign bank-account operation by public officials, as well as acceptance of bribes by officials in their governmental capacity, in addition to public officials "running [] any private business, profession, or trade (except when employed on a part-time basis)").

47. *See id.* at 127–28 (discussing Part I of the Fifth Schedule to the Nigerian constitution, which governs asset declaration, as well as the Code of Conduct Bureau's capacity to make asset declarations public).

48. *See id.* at 130 (addressing the "most comprehensive provisions on fundamental objectives" of the constitutions examined by the author, which are contained in Chapter II of the Nigerian constitution).

49. *See id.* at 131 (laying out the Nigerian constitutional principles on transparency and accountability contained in sections 88, 125, 225, and 226 of the nation's constitution).

50. OLANIYAN, *supra* note 38, at 133–39.

51. *Id.* at 133.

52. *Id.*

53. As contemporaneous evidence of Nigeria's continued commitment to construct bulwarks against corruption in the nation, the Nigerian Presidential Advisory Committee on Anti-Corruption, as of May 2016, announced that it plans to team up with Civil Society Organizations to defeat the great beast of corruption lurking within and among Nigerian governance structures. Samson Atekojo Usman, *Presidential Advisory Committee Pledges Commitment to Anti-Corruption Fight*, DAILY POST (May 2, 2016), http://dailypost.ng/2016/05/02/presidential-advisory-committee-pledges-commitment-to-anti-corruption-fight/. According to the World Bank, Civil Society Organizations include nongovernmental organizations ("NGO"), faith-oriented groups, "indigenous peoples movements, foundations and many other [sic]." *Civil Society Organizations*, WORLD BANK (Nov. 6, 2013), http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20127718~menuPK:288622~pagePK:220503~piPK:220476~theSitePK:228717,00.html.

54. OLANIYAN, *supra* note 38, at 134–35.

55. *See id.* at 137 (explaining that Nigeria's ICPC Act shifts the burden to the criminal defendant charged with the crimes of "illicit enrichment" or "unexplained lifestyle" to explain the origin of his or her fortune, creating a "presumption of corruption").

56. *See id.* at 138 (discussing section 60 of the ICPC Act, which effectively removes custom from the array of defenses available to a criminal defendant charged with any proceeding under the Act).

57. *Id.* at 138–39.

Africa,[58] Nigerian resource corruption remains rampant. One explanation Olaniyan offers for the entrenchment of corruption in Nigeria is that the immunity clause in the Nigerian constitution effectively absolves high-ranking officials from criminal liability while they hold office.[59] Evidently, immunity provisions are prevalent in African constitutions, as Olaniyan refers to the clauses as major obstacles to the anti-corruption goals espoused throughout Africa,[60] and calls the Angolan constitution's Article 140—which actually allows for criminal liability for government officials while in office—a "rare exception."[61] In addition to constitutional immunity clauses, Olaniyan floats two more explanations for the entrenchment of corruption in Africa; namely, (1) prosecutorial investigation, objectivity, independence,[62] and (2) a lack of independent anti-corruption bodies or, in the rare exceptions, such as Nigeria, a lack of body independence and a weakness in investigative power.[63] Having outlined the failures of current, national anti-corruption measures in Africa, the next subsection examines regional efforts on point.

B. African Regional Anti-Corruption Efforts

With regard to regional efforts to combat corruption among African nations, the African Union ("AU")[64] has remained staunchly opposed to corruption; the organization adopted the Convention on the Prevention and Combating of Corruption in 2003. The Preamble of the document expressly acknowledges that corruption breeds a lack of accountability in governments, and stymies development of economies and social structures.[65] The AU Convention was lauded for its "extremely innovative" anti-corruption measure, which supporters claimed would serve as a pragmatic and effective tool for reducing corruption throughout the continent.[66] Although the AU Convention on Corruption was framed with an idyllic vision for the enforcement of its regional anti-corruption regime, it ultimately revealed the necessity of generating

58. Another timely example of Nigeria's commitment to fight corruption at all costs—including possibly harming its nation's economy—is the Nigerian financial crimes agency's nabbing of the CEO of Nigeria's Fidelity Bank for specific, potentially-corrupt, transactions, an event which has led to a plummet in the bank's share price. Chijioke Ohuocha & Oludare Mayowa, *Shares in Nigeria's Fidelity Bank Slide as Anti-Corruption Agency Detains CEO*, REUTERS (May 3, 2016, 11:52 AM), http://af.reuters.com/article/investingNews/idAFKCN0XU14X. Fidelity Bank is ranked among the top ten banks in Nigeria. *Our History*, FIDELTY BANK, https://www.fidelitybank.ng/about-us/ (last visited May 24, 2017).

59. OLANIYAN, *supra* note 38, at 140–41.

60. *Id.* at 140.

61. *Id.* at 140 n.60.

62. *Id.* at 142–45.

63. *Id.* at 145–47.

64. The African Union is a pan-African organization which was designed to promote the integration of African economies and governance organs, enhance peace and security throughout its member states, and increase legal integrity, promote human rights, and generate and preserve democracy in Africa. Mpazi Sinjela, *The African Convention on the Prevention and Combating of Corruption*, *in* THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK 291, 293–95 (Abdulqawi A. Yusuf & Fatsah Ouguergouz eds., 2012).

65. AU Convention on Corruption, *supra* note 5, at preamble.

66. *Transparency International Welcomes African Convention Against Corruption*, TRANSPARENCY INT'L (Sept. 19, 2002), http://www.transparency.org/news/pressrelease/transparency_international_welcomes_draft_african_convention_against_corrup.

consistency among national policies regarding punishment for corruption, aimed at "protecting the African people against [corruption's] negative effects."[67] The structure and impact of the AU Convention on Corruption will be explored further below.

In terms of the substantive provisions of the AU Convention on Corruption, the treaty obligates ratifying nations to implement legislation that deems corruption an offense.[68] Additionally, States Parties are required to create, maintain, and increase the power of "independent national anti-corruption authorities or agencies."[69] In order to allow for the collection of useful evidence and information in anti-corruption investigations, the AU Convention on Corruption also obligates States Parties to pass legislation protecting witnesses and informants;[70] one commentator identified this protection as critical, due both to the secretive circumstances under which corruption takes place and the fact that corruption and organized crime may be intertwined.[71]

In addition to the obligation to pass anti-corruption legislation and protective legislative measures regarding the identity of witnesses and informants, the AU Convention on Corruption obligates States Parties to pass legislation criminalizing money laundering.[72] Offenses include handling property with knowledge that it "is the proceeds of corruption,"[73] concealing or disguising the source from which the property was derived,[74] and acquiring, possessing, or using property knowing that it is derived from corruption.[75] Each State Party is given jurisdiction over acts of corruption that take place within its territory and over criminals present in States Parties' territories whom the states fail to extradite.[76] Moreover, States Parties enjoy jurisdiction over offenders when the offenses are viewed by a State Party as impacting its "vital interests" and when the "deleterious or harmful consequences" of the offenses otherwise affect the State Party.[77]

Although extradition is not textually required in the AU Convention on Corruption, particular offenses under the Convention can lead to an extradition request.[78] Offenses included in the Convention are required to be extraditable offenses, so States Parties must deem them as such in their extradition treaties with other States Parties.[79] With respect to investigation, the Convention obligates States Parties to pass legislation allowing for the search and seizure of "instrumentalities and proceeds of corruption" and property purchased using funds secured through

67. Sinjela, *supra* note 64, at 293.

68. *See id.* at 295 (stating the "Convention imposes an obligation on State Parties to adopt legislative measures that establish as offences acts identified as corruption"); AU Convention on Corruption, *supra* note 5, art. 5(1) (requiring states to "[a]dopt legislative and other measures that are required to establish as offences" corruption acts listed elsewhere in the document).

69. AU Convention on Corruption, *supra* note 5, art. 5(3).

70. *Id.* art. 5(5).

71. Sinjela, *supra* note 64, at 295.

72. AU Convention on Corruption, *supra* note 5, art. 6.

73. *Id.* art. 6(a).

74. *Id.* art. 6(b).

75. *Id.* art. 6(c).

76. *Id.* art. 13.

77. *Id.*

78. AU Convention on Corruption, *supra* note 5, art. 15; Sinjela, *supra* note 64, at 297.

79. AU Convention on Corruption, *supra* note 5, art. 15(2).

corruption, as well as the return of corruption proceeds back to their countries of origin.[80]

In terms of the treaty's implementation, the AU Convention on Corruption involved the creation of an Advisory Board comprising eleven members, each of whom is elected by the States Parties.[81] In the spirit of progress toward gender equality, the Board is required to consider "gender balance" as a factor in member selection; in order to ensure equal representation of States Parties from remote regions of the continent, the Board is required to take account of "equitable geographical representation" as an additional selection criteria.[82] Distilled down to the Advisory Board's essential functions, the Board is tasked with promoting anti-corruption efforts; collecting data on African corruption; formulating analytical methods to assess "the nature and extent of corruption in Africa" and inform the public on this topic; advising governments on reducing corruption within their respective nations; collecting data and analyzing "the conduct and behaviour of multi-national corporations operating in Africa;" providing the results of this analysis to States Parties; and ancillary tasks related to administrative functions and international relations.[83] However, as indicated by its name, the Board is merely advisory; thus, it lacks investigative authority and prosecutorial power. For reasons outlined below, this is a highly-problematic feature of the AU Convention on Corruption which has allowed for the continued propagation of resource corruption throughout the African continent.

One legitimate question that this section of the Note—thus far—begs, is, why has the AU ultimately failed Africa in terms of combating corruption, even in light of the ostensibly-comprehensive AU Convention? While nuanced reasons likely explain the failure of the AU Convention on Corruption, one of the most overt and devastating explanations is what effectively amounts to a monumental enforcement problem.[84] Although the creation of a diverse Advisory Board seems like a step in the right direction, to the extent that it represents the establishment of a neutral body tasked with handling the entrenched corruption throughout the African continent, the States Parties are free to ignore the Advisory Board's admonitions, warnings, and recommendations, entirely.[85]

Another explanation for the failure of the AU Convention on Corruption is—simply—that the most egregious offenders, in terms of resource corruption, have failed to ratify the Convention.[86] Therefore, even if the African Union had the teeth to enforce its Convention on Corruption, the worst offenders would remain beyond the reach of its enforcement mechanisms. Certainly, a regional anti-corruption solution would be highly desirable for Africa. One reason behind the attractiveness of a

80. *Id.* art. 16(1)(a)–(c).

81. *Id.* art. 22(1)–(2); Sinjela, *supra* note 64, at 299.

82. AU Convention on Corruption, *supra* note 5, art. 22(2); Sinjela, *supra* note 64, at 299.

83. AU Convention on Corruption, *supra* note 5, art. 22(5)(a)–(i); Sinjela, *supra* note 64, at 299–300.

84. OLANIYAN, *supra* note 38, at 184.

85. *Id.* at 127–28.

86. Notably, Equatorial Guinea is absent from the current list of African States Parties to the AU Convention on Corruption. *Status of Ratification of the Convention on Corruption*, AFR. UNION ADVISORY BOARD ON CORRUPTION, http://www.auanticorruption.org/auac/about/category/status-of-the-ratification (last visited May 24, 2017). However, all African nations besides Morocco are members of the African Union, although the Central African Republic is currently on suspension. *Member States Profiles*, AFR. UNION, https://www.au.int/web/en/memberstates (last visited May 24, 2017).

regional effort to address corruption on the African continent—in the alternative to an international solution—is to avoid the common criticism levied against the ICC: that, due to the fact that the ICC has prosecuted only Africans in its short history, the court is biased against Africa.[87] In reality, corruption is not a problem unique to the African continent, as the recent Panama Papers leak illustrates quite clearly.[88] The proposed IACC would need to be sensitive to the issue of appearing imperialist or appearing to unduly target Africans; multiple potential means of reducing the imperialist perception of the proposed IACC will be outlined in Part V of this Note.

C. American Anti-Corruption Efforts

Two of the primary anti-corruption measures America has taken, which impact African resource corruption, are the passage of both the FCPA the Dodd-Frank Act. Both legislative measures have had marked impacts on the battle against corruption in Africa. However, they do not collectively comprise a broad enough enforcement mechanism as that which will ultimately be necessary to significantly reduce resource corruption in Africa, along with its associated violence and human suffering. The two pieces of American legislation, and their failures at tackling the African resource corruption problem, are outlined below.

First, in terms of the FCPA, the statute is certainly a noble attempt by the U.S. Congress to rein in corruption in American businesses, and it has been instrumental as an example within the international community of what taking a firm stance against corruption looks like.[89] Perhaps illustrative of its impact internationally, the Organization for Economic Cooperation and Development's Anti-Bribery Convention was developed 20 years after the FCPA's enactment in 1977.[90] However, the problem with the FCPA is not that it lacks teeth; the real issue is that it applies to bribe-makers, not the foreign government officials who take the bribes, and use them to buy houses and yachts, rather than allowing the money to flow to the public.[91] Because of this limitation in application of the FCPA, the root cause of the corruption problem—the powerful regimes of corrupt bureaucrats and dictators—remains untreated by the best intentions of American legislators.

---

87. Max du Plessis et al., *Africa and the International Criminal Court* 2 (Chatham House, Int'l Law Research Paper No. 2013/01, 2013), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf.

88. Malaka Gharib, *A Silver Lining in the Panama Papers*, NPR: GOATS AND SODA (Apr. 7, 2016, 11:47 AM), http://www.npr.org/sections/goatsandsoda/2016/04/07/473244308/a-silver-lining-in-the-panama-papers.

89. *Spotlight: History of the FCPA: How a Tough U.S. Anti-Bribery Law Came to Pass*, PBS (Feb. 13, 2009), http://www.pbs.org/frontlineworld/stories/bribe/2009/02/history-of-the-fcpa.html.

90. *Id.*

91. *Id.*; *see also* Ben W. Heineman, Jr., *Can America Lead the World's Fight Against Corruption*, ATLANTIC (Feb. 3, 2012), http://www.theatlantic.com/international/archive/2012/02/can-america-lead-the-worlds-fight-against-corruption/252448/ (noting that the FCPA applies to "an important but limited part of global corruption"—the bribing corporations—but does not touch the entrenched power held by corrupt regimes in developing and underdeveloped nations); *see also The Foreign Corrupt Practices Act*, LOCKE LORD (Jan. 2014), http://www.lockelord.com/the-foreign-corrupt-practices-act-12-17-2012 (explaining that the FCPA applies to American citizens, American corporations, specific American securities issuers, and foreign citizens within America, and criminalizes paying foreign officials in a corrupt manner).

Second, with regard to the Dodd-Frank Act, the omnibus bill led to the SEC's addition of Section 13(p) to the 1934 Act, which requires the promulgation of rules mandating disclosure of whether minerals "necessary to the functionality or production" of manufactured goods originated in the DRC, or a nation bordering the DRC.[92] In fairness, these rules have had a significant impact in the effort to reduce violence in the DRC.[93] However, one major issue associated with the conflict-mineral disclosure rules is that their implementation has led to a reduction in standard of living—sometimes to an extreme degree—in certain communities in the DRC which depend heavily on mining.[94] Evidently, although many mines have become conflict-free since the passage of the Dodd-Frank Act,[95] the militias have diversified their trade and become peddlers of other valuable goods to maintain their iron-fisted, torturous rule of violence over the citizens of the DRC.[96] However, the income from these diversified goods is, reportedly, significantly less than the militant groups were previously earning from conflict minerals.[97]

The reduction in funding does not appear to have made an extensive dent in the violence in the eastern Congo, as the region continues to play host to infighting between rebel groups.[98] Moreover, at least one member of the UN Group of Experts—as reported by the U.S. Government Accountability Office—has stated that instances of fraud in conflict reporting "call into question the integrity" of reporting systems designed to ensure the accurate tracing of mineral sources.[99]

Due to the failure of the existing national and regional anti-corruption legal frameworks, which appear robust on their face, but have little impact in practice—a result explained by the endemic and deeply-entrenched nature of resource corruption

92. 17 C.F.R. § 240.13p-1.

93. According to the Enough Project, the Dodd-Frank Act and associated reforms have increased transparency regarding the sourcing of minerals and reduced the raw number of third-tier "conflict mines" in the DRC; evidently, the reforms have also reduced the going rate for "untraceable" minerals potentially associated with conflict mines. *Progress and Challenges on Conflict Minerals: Facts on Dodd-Frank 1502*, ENOUGH PROJECT, http://enoughproject.org/special-topics/progress-and-challenges-conflict-minerals-facts-dodd-frank-1502 (last visited May 24, 2017).

94. *Id.*; *see also* Sudarsan Raghavan, *Obama's Conflict Minerals Law Has Destroyed Everything, Say Congo Miners*, GUARDIAN (Dec. 2, 2014, 6:25 AM), http://www.theguardian.com/world/2014/dec/02/conflict-minerals-law-congo-poverty (describing the devastating impact of the Dodd-Frank Act's passage on miners in the DRC, a nation in which one-sixth of the population of 70 million "depend on artisanal mining").

95. According to an Enough Project report published in 2014, at the time of the report's publication, two-thirds of "tin, tantalum, and tungsten mines" in eastern Congo had become free of the presence of militant factions and the DRC's soldiers. FIDEL BAFILEMBA ET AL., ENOUGH PROJECT, THE IMPACT OF DODD-FRANK AND CONFLICT MINERALS REFORMS ON EASTERN CONGO'S CONFLICT 1, 2 (June 2014), http://www.enoughproject.org/files/Enough%20Project%20-%20The%20Impact%20of%20Dodd-Frank%20and%20Conflict%20Minerals%20Reforms%20on%20Eastern%20Congo's%20Conflict%2010June2014.pdf.

96. Such goods include "palm oil, charcoal, marijuana, cattle and soap." Raghavan, *supra* note 94.

97. *Id.*

98. Magdalena Mis, *More than 30,000 Displaced in Congo Left Without Aid – Agency*, THOMPSON REUTERS FOUND. (Apr. 7, 2016), http://news.trust.org/item/20160407155515-84t3i (reporting that "[d]ozens" of factions are still active in eastern Congo, "prey[ing] on the local population and exploit[ing] the region's rich mineral deposits").

99. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-561, SECURITIES AND EXCHANGE COMMISSION: SEC CONFLICT MINERALS RULE 36 (2014).

in Africa—an international solution is desperately needed. The body count climbs ever higher,[100] while the international community appears to be engaged in a great deal of head-scratching. The following section embarks on an in-depth exegesis of both the criminal and civil sides of such a body—the component parts of the IACC.

III. OVERVIEW OF THE PROPOSED IACC

This Note will now examine the proposed IACC, to lay the foundation for applying the international-court framework to resource corruption in Africa. The movement in favor of an IACC ostensibly began with a Brookings Institute article published by Mark Wolf; therefore, this Part of the Note will open with a brief examination of Wolf's vision for the IACC.[101] Wolf's basic argument is that an IACC "similar to the ICC or as part of it, should now be established to provide a forum for the criminal enforcement of the laws prohibiting grand corruption that exist in virtually every country, and the undertakings that are requirements of various treaties and international organizations."[102] As a corollary to criminal enforcement, Wolf also calls for the adoption of an "international civil statute," similar to the U.S. False Claims Act—the federal statute authorizing *qui tam* whistleblowing actions[103]—which would be "enforceable in the [IACC]."[104] To give teeth to his proposed court, Wolf suggests making "submission to the jurisdiction of the [IACC]" part of the UN Convention Against Corruption, and requiring jurisdictional submission as a prerequisite to both membership in "international organizations such as the OECD and WTO," and the obtainment of "loans from international lenders such as the World Bank."[105] Prominent voices in the international human rights community joined Wolf on the heels of the publication of his proposal.[106]

Using Wolf's basic outline for the IACC as an analytical lens, this Note will now propose a structure for the IACC in detail, particularly regarding the joint criminal and civil jurisdiction touched on by Wolf. Because of the persistence and entrenchment of corruption in Africa, civil jurisdiction is imperative to the success of the IACC in addressing the resource corruption described in the preceding section.

---

100. To illustrate a recent example of what happens to those who try to take on Africa's corruption problem with pen rather than with sword, catholic priest and anti-corruption advocate Fr. Vincent Machozi was gunned down after writing an article on the complicity of the presidents of the DRC and Rwanda in the mass slaughter occurring in the heart of the continent. *DR Congo: Gunmen Kill Priest who Denounced Corruption*, INDEP. CATHOLIC NEWS (Mar. 25, 2016), http://www.indcatholicnews.com/news.php?viewStory=29718.

101. *See generally* WOLF, *supra* note 7.

102. *Id.* at 1.

103. *Qui tam* actions empower private plaintiffs, known as relators, to bring claims on behalf of the government, and to contingently obtain a share of the final award if the government prevails.

104. WOLF, *supra* note 7, at 11.

105. *Id.*

106. *See, e.g.*, *Tom Lantos Human Rights Commission Briefing: An International Anti-Corruption Court (IACC) to Mitigate Grand Corruption and Human Rights Abuses* (Nov. 13, 2014) (statement of Arvind Ganesan, Business and Human Rights Director, Human Rights Watch) ("Judge Mark Wolf's proposal for an [IACC] is something Human Rights Watch believes could be a valuable step forward.").

A. The Case for a Civil Component of the IACC

Civil jurisdiction in the IACC is necessary to reduce corruption in Africa, because corruption is entrenched at the highest levels of government.[107] This endemic nature of corruption, which leads to governmental actors enjoying impunity for their actions,[108] has caused at least one of the major critics opposed to Judge Wolf's proposed IACC to partially turn his critique of the court on the improbability of corrupt governments turning over officials charged with corruption.[109] While solutions to this enforcement problem on the criminal side of the IACC—referred to as "the impunity problem" throughout the remainder of this Note—will be addressed in greater detail in the next Part, civil jurisdiction would augment deterrence of corruption, in addition to totally circumventing governmental impunity.

B. Criminal IACC Recommendation: International Anti-Corruption Law

In terms of the criminal side of the IACC, one relevant question, with respect to the court's structure, is how the tribunal would derive its legal basis for imposing criminal liability on governmental officials. Although Judge Wolf essentially proposes that the IACC enforce existing anti-corruption laws,[110] in the context of African resource corruption, existing law will likely not be sufficient to deter corrupt officials. This is so due to the systemic level of corruption surrounding resources in Africa. To illustrate this proposition, commentators identified the failure of contemporary African anti-corruption efforts in 2010.[111] While commentators pointed to this failure

---

107. In Equatorial Guinea, for example, Obiang's reign continues to be marked by "[v]ast oil revenues fund[ing] lavish lifestyles for the small elite surrounding the president, while a large proportion of the population continues to live in poverty," along with persistent "[m]ismanagement of public funds and credible allegations of high-level corruption." *World Report 2015: Equatorial Guinea*, HUM. RTS. WATCH, https://www.hrw.org/world-report/2015/country-chapters/equatorial-guinea (last visited May 25, 2017).

108. As Aziz Fall stated succinctly in 2010, "[t]he great problem of Africa is impunity." José Naranjo, *Aziz Fall: "The Great Problem of Africa is Impunity"*, GUINGUINBALI (July 26, 2010), http://guinguinbali.com/index.php?lang=en&mod=news&task=view_news&cat=3&id=705. To compound the problem of impunity, as reported by Freedom House, evidence suggests that economic criminal impunity buttresses human-rights violation impunity, "creating an impunity gap." SANJA PESEK, FREEDOM HOUSE, COMBATING IMPUNITY: TRANSITIONAL JUSTICE AND ANTI-CORRUPTION 2 (2014), https://freedomhouse.org/sites/default/files/Combating%20Impunity%20-%20Transitional%20Justice%20and%20Anti-Corruption.pdf.

109. *See* BRETT D. SCHAEFER, STEVEN GROVES, & JAMES M. ROBERTS, HERITAGE FOUND., WHY THE U.S. SHOULD OPPOSE THE CREATION OF AN INTERNATIONAL ANTI-CORRUPTION COURT 12 (Oct. 1, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/BG2958.pdf (noting that "[e]nforcement is a necessary element for the U.S. federal government in exercising its authority, and essential if the IACC is to perform as a supra-national federal prosecutorial authority as envisioned by Judge Wolf," and arguing that, "as with the ICC, it is very unlikely that governments would grant, or submit willingly to, such authority—especially if a government is populated with corrupt individuals at levels high enough to enjoy impunity").

110. Judge Wolf notes that "[g]rand corruption is a crime in virtually every country. It is also a violation of the United Nations Convention Against Corruption . . . and the OECD Convention on Combating Bribery of Foreign Officials," further observing that "[a] commitment to combat grand corruption is also a requirement of membership in the WTO." WOLF, *supra* note 7, at 10.

111. *See generally* Anna Persson et al., *The Failure of Anti-Corruption Policies: A Theoretical Mischaracterization of the Problem* (Quality of Government Institute, Working Paper No. 19, 2010), https://gupea.ub.gu.se/bitstream/2077/39039/1/gupea_2077_39039_1.pdf.

as a problem with enforcement mechanisms rather than substantive law,[112] the more important point is that the most-corrupt African nations, with the greatest gaps between the elite and the poor—such as Equatorial Guinea[113]—have very little in the way of anti-corruption legal frameworks.[114]

Due to this lack of anti-corruption frameworks in countries that arguably need them the most, Judge Wolf's proposal for the IACC to enforce existing anti-corruption laws misses the mark with regard to effectively reducing resource corruption in Africa. Instead, a more holistic, and potent, approach for reducing African resource corruption would involve the generation of an international criminal law via treaty, using the Rome Statute as a model.[115] An international criminal law against corruption would make anti-corruption efforts apply uniformly to all states in the international sphere, taking care of the most-afflicted countries, in which corruption is so endemic as to have rotted and crippled virtually all of the nations' governmental organs. However, even more so than an IACC as a general matter, an international criminal law against corruption raises legitimate concerns for national sovereignty, which will be taken up in Part V of this Note. Before getting there, however, the analysis now turns to more-nuanced issues in the structure of the proposed court, including both jurisdictional concerns, and an international civil right of action.

IV. DETAILED ARCHITECTURE OF THE IACC: ENFORCEMENT AND INTERNATIONAL CIVIL STATUTE

Although Judge Wolf's proposal for the IACC conceptually mirrors the ICC in many ways, including its jurisdictional mechanism, it fails to address the enforcement problems with the current ICC and, perhaps more notably, the ways in which an international civil statute might operate, to allow for private enforcement on the civil side of the proposed court. This Part is broken into two sections, (A) and (B), to adequately grapple with the issues raised by enforcement and an international civil statute, respectively. Addressing the former set of issues, the framers of the proposed IACC should take lessons from the failures of the ICC, and provide for enforcement mechanisms with more teeth than those established by the Rome Statute for the ICC; this ought not be a difficult task.[116] Addressing the latter bundle of concerns, for a

112. *See id.* at 8 (noting that "in both Kenya and Uganda—as well as in the majority of other African countries—a large number of indirect and direct strategies have recently been adopted in an attempt to curb rampant corruption," and concluding that "the legal-institutional framework in most African countries—including the ones in Kenya and Uganda—have all it takes to pave the way for success," and later observing that, despite this apparently robust framework, "there are very few success stories to tell when it comes to the actual *implementation* of anti-corruption reforms").

113. *See World Report 2015: Equatorial Guinea*, *supra* note 107.

114. *See* OLANIYAN, *supra* note 38, at 133 ("It should be noted that Equatorial Guinea has neither specific legislation against corruption, nor an anti-corruption commission or agency. Apart from isolated cases of corruption involving low-level civil servants working in telecommunications and finance, it is rare to find cases of large-scale corruption filed in court.").

115. The Rome Statute operates to define crimes punishable under the jurisdiction of the ICC. *Founding Treaty: The Rome Statute*, INT'L CRIM. CT., https://www.icc-cpi.int/about?ln=en (last visited May 25, 2017).

116. The ICC's recent dropping of war-crimes cases against Kenyan Deputy President William Ruto in April 2016, for instance, has garnered comments to the effect that the ICC was complicit in "allow[ing] itself to be blackmailed by Kenya" into deciding not to pursue charges against both Ruto and President Uhuru Kenyatta. *ICC Failure 'Spells Doom'*, TIMES LIVE (Apr. 14, 2016, 12:47 AM), http://www.timeslive.co.za/thetimes/2016/04/14/ICC-failure-spells-doom.

solitary reason—as will be explained in section (B) of this Part—an international civil statutory right of action is central to the efficacy of the civil side of the IACC. The establishment of a proper incentive structure is necessary to encourage individuals to bring claims against corrupt officials.

A. Wisdom from the Experience of the ICC: More Muscle Behind Enforcement

To provide a basis for understanding the various enforcement mechanisms this Note will propose for the IACC, a brief explanation of concerns over the strength of ICC enforcement mechanisms will be outlined. First, however, a basic overview of the fundamentals of the concept of complementary jurisdiction will prove useful in navigating the rest of this Part, given Judge Wolf's recommendation that the IACC adopt this type of jurisdiction.[117]

Although Judge Wolf does not touch much on the principle of complementarity in his proposal for the IACC, he does explain that complementary jurisdiction "would preclude prosecution of . . . officials in the [IACC]," from a state which "demonstrates the determination and ability to prosecute grand corruption itself."[118] This is so because of the principle of complementarity, enshrined in the Rome Statute, which requires that states either have the capacity to investigate or prosecute, or have engaged in the investigation or prosecution of, individuals who commit crimes defined in the statute, as a precursor to the triggering of the ICC's jurisdictional powers.[119] The principle is reflected succinctly in the following statement by the ICC Office of the Prosecutor ("OTP"), regarding the OTP's proper exercise of power: "The ICC is not intended to replace national courts, but to operate when national structures and courts are unwilling or unable to conduct investigations and prosecutions."[120]

In terms of enforcement concerns, if the IACC were to operate similarly to the ICC, it would be most effective for the IACC to have stronger enforcement mechanisms than those of the ICC, in order to address concerns of the court's ineffectiveness.[121] The ICC has taken flack because the court "enforces its arrest warrants exclusively through the cooperation of its member states," and has no real means of forcing states to cooperate when they refuse to turn over individuals for

117. *See* WOLF, *supra* note 7, at 10 ("Like the ICC, the [IACC] should operate on the principle of complementarity.").

118. *Id.* at 12.

119. *See* PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR, OFF. OF THE PROSECUTOR, INT'L CRIM. CT. 4 (Sept. 2003), https://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf ("[I]n deciding whether to investigate or prosecute, the Prosecutor must first assess whether there is or could be an exercise of jurisdiction by national systems with respect to particular crimes within the jurisdiction of the Court . . . . The Prosecutor can proceed only where States fail to act.").

120. *Id.*

121. As Judge Wolf identifies, at the time he wrote his paper, "[t]he initial work of the ICC has been ponderously slow; it took more than six years to try the first suspect captured, Thomas Lubanga of the Congo, and his appeal is still pending." WOLF, *supra* note 7, at 13. As a statistical illustration of what critics describe as the ICC's ineffectiveness, "[i]n the past 13 years, the ICC has spent more than $1 billion . . . and only had two successful convictions." *How Effective is the International Criminal Court?*, CONSUL (Mar. 26, 2015), http://theconsul.org/?p=3609.

prosecution.[122] In fact, the Rome Statute contains only a naked admonition regarding the duty of member states to extradite indicted persons to be tried at the ICC.[123]

As alternative means of solving the ICC's enforcement problem, Gwen Barnes proposes two distinct enforcement mechanisms for deterring states from breaching the Rome Statute: (1) a statutory option to suspend breaching member states from the ICC and (2) a statutory option to expel breaching member states from the ICC, although she clarifies that "both should be used sparingly," and that expulsion should be reserved for the most egregious of breaches.[124] Both of these solutions reflect a rose-hued view of the types of concerns that would deter would-be breaching states from failing to perform their duty of extradition, and analogous solutions in the context of African resource corruption would be even less effective, as a practical matter.

Regarding Barnes' proposal for new enforcement mechanisms for the ICC, her proffered solutions presuppose that full ICC membership—with respect to her first proposal of a suspension measure—or membership at all—with respect to her second proposal of expulsion—are particularly important to all States Parties to the Rome Statute. However, she fails to back up this implicit presupposition with any evidence.[125] On the contrary, it appears that significant voices, speaking on behalf of a majority of the African continent—most notably the African Union (AU)—have, on multiple occasions, explicitly opposed the ICC.[126] In the most unified instance of opposition, the AU "urged its members to 'speak with one voice' against criminal proceedings at the [ICC] against sitting presidents" in Africa, with Botswana being the only nation which failed to align with the AU's stance.[127]

Due to the AU's repeated opposition to African membership in the ICC, Barnes' implied assertion that the ICC is of significant importance to its member states seems particularly implausible, concerning African member states' expressed distaste for the court. Therefore, rather than conditioning full membership in the ICC on abiding by the Rome Statute, a more-effective proposal involves conditioning membership in the UN or WTO on abidance by the Rome Statute, regarding extradition of suspects to

---

122. Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34 FORDHAM INT'L L.J. 1584, 1587 (2011).

123. *See* Rome Statute of the International Criminal Court art. 89(1), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute] ("States Parties shall, in accordance with the provisions of the Part and the procedure under their national law, comply with requests for arrest and surrender.").

124. Barnes, *supra* note 122, at 1617–18.

125. *See generally id.* (failing to discuss what, specifically, about the ICC makes membership in the court of enough importance to its member states to render the threat of either suspension or expulsion from the court so significant in magnitude as to deter the states from breaching the Rome Statute).

126. In 2013, based on an ICC prosecution against Kenyan president Uhuru Kenyatta, African Union members considered "[a] proposal for African nations to withdraw from the ICC." Shane Hickey, *African Union Says ICC Should Not Prosecute Sitting Leaders*, GUARDIAN (Oct. 12, 2013, 8:40 AM), http://www.theguardian.com/world/2013/oct/12/african-union-icc-kenyan-president. To provide an additional illustration of AU opposition of the ICC, in February of this year, "[m]embers of the African Union . . . backed a Kenyan proposal to push for withdrawal from the international criminal court [sic], repeating claims that it unfairly targets the continent." Agence France-Presse, *African Union Members Back Kenyan Plan to Leave ICC*, GUARDIAN (Feb. 1, 2016, 8:54 AM), http://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court.

127. *African Union Urges United Stand Against ICC*, AL JAZEERA (Feb. 1, 2014), http://www.aljazeera.com/news/africa/2014/02/african-union-urges-united-stand-against-icc-20142111727645567.html.

The Hague. In terms of the IACC, such an enforcement mechanism would mitigate the ineffectiveness problem outlined above, which critics of Judge Wolf's proposed court latched onto when attacking the IACC, based on problematic aspects of its corollary: the ICC.[128] In addition, the proposal is, arguably, in line with Judge Wolf's vision for the court of conditioning membership in the "OECD and WTO," among other suggestions regarding World Bank loans, on states' submission to IACC jurisdiction.[129] Although Judge Wolf does not explicitly address enforcement concerns, his indicated support of robust mechanisms for encouraging submission to the court's jurisdiction displays his doctrinal alignment with the philosophical underpinnings of the membership-conditioning enforcement mechanism.

As a more-detailed matter, the specific organization or organizations on which to condition membership plays more of a central role in the context of African resource corruption than in the context of corruption on any other continent. This is so for two reasons: (1) no African nation is a member of the Organisation for Economic Co-operation and Development ("OECD"),[130] and (2) at least some of the nations with the most-endemic corruption—like Equatorial Guinea—are not full members of the World Trade Organization ("WTO").[131] Therefore, the same issue plagues Judge Wolf's proposal of organizational membership conditions which plagues his proposal of enforcing substantive anti-corruption law, rather than creating a Rome Statute corollary to universalize the anti-corruption law to be enforced at the IACC.[132] That is, officials in the African nations with the most-endemic corruption, such as Equatorial Guinea, would be the least deterred regarding corrupt practices, in relation to officials in all other IACC member nations. In order to avoid this ludicrous result, the only international organization that would lead to adequate deterrence with respect to conditional membership is the UN, since all African nations are members of the organization.[133]

While critics could lodge a number of objections against conditioning membership in the UN on ratification of a Rome-Statute corollary, one of the most potent would be that the UN Charter specifically provides for mechanisms of suspension and expulsion that involve the discretion of the Security Council—and the General Assembly at the Security Council's recommendation—respectively.[134]

---

128. *See* SCHAEFER ET AL., *supra* note 109, at 12 (outlining the concern that "[l]ike the ICC, an IACC would likely lack independent means of enforcement" and explaining that, "as with the ICC, it is very unlikely that governments would grant, or submit willingly to, such authority—especially if a government is populated with corrupt individuals at levels high enough to enjoy impunity").

129. WOLF, *supra* note 7, at 11.

130. *List of OECD Member Countries – Ratification of the Convention on the OECD*, OECD, http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm (last visited May 25, 2017).

131. Equatorial Guinea is listed as an "[o]bserver government," along with Algeria, Comoros, Ethiopia, the Republic of Liberia, Libya, São Tomé and Príncipe, and the Sudan, to list African observer governments alone. *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited May 25, 2017).

132. For a discussion of the importance of universal law to be applied at the IACC, in terms of curbing the most egregious corruption in Africa, see *supra* Part I(B).

133. *See generally Member States*, UNITED NATIONS, http://www.un.org/en/member-states/index.html (last visited May 25, 2017).

134. *See* U.N. Charter art. 5 ("A Member of the United Nations against which preventative or enforcement action has been taken by the Security Council may be suspended . . . upon the recommendation

Therefore, the argument would go, the suspension and expulsion mechanisms provided for by the UN Charter would supersede any international treaty or agreement, due to the UN Charter's Supremacy Clause. The so-called Supremacy Clause of the UN Charter, laid out in Article 103, states that, "[i]n the event of a conflict between the obligations of the Members of the [UN] under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[135] However, there are two counterarguments, both explained below, for allowing a Rome Statute corollary that would empower the IACC to condition membership in the IACC on full membership in the UN, and using the credible threat of suspension and/or expulsion as an enforcement mechanism to incentivize abidance by the treaty's extradition duties.

First, the Articles 5 and 6 suspension and expulsion mechanisms arguably do not fall within the ambit of Article 103 of the UN Charter. Article 103 speaks to the "obligations of the Members of the United Nations under the present Charter;"[136] however, Articles 5 and 6 address what essentially amount to duties of the Security Council and the General Assembly, not obligations of the member states themselves. Alternatively, even if the procedures for suspension and expulsion outlined in Articles 5 and 6 of the UN Charter are construed as obligations of the Members as defined under Article 103, the language in Articles 5 and 6 is permissive—the respective duties of the General Assembly and Security Council are defined in terms of "may," rather than "shall," in both Articles.[137] Therefore, Articles 5 and 6 are logically construed as outlining non-exhaustive means of suspension and expulsion from the UN. As James Fry argues when addressing the discrepancy between Articles 31 and 32 of the UN Charter,[138] "Article 31 involves permissive language with States that are specially affected by the discussions" of questions brought before the Security Council pursuant to Article 31, "while Article 32 involves mandatory language."[139]

Although, apparently, neither Article 5 nor Article 6 of the UN Charter has been litigated on the point of the permissiveness of the articles' language, it stands to reason that the same logic Fry applies to Articles 31 and 32 of the Charter apply to these two Articles. Therefore, even if Articles 5 and 6 prescribe duties that are covered under the Article 103 Supremacy Clause, the permissive language in the Articles informs the conclusion that other means of suspension and expulsion are permissible. Suspension and expulsion as consequences for non-ratification of the Rome-Statute corollary would, therefore, be squarely permitted under the Charter. Now that this Note has presented the argument for ratification incentive and enforcement, using mechanisms

---

of the Security Council."); *see also* U.N. Charter art. 6 ("A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled . . . by the General Assembly upon the recommendation of the Security Council.").

135. U.N. Charter art. 103.

136. *Id.*

137. *See* U.N. Charter, arts. 5 & 6 (stating, in Article 5, that "A Member . . . *may* be suspended" and, in Article 6, that "A Member . . . *may* be expelled") (emphasis added).

138. *See* U.N. Charter, art. 31 ("Any Member of the [UN] which is not a member of the Security Council *may* participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.") (emphasis added); *see also* U.N. Charter, art. 32 ("Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, *shall* be invited to participate, without vote, in the discussion relating to the dispute.") (emphasis added).

139. JAMES D. FRY, LEGAL RESOLUTION OF NUCLEAR NON-PROLIFERATION DISPUTES 125 (2013).

stronger than those incorporated in the Rome Statute, the analysis turns to an international, civil, private right of action to augment the court's deterrent impact.

B. The Case for an International, Civil, Private Right of Action

In addition to the international criminal legal and procedural provisions and structures detailed in the previous subsection, resource corruption in Africa would be best dealt with via the implementation of an international civil statute modeled after the U.S. False Claims Act ("FCA"), as Judge Wolf argues.[140] As at least one commentator has identified, the FCA—which authorizes *qui tam* actions on behalf of the U.S. government, to recover money from those who defraud it—has significant potential to deter fraudulent actions.[141] The rest of this subsection expounds upon the argument for, and the design of, an international statute modeled after the U.S. FCA.

An astute reader might be questioning—altogether reasonably, at this point—the necessity of an international civil statute on top of the public-international criminal law proposed in the previous subsection. Is it really true that the international criminal law with robust enforcement mechanisms described in the previous subsection would not provide enough deterrence of corruption standing alone? The short and long of it is, likely not—and here is one reason why: assuming more officials are extradited to The Hague under the Rome-Statute analogue than under the Rome Statute itself, evidentiary hurdles may prove insurmountable in meeting the beyond-a-reasonable-doubt burden of proof codified in the Rome Statute.[142] This burden would be the same burden recommended for the IACC statute, due to the gravity of the sentences to be imposed; Judge Wolf echoes this basic point in terms of the deterrence provided by the FCA in the U.S.[143]

While the point about the burden of proof may seem superficial, a cursory comparison of the number of convictions (three) with the number of indictments resulting in dismissed charges (five)—not counting individuals who died and the one case that was held inadmissible—suggests that the reasonable-doubt burden is difficult to meet in the context of international criminal law.[144] This poor track record, based

140. *See* WOLF, *supra* note 7, at 11 (submitting that an "international civil statute [comparable to the False Claims Act], enforceable in the International Anti-Corruption Court, would create a powerful incentive for whistleblowers, greatly enhance the resources devoted to combating fraud and corruption, and enhance the potential for restitution for its victims").

141. *See* Ralph C. Mayrell, *Blowing the Whistle on Civil Rights: Analyzing the False Claims Act as an Alternative Enforcement Method for Civil Rights Laws*, 91 TEX. L. REV. 449, 449–50, 477 (2013) (arguing that "[t]raditional antidiscrimination laws do not effectively deter or remedy civil rights violations by local governments and related entities" and noting that "[t]he FCA offers significant benefits to civil rights plaintiffs," and "[r]esponsible *qui tam* litigation by civil rights advocates and agency changes have the potential to make the FCA an effective remedy for victims of civil rights abuses").

142. *See* Rome Statute, *supra* note 123, art. 66(3) ("In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.").

143. *See* WOLF, *supra* note 7, at 11 (arguing that the preponderance burden of proof in civil fraud actions is easier to prove than the reasonable-doubt burden in criminal cases).

144. The following is a chronological listing of selected articles detailing what could be termed "unsuccessful" ICC proceedings, at least from the standpoint of the OTP, in which charges were dropped against defendants: Frank Nyakairu, *ICC Drops Warrant on Ex-LRA's Lukwiya*, HUM. RTS. HOUSE (Apr. 2, 2007), http://humanrightshouse.org/noop/page.php?p=Articles/7897.html&d=1 (detailing the ICC's dropping of charges against Raska Lukwiya); *Darfur Rebel Abu Garda Will Not Face ICC Charges*, BBC

on any reasonable definition of the term "poor," is likely attributable to the ICC's evidence-gathering difficulties, as identified by commentators.[145]

While it would be possible to implement more-intensive provisions for evidence gathering in the IACC's Rome-Statute analogue, they likely would not solve the issue of investigating crimes of corruption in nations ruled by the most-egregious violators of anti-corruption laws, due to the impunity problem explained in the previous Part. In order to adequately curb the problems of criminal investigation, a civil right of action, judiciable in the IACC, is entirely necessary. The lower burden of proof—preponderance of the evidence—would mitigate much of the concern described above, in regard to prosecutorial-investigation difficulties.

Judge Wolf is certainly not the first individual to call for a civil right of action to serve on the front lines of the judicial and legislative effort to curb corruption, although he may be the first to call for an *international* civil right of action. For that, he has received significant criticism.[146] Perhaps Judge Wolf's most vocal critic, Matthew Stephenson, has written at least two articles vehemently denouncing Judge Wolf's vision of the IACC.[147] Stephenson's main critique of the civil right of action, that it would cost a great deal of money and invite excessive litigation, identifies a potential, elementary problem with the court that would be quite easy to fix. The international civil statute would merely have to include some kind of evaluative mechanism for claims to ensure that only claims likely to succeed at trial and win the relator money—i.e., claims that would tend to have a maximal deterrent effect on corruption in the nations of origin of the official being sued—would proceed to the costlier phases of litigation. One easy way to do this would be to farm out intake work to international lawyers and give them a small, contingent fee, say, one percent of the ultimate recovery. The incentives created by the small, contingent fee would promote the effective screening mechanism that Stephenson seems to suggest is an elusive and impossible creature to trap.

NEWS (Feb. 8, 2010, 6:07 PM), http://news.bbc.co.uk/2/hi/africa/8505014.stm (detailing the ICC's decision to drop charges against Abu Garda); *ICC Upholds Decision to Drop War Crimes Charges Against Rwandan Rebel Leader*, UN NEWS CTR. (May 30, 2012), http://www.un.org/apps/news/story.asp?NewsID=42113#.Vu44jCQx_FI (detailing the dropped ICC charges against Callixte Mbarushimana); Carol J. Williams, *'Dark Day:' Hague Prosecutors Drop Charges Against Kenyan Leader*, L.A. TIMES (Dec. 5, 2014, 3:25 PM), http://www.latimes.com/world/africa/la-fg-icc-kenya-kenyatta-charges-dropped-20141205-story.html (explaining the ICC's decision to drop charges against Kenyan president Uhuru Kenyatta); and *International Criminal Court Drops Case Against Ugandan Rebel After He Is Confirmed Dead*, FOX NEWS (Sept. 10, 2015), http://www.foxnews.com/world/2015/09/10/international-criminal-court-drops-case-against-ugandan-rebel-after-is.html (outlining the ICC's dropping of charges against Okot Odhiambo).

145. *See, e.g.*, Christian M. De Vos, *Investigating from Afar: The ICC's Evidence Problem*, 26 LEIDEN J. INT'L L. 1009, 1010 (2013) (arguing that the presence of the ICC's "evidence problem" is becoming "increasingly clear").

146. *See, e.g.*, Matthew Stephenson, *The Case Against an International Anti-Corruption Court*, GAB: THE GLOBAL ANTICORRUPTION BLOG (July 31, 2014), https://globalanticorruptionblog.com/2014/07/31/the-case-against-an-international-anti-corruption-court/ (arguing that an international civil right of action would prove prohibitively expensive and invite an unmanageable level of litigation without (1) a front-end screening mechanism for claims, and (2) a mountainous collection of resources at the Court's disposal).

147. *Id.*; *see also* Matthew Stephenson, *Dear International Anticorruption Court Advocates: It's Time to Answer Your Critics*, GAB: THE GLOBAL ANTICORRUPTION BLOG (Mar. 1, 2016), https://globalanticorruptionblog.com/2016/03/01/dear-international-anticorruption-court-advocates-its-time-to-answer-the-critics/ (expressing the author's frustration, based on his perception that advocates for an IACC are failing to engage in discourse with the author by answering his objections to the proposed IACC).

Ultimately, Stephenson fails to grasp the point of Judge Wolf's Brookings-Institute paper proposing the IACC. Judge Wolf intended the paper to provide a skeleton frame on which others could build, and to generate meaningful discourse in the global effort to curb corruption, a frame without which this Note would not likely have been brought into being. If he had intended anything more, he would have fleshed out the detailed mechanics of the court's operation and, more significantly, titled the paper something like "The Case For, and Internal Workings of, an International Anti-Corruption Court," rather than "The *Case for* an International Anti-Corruption Court."[148] Stephenson's misguided, scorched-earth critiquing style aside, creating a front-end tool for sifting through relators' claims would be a fairly simple task. With a one-percent contingent fee, it is not outside the realm of the possible that international lawyers who wanted to diversify their practice—folks who had retired from practice and were looking for a way to apply their adept skills of legal analysis, for instance—could earn a substantial income selecting civil cases to proceed to the trial phase in the IACC.

Not only does Stephenson criticize Judge Wolf for lacking the foresight to include a proposed screening mechanism for the civil side of the court in his 15-page *outline* of a case for an IACC, but also he critiques Judge Wolf's proposal for the IACC's civil jurisdiction on the grounds that many countries explicitly prohibit contingent fees.[149] Stephenson is certainly correct that many countries do, indeed, prohibit contingency fees; in fact, out of the countries examined in this Note, the DRC expressly forbids contingent fees.[150]

Assuming, *arguendo*, that all African countries forbid contingency fees,[151] Stephenson's critique on the point of contingency fees still reflects a conception of an international civil right of action that is entirely incorrect, and the argument would still be facially invalid. Although there does not appear to be much scholarship addressing the idea, what Judge Wolf is calling for is a truly international civil right of action, something analogous to a criminal arbitration agreement between all States Parties to the empowering Rome-Statute analogue that would give the IACC jurisdiction; the arbitrator, in this analogy, is the decision-making body of the IACC. As such, adjudication under the statue would occur in an international framework, completely unmoored from the laws of the respective States Parties, including of course laws regulating or forbidding contingency fees. So, extending the arbitration analogy, rather than ICSID being the forum of adjudication, as is the case in the standard bilateral investment treaty ("BIT") in the context of investment-treaty arbitration,[152] the forum would be the IACC itself.

148. WOLF, *supra* note 7, at 1 (emphasis added).

149. Stephenson, *supra* note 146.

150. BOWMAN GILFILLAN AFRICAN GROUP, LITIGATION GUIDE 13, http://services.bowman.co.za/Brochures/PracticeAreas/Litigation/Litigation%20guide.pdf (last visited May 25, 2017).

151. This proposition is far from the truth. Just out of the countries covered in this Note, Nigeria expressly allows contingent fees, stating in its rules that "nothing herein shall prohibit a just and reasonable contingent fee contract." Legal Practitioners Act, Ch. 207, Professional Conduct in the Legal Profession para. 42(a) (1980) (Nigeria).

152. *Treaty Arbitration: A Primer*, LATHAM & WATKINS 4 (Client Alert Commentary No. 1563, July 29, 2013), https://www.lw.com/thoughtLeadership/LW-investment-treaty-arbitration-primer.

Further spinning out the analogy of the international civil right of action to an ICSID arbitral body, Judge Wolf proposes what essentially amounts to an arbitral panel composed of "elite investigators and prosecutors as well as impartial judges."[153] However, many other possibilities exist for the civil side of the IACC as far, as fact-finders are concerned. One possibility would be to create ad hoc juries drawn from the population of the State Party ruled by the corrupt official being tried in any given case, and sequester them from threat or coercion at the hands of the cronies of the indicted official awaiting trial. Presumably, these juries would need to be paid for their service. Logistically, the IACC could get funding à la the ICC—that is to say, through its member states[154]—and the UN could similarly fund the Court, if need be.[155] In the next Part, issues in the realm of international law, raised by the proposed IACC will be examined, and potential solutions to each will be outlined.

V. INTERNATIONAL LAW ISSUES RAISED BY THE IACC AND POTENTIAL SOLUTIONS

The most-significant problem with the IACC is that it will be perceived as an intrusion on national sovereignty.[156] Commentators have expressed concern about what arguably amounts to forced ratification of the Rome-Statute analogue causing extensive damage to the already-existing effort to illustrate to the global South that the project of anti-corruption is not just the darling of the global North.[157]

These types of concerns are not without merit. To the extent possible, they must be treated as tools of guidance in determining the appropriate measures that will likely be necessary to incentivize the most-egregious violators to ratify the IACC's Rome-Statute corollary. However, due to the repeated, systematic abuses of power perpetrated by the most corrupt officials throughout the African continent—including Obiang, president of Equatorial Guinea, individuals affiliated with the NNPC state-run oil company in Nigeria, and managers of state-owned enterprises in the DRC[158]—even in light of national and regional anti-corruption frameworks, the need for an international solution to corruption has never been more pressing than at present.

In order to navigate the potential minefield of international-sovereignty issues raised by measures necessary to effectuate the comprehensive and effective international anti-corruption regime envisioned by Judge Wolf and other IACC advocates, sanctions for failure to ratify the Rome Statue analogue must be imposed using a multi-tiered approach and ought never be so draconian as to effectively amount to inflicting human rights violations on the populace of non-ratifying nations. In the

153. WOLF, *supra* note 7, at 1.

154. *See* Claire Calzonetti, *Frequently Asked Questions About the International Criminal Court*, COUNCIL ON FOREIGN RELATIONS (July 23, 2012), http://www.cfr.org/courts-and-tribunals/frequently-asked-questions-international-criminal-court/p8981 (explaining that funding for the ICC comes from its member states).

155. *See id.* ("The United Nations may provide funding if it is approved by the General Assembly and is related to a 'situation' referred to the court by the Security Council.").

156. *See* Stephenson, *supra* note 146 (arguing that the perception of "neo-imperialism" of the IACC will be all the more magnified if the majority of its targets are developing, non-Western nations).

157. *Id.*

158. *See* Chêne, *supra* note 4, at 1 (detailing the DRC's resource waste at the hands of its public administration, and the series of grand-corruption instances perpetrated by state-owned enterprises, to the extent that the DRC's ability to contribute to the good of its own people has been crippled).

first phase, membership in the OECD and WTO will become conditional on ratification of the treaty. Then, the global community should give the African nations that did not voluntarily ratify the treaty a reasonable time in which to do so. If the non-ratifying nations continue to refuse to ratify, the next, more drastic step would be the imposition of the UN membership sanction; that is, conditioning membership in the UN on ratifying the Rome-Statute analogue. Once again, non-ratifying nations will be given a reasonable time in which to ratify the treaty.

Third, and finally, for countries which do not ratify the Rome Statute analogue after the imposition of the second phase of UN membership conditioning, the final phase would be reducing foreign aid. To mitigate sovereignty concerns, however, the global community at large would have to weigh the interests of the country's populace with the goal of corruption deterrence. If the former interest outweighs the latter, as would occur in nations in which the population is heavily dependent on foreign-aid sources, foreign nations will not cut off aid below the point at which the populace would be harmed by increased starvation and lack of access to necessities— including food, shelter, and basic medical care. Necessarily, this balancing test would be very fact-intensive, and of vital importance—both in terms of ensuring basic human rights to citizens of the non-ratifying nations and, relatedly, in terms of ensuring that the perception of the IACC remains one of a non-imperialist body. To further mitigate sovereignty concerns, this balancing test should be left to regional entities. In Africa, the African Union Advisory Board would be the best organization to determine the levels of foreign aid necessary to sustain non-ratifying African nations. Ultimately, the goal would be to penalize non-ratifying nations to the point where the leaders would have to return some of their own funds siphoned off via corruption back to the public at large in order to guarantee access to basic human necessities to citizens of their countries.

In addition to the tiered sanctions system and balancing test described above, another useful means of reducing the appearance of imperialism on the part of the IACC is to ensure prosecution of instances of fraud from regions of the world other than Africa. Although grand corruption is objectively a massive problem in Africa and less so in many other regions of the world,[159] the problem is certainly present on other continents.[160] If violators from outside Africa are found to have committed fewer egregiously-corrupt acts, the IACC would be able to proportionately reduce the violators' penalties by way of reduced sentences. It may even be possible to include offenses for lesser crimes of corruption in the Rome-Statute analogue, which would allow for the prosecution of a more diverse array of officials from countries in which grand corruption may not be as endemic as in the African nations discussed in this Note. Criminalizing lesser offenses aside, the civil side of the IACC would take care of diversifying the mix of individuals tried in the court, as a general proposition.

---

159. *See* WOLF, *supra* note 7, at 13 (identifying the common critique levied against the ICC, that the institution is focused solely on prosecuting Africans, and laying out one potential explanation for the ICC's focus on Africa in the form of the extreme human rights violations that have taken place on the continent during the short lifespan of the ICC thus far).

160. Transparency International's Unmask the Corrupt campaign highlighted many cases of grand corruption around the world, ranging in location from Delaware to China. *Transparency International: Vote out Grand Corruption on Unmaskthecorrupt.org*, TRANSPARENCY INT'L (Dec. 9, 2015), http://www.transparency.org/news/pressrelease/transparency_international_vote_out_grand_corruption_on_unmaskthecorrupt.or.

With respect to defining lesser offenses as "corruption" in the Rome-Statute analogue, one concern with this proposal would be that deeming lesser instances of corruption serious crimes would lessen the grave nature of crimes prosecutable under the Rome Statute: "genocide, crimes against humanity, and violent aggression."[161] Although Shaefer et al. quickly dismiss the crimes of which corruption is composed—"theft, intimidation, and abuse of authority"[162]—the fact remains that these crimes, in the aggregate, completely undermine the rule of law and lead to the creation of kleptocracies in which human rights abusers run rampant and have virtually-plenary control over the populace. Additionally, the fact that the IACC would be a completely separate institution from the ICC, and would additionally have civil jurisdiction by way of the international civil statute, would serve to help observers distinguish between the two international courts. Certainly, a good argument can be made that civil-whistleblower offenses are best considered as covering acts that are of less harm to the public good than the crimes tried in the ICC. However, an even better argument can be made that endemic, widespread corruption lays the groundwork for genocide, crimes against humanity, and aggression in societies, and ought to be considered a highly-serious offense worthy of international prosecution. Now that incidental, international-law issues have been explored and potential mechanisms for mitigating them have been outlined, this Note will conclude with a brief recap and some final remarks.

CONCLUSION

In summation, many nations in Africa have been plagued by entrenched, large-scale corruption at the highest levels of government, often centered around the extraction of valuable troves of minerals, including coltan and oil. The three nations explored in this Note—the DRC, Equatorial Guinea, and Nigeria—are case studies in the destructive and virulent nature of resource corruption. Due to the failure of both national and regional efforts to curb corruption in the form of overtly-robust, structural anti-corruption legal frameworks within African states and the African Union Convention on Corruption, an International Anti-Corruption Court is necessary to affect any truly lasting, deep progress in the effort to reduce corruption surrounding mineral-resource extraction in Africa. While criminal punitive measures are necessary, and would be brought into being in the form of a statute analogous to the Rome Statute, an international civil statute is also crucial to the IACC's success. The international civil statute would greatly increase the deterrent impact of the court in terms of removing the incentives of African officials to siphon off revenues from mineral-resource extraction, which rightfully belong to their respective nations, for the purpose of personal or familial enrichment.

Due to the seemingly-careless attitudes of many rulers of Africa's most notorious kleptocracies, and in order to address the most egregious instances of corruption, it would be necessary to condition membership in the UN, and the receipt of certain amounts of foreign aid, on ratification of the Rome-Statute analogue. To allay concerns that these methods of incentivizing ratification of the Rome-Statute analogue violate principles of national sovereignty, the ideal incentive measures would be structured in a three-tiered program, with the first tier populated by the requirement

161. SCHAEFER ET AL., *supra* note 109, at 11.
162. *Id.*

of conditional membership in trade organizations, dependent on ratification, and the final tier populated by foreign-aid sanctions. The African Union would have the ability to determine the amount of foreign-aid reduction in the third tier of the incentive program, to ensure that citizens of nations refusing to ratify the Rome-Statute analogue would still have access to the guarantees of basic human rights.

Although the IACC is certainly an ambitious project, the world demands its presence now more than ever. The international community has lamented the existence of widespread grand corruption in Africa, surrounding mineral resource extraction, for long enough. If action is not taken soon, it is highly likely that the suffering of millions of Africans will simply fade into the woodwork of history, while their tormentors are whisked away from the hellish realities they have continued to propagate in G5s and mega-yachts—arms clasped around the shoulders of moribund world leaders who smile wryly, whispering into the tormentors' ears, "We know what you are up to, and it is perfectly ok."


T
I
L
J