A LEGAL REGIME FOR STATE-OWNED COMPANIES IN THE MODERN ERA

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Foreign state-owned companies (SOCs), particularly those in the energy sector, are more powerful than ever before. Yet under the Foreign Sovereign Immunities Act of 1976 (FSIA), agencies and instrumentalities—a category in which many SOCs fall—enjoy a presumption of immunity. At the same time, however, pursuant to the U.S. Supreme Court's 1983 decision in First National City Bank v. Banco Para el Comercio Exterior de Cuba, in most cases the foreign state also enjoys the benefit of legal separateness—i.e., it is very difficult for a third party to "pierce the corporate veil" between the sovereign and its subsidiary. Thus, SOCs enjoy immunity (a principle applied to sovereigns) while their parent governments are not responsible for the obligations of the SOCs (a principle more typically applied to traditional companies). In the author's view, there is a significant underlying tension in such cases that gives one pause in an era of dominant SOCs.

Over thirty years following the enactment of the FSIA, it is appropriate to re-examine the legal regime applicable to SOCs. In addition to the issues outlined above, there is significant confusion in the courts with respect to when an SOC is considered an agency or instrumentality and thus is entitled to a presumption of immunity. This Article proposes amendments to the FSIA in order to provide a more predictable and just legal regime for application to SOCs. In particular, the proposed amendments would involve eliminating immunity for agencies and instrumentalities altogether and revising the definition of foreign state to include specific types of entities, as well as other entities that engage in essentially public, noncommercial activity.

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INTRODUCTION

Foreign state-owned companies (SOCs), particularly those in the energy sector, are more powerful than ever before. There is no question that traditional companies remain powerful; ExxonMobil's second quarter 2008 profits reached nearly $12 billion.[1] But the grand majority of worldwide oil reserves are controlled and exploited by state-owned oil companies.[2] In many cases these companies are sophisticated international market players, selling receivables, investing abroad, acquiring foreign subsidiaries, and issuing bonds while trading their products around the world. A recent study found that SOCs in the petroleum sector "want to operate like [international oil companies], though they are clearly national companies with public ownership of capital, special status in the hydrocarbon domain, obligations to the national market and a common history."[3]

Despite their commercial characteristics, SOCs are commonly provided with presumptive immunity from U.S. legal proceedings as "agencies or instrumentalities" of the foreign state under the Foreign Sovereign Immunities Act of 1976 (FSIA).[4] Additionally, SOCs and their sovereign parents enjoy the shield of separate corporate status. This dual protection has created significant doctrinal tension and tilted the commercial playing field in favor of SOCs. The fact that immunity is also applied in an inconsistent and unpredictable manner has made the need for reform to ease this tension all the more apparent.

Therefore, this Article will propose a simple, straightforward way to modernize the FSIA by amendment. Specifically, the definition of "foreign state" should be broadened and clarified to list explicitly defense ministries, central banks, and the like as inherently part of the foreign state. Those falling within this definition would enjoy the benefit of immunity, but they would also typically be considered one and the same as the foreign state with respect to liability. Additionally, the term "agencies and instrumentalities"

1. Clifford Krauss, *Exxon's Second-Quarter Earnings Set a Record*, N.Y. TIMES, Aug. 1, 2008, at C2.

2. Tina Rosenberg, *The Perils of Petrocracy*, N.Y. TIMES MAGAZINE, Nov. 4, 2007, at 42 ("77 percent of the world's oil reserves are held by national oil companies with no private equity, and there are 13 [SOCs] with more reserves than ExxonMobil, the largest multinational oil company").

3. VALÉRIE MARCEL, OIL TITANS 55 (Chatham House/Brookings Inst. Press, 2006).

4. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1441, 1602-1611 (2000 & Supp. V 2005).

should be eliminated from the definition of "foreign state" provided in 28 U.S.C. § 1603(a). SOCs will enjoy legal separateness, as they should, but due to their commercial, non-political nature, they should not be immune.

The proposed amendment to 28 U.S.C. § 1603(a) is as follows:

> (a) A "foreign state" includes the following:
> (1) the central government and its embassies, consulates and other diplomatic facilities abroad;
> (2) all political subdivisions, including states, provinces, cities and other regional and local subdivisions;
> (3) all state entities, agencies and offices whose principal, fundamental purpose and activity is public, rather than commercial, in nature, including departments, ministries, the armed services, regulatory agencies and other such entities, agencies and offices of the central government and its political subdivisions; and
> (4) the central bank of that foreign state.

Not only are these reforms sensible, yielding more equitable results, but they would also provide needed simplification and clarity to the rules governing the liability of foreign states and their corporate subsidiaries. Foreign states would enjoy the benefits of a more predictable system, enabling them to conduct their governmental functions and structure their business operations accordingly. Moreover, other companies that do business with SOCs would also benefit by having a better understanding of when immunity could apply.

Part I of this Article will provide a discussion of the background of the FSIA more generally, with a particular focus on the distinctions among foreign states, political subdivisions, agencies and instrumentalities, and entities that do not fall within any of these categories. Part II will discuss *Bancec*[5] and its application by the courts. Part III analyzes the tensions that are caused by the current rules of state liability due to the peculiarities of the application of those rules, while also examining the role that SOCs play in the modern business environment. Finally, Part IV offers a solution.

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5. First Nat'l City Bank v. Banco Para El Commercio Exterior de Cuba, 462 U.S. 611 (1983).

I. THE DISTINCT SOVEREIGN ENTITIES FALLING WITHIN THE FSIA

A. Brief Overview of the FSIA

1. Historical Basis for Sovereign Immunity in the United States

Sovereign immunity arose based upon the principle that the ability of a foreign state to exercise its sovereignty without undue external interference must be protected.[6] In other words, states (and the courts of those states) should refrain from entertaining legal actions against foreign sovereigns, based upon international comity.[7] In reliance on this principle, throughout most of the United States' existence as a nation, U.S. courts have considered foreign sovereigns to be absolutely immune from their jurisdiction[8] based upon the Supreme Court's 1812 decision in *The Schooner Exchange v. McFaddon*.[9]

In the 1940s, the Supreme Court began to consider as a significant factor in its immunity analysis whether the U.S. State Department had recommended that U.S. courts apply immunity in a particular case.[10] In 1952, the U.S. State Department Acting Legal Advisor, Jack B. Tate, issued a letter to the Department of Justice (this letter would come to be known as the "Tate letter") announcing that the State Department had adopted the restrictive theory of sovereign immunity.[11] The restrictive theory holds that foreign sovereigns should not enjoy immunity for their commercial acts.[12]

The Tate letter left the Executive Branch with significant influence over courts' decisions, which led to unpredictable and inconsistent application by courts of the restrictive theory. In some cases, the Executive Branch would intervene, recommending to a court that immunity should apply in a particular instance. In other

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6. *See* David P. Vandenberg, Comment, *In the Wake of* Republic of Austria v. Altmann*: The Current Status of Foreign Sovereign Immunity in United States Courts*, 77 U. COLO. L. REV. 739, 740 (2006).

7. *Id.* at 740-41.

8. *See, e.g.*, Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926) (applying absolute immunity).

9. 11 U.S. 116 (1812). In a case brought by owners of a ship seized by the French Navy in Philadelphia Harbor, Chief Justice Marshall held that in the spirit of "equal rights and equal independence" of foreign sovereigns, courts typically must refrain from exercising jurisdiction over them. *Id.* at 136, 146.

10. *See* Republic of Mex v. Hoffman, 324 U.S. 30 (1945); *Ex Parte* Republic of Peru, 318 U.S. 578 (1943).

11. Letter from Jack B. Tate, Acting Legal Advisor for the Secretary of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *in Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments,* 26 DEP'T ST. BULL. 969, 984-85 (1952).

12. *See id.*

cases the Executive Branch would be silent, leaving a court to wonder how it should proceed. The result was the inconsistent application of an unclear rule.[13]

In 1976, Congress succeeded in codifying the restrictive theory in a comprehensive statutory scheme known as the Foreign Sovereign Immunities Act of 1976 (FSIA).[14] The FSIA was enacted to accomplish four objectives: (1) codifying the restrictive theory of sovereign immunity; (2) ensuring that immunity became a judicial (rather than executive) determination; (3) providing a statutory procedure for serving foreign states; and (4) providing a remedy for a plaintiff against a noncompliant foreign sovereign judgment debtor.[15] The hope was that the FSIA would resolve "considerable uncertainty" for both private litigants and foreign states.[16]

2. Basic Structure of the FSIA

The enactment of the FSIA did not create an independent federal cause of action,[17] but rather established the exclusive jurisdictional statute for actions against foreign states.[18] The basic structure of the FSIA begins with Sections 1604 and 1609, which provide the general rule of immunity.[19] Section 1604 provides that foreign states are "immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."[20] Section 1609, meanwhile, provides that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter."[21]

Section 1605 provides a list of exceptions to the general rule of immunity from jurisdiction.[22] A full examination of the exceptions would entail a lengthy discussion on its own, but for the purposes of this Article, it is sufficient to note that they include waiver, commercial activity, and cases involving any of the following:

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13. H.R. REP. NO. 94-1487, at 8-9 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606-07.

14. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, 2891-98 (codified as amended at 28 U.S.C. §§ 1330, 1441, 1602-1611 (2000)).

15. H.R. REP. NO. 94-1487, at 7-8, 1976 U.S.C.C.A.N. 6604, 6604-06.

16. H.R. REP. NO. 94-1487, at 6-9, 1976 U.S.C.C.A.N. 6604, 6604-07.

17. Boxer v. Gottlieb, 652 F. Supp. 1056, 1060 (S.D.N.Y. 1987); Unidyne Corp. v. Gov't of Iran, 512 F. Supp. 705, 709 (E.D. Va. 1981).

18. City of N.Y. v. Permanent Mission of India to the U.N., 446 F.3d 365, 369 (2d Cir. 2006).

19. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1604, 1609 (2000).

20. *Id.* § 1604.

21. 28 U.S.C. § 1609.

22. *Id.* § 1605 (2000 & Supp. V 2005).

rights in property taken in violation of international law; rights in U.S. immovable property or other U.S. property acquired by succession or gift; money damages sought against a foreign state for injury occurring in the U.S.; actions to enforce agreements to arbitrate or confirm arbitral awards;[23] and in Section 1605A, added to the FSIA in 2008, money damages sought for injury caused by acts of terrorism.[24]

Meanwhile, Section 1610 provides the main exceptions to immunity from execution or attachment.[25] Once again put simply, the property of a foreign state is not immune from execution or attachment if the property is located in the U.S., the property is used for a commercial activity in the U.S., and one of seven conditions applies: (1) waiver; (2) the property was used for the commercial activity upon which the claim is based; (3) the execution relates to a judgment establishing rights in property taken in violation of international law; (4) the execution relates to a judgment establishing rights in immovable property or property acquired by succession or gift; (5) the property consists of certain types of insurance policies; (6) the judgment is based on an order confirming an arbitral award; (7) or the judgment relates to an act of terrorism.[26] Additional exceptions to immunity from execution or attachment apply for agencies and instrumentalities.[27] Most importantly, it need not be established that the particular property at issue has been used for "commercial activity" in the U.S., but rather only that the agency or instrumentality generally engages in commercial activity in the U.S.[28] Meanwhile, Section 1611 provides additional protections for property owned by foreign central banks.[29]

Under this statutory scheme, the burden of proof typically applies as follows: (1) the defendant must make a prima facie showing that it is a foreign state; (2) the plaintiff must demonstrate that an exception to immunity applies; and (3) the ultimate burden of proof on demonstrating immunity lies with the defendant.[30]

While other provisions of the FSIA address such matters as the mechanics of subject-matter and personal jurisdiction,[31] removability from state courts,[32] punitive damages,[33] counterclaims[34] and

23. *Id.* § 1605(a).

24. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 337, 338-44 (2008) (to be codified at 28 U.S.C. § 1605A).

25. 28 U.S.C. § 1610 (2000 & Supp. V 2005).

26. *Id.* § 1610(a).

27. *Id.* § 1610(b).

28. *Id.*

29. *Id.* § 1611(b)(1).

30. Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 847 (5th Cir. 2000).

31. 28 U.S.C. § 1330 (2000).

32. *Id.* § 1441.

service of process,[35] the fundamental structure of the FSIA (including immunity and the exceptions thereto) is outlined above.

B. Classifications of Foreign States and Their Subsidiaries Under the FSIA

The most important FSIA provisions for the purposes of this Article, however, delineate which entities fall within the scope of the FSIA. Sovereigns are generally quite sophisticated, and they tend to structure their operations in a complex manner. There are ministries, departments, sub-departments, offices, and various layers of subsidiaries. The question arises as to which of these entities falls within the scope of the FSIA.

Section 1603, the definitional section of the FSIA, provides the framework for this analysis:

> (a) [a] "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
> (b) [a]n "agency or instrumentality of a foreign state" means any entity—
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.[36]

In other words, a "foreign state" includes not only a foreign sovereign as typically formulated—the United Republic of Tanzania, for example—but also all political subdivisions, agencies, and instrumentalities of the sovereign.

1. The Foreign State Proper and Political Subdivisions

There is no doubt that the United Republic of Tanzania and its U.S. embassy are each considered a "foreign state" under the

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33. *Id.* § 1606.
34. *Id.* § 1607.
35. *Id.* § 1608.
34. 28 U.S.C. § 1603 (2000 & Supp. V 2005).

FSIA; the embassy is the state itself, acting as an arm of the state in the U.S. Each of these entities could be considered the "foreign state proper." Meanwhile, political subdivisions, agencies, and instrumentalities are not part of the foreign state proper but are considered to be "foreign states" under the FSIA.

The term "political subdivision" is not defined in the FSIA. The legislative history indicates that the term was intended to include "all governmental units beneath the central government, including local governments."[37] True to this description, courts have found, for example, the Argentine province of Formosa,[38] the Nigerian state of Cross River[39] and the city of Amsterdam[40] to be political subdivisions under the FSIA.

2. Agencies and Instrumentalities

Application of the FSIA to agencies and instrumentalities involves a more complex analysis. Agencies and instrumentalities (terms between which courts do not distinguish, but rather consider to be synonymous) must meet the three criteria outlined in Section 1603(b).[41] Typically the first and third criteria involve a straightforward determination. The first criterion requires that the entity be "a separate legal person, corporate or otherwise."[42] According to the legislative history, this "is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name."[43] It is usually not difficult to determine whether an entity is a separate legal person for the purposes of this definition.

The third criterion is that the entity must be "neither a citizen of a State of the United States . . . nor created under the laws of any third country."[44] As explained in the legislative history, "[t]he rationale behind these exclusions is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such entity is presumptively engaging in activities that are either

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37. H.R. REP. NO. 94-1487, at 15 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6613.

38. Wasserstein Perella Emerging Mkts. Fin., L.P. v. Province of Formosa, No. 97 CIV. 793(BSJ), 2002 WL 1453831, at *7 (S.D.N.Y., July 2, 2002).

39. Hester Int'l Corp. v. Fed. Republic of Nig., 681 F. Supp. 371, 377 (N.D. Miss. 1988), *aff'd*, 879 F.2d 170 (5th Cir. 1989).

40. Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 306 (D.D.C. 2005).

41. 28 U.S.C. § 1603(b) (2000).

42. *Id.* § 1603(b)(1).

43. H.R. REP. NO. 94-1487, at 15 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.

44. 28 U.S.C. § 1603(b)(3) (2000).

commercial or private in nature."[45] Again, it is straightforward to determine whether an entity was created under the laws of the foreign state, or rather of a third country.

The second criterion, on the other hand, has tended to be more difficult in application for courts. There are two ways that an entity can qualify as an agency or instrumentality under Section 1603(b)(2): either it "is an organ of a foreign state or political subdivision thereof, *or* a majority of [its] shares or other ownership interest is owned by a foreign state or political subdivision thereof."[46]

Typically a court will apply the majority ownership prong first, as this analysis tends to be more straightforward than that for the organ prong. Prior to 2003, some courts had considered indirect subsidiaries of a foreign state proper to be "majority . . . owned by a foreign state."[47] In *Dole Food Co. v. Patrickson*, decided by the U.S. Supreme Court in 2003, the Court settled once and for all the question whether majority ownership needed to be direct, or rather if an entity held indirectly by the foreign state (i.e., with one or more layers in the corporate ownership chain between the foreign state and the entity) would also qualify as majority-owned under Section 1603(b)(2).[48]

In *Dole*, a group of workers from several Latin American countries filed suit against their employer Dole Food Company, alleging injuries from exposure to chemicals.[49] Dole impleaded two chemical manufacturers indirectly owned by the State of Israel.[50] The Court found that the companies at issue, which were

> separated from the State of Israel by one or more intermediate corporate tiers . . . cannot come within the statutory language which grants status as an instrumentality of a foreign state to an entity a "majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." We hold that only direct ownership of a majority of shares by the foreign state satisfies the

45. H.R. REP. NO. 94-1487, at 15.

46. 28 U.S.C. § 1603(b)(2) (2000) (emphasis added).

47. *See In re* Air Crash Disaster Near Roselawn, 96 F.3d 932, 939-41 (7th Cir. 1996); *cf.* Gates v. Victor Fine Foods, 54 F.3d 1457, 1461-63 (9th Cir. 1995). In other words, the argument would be that because the FSIA considers an agency or instrumentality to be a "foreign state," an entity that is majority-owned by an agency or instrumentality is majority-owned by a foreign state, thus itself falling with the definition of agency or instrumentality.

48. 538 U.S. 468, 474-78 (2003).

49. *Id.* at 471.

50. *Id.*

statutory requirement.[51]

In a case where the foreign state is not a direct majority owner of the entity, the entity attempting to establish immunity must turn to the other prong of Section 1605(b)(2) and demonstrate that it is an organ of the state. The various U.S. Courts of Appeal have established similar tests to determine whether an entity is an organ of the state. The Second Circuit, for example, considers the following:

> (1) whether the foreign state created the entity for a national purpose;
> (2) whether the foreign state actively supervises the entity;
> (3) whether the foreign state requires the hiring of public employees and pays their salaries;
> (4) whether the entity holds exclusive rights to some right in the [foreign] country; and
> (5) how the entity is treated under foreign state law.[52]

The Fifth Circuit applies an identical test, while the test applied by the Third Circuit is very similar.[53] While these tests may differ subtly, the heart of the analysis in each case revolves around the purpose for which the entity was established and the degree of control that the state exercises over the entity.

C. Determining Among the Three Possibilities

There are several significant differences in treatment under the FSIA depending upon whether an entity is a foreign state proper or political subdivision, on the one hand, or an agency or instrumentality on the other. For example, only agencies or in-

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51. *Id.* at 473-74 (quoting § 1603(b)(2)).

52. Filler v. Hanvit Bank, 378 F.3d 213, 217 (2d Cir. 2004) (alteration in original) (quoting Kelly v. Syria Shell Petroleum Dev., 213 F.3d 841, 846-47 (5th Cir. 2000)).

53. USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 209 (3d Cir. 2003) (considering "(1) the circumstances surrounding the entity's creation; (2) the purpose of its activities; (3) the degree of supervision by the government; (4) the level of government financial support; (5) the entity's employment policies, particularly regarding whether the foreign state requires the hiring of public employees and pays their salaries; (6) the entity's obligations and privileges under the foreign state's laws," and adding "(7) the ownership structure of the entity."); Kelly, 213 F.3d at 846-47 (5th Cir. 2000) (applying the same test as that used by the Second Circuit) (quoting Supra Med. Corp. v. McGonigle, 955 F. Supp. 374, 379 (E.D. Pa. 1997)).

strumentalities may be subject to punitive damages.[54] Additionally, service requirements are less demanding for agencies and instrumentalities than for foreign states proper or political subdivisions.[55] Venue in the U.S. District Court for the District of Columbia is automatically appropriate for foreign states proper or political subdivisions, but not necessarily so for agencies and instrumentalities.[56] Finally, and perhaps most importantly, the exceptions to immunity from attachment or execution are broader for agencies and instrumentalities than for foreign states proper or political subdivisions.[57]

Thus, even if an entity will be covered by the FSIA regardless, it is legally significant to distinguish between these categories of entities that fall under the umbrella of the FSIA. This question would arise, for example, when an entity meets the criteria for agency or instrumentality status, but claims to be a foreign state proper. The legislative history provides that

> [a]s a general matter, entities which meet the definition of "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.[58]

Quite unhelpfully, this list of examples would seem to include a number of entities, such as departments, ministries and central banks, that most would consider to be part of the foreign state proper.[59]

The courts have adopted two tests to distinguish between the two types of entities: a "legal characteristics test" and a "core function" test. The core function test examines whether the core function of the entity is commercial; if it is, the entity is considered to be an agency or instrumentality.[60] The legal characteristics test, meanwhile, examines whether, under the law of the foreign state where it was created, the entity can sue and be sued, own proper-

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54. 28 U.S.C. § 1606 (2000).
55. *Id.* § 1608.
56. *Id.* § 1391(f)(3)-(4).
57. *Id.* § 1610.
58. H.R. REP. NO. 94-1487, at 15-16 (1976), *as reprinted in* U.S.C.C.A.N. 6604, 6614.
59. Working Group of the Am. Bar Ass'n, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 509-10 (2002).
60. Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 151 (D.C. Cir. 1994).

ty, and contract, all in its own name; if so, the entity is considered an agency or instrumentality.[61] Typically, courts apply one test or the other.

II. Piercing the Veil Between the Sovereign and its Subsidiary: *Bancec*

A. *The* Bancec *Presumption of Separateness*

A separate, yet inextricably intertwined question relates to when a foreign state may be held responsible for the actions or obligations of its subsidiary, or vice versa. This question commonly arises with respect to execution or attachment, where the plaintiff seeks to collect on a judgment against a foreign state by executing upon the assets of the state's subsidiary. The issue would also exist where a plaintiff seeks to impute the commercial activity of an SOC to the parent government for the purposes of establishing an exception to sovereign immunity.

The seminal case in this context is *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*), decided by the U.S. Supreme Court in 1983.[62] *Bancec* established a rebuttable presumption that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."[63] In stating this general rule, the Court quoted from the legislative history of the FSIA:

> Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.[64]

The Court then stated that the presumption of legal separateness can be rebutted upon a showing either that: (1) the "corporate enti-

61. Hyatt Corp. v. Stanton, 945 F. Supp. 675, 681 (S.D.N.Y. 1996).
62. 462 U.S. 611 (1983).
63. *Id.* at 626-27.
64. *Id.* at 627-28 (quoting H.R. Rep. No. 94-1487, at 29-30 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6628-29).

ty is so extensively controlled by its owner that a relationship of principal and agent is created" (i.e., the parent is an alter ego of the corporation); or (2) recognition of the separate corporate status "would work fraud or injustice" on the other party.[65]

B. The Bancec *Exceptions*

Under the principal/agent exception, a court will typically "pierce the corporate veil" only where it is established that the parent exercises day-to-day operational control over the subsidiary.[66] Meanwhile, the kind of control that any sole shareholder would normally exercise over its subsidiary is insufficient to justify piercing the veil.[67]

Under the fraud or injustice exception, courts apply a fact-specific analysis to determine whether recognition of separate legal status would be unfair. Typically such cases involve the foreign state's manipulation of the corporate form for its own benefit, to the detriment of the plaintiff.[68] The primary example here is *Bancec* itself.

Bancec, a Cuban government-owned bank utilized in foreign trade, attempted to collect on a letter of credit from First National City Bank (now Citibank) in U.S. court.[69] Citibank claimed a setoff based upon the Cuban expropriation of its assets, which was effected by Banco Nacional (the Cuban National Bank) and the Cuban government.[70] After filing the initial claim, Bancec was dissolved.[71] Its assets, including the claim, were passed to the Cuban National Bank, and then to another entity shortly thereafter.[72] The Supreme Court found that the fraud or injustice exception applied because: (1) due to the dissolution of Bancec, the Cuban government and Cuban National Bank would be the only beneficiaries of any recovery; and (2) if Cuba had brought the claim itself, it

65. *Id.* at 629. It should be noted that, following amendments to the FSIA in January 2008, *Bancec* does not apply to execution or attachment in terrorism cases. *See infra* note 213. Rather, in cases falling under Section 1605A of the FSIA, "the property of an agency or instrumentality of [a foreign state that is a judgment debtor for a claim based upon acts of terrorism], including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution." National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 337, 341 (2008) (to be codified at 28 U.S.C. § 1610(g)(1)).

66. *See infra* text accompanying notes 94-95.

67. *See infra* text accompanying notes 96-98.

68. *See infra* Section III.B.2.

69. First Nat'l City Bank v. Banco Para El Commercio Exterior de Cuba, 462 U.S. 611, 613, 615 (1983).

70. *Id.* at 616.

71. *Id.*

72. *Id.* at 616, 632.

would have been subject to the counterclaim.[73] Cuba could not "reap the benefits of our courts while avoiding the obligations of international law."[74] Thus, the Court "decline[d] to adhere blindly to the corporate form where doing so would cause such an injustice" and permitted the setoff.[75]

Successfully piercing the corporate veil is a rare feat for those attempting to meet the exceptions established in *Bancec*. The cases establish that the degree of day-to-day operational control that a plaintiff must demonstrate to prove a principal/agent relationship is indeed extensive, and few are able to make this showing.[76] Moreover, the fraud or injustice exception applies rarely, and only in unique factual circumstances.[77]

This sensible approach is how the Supreme Court intended it to be. As the Court noted in *Bancec*,

> [f]reely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee. As a result, the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated.[78]

Bancec is based upon sound legal principles, and its underlying policy rationale is well founded. While this Article proposes changes to the FSIA, the law governing corporate separateness with respect to SOCs is sensible and need not be changed.

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73. *Id.* at 630-32.

74. *Id.* at 634.

75. *Id.* at 632.

76. *See infra* notes 94–98 and accompanying text.

77. *See, e.g.*, Bridas S.A.P.I.C. v. Turkmenistan, 447 F.3d 411, 417 (5th Cir. 2006) (holding that the fraud and injustice exception was satisfied because the Turkmen government manipulated the corporate form in an attempt to shield itself from liability); Banco Central de Reserva del Peru v. Riggs Nat'l Bank of Washington, D.C., 919 F. Supp 13, 16 (D.D.C. 1994) (where a Peruvian SOC had taken out a loan from an American bank and another Peruvian SOC provided an offsetting deposit, the court found that treating the entities as distinct would work a fraud or injustice, and permitted the setoff).

78. First Nat'l City Bank v. Banco Para El Commercio Exterior de Cuba, 462 U.S. 611, 626 (1983) (footnote omitted).

III. TENSIONS CAUSED BY THE CURRENT RULES GOVERNING STATE LIABILITY

The legal rules governing immunity for SOCs are a different story. Over thirty years after the enactment of the FSIA, the body of case law interpreting this statutory scheme—while reflecting a generally successful effort by Congress to render the application of immunity more predictable than it was previously—has yielded a considerable amount of confusion and doctrinal tension regarding the entities that fall within its ambit. Some confusion has arisen due to the Supreme Court's 2003 decision in *Dole Food Co. v. Patrickson*.[79] More fundamentally, however, there is an underlying tension between the distinct standards for the "organ" analysis under Section 1603(b) of the FSIA and the principal/agent analysis under *Bancec*, creating a bizarre contradiction whereby a company and its sovereign owner enjoy the fundamentally corporate status of legal separateness along with the essentially sovereign status of immunity.

A. *The Impact of* Dole Food Co. v. Patrickson

As discussed in Section I.B.2 above, the Supreme Court in *Dole Food Co. v. Patrickson* held that "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement" involving an entity a "majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."[80] The majority ownership prong was plainly the only one discussed by the Court; Dole had not argued explicitly that the companies at issue were organs of the state. The bulk of the Court's opinion was quite clear that the reach of its ruling extended only to the majority ownership prong; in fact, the Court did not once mention the organ prong.

However, when the companies at issue asserted that Israel "exercised considerable control over their operations," the Court found that "[m]ajority ownership by a foreign state, not control, is the benchmark of instrumentality status."[81] The Court went on to state that "[t]he statutory language will not support a control test that mandates inquiry in every case into the past details of a foreign nation's relation to a corporate entity in which it does not own a majority of the shares"[82]—in other words, precisely what the or-

79. 538 U.S. 468.
80. *Id.* at 474 (quoting § 1603(b)(2)).
81. *Id.* at 477.
82. *Id.*

gan test requires. Moreover, on the last page of its opinion the Court held that "a foreign state must itself own a majority of the shares of a corporation if the corporation is to be deemed an instrumentality of the state under the provisions of the FSIA."[83]

This statement suggests that *only* companies that are directly majority-owned by the state could qualify as agencies or instrumentalities, thus reading the organ prong right out of the statute. Contrary to this apparent implication, U.S. Courts of Appeal continue to apply the organ prong post-*Dole*; *Filler v. Hanvit Bank*,[84] decided by the Second Circuit in 2004, and *USX Corporation v. Adriatic Insurance Co.*,[85] decided by the Third Circuit in 2003, are two examples. However, the author can state, based on his own personal experience, that some practitioners remain under the impression—or feign to be so as it suits them in their pleadings—that direct majority ownership is the exclusive means to agency/instrumentality status.

Merely adding to the confusion, some courts in fact have interpreted *Dole* in this fashion. In *Allen v. Russian Federation*, decided by the U.S. District Court of the District of Columbia in November 2007, the court found that the plaintiffs' argument that "Rosneft is an agency or instrumentality of the Russian Federation despite its status as an indirect subsidiary of the Russian Federation . . . is nothing more than a frontal assault on the Supreme Court's decision in *Dole*."[86] These are harsh words for an argument that has been accepted by numerous courts.

When the plaintiffs urged the court to pierce the corporate veil to treat Rosneft's parent company Rosneftegaz (directly held by the Russian Federation) and the Russian Federation as a single entity, the court found that "[t]his argument . . . is simply an attempt to circumvent the *Dole* holding."[87] At this point the author will forgive the reader if he or she feels dizzy. It would seem that the "considerable uncertainty" sought to be remedied by the enactment of the FSIA over thirty years ago is creeping back.[88]

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83. *Id.* at 480.
84. 378 F.3d 213, 217 (2d Cir. 2004).
85. 345 F.3d 190, 209 (3d Cir. 2003).
86. Allen v. Russian Fed'n, 522 F. Supp. 2d 167, 184 (D.D.C. 2007).
87. *Id.* at 184-85.
88. H.R. REP. NO. 94-1487, at 6-9, 1976 U.S.C.C.A.N. 6604, 6604-07.

B. *The Underlying Tension Between Organ Status and* Bancec

1. The Role of Sovereign States and Their Subsidiaries

A second, more fundamental problem relates to the underlying tension between the organ analysis under the agency/instrumentality formulation and the principal/agent analysis under *Bancec*.[89] Historically, sovereign immunity was a concept created to apply to foreign states proper. But states have become more sophisticated, structuring their commercial operations through legally separate entities that also enjoy immunity under the FSIA.

Meanwhile, the benefits of corporate separateness historically have applied to traditional companies and individuals who seek to compete in the marketplace. By creating a separate company, a company or individual can engage in a commercial venture without the worry of being held liable for that separate entity's obligations. This legal principle rightfully encourages and promotes investment, entrepreneurship and activity that fosters growth in a given country's—or increasingly, the interconnected world's—economy.

Sovereign states have been the most powerful entities in the world for some time. Their control of economic and other public policy, as well as their immense financial resources due to their unique power to tax their inhabitants, renders sovereign states advantageously and specially positioned to participate in the global economy. As the Supreme Court discussed in *Bancec*, the ability of sovereign states to utilize separate subsidiaries can have numerous positive effects on society:

> Increasingly during this century, governments throughout the world have established separately constituted legal entities to perform a variety of tasks. The organization and control of these entities vary considerably, but many possess a number of common features. . . . These distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies. These same features fre-

89. First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec), 462 U.S. 611 (1983).

> quently prompt governments in developing countries to establish separate juridical entities as the vehicles through which to obtain the financial resources needed to make large-scale national investments.[90]

Foreign states, both developed and developing, utilize SOCs to implement important commercial goals and promote economic growth.

2. The Tension Between the Principal/Agent and Organ Standards

The case for the utility of separate corporate subsidiaries for foreign states is convincing, as is the principle that states should generally be insulated from the obligations of these subsidiaries. However, it is unconvincing that such entities, market players that they are, should enjoy a level of immunity similar to that of the foreign state proper. Indeed, a gap exists in the law that yields such a result; that gap is created by the fact that agency/instrumentality status and principal/agent status are based upon two different standards, resulting in numerous entities that enjoy both immunity, essentially a sovereign feature, and corporate separateness, which is essentially a private feature. This gap unjustly tilts the competitive playing field of the marketplace in the direction of sovereigns and their SOCs.

As discussed in further detail in Section I.B.2 above, relatively speaking, it is not very difficult to establish organ status. Essentially, the purpose of the entity should somehow be public, and the state must exert some reasonable amount of control over the entity.[91] Under the *Bancec* standard, on the other hand, the control exercised by the state must be significant, rising to the level of day-to-day operational control.[92] As described by the U.S. Court of

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90. *Id.* at 624-25 (footnote omitted). According to the Court,

> [a] typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply.

Id.

91. *See* Filler v. Hanvit Bank, 378 F.3d 213, 217 (2d Cir. 2004); *see also* note 53 and accompanying text.

92. *Bancec*, 462 U.S. at 614.

Appeals for the Fifth Circuit, despite the use of the term "agency" in both contexts, the *Bancec* analysis is a "completely different inquiry," and "the level of state control required to establish an 'alter ego' relationship is more extensive than that required to establish FSIA 'agency.' "[93]

For example, when an Iranian cabinet minister became involved in the daily decision-making process of an SOC and the company was carrying out Iranian political (as opposed to commercial) policy, this constituted day-to-day operational control.[94] Additionally, when Brasoil (owned by Braspetro, which was owned by Petrobras) had no president, but its parent companies executed agreements on behalf of Brasoil, handled Brasoil's legal work, made decisions at their headquarters regarding Brasoil's day-to-day operations, and utilized Brasoil's bank accounts in New York for their worldwide transactions, Petrobras exercised day-to-day operational control over Brasoil.[95]

Such cases are anomalous. More typical was a case where the U.S. Court of Appeals for the Ninth Circuit found that proposing candidates for the board of directors, assisting "in the preparation of regulations, budgets, and reports on banking operations in Iran," but no involvement in day-to-day operations, was insufficient to establish a principal/agent relationship.[96] Another example occurred when the U.S. Court of Appeals for the D.C. Circuit found that owning all stock, appointing the board of directors, financial infusion, and the approval of certain sales, while again lacking control of day-to-day operations, was also insufficient to establish a principal/agent relationship.[97] Finally, a last representative example occurred when the U.S. District Court for the Southern District of New York found that appointing the board of directors, a majority of whom are government employees, typifies all instrumentalities and their parent governments; the Court also found that the power of the government to decree the entity's dissolution did not

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93. Hester Int'l Corp. v. Fed. Republic of Nig., 879 F.2d 170, 176 n.5 (5th Cir. 1989).

94. McKesson Corp. v. Islamic Republic of Iran, 52 F.3d 346, 352 (D.C. Cir. 1995).

95. U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co., No. 97 CIV. 6124(JGK), 1999 WL 307666, at *9 (S.D.N.Y. May 17, 1999); U.S. Fid. & Guar. Co. v. Petroleo Brasieiro S.A.-Petrobras, No. 98 CIV. 3099(JGK), 1999 WL 307642 (S.D.N.Y. May 17, 1999). These two cases were companion actions decided the same day. *See also* Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Eth., 616 F. Supp. 660, 666 (W.D. Mich. 1985) (the government exercised direct control over the company; all checks over $25,000 needed approval by a government-appointed director; all invoices for shipments exceeding $13,000 needed approval by a government agency).

96. Flatow v. Islamic Republic of Iran, 308 F.3d 1065, 1073 (9th Cir. 2002).

97. Transamerica Leasing, Inc. v. La Republica de Venez., 200 F.3d 843, 851-52 (D.C. Cir. 2000).

establish a principal/agent relationship.[98] Piercing the corporate veil rarely occurs; more typically, separate legal status remains intact.

3. Specific Examples of Dual Protection

Thus, many cases arise where an SOC and its sovereign parent enjoy the dual protection of both corporate separateness and immunity. For example, in *Corporación Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect* (decided by the U.S. Court of Appeals for the Ninth Circuit in 1996), a dispute had arisen over a freight contract between Pemex-Refinación ("Pemex-Refining") and a Mexican private corporation.[99] Pemex is the Mexican state-owned oil company.[100] In 1992, Pemex was restructured so that it became a holding company for four subsidiaries, each of which carried out a different part of the oil business.[101] Pemex-Refining, as the name suggests, is responsible for the refining, manufacturing, and distribution of gasoline and other products.[102]

The Ninth Circuit found that Pemex-Refining was an organ of the Mexican state.[103] Quoting from the court below, it noted that

> [Pemex-Refining] is an integral part of the United Mexican States. Pemex[-Refining] was created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation; it is entirely owned by the Mexican Government; is controlled entirely by government appointees; employs only public servants; and is charged with the exclusive responsibility of refining and distributing Mexican government property.[104]

The issue of piercing the corporate veil was not before the court, as

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98. Minpeco, S.A. v. Hunt, 686 F. Supp. 427, 435-36 (S.D.N.Y. 1988).

99. 89 F.3d 650, 652.

100. *Id.* at 654.

101. *Id.*

102. *Id.*

103. *Id.* at 655.

104. *Id.* (quoting District Court opinion) (alteration in original). Other courts have found Pemex to be an agency or instrumentality under the FSIA. In *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General*, 923 F.2d 380, 386 n.7 (5th Cir. 1990), the Fifth Circuit found that "[t]here is no question that Pemex is a 'foreign state' for purposes of the FSIA." Similarly, in *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533 (5th Cir. 1992) (citing *Stena*, 923 F.2d), the U.S. Court of Appeals for the Fifth Circuit determined that Pemex's status as a foreign government instrumentality was "undisputed," without engaging in an organ or majority ownership analysis. In each case, the Court found that the plaintiff had failed to demonstrate the applicability of the commercial activity exception, so Pemex was immune from suit.

the plaintiff was not seeking to hold the Mexican government liable for Pemex-Refining's obligations under the contract. However, based upon the other cases discussed above, it is clear that the above facts would be insufficient to establish a principal/agent relationship between Pemex-Refining and the Mexican government.

Another example is presented by the U.S. Court of Appeals for the Fifth Circuit's decision in *Kelly v. Syria Shell Petroleum Development B.V.*[105] This case involved an action brought by the survivors of firefighters who had been killed by a fire caused by gas escaping from a well operated by the defendants.[106] The court noted that Al Furat Petroleum Company ("Al Furat"), a Syrian company owned 50% by Syrian Petroleum Company (an entity wholly owned by the Syrian government), 31.25% by Syria Shell, and 18.75% by Deminex Syria GmbH,

> was formed pursuant to a government authorization decree stating that Al Furat's objective is to develop identified petroleum reserves in Development Lease Areas in Syria; its by-laws require that, for its eight-member board, four be appointed by Syrian Petroleum Company, with one always serving as chairman; and . . . Syrian Petroleum Company's representatives on the board have invariably been Syrian government officials representing the highest level of government.[107]

The court concluded that Al Furat had established that it was an organ of the Syrian government.[108] Again, veil piercing was not at issue—the firefighters' survivors were not seeking compensation from the Syrian government—but the facts outlined above would seem insufficient to establish a principal/agent relationship.

Each of these cases involved state-owned oil companies that the FSIA provides with immunity, yet the state itself also enjoys the benefits of corporate separateness. The activities in which these entities engage are fundamentally commercial, yet they compete with other companies in the market with the benefit of presumed immunity. In an age when SOCs exert immense power and influence, their ability to assert immunity seems less appropriate with each passing day on which the price of a barrel of oil rises.

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105. 213 F.3d 841 (5th Cir. 2000).
106. *Id.* at 844-45.
107. *Id.* at 847-48.
108. *Id.* at 849.

C. The Use of Subsidiaries by Sovereigns

SOCs, particularly those in the oil and gas industry, are increasingly influential. The far-reaching power of the Standard Oil Trust, followed by the dominance of its former constituent parts that begot Exxon, Mobil, Chevron and others, long ago ceded control of much of the world's oil reserves to host governments.[109] Not only do SOCs control the vast majority of the world's oil and gas reserves,[110] but they are also venturing out to invest internationally. For example, in 2002, China formally adopted a policy of encouraging its three main state-owned oil companies to engage in global exploration projects.[111] Moreover, with 84% of global growth in oil production over the next decade occurring in fifteen countries—only one of which, Canada, freely permits private exploration and development—the amount of reserves controlled by SOCs will only increase.[112]

The power of SOCs is not limited to oil companies such as Saudi Aramco, PdVSA, Pemex, National Iranian Oil Company, Kuwait Petroleum Company, Abu Dhabi National Oil Company, Nigerian National Petroleum Company, Gazprom, Rosneft, Chinese National Petroleum Company, Petrobras, and Statoil, to name a few. Indeed, SOCs are active market players in telecommunications, banking, and numerous other sectors.

While it is true that political or foreign policy reasons creep into (or in some cases, dominate) the commercial decisions of SOCs, for the most part such companies are market players in the same manner as their more traditional, non-state counterparts. SOCs participate in the international economy in a significant way, and they structure their holdings and investments much the same as traditional companies do. In order to demonstrate these characteristics of SOCs, it is helpful to consider three specific cases: (1) the Middle East (based upon a study of SOCs from five countries in the region); (2) Russia; and (3) Brazil. Fundamentally, while the bureaucratic nature and at times politically driven decision-making of SOCs distinguish them from their non-state counterparts, at

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109. Rosenberg, *supra* note 2.

110. *Id*. Even in the 1970s, Western oil companies controlled over half of global oil production. They now produce only 13%, and the ten companies holding the world's largest reserves are all SOCs. Jad Mouawad, *As Oil Giants Lose Influence, Supply Drops*, N.Y. TIMES, Aug. 19, 2008, at A1(L).

111. Flynt Leverett & Pierre Noël, *The New Axis of Oil*, THE NATIONAL INTEREST, Summer 2006, at 66.

112. Patrice Hill, *State Monopolies Nudge Out Big Oil*, WASHINGTON TIMES, May 24, 2008, at A1. Indeed, Western oil companies "are being forced to renegotiate contracts on less-favorable terms and are fighting losing battles with assertive state-owned companies." Mouawad, *supra* note 110.

their core SOCs are commercial entities that interact with the marketplace much as traditional companies do.

1. The Middle East

Saudi Arabian oil production, resulting in more oil exports than any other country in the world,[113] is spearheaded by the state-owned oil company, Saudi Aramco.[114] Aramco has recently been initiating joint ventures with private investors in downstream activities in Saudi Arabia.[115] Additionally, Aramco has interests in refineries in the United States, China, South Korea, Japan, and the Philippines.[116] Its U.S. interests include three refineries in Louisiana and Texas that it holds jointly with Royal Dutch/Shell.[117]

Of course, Middle Eastern oil power is not limited to Saudi Arabia. A study conducted by Dr. Valérie Marcel (Principal Researcher with the Energy, Environment and Development Programme at Chatham House, home of the Royal Institute of International Affairs in London) from 2003 to 2005, involving numerous interviews with executives of the state oil companies of Saudi Arabia, Kuwait, Iran, Algeria, and Abu Dhabi, yielded much helpful information regarding how such SOCs function.[118] Dr. Marcel found that these SOCs "want to operate like [international oil companies], though they are clearly national companies with public ownership of capital, special status in the hydrocarbon domain, obligations to the national market and a common history."[119] While these companies "wish to be seen as independent commercial entities . . . [they] play on their government's relationship with the host country's authorities to obtain deals."[120]

Dr. Marcel described the necessity for "clear distinction between the roles of each institution" (the SOC and its government owner):

> Strategy is the plan of action by which the operator,

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113. Energy Information Administration, U.S. Dep't of Energy, Saudi Arabia Country Analysis Brief (Aug. 2008), http://www.eia.doe.gov/cabs/Saudi_Arabia/pdf.pdf.

114. Saudi Aramco has repeatedly been considered by courts to be an agency or instrumentality of a foreign state falling under the FSIA. *See, e.g.*, Mendenhall v. Saudi Aramco, 991 F. Supp. 856, 857-58 (S.D. Tex. 1998); Good v. Aramco Servs, Co., 971 F. Supp. 254, 256 (S.D. Tex. 1997).

115. Saudi Arabia Country Analysis Brief, *supra* note 113.

116. *Id.*

117. *Id.*

118. MARCEL, *supra* note 3, at 10-12.

119. *Id.* at 55.

120. *Id.* at 71.

> that is, the national oil company, the international oil company, or both set out how they will achieve the targets established by government. The potential blurring between the roles of government and [SOC] arises because the state is the shareholder of the company and, as such, participates in the strategy-making process. The state may indeed be represented on the supreme petroleum council (SPC), which approves the strategic plan, and on the company's board, which manages day-to-day operations. If the state is involved excessively in the management of operations, the national oil company's decisions will be relatively more influenced by political objectives, presumably to the detriment of commercial considerations.[121]

As described by a Saudi Aramco manager, "[w]e don't set government policy (in relation to OPEC in particular). We make sure we don't get sucked into their process. It's better to divide these roles. We deliver the goods."[122] In Kuwait, on the other hand, Dr. Marcel found that "political interference hampers operations."[123]

Ultimately, Dr. Marcel concluded that "[SOCs] are now competing directly with [international oil companies] for projects and investment opportunities overseas, long the preserves of the supermajors."[124] Moreover, "[i]n today's high oil price environment, they have also been able to leverage their influence to an extent not seen in recent years."[125] Finally, she noted, tellingly, that "[SOCs] are proving themselves able to compete head-on with [international oil companies] in everything from field development to mergers and acquisitions."[126]

2. Russia

Perhaps the most intriguing and politically complex example of how states utilize SOCs is presented by Russia. Gazprom and Rosneft, the largest Russian gas and oil companies respectively,[127] are

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121. *Id.* at 77.
122. *Id.* at 80.
123. *Id.* at 85.
124. *Id.* at 228.
125. *Id.*
126. *Id.*
127. *See* Andrew E. Kramer, *As Gazprom Goes, So Goes Russia*, N.Y. TIMES, May 11, 2008, at 1 [hereinafter Kramer, *As Gazprom Goes*]; Rosneft History, http://www.rosneft.com/printable/about/history (last visited Mar. 4, 2009).

critical strategic parts of a newly assertive Russia. Indeed, that Russia's new President, Dmitri Medvedev, came to the presidency directly from his position as Gazprom chairman is not an insignificant fact.[128] These companies no doubt benefit significantly from their positions as Russia's favored sons; fully two-thirds of Rosneft's production comes from former Yukos property seized by the Russian authorities.[129] At the same time, their commercial policies tend to be aligned with the politically motivated directives of the Kremlin, as when Gazprom halted gas supplies to Ukraine following Ukraine's turn westward[130] or when Transneft (a Russian SOC that manages pipelines) slowed the flow of oil to the Czech Republic following that country's discussions with the United States regarding installation of missile defense radar detection equipment on Czech territory.[131]

Gazprom extracts more natural gas than any other company in the world.[132] It also possesses the largest natural gas reserves and the largest gas transmission system in the world.[133] The Russian government holds a 50.002% interest in Gazprom,[134] whose stated goal is to "surpass Exxon Mobil as the world's largest publicly traded company" by 2014.[135]

Rosneft, meanwhile, was created in 1993, inheriting assets once held by the USSR Ministry of Oil and Gas.[136] In 1995, Rosneft was opened to partial private ownership.[137] In recent years Rosneft has frequently acquired new oil assets within Russia—often owing to opportunities opened up by its parent, the Kremlin. In 2006, Rosneft engaged in a restructuring that involved the consolidation of twelve subsidiaries.[138] Additionally, it conducted a large IPO, placing approximately 15% of its shares in London and Moscow and raising about US$10.7 billion.[139]

As for Gazprom's international reach, much like a traditional multinational company, Gazprom owns numerous global assets,

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128. Kramer, *As Gazprom Goes*, *supra* note 127.

129. Andrew E. Kramer, *Russia Fattens Up A State Oil Company*, N.Y. TIMES, June 8, 2006, at C7 [hereinafter Kramer, *Russia Fattens Up*].

130. *Id.*

131. Andrew E. Kramer, *Czechs See Oil Flow Fall and Suspect Russian Ire on Missile System*, N.Y. TIMES, July 12, 2008, at A5.

132. Kramer, *Russia Fattens Up*, *supra* note 129.

133. About/Gazprom Today, http://www.gazprom.com/eng/articles/article8511.shtml (last visited Mar. 4, 2009).

134. *Id.*

135. Kramer, *As Gazprom Goes*, *supra* note 128.

136. Rosneft History, http://www.rosneft.com/printable/about/history (last visited Mar. 4, 2009).

137. *Id.*

138. *Id.*

139. *Id.*

particularly gas distribution companies in Europe, including companies in Germany, the Czech Republic, Finland, Hungary, Italy, and the United Kingdom, among others.[140] Gazprom is also engaging in exploration and production in Venezuela, Libya, and Algeria.[141] Finally, Gazprom is in the retail supply business in the United Kingdom, Denmark, France, Scandinavia, and Hungary, and also has a subsidiary in Houston that markets LNG and natural gas.[142] In all, Gazprom has founded approximately sixty subsidiaries and also owns—wholly or in part—approximately 100 Russian or foreign companies.[143]

While Gazprom enjoys numerous advantages due to its ownership by the Russian government, and its business decisions are at times driven by political policy, it functions much like a non-state company. Gazprom has a sophisticated corporate structure, is owned by international shareholders, has invested in various countries around the world, and enjoys numerous commercial relationships. Regardless of the source of its power, its activity is essentially commercial.

3. Brazil

Brazilian SOC Petrobras (the Brazilian government holds 55.7% of its voting shares) controls more than 95% of Brazil's crude oil production and is involved in all aspects of Brazil's oil sector.[144] Petrobras operates in twenty-three countries outside of Brazil. Included in its international operations are "interests in 331 offshore blocks in the United States" and a 50% interest in a Texas refinery.[145]

Petrobras also owns a Cayman Islands company, Petrobras International Finance Company, that "acts as an intermediary between third-party oil suppliers and [Petrobras] by engaging in crude oil and oil product purchases from international suppliers, and reselling crude oil and oil products in U.S. dollars to [Petrobras]."[146] Petrobras has over two dozen direct and indirect subsidiaries.[147] Many of them are incorporated in Brazil, but several are

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140. Nadejda Makarova Victor, *Gazprom: Gas Giant Under Strain* 26 (Stanford Program on Energy and Sustainable Dev., Working Paper No. 71, 2008).

141. *Id.* at 26-27.

142. *Id.* at 27.

143. *Id.*

144. Energy Information Administration, U.S. Dep't of Energy, Brazil Country Analysis Brief, (Sept. 2007), http://www.eia.doe.gov/cabs/Brazil/pdf.pdf.

145. Brazilian Petroleum Corp.-Petrobras. Annual report (Form 20-F), at 50, 52 (Dec. 31, 2007).

146. *Id.* at 53.

147. *Id.* Exhibit 8-1.

incorporated in the Cayman Islands, the Netherlands, the United Kingdom, Bermuda, and Singapore.[148]

4. Trends from the Three Examples

Each of these examples involves companies whose essential purpose is commercial. There are, of course, several notable differences between these companies and traditional companies. For one, in the case of SOCs, dividends find their way into the national budget. To draw from a case discussed earlier, dividends from Pemex constitute approximately 40% of the Mexican national budget.[149] Additionally, as seen in particular with Gazprom and Rosneft, political considerations can often drive decision-making.

At their core, though, SOCs are fundamentally commercial. These companies engage in IPOs, have sophisticated corporate structures, invest in numerous ventures around the world, and otherwise engage in complex financial transactions. There is little justification for endowing these companies with such significant advantages over their non-state counterparts. The nature of these advantages is explored further in the following section.

D. The Current Exceptions to Immunity

As discussed above in Section I.A.2, the FSIA is based upon a system whereby certain entities enjoy a presumption of immunity. If the opposing party can demonstrate the existence of an applicable exception to immunity, the entity is not immune. Despite the availability of these exceptions, in many cases it is actually quite difficult for parties suing or attempting to attach the assets of an SOC to establish an applicable exception. As a result, the initial presumption of immunity is a significant advantage for SOCs.

First, and most importantly, the advantages with respect to immunity from execution enable an SOC to resist attachment or execution in a way that non-state companies cannot. Second, the commercial activity exception to immunity from jurisdiction can be difficult to establish. Finally, because courts are nervous to tackle issues that potentially impact U.S. foreign policy, the expropriation exception provides them with yet another way to avoid hearing cases addressing issues such as takings under international law.

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148. *Id.*

149. *Running Just to Stand Still*, ECONOMIST, Dec. 19, 2007, at 55-56, *available at* http://www.economist.com/world/americas/displaystory.cfm?story_id=10328190.

1. Protection from Attachment

Section 1610 of the FSIA provides foreign states—including agencies and instrumentalities—with the tools to delay or hinder enforcement of judgments and to prevent the imposition of pre-judgment security.[150] Section 1610(a) lists the general exceptions to immunity from attachment or execution.[151] Section 1610(b), meanwhile, provides a list of additional exceptions that apply to agencies and instrumentalities.[152]

Critically, however, Section 1610(c) provides that

> [n]o attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.[153]

While the FSIA does not specify what constitutes a reasonable period of time, in one case, the U.S. District Court for the Southern District of New York found thirty days to meet this standard.[154] This will often provide an SOC with ample time to move its assets after the issuance of a judgment against it. This grace period is, of course, not available to other market participants.

Additionally, Section 1610(d) provides an extremely high standard for the exception to immunity from pre-judgment attachment. Generally, SOCs are immune from pre-judgment attachment unless: (1) the property is used for commercial activity in the U.S.; (2) the SOC has *explicitly* waived its immunity from pre-judgment attachment; and (3) the purpose of attachment is to secure satisfaction of a judgment that has or may be entered, not to obtain jurisdiction.[155] While the third requirement is not difficult to establish, the first two requirements present significant obstacles to many efforts at pre-judgment attachment of the assets of an SOC.

With respect to the first requirement, that the property be used for commercial activity in the U.S., the term "commercial," while not defined in the FSIA, refers to situations where the state acts as

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150. 28 U.S.C. § 1610 (2000).
151. *Id.* § 1610(a).
152. *Id.* § 1610(b).
153. *Id.* § 1610(c).
154. FG Hemisphere Assocs. v. Republique du Congo, No. 01 CIV 8700SASHBP, 2005 WL 545218, at *7 (S.D.N.Y. Mar. 8, 2005) (order granting motion to execute on judgment).
155. 28 U.S.C. § 1610(d) (2000).

a private player in the market, rather than as a regulator.[156] In other words, an activity is commercial if it is the kind of activity in which private persons may engage, rather than the type of activity that is peculiar to a sovereign.[157] This amorphous standard has proven difficult, in many cases, for courts to apply.[158]

Meanwhile, "commercial activity" is defined in Section 1603(d) of the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[159] It is important to note that the question of whether property is used for commercial activity in the U.S. has nothing to do with how the SOC generated the asset. Rather, the property must be "put into action, put into service, availed or employed *for* a commercial activity, not *in connection* with a commercial activity or *in relation* to a commercial activity" in the U.S.[160]

SOCs may not have physical assets in the U.S., and savvy SOCs may not have cash sitting in a bank account in New York. Thus, a judgment debtor may find itself seeking intangible assets, such as receivables—the payment that a U.S. buyer owes to a state oil company for a purchase of crude, for example. Because "the situs of a debt obligation is the situs of the debtor," such receivables are considered to be an asset located in the U.S.[161] However, it is the rare case when an SOC has used such an asset for commercial activity in the U.S.; assigning the receivable or utilizing it as collateral for a loan are examples that come to mind.[162]

Even if the judgment debtor can establish that the asset has

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156. Republic of Arg.. v. Weltover, Inc., 504 U.S. 607 (1992) (holding that bond issuance by the state is commercial); Tex. Trading & Milling Corp. v. Fed. Republic of Nig., 647 F.2d 300 (2d Cir. 1981) (holding that private contract to purchase goods is commercial).

157. *Tex. Trading & Milling Corp.*, 647 F.2d at 309; *see also* De Sanchez v. Banco Central de Nicar., 770 F.2d 1385, 1392-93 (5th Cir. 1985) (holding that regulation and supervision of a nation's foreign exchange reserves is a sovereign activity); MOL, Inc. v. People's Republic of Bangl., 736 F.2d 1326, 1329 (9th Cir. 1984) (holding that only a state can regulate its imports and exports).

158. Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat It Like One*, 5 CHI. J. INT'L L. 675, 684 (2005) ("[A]mbiguities and challenges exist for the courts in this regard. Fact patterns abound[—]from expropriations to governmental trade in wildlife[—]involving activities that do not easily lend themselves to characterizations as either private or governmental."); Steven Swanson, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act,* 13 EMORY INT'L L. REV. 445, 455 (1999) ("Applying the [FSIA] has been far from simple. In particular, the commercial exception has proved to be troublesome.").

159. 28 U.S.C. § 1603(d) (2000).

160. Af-Cap Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080, 1091 (9th Cir. 2007).

161. Af-Cap Inc. v. Congo, 383 F.3d 361, 371 (5th Cir. 2004).

162. *See id.* at 363.

been used for commercial activity in the U.S., it also must show that the SOC has explicitly waived its immunity from pre-judgment attachment. A general waiver typically is insufficient, and a waiver of immunity from jurisdiction—or for that matter, a waiver of immunity from attachment—will not be construed as a waiver of immunity from pre-judgment attachment.[163] While the SOC need not use the phrase "prejudgment attachment" in order to constitute an explicit waiver,[164] establishing the presence of all three elements for the exception to immunity from pre-judgment attachment is a tall order indeed.

It is true that Section 1610(b) provides a lower standard for agencies and instrumentalities for post-judgment attachment—in particular, because the judgment debtor need not establish that the property itself has been used for commercial activity in the United States, but rather merely that the agency or instrumentality generally engages in commercial activity in the United States. However, it should be kept in mind that in such cases this showing must be coupled with a demonstration of an additional element.[165] In any event, the advantages accruing to SOCs from the "reasonable period of time" that must pass before a court can order execution, as well as the high barriers to pre-judgment attachment, tilt the playing field toward SOCs compared to their non-state counterparts.

2. The Commercial Activity Exception to Immunity from Jurisdiction

Plaintiffs are often not so fortunate as to have secured an explicit waiver from the foreign state of immunity from jurisdiction.

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163. *See, e.g.*, O'Connell Mach. Co. v. M.V. "Americana", 734 F.2d 115, 117 (2d Cir. 1984) (finding that a waiver of "immunity 'from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject' " was not sufficient to establish a waiver of pre-judgment attachment).

164. Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 258, 261 (2d Cir. 2003) (finding explicit waiver where arbitral agreements provided that the arbitrators " 'are relieved of all judicial formalities and may abstain from following the strict rules of law' "); Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 676 F.2d 47, 49 (2d Cir. 1982) (finding explicit waiver where the sovereign had agreed to " 'irrevocably and unconditionally waive[] any right or immunity from legal proceedings including suit judgment and execution on grounds of sovereignty which it or its property may now or hereafter enjoy' ").

165. Specifically, the judgment debtor must demonstrate one of the following: (1) waiver of immunity from execution or attachment as stated in Section 1605(a)(1) (implicit or explicit, but simple waiver of immunity from jurisdiction is insufficient); (2) the action is based upon commercial activity as outlined in Section 1605(a)(2); (3) the action is based upon a taking in violation of international law pursuant to Section 1605(a)(3); (4) the action is based upon a case for money damages for personal injury or death or property damage as outlined in Section 1605(a)(5); or (5) the action is based upon a terrorist act as provided in Section 1605A.

In many cases, they simply have not had the opportunity. Moreover, the implicit waiver provision in Section 1605(a)(1) is construed very narrowly.[166] Thus, plaintiffs find themselves relegated to relying on another exception—most commonly the commercial activity exception.

Section 1605(a)(2) provides an exception to immunity from jurisdiction in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[167]

The definition of "commercial activity" and the types of activities that are "commercial" are discussed in Section III.D.1 above. Establishing that an SOC has engaged in commercial activity is straightforward; after all, most SOCs are inherently commercial. However, it is insufficient for the purposes of establishing an exception simply to demonstrate that the foreign state has engaged in commercial activity. Rather, the plaintiff must demonstrate a nexus between the foreign state's commercial acts, the plaintiff's claim, and the United States.[168]

Section 1605(a)(2) provides three prongs under which this exception to immunity applies; in each case the claim is "based upon" a particular type of act. The court must focus on "those *specific* acts that form the basis of the suit."[169] A claim is based upon those facts which, if proven, would entitle the "plaintiff to relief under his

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166. *See, e.g.*, Shapiro v. Republic of Bol., 930 F.2d 1013, 1017 (2d Cir. 1991) (determining that the Republic of Bolivia did not implicitly waive sovereign immunity, even though it filed suit on associated claims in U.S. court); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444-45 (D.C. Cir. 1990) (refusing to find an implied waiver of sovereign immunity when the Republic of Iran failed to include a defense of sovereign immunity in its initial answer, and allowing Iran to file an amended answer with the defense). *But see* Joseph v. Office of the Consulate Gen. of Nig., 830 F.2d 1018, 1022-23 (9th Cir. 1987) (holding that the waiver exception applied because the parties entered into a contract that specifically contemplated dispute resolution in U.S. courts but recognizing precedent for a narrow reading of implicit waiver).

167. 28 U.S.C. § 1605(a)(2) (2000).

168. Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 200, 202 (5th Cir. 1984); Sugarman v. Aeromexico, Inc., 626 F.2d 270, 272-73, 275 (3d Cir. 1980).

169. Joseph v. Office of the Consulate Gen. of Nig., 830 F.2d 1018, 1023 (9th Cir. 1987) (emphasis in original).

theory of the case."[170] As noted by the U.S. Court of Appeals for the Second Circuit, this suggests an extremely close connection between the act and the claim:

> What does "based upon" mean? At a minimum, that language implies a causal relationship. . . . That is, it must be true that without the Act, there would be no judgments on which to sue. But this is not enough. . . . "[B]ased upon" requires a degree of closeness between the acts giving rise to the cause of action and those needed to establish jurisdiction that is *considerably greater than common law causation requirements*.[171]

Establishing the requisite nexus among the United States, the foreign state's acts and the claims of the plaintiff is anything but straightforward as an evidentiary matter. As noted in the quote directly above, this nexus is "considerably greater" than what would apply in the context of a typical company.[172] Thus, Section 1605(a)(2) is another example of how, due to the difficulty of establishing an applicable exception, the presumption of immunity is a significant advantage for SOCs.

The first prong under Section 1605(a)(2) applies where "the action is based upon a commercial activity carried on in the United States by the foreign state."[173] According to Section 1603(e), "[a] 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States."[174]

Saudi Arabia v. Nelson, decided by the U.S. Supreme Court in 1993, is the most prominent case addressing the first prong of Section 1605(a)(2).[175] Saudi Arabia, through its agent, had recruited Scott Nelson in the United States to work at a state-owned hospital in Saudi Arabia.[176] Following an interview in Saudi Arabia, Nelson signed an employment contract and attended an orientation session in the United States.[177] Several months after moving to Saudi Arabia, Nelson began complaining repeatedly about safety

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170. Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993).

171. Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp., 204 F.3d 384, 390 (2d Cir. 2000) (emphasis added).

172. *Joseph*, 204 F.3d at 390.

173. 28 U.S.C. § 1605(a)(2) (2000).

174. *Id.* § 1603(e).

175. Saudi Arabia v. Nelson, 507 U.S. 349, 351 (1993).

176. *Id.* at 352.

177. *Id.*

defects in the hospital's oxygen and nitrous lines.[178] Six months after his first complaints, Nelson was detained by Saudi agents, who brutally tortured him.[179] Nelson was then detained in a prison for over a month.[180] Eventually, following his return to the United States, Nelson filed suit against Saudi Arabia.[181]

While Saudi Arabia had recruited Nelson in the United States and Nelson had signed an employment contract and engaged in training in the United States, the Supreme Court found that Nelson's claim was not based upon those acts.[182] Rather, his claim was based upon the alleged torts committed in Saudi Arabia, which were not commercial acts, let alone commercial acts committed in the United States.[183] Thus, the Court found that Saudi Arabia was immune from suit because Nelson had failed to establish that his suit was "based upon a commercial activity" carried on in the United States.[184] This case provides a clear example of the exacting manner in which courts demand that the specific acts at issue were commercial acts that occurred in the United States.[185]

The second prong under Section 1605(a)(2) applies where "the action is based upon . . . an act performed in the United States in connection with a commercial activity of the foreign state elsewhere."[186] This seldom-applied prong "is 'generally understood to apply to non-commercial acts in the United States that relate to commercial acts abroad.'"[187] Of course, the claim must be based upon the act performed in the United States—not the commercial act abroad.[188]

The final prong under Section 1605(a)(2) applies where "the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[189] That an American firm or individual suffers loss caused by a foreign act does not itself establish a "direct effect in the United States."[190] Indeed, the U.S. Court of Appeals for the Second Cir-

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178. *Id.*
179. *Id.* at 352-53.
180. *Id.*
181. *Id.* at 353.
182. *Id.* at 358.
183. *Id.*
184. *Id.* at 358, 363.
185. *See id.*
186. 28 U.S.C. § 1605(a)(2) (2000).
187. Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 390 (5th Cir. 1999) (quoting Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 892 n.5 (5th Cir.), *cert. denied* 119 S.Ct. 591 (1998)).
188. *Id.*
189. 28 U.S.C. § 1605(a)(2).
190. Antares Aircraft, L.P. v. Fed. Republic of Nig., 999 F.2d 33, 36 (2d Cir. 1993).

cuit has stated that "[i]f a loss to an American individual and firm resulting from a foreign tort were sufficient standing alone to satisfy the direct effect requirement, the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states."[191]

It is not necessary to establish that the effect be substantial or foreseeable.[192] Rather, the effect must simply be direct—that is, an effect that follows "as an immediate consequence of the defendant's . . . activity."[193] Thus, the Supreme Court held that Argentina's rescheduling of bonds payable to accounts in New York—the place of performance for Argentina's obligations—caused a direct effect in the United States.[194] The critical distinction in this case and others involving application of this prong is, according to the U.S. Court of Appeals for the Ninth Circuit, that "something legally significant actually happened in the U.S."[195] Unlike the failure to fulfill a legal obligation within the United States, financial loss alone does not establish a direct effect.[196]

In sum, the case law establishes what the U.S. Court of Appeals for the Fifth Circuit has stated succinctly: "The requirement under the FSIA of a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign is a significant barrier to the exercise of subject-matter jurisdiction in United States courts."[197]

3. The Expropriation Exception

As courts tend to go out of their way to avoid hearing cases that relate to sovereigns, the FSIA provides them with a ready tool to dismiss such cases. The Act of State Doctrine and Political Question Doctrine provide ample opportunities for courts to avoid resolving cases that courts view as touching on sensitive international issues. In this respect, the FSIA has served as an additional means for courts to remove such disputes from their jurisdiction.

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191. *Id.*

192. Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 617 (1992) (quoting Weltover, Inc., v. Republic of Arg., 941 F.2d 145, 152 (2d Cir. 1991)).

193. *Id.* at 618 (alteration in the original) (quoting Weltover, Inc. v. Republic of Arg., 941 F.2d 145, 152 (2d Cir. 1991)).

194. *Id.* at 618-19.

195. Gregorian v. Izvestia, 871 F.2d 1515, 1527 (9th Cir. 1989) (quoting Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1515 (D.C. Cir. 1988)).

196. Siderman de Blake v. Republic of Arg., 965 F.2d 699, 710 (9th Cir. 1992); *see also* Alperin v. Vatican Bank, No. C-99-04941 MMC, 2007 WL 4570674, at *7 (N.D. Cal. Dec. 27, 2007); Adeler v. Fed. Republic of Nig., 107 F.3d 720, 726-27 (9th Cir. 1997).

197. Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General, 923 F.2d 380, 387 (5th Cir. 1991).

Cases decided under Section 1605(a)(3) provide a good example. As a reminder, this exception to jurisdictional immunity covers cases

> in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.[198]

At the jurisdictional stage, the court does not need to decide whether the taking actually violated international law.[199] Rather, as long as a claim is substantial and non-frivolous, this requirement is met.[200] Nonetheless, in 37 of 47 cases found by the author in which Section 1605(a)(3) was at issue, the plaintiff's claim was dismissed relatively quickly because the plaintiff could not establish the applicability of the exception.[201]

Nemariam v. Federal Democratic Republic of Ethiopia,[202] decided by the U.S. Court of Appeals for the D.C. Circuit in 2007, is a good example of the lengths to which courts will go to avoid hearing such cases. The plaintiffs, individuals of Eritrean origin who had been expelled from Ethiopia during the armed conflict between Eritrea and Ethiopia, claimed that the Central Bank of Ethiopia ("CBE") had prevented them from accessing their bank accounts.[203] While the court found that intangible property such as bank accounts (a right to receive payment from a bank) can fall

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198. 28 U.S.C. § 1605(a)(3) (2000).

199. *Siderman de Blake*, 965 F.2d at 711.

200. *Id.*

201. Eleven of these cases were decided at the Circuit Court of Appeals level. *See* Nemariam v. Fed. Democratic Republic of Eth., 491 F.3d 470 (D.C. Cir. 2007); Garb v. Republic of Pol., 440 F.3d 579 (2d Cir. 2006); Peterson v. Royal Kingdom of Saudi Arabia, 416 F.3d 83 (D.C. Cir. 2005); Zappia Middle East Construction Co. Ltd. v. Emirate of Abu Dhabi, 215 F.3d 247 (2d Cir. 2000); Gabay v. Mostazafan Found. of Iran, No. 97-7826, 1998 WL 385909 (2d Cir. May 4, 1998); Antares Aircraft, L.P. v. Federal Republic of Nigeria, 948 F.2d 90 (2d Cir. 1991); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990); Brewer v. Socialist People's Republic of Iraq, 890 F.2d 97 (8th Cir. 1989); Dayton v. Czechoslovak Socialist Republic, 834 F.2d 203 (D.C. Cir. 1987); De Sanchez v. Banco Central de Nicar., 770 F.2d 1385 (5th Cir. 1985); Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195 (5th Cir. 1984).

202. 491 F.3d 470 (D.C. Cir. 2007).

203. *Id.* at 472-73.

within the Section 1605(a)(3) exception—even if they remain outside of the Second Hickenlooper Amendment that prevents application of the Act of State Doctrine to such cases involving tangible property[204]—the resolution of the case came down to application of the Section 1605(a)(3) requirement that the agency or instrumentality "owned or operated" such property.[205] The court dismissed the plaintiffs' claims on the following grounds:

> [t]he CBE owns the funds in the appellants' accounts. The *property right* at issue, however, is the appellants' *contractual right to receive payment* and the CBE has neither taken possession of nor exerted control over that right. Instead, accepting as true the appellants' allegation that Ethiopia and the CBE have in fact prevented them from accessing the funds in the accounts, . . . we believe the CBE has *extinguished* that contract right. . . . That is, the CBE did not assume the appellants' contractual right to performance[—]instead it declined to perform its own contractual obligations.[206]

This case is merely one example, but the FSIA serves to provide courts with an easy way out because it involves what courts do best: step-by-step application of the particular language of a statute. If a court can apply the nuanced wording of a statute to avoid hearing a case, rather than applying the "fuzzier" standards related to the Act of State or Political Question Doctrines, then it will seize that opportunity.[207]

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204. The Second Hickenlooper Amendment provided that unless (1) the act of the foreign state is not contrary to international law or (2) the President instructs the court otherwise, no court shall decline on the grounds of the act of state doctrine to hear a claim on the merits for a case "in which a claim of title or other right to property is asserted by any party including a foreign state . . . based upon (or traced through) a confiscation or other taking after January 1, 1959." 22 U.S.C. § 2370(e)(2) (2000). The courts have generally interpreted the Second Hickenlooper Amendment to apply to confiscations of tangible property only. *See, e.g.*, Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973) *rev'd in part on other grounds sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A., 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982).

205. *Nemariam*, 491 F.3d at 479-80.

206. *Id.* at 481 (citations omitted).

207. Admittedly, under the particular facts of *Nemariam*, CBE as a central bank would indeed constitute a "foreign state" under the revised definition proposed in this Article. The point, however, relates to the interpretation of the statute, which would also have applied if the plaintiffs had been owed money—or oil—by an SOC.

IV. A PROPOSED FRAMEWORK

As discussed above, the body of cases applying Section 1603(b) has been anything but a model of clarity, sowing much confusion and unpredictability both for sovereigns and for those interacting with sovereigns' subsidiaries in the market. Paradoxically, many such subsidiaries benefit from immunity while their owners benefit from separate corporate status. The enormous commercial influence exerted by SOCs suggests that they should be treated the same as any traditional, non-state company. All of these factors point to one conclusion: SOCs should not be entitled to any presumption of immunity at all.

Implementing such a principle could be done only by amending the FSIA. This amendment would not be simply a matter of eliminating agencies and instrumentalities from the scope of the FSIA, however, as many government entities that should enjoy immunity—departments, ministries and central banks—could fit within the current definition of agencies and instrumentalities.[208] Thus, the definition of "foreign state" more generally would need to be tweaked to provide that certain types of governmental entities are entitled to a presumption of immunity, irrespective of their ability to sue or be sued or enter into contracts in their own name.

A. Proposed Amendments to the FSIA

Section 1603 of the FSIA should be amended to read as follows:

> (a) A "foreign state" includes the following:
> (1) the central government and its embassies, consulates and other diplomatic facilities abroad;
> (2) all political subdivisions, including states, provinces, cities and other regional and local subdivisions;
> (3) all state entities, agencies and offices whose principal, fundamental purpose and activity is public, rather than commercial, in nature, including departments, ministries, the armed services, regulatory agencies and other such entities, agencies and offices of the central government and its political subdivisions; and
> (4) the central bank of that foreign state.

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208. *See* H.R. REP. NO. 94-1487, at 15-16 (1976), *as reprinted in* U.S.C.C.A.N. 6604, 6614.

Section 1603(b), which provides the definition for "agency or instrumentality of a foreign state," would be deleted. This amendment would also require corresponding amendments in Sections 1605, 1606 (punitive damages), 1608 (service) and 1610 to eliminate references to agencies and instrumentalities.

Amending Section 1603 in this manner would provide greater predictability by specifying in more precise detail the entities that are considered to be part of the foreign state. These amendments would also ensure that only those government entities whose purpose and activity is essentially public would enjoy a presumption of immunity. Meanwhile, SOCs—whose purpose and activity are typically commercial in nature—would enjoy no presumption of immunity. Following such amendments, the law would treat SOCs as it would any other company with respect to jurisdiction; it would depend upon the typical standards of due process, minimum contacts[209] and long-arm statutes.[210]

While these changes would alter the legal landscape significantly, they would do so in a manner consistent with principles long applied by U.S. courts. As noted by the United States Court of Appeals for the Eighth Circuit:

> From the earliest days of our Republic, courts have distinguished between the public and private acts of government. Public acts, such as punishing criminals and printing money, emanate from the power inherent in sovereignty. Private acts, such as commercial transactions, are not unique to government and could be performed by an individual. Jurisdictional consequences flow from this distinction between public and private acts.[211]

These principles underlie the restrictive theory of sovereign immunity, which Congress intended to implement into U.S. law through the FSIA.[212] If SOCs continue to enjoy a presumption of immunity, these principles are applied superficially at best. It is

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209. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (noting that "[a] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State").

210. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 464, 487 (1985) (holding that Florida's long-arm statute did not offend traditional conceptions of fair play and justice embodied in the Due Process Clause of the Fourteenth Amendment and, therefore, the statute gave rise to jurisdiction in U.S. District Court in Florida).

211. BP Chems. Ltd. v. Jiangsu Sopo Corp., 285 F.3d 677, 681 (8th Cir. 2002) (internal citations omitted).

212. *See* H.R. REP. NO. 9401487, at 9-6.

only through amendment of the FSIA that they will be carried out in practice.

Finally, it is important to note that these changes would not revamp the FSIA entirely. In fact, the basic structure—in which a foreign state is presumed immune unless the plaintiff can establish that an exception to immunity applies—would remain in place. For the most part, the FSIA has been an enormous success in an area that badly needed codification. The problem outlined in this Article—and intended to be addressed by the amendments proposed above—is that this structure has been applied to certain entities that should fall outside the immunity regime applicable to foreign states. The structure should remain in place—minus SOCs.

Of course, it is rarely easy to amend a statute, particularly one that has been in place for some time. However, Congress has shown that it can amend the FSIA when it needs to do so. Congress amended the FSIA in 1996 and in 2007, in each case to allow victims of terrorism to seek compensation from foreign states.[213] The amendments proposed in this Article are very narrow and targeted, focused on a particular issue. The problems outlined above are extensive, but there is a relatively simple, straightforward solution.

B. The 2002 ABA Working Group Report

The author is not the only one who has been considering how to revise the FSIA. In 2002, a working group of the American Bar Association issued a report (the "ABA Report") entitled "Reforming the Foreign Sovereign Immunities Act."[214]

The ABA Report noted initially that "[o]ver the course of the past twenty-five years, judicial interpretations of the statute have highlighted some of the shortcomings, ambiguities, and problems of the [FSIA]. Although courts have resolved certain of these problems, many remain, some of which are not easily addressed by the

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213. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act, which amended Section 1605 of the FSIA by creating a new exception that would apply when terrorism victims sued individuals employed by foreign sovereigns for engaging in or supporting various acts of terrorism. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-42 (to be codified at 28 U.S.C. § 1605). In the same year, Congress also passed the "Flatow Amendment" to the FSIA, which permitted punitive damages for state-sponsored terrorism. Foreign Operations, Export Financing, and Related Programs Approriations Act, 1997 Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3009-172 (to be codified at 28 U.S.C. § 1605). In 2008, Congress again amended Section 1605, further enhancing the ability of individuals to sue states for acts of terrorism. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 337, 338-44 (to be codified at 28 U.S.C. § 1605A).

214. Working Group of the Am. Bar Ass'n, *supra* note 59.

courts."[215] The ABA Report set out to address such issues—including, among others, "the scope of the term 'foreign state'"[216]—by proposing amendments to the FSIA. The ABA Report was thoroughly researched, and much of its discussion is relevant to the issues discussed in this Article. Some of its proposals, however, did not go far enough and would leave in place a statute that applies, inappropriately, to SOCs.

Two proposals of the ABA Report are worth discussing in the context of this Article: (1) adoption of the "legal characteristics" test rather than the "core function" test for the purposes of distinguishing between foreign states proper and agencies/instrumentalities;[217] and (2) extension of the "majority ownership" prong to entities held indirectly by the foreign state.[218]

The ABA Report found that in distinguishing between foreign states proper and agencies/instrumentalities, "the legal characteristics test is the more appropriate test."[219] Appropriate factors for consideration would "include whether the entity maintains a distinct personality, was sufficiently capitalized, observes corporate formalities, maintains corporate records, holds property in its own name, contracts in its own name, and is able to sue and be sued."[220] However, the ABA Report also recognized that although "some governments give contract and litigation powers to certain entities . . . this does not mean that the entity operates independently of the state. Government departments, ministries, and regulatory agencies can be in this position."[221] Thus, the ABA Report proposed modifying the definition of "foreign state" to clarify that the state includes "departments and ministries of government," as well as "the armed services and independent regulatory agencies."[222]

This proposal is sensible, and it has been incorporated into the amendments proposed in this Article. In fact, while the ABA Report claimed to have adopted the legal characteristics test,[223] the above-mentioned carve-outs actually provide for a hybrid test. It is not the case that one test is objectively better than the other; rather, both are valid and relevant. It is a matter of striking the appropriate balance so that the entities that intuitively should be entitled to presumptive immunity are in fact provided with this pre-

215. *Id.* at 489.
216. *Id.*
217. *Id.* at 514-16.
218. *Id.* at 522-27.
219. *Id.* at 514.
220. *Id.* at 515.
221. *Id.*
222. *Id.*
223. *Id.* at 514-16.

sumption, and that those that are not so entitled do not unjustly enjoy this benefit. Where the ABA Report fell short, however, was in keeping in place the application of the FSIA to instrumentalities such as SOCs.[224]

Second, the ABA Report proposed that presumptive immunity be extended to indirect subsidiaries of foreign states.[225] Of course, following the Supreme Court's decision in *Dole Food Co. v. Patrickson*,[226] such a proposal necessitates legislative action, rather than merely a choice between conflicting court interpretations. However, in an age when foreign states structure their subsidiaries in a sophisticated manner, the majority ownership prong is an entirely inadequate test—whether it be merely one option or the exclusive means to establish agency/instrumentality status.

The number of tiers between a foreign state and an SOC has little to do with the control that that foreign state exercises over the SOC or otherwise with its "sovereignness." The intervening tiers could be merely inactive holding companies, for example. Or, for that matter, a foreign state in theory could manipulate its holding structure so that it holds all of its subsidiaries directly, in one tier. Of course, the foreign state's control over and involvement in the operations of each company, as well as the public or commercial nature of each company, could vary dramatically. All in all, whether an SOC is held directly is more a matter of form than substance. In any event, Congress should be eliminating the application of the FSIA to SOCs, not expanding its scope.

C. Potential Impact of the Proposed Changes on the International Legal Landscape

Sovereign immunity is derived from international law. In practice, however, principles of sovereign immunity are most typically applied in jurisdictions around the world at the level of national legal systems. The development of the law governing sovereign immunity has thus occurred mostly at the national level. Rather than being hashed out at an international conference or in international courts, the legal principles applying to sovereign immunity have been developed by individual jurisdictions.

At times, these jurisdictions may be influenced by the development of the law in foreign jurisdictions. As the U.S. Congress considered enactment of the FSIA in 1976, for example, the House

224. *Id.* at 508.
225. *Id.* at 522-23.
226. 538 U.S. 468 (2003).

Report noted that the FSIA "[was] also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts."[227] If the United States was following other nations in 1976, it now has an opportunity to modernize the FSIA in a way that can serve as a model for other nations. The proposed changes are intuitive in the current climate, and they will not go unnoticed abroad.

While development of the principles of sovereign immunity at the international level has not been completely absent, it has not gone very far. On December 2, 2004, the United Nations General Assembly adopted the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (the "UN Convention").[228] The UN Convention would enter into force only once thirty states had deposited original instruments of ratification, acceptance, approval or accession.[229] While the UN Convention was open for signature from January 17, 2005 until January 17, 2007, only twenty-eight states signed the Convention during that period.[230] As of January 2009, only six states had deposited instruments of ratification.[231] The United States has not signed the UN Convention.[232]

With respect to the Convention's rationale, the Preamble provides that the Convention "would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area."[233] The UN Convention offers the following definition of the term "State":

> (i) the State and its various organs of government;
> (ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;
> (iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise

227. H.R. REP. NO. 94-1487, at 12 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6610.

228. G.A. Res. 59/38, ¶ 3, U.N. Doc. A/RES/59/38 (Dec. 2, 2004).

229. United Nations Convention on Jurisdictional Immunities of States and Their Property art. 30(1), *adopted* Dec. 2, 2004, 44 I.L.M. 803, 812.

230. Status of United Nations Convention on Jurisdictional Immunities of States and Their Property, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&id=284&chapter=3&lang=en (last visited Mar. 4, 2009).

231. *Id.*

232. *See id.*

233. United Nations Convention on Jurisdictional Immunities of States and Their Property, *supra* note 229, pmbl.

> of sovereign authority of the State;
> (iv) representatives of the State acting in that capacity.[234]

The vagueness of subsection (iii) of the proposed definition of "State" is problematic. It is unclear when an entity is "performing acts in the exercise of sovereign authority of the State." Moreover, it appears that no particular connection to the State is necessary for the entity, other than its qualifying as an agency or instrumentality—terms left undefined—and being "entitled to perform" such acts.

Regardless of the failure of the UN Convention to address the concerns at the heart of this Article, an insufficient number of states has signed or ratified the Convention. Efforts at the international level to develop the legal principles governing sovereign immunity have been unsuccessful, so these principles will continue to be developed mainly at the domestic level. As recently noted by Professor Catherine Powell of Fordham Law School in the human rights context:

> Because international law is "incomplete," it is interpretatively open and invites domestic actors to be involved in the process of its creation. In the U.S. context, this means that norms developed democratically at the domestic level play a gap-filling function and have the potential to inform international law (and vice versa) through a continually iterative process.[235]

Similarly, norms developed at the domestic level can also inform international legal principles—such as those governing sovereign immunity—embedded in other domestic legal systems. Thus, modernization of the FSIA by the United States could potentially have an impact on the modernization of sovereign immunity globally.

CONCLUSION

We live in an era of increasingly powerful and influential SOCs. The current legal regime provided by the FSIA, as interpreted by the courts, is not only outdated in its application to SOCs, it is also conflicting and confusing. The best way to solve this problem is to amend the FSIA so that SOCs no longer enjoy a

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234. *Id.* art. 2(1)(b).

235. Catherine Powell, *Tinkering with Torture in the Aftermath of* Hamdan*: Testing the Relationship Between Internationalism and Constitutionalism*, 40 N.Y.U. J. INT'L L. & POL. 723, 738 (2008) (footnote omitted).

presumption of immunity. Doing so will better honor the restrictive theory of sovereign immunity applied around the world, including the United States since 1952.

No legislation is perfect. Times change, and it is only following the development of case law over a period of decades that the myriad implications of a statute become clear. Implementation of the amendments proposed in this Article would provide a clear, predictable legal framework for SOCs that will provide stability both for sovereigns and for the companies with whom sovereigns and their subsidiaries do business.

QUESTIONING THE SILENCE OF THE BENCH: REFLECTIONS ON ORAL PROCEEDINGS AT THE INTERNATIONAL COURT OF JUSTICE

CECILY ROSE*

The growth of the docket of the International Court of Justice over the last several decades has been both a sign of its success and a source of its troubles. Because the Court's continued attractiveness as a forum for dispute settlement depends not only on the quality of its judgments, but also on the efficiency of its procedures, the Court has responded by attempting to modernize its working methods. Literature concerning the weaknesses of the Court's procedures, however, has not focused on how oral proceedings suffer from an absence of direct exchanges between the judges and counsel. The judges' hesitancy to posit questions stems in part from a long-standing institutional concern about respecting the sovereign status of the parties which appear before it. This Article argues that the Court should shed its anxiety about questioning parties because doing so would not only pose little threat to State sovereignty, but would actually heighten the attractiveness of the Court as a forum for the adjudication of international disputes.

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INTRODUCTION

The growth of the docket of the International Court of Justice over the last several decades has been both a sign of its success and a source of its troubles. As more and more States have turned to the Court for the adjudication of their disputes, the Court's ability to conduct prompt proceedings has been strained. Because the Court's continued attractiveness as a forum for dispute settlement depends not only on the quality of its judgments, but also on the efficiency of its procedures, the Court has responded by attempting to modernize its working methods. The Court's current President, Rosalyn Higgins, has been a particularly prominent advocate of modifying the Court's procedures in order to better serve the Court's clientele.[1] This Article builds upon her call for the Court to exercise greater control over its own procedures, particularly oral proceedings.

The Court's oral proceedings are a critical weakness in its working methods because of their length and relative under-productivity. They suffer in particular from an absence of direct exchanges between the judges and counsel. Although oral proceedings often span days or weeks, the judges rarely question counsel. Their hesitancy to posit questions stems in part from a long standing institutional concern about respecting the sovereign status of the parties which appear before it. Even though a back and forth between the bench and the bar would be far more efficient and productive for the Court and its litigants, the Court has not yet gained control of oral proceedings in this manner. This Article argues that the Court should shed its anxiety about questioning the parties during oral proceedings because doing so would not only pose little threat to State sovereignty, but would actually heighten the attractiveness of the Court as a forum for the adjudication of international disputes.

This Article begins by describing oral proceedings at the ICJ (Part I) and the relevant rules of procedure and attempts at reform (Part II). Subsequent sections examine the potential utility of questioning parties during oral proceedings (Part III), as well as various defences and critiques of the status quo (Part IV). This Article concludes by comparing oral proceedings at the ICJ to oral

1. *See infra* Part IV.

arguments at the European Court of Justice and the Supreme Court of the United States (Part V).

I. A SKETCH OF ORAL PROCEEDINGS AT THE INTERNATIONAL COURT OF JUSTICE

Oral proceedings at the International Court of Justice take place sporadically throughout each year in the Great Hall of Justice of the Peace Palace in The Hague. The sheer grandeur of this Hall—complete with chandeliers, stained glass windows, and a large oil painting depicting peace and justice—instills the proceedings with a sense of import.[2] During the hearings, the Registrar and the fifteen judges of the ICJ, who are usually accompanied by two *ad hoc* judges, sit in almost total silence in black robes behind a long bench. From the center of the bench, the President of the Court opens the public sittings and gives the floor to one of the parties in typically no more than a few brief sentences.[3] One or more representatives then proceed to address the bench virtually uninterrupted for several hours, usually by reading, verbatim, a prepared text distributed in advance to the judges.[4] After each sitting, the Registry of the Court produces a *compte rendu* (transcript), which is typically over fifty pages long, and is followed by a translation of each day's proceedings into either French or English, the official languages of the Court. Usually oral proceedings on the merits altogether entail one or two three-hour sittings each day for two to six weeks, though in the *Genocide* case, the Court exceptionally heard nine weeks of oral arguments, often for six hours each day.[5] In general, the proceedings consist of two rounds of oral arguments in which the parties have equal time to address the Court.[6]

During oral proceedings, questions from the bench are very much the exception rather than the rule. Judges wishing to pose

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2. For information on the Great Hall of Justice, see Great Hall of Justice, http://www.vredespaleis.nl/showpage.asp?pag_id=475 (last visited Mar. 4, 2009).

3. For detailed accounts of all aspects of oral proceedings at the ICJ, see Stefan Talmon, *Article 43*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 977-1038 (Andreas Zimmermann et al. eds., 2006).

4. Representatives of the parties generally consist of agents, counsel, and advocates. *See* Rules of the International Court of Justice art. 61(2), 2007 I.C.J. Acts & Docs. 90, 129 [hereinafter ICJ Rules]. Behind the podium, the agents, counsel, and advocates of the Applicant and Respondent States sit at their respective tables, behind which there is seating for the press, the diplomatic corps, and the general public.

5. *See* Archive of Oral Proceedings Transcripts in *Genocide* Case, http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=f4&case=91&code=bhy&p3=2 (last visited Mar. 4, 2009).

6. Talmon, *supra* note 3, at 1010.

questions may usually only do so at the end of a day's proceedings, after the President gives them the floor, and after the judges have discussed the proposed question amongst themselves. When the judges do pose questions, they almost never expect an immediate answer, but instead ask the parties either to prepare an oral answer for a future sitting, or to submit an answer in writing by a later date. By way of example, the bench posed a total of only three questions during the oral proceedings in the *Nicaragua-Honduras Maritime Delimitation* case which lasted for three weeks in March 2007.[7] The first two questions went to the heart of the case but came only at the end of the second week of proceedings when the parties had already concluded the first round of oral arguments.[8] Moreover, these oral questions nonetheless took a written form because the Court sent a written text of the questions to the parties, who could then opt to respond orally or in writing.[9] A final follow-up question came only at the close of Nicaragua's second round of oral arguments, at which point the President had to invite Nicaragua to provide a written rather than oral response to the ques-

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7. *See* Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), at 7 (Oct. 8, 2007), *available at* http://www.icj-cij.org/docket/files/120/14075.pdf.

8. *See* Transcript of Oral Argument, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), CR 2007/10, at 36-37 (Mar. 16, 2007), *available at* http://www.icj-cij.org/docket/files/120/13749.pdf. The *compte rendu* reads as follows:

> The PRESIDENT: . . . I shall now give the floor to Judge Keith and Judge *ad hoc* Gaja, who each have questions for the Parties. Judge Keith.
>
> Judge KEITH: Thank you, Madam President. My question is for Nicaragua. What consequences for the location of a single maritime boundary would Nicaragua draw were Honduras to have sovereignty over some or all of the islands and maritime features which are located north of parallel of latitude 15° N. Thank you, Madam President.
>
> The PRESIDENT: Thank you, Judge Keith. Judge Gaja, you have the floor.
>
> Judge GAJA: Thank you, Madam President. I would like to address the following question to both Parties. May Logwood Cay and Media Luna Cay be currently regarded as islands within the meaning of Article 121, paragraph 1, of the United Nations Convention on the Law of the Sea? Thank you.

Id.

9. *See id.* President Higgins further stated that "in this latter case, any comments that a Party may wish to make, in accordance with Article 72 of the Rules of Court, on the responses by the other Party must be submitted not later than Tuesday 10 April 2007." *Id.* at 37. Article 72 provides that

> [a]ny written reply by a party to a question put under Article 61, or any evidence or explanation supplied by a party under Article 62 of these Rules, received by the Court after the closure of the oral proceedings, shall be communicated to the other party, which shall be given the opportunity of commenting upon it. If necessary the oral proceedings may be reopened for that purpose.

ICJ Rules, *supra* note 4, art. 72.

tion.[10] Thus, even when the judges do ask questions, their procedures for doing so are slow, formal, and far from efficient.

II. THE RELEVANT RULES OF COURT AND THEIR HISTORY

According to the Rules of Court, proceedings on the merits at the ICJ consist of written and oral proceedings.[11] The often lengthy and elaborate written proceedings usually entail memorials, counter-memorials, replies, rejoinders and many volumes of supporting documents.[12] During the subsequent oral proceedings the Court may hear witnesses, experts, agents, counsel, and advocates.[13] Although parties typically appear before the court for three to four weeks of oral proceedings, the Rules of Court specifically call for brevity. Each party's oral statements "shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party's contentions at the hearing."[14] In addition, oral statements shall "be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain."[15] Furthermore, in a recent Practice Direction, the Court stressed that it requires the parties' "full compliance with these provisions and [their] observation of the requisite degree of brevity."[16]

The Rules also provide for guidance and questions from the bench during oral proceedings. Before or during hearings, the

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10. *See* Transcript of Oral Argument, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), CR 2007/12, at 53-54 (Mar. 20, 2007), *available at* http://www.icj-cij.org/docket/files/120/13753.pdf. The *compte rendu* reads as follows:

> Judge SIMMA: . . . My question is directed at Nicaragua. In yesterday's hearings in the reply to the question posed by Judge Keith . . . Nicaragua presented a sketch-map which showed the cays claimed by Honduras lying to the south of the bisector line argued by Nicaragua as enclaves having 3-mile territorial seas . . . My question is: What are the reasons for the indication by Nicaragua of 3-mile territorial seas around these cays while both Parties to the present dispute in general claim 12-mile territorial seas? Thank you.

Id. at 54.

11. *See* ICJ Rules, *supra* note 4, arts. 44-72.

12. *Id.* arts. 49-50.

13. *Id.* arts. 61, 63.

14. *Id.* art. 60(1). Article 60(1) was Article 56 in the 1972 version of the Rules. *See* Rules of the International Court of Justice art. 56, 11 I.L.M. 899, 912.

15. ICJ Rules, *supra* note 4, art. 60(1).

16. Int'l Court of Justice, Practice Directions Practice Direction VI, http://www.icj-cij.org/documents/index.php? p1=4&p2=4&p3=0 (as amended on Dec. 6, 2003) (last visited Mar. 4, 2009); *see also* Press Release, Int'l Court of Justice, The International Court of Justice revises its working methods to expedite the examination of contentious cases, ICJ Press Release No. 1998/14 (Apr. 6, 1998).

Court may guide the parties by indicating "any points or issues to which it would like the parties specially to address themselves, or on which it considers that there has been sufficient argument."[17] During hearings the Court may "put questions to the agents, counsel and advocates, and may ask them for explanations."[18] Although "[e]ach judge has a similar right to put questions . . . before exercising it he should make his intention known to the President," who is responsible for the control of hearings.[19] In response to such questions, "agents, counsel and advocates may answer either immediately or within a time-limit fixed by the President."[20]

These Rules are a product of the Court's attempts to exercise greater control over oral proceedings.[21] In the late 1960s, general dissatisfaction with the length and cost of written and oral proceedings before the Court led to the UN General Assembly's call in 1970 for generally enhancing the effectiveness of the Court.[22] Scholars had commonly observed that the Court's procedures and work method had "become repetitive and excessively lengthy" and had "taken the form of an additional round of written pleadings, the main difference being that the parties attend to read their pleadings to the Court, instead of delivering them through their agents."[23] In the 1970s the Court accordingly adopted a series of amendments to the Rules, which were intended to accelerate the proceedings and reduce costs for parties, partly by increasing the control of the Court or the President over written and oral proceedings.[24] These changes, however, had little effect. The Court's procedures remained essentially the same as those which were developed by the Permanent Court of International Justice in the 1920s.[25]

Consequently, the Court has made several subsequent attempts to reform its somewhat intractable procedures. Measures adopted by the Court in 2002 stressed that "the efficient functioning of justice" required parties to observe conscientiously the req-

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17. ICJ Rules, *supra* note 4, art. 61(1). Article 61(1) was Article 57 in the 1972 version of the Rules. *See* Rules of the International Court of Justice art. 57, 11 I.L.M. 899, 912.

18. ICJ Rules, *supra* note 4, art. 61(2).

19. *Id.* art. 61(3).

20. *Id.* art. 61(4).

21. Talmon, *supra* note 3, at 982-83. Talmon writes that "[t]he Rules of Court have been the main vehicle used to bring about changes to the Court's procedure within the broad framework set by Art. 43." *Id.* at 982; *see also* Eduardo Jiménez de Aréchaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 AM. J. INT'L L. 1 (1973).

22. *See* G.A. Res. 2723 (XXV), 1931 plen. mtg., U.N. Doc. A/RES/2723(XXV) (Dec. 15 1970).

23. Jiménez de Aréchaga, *supra* note 21, at 6.

24. Talmon, *supra* note 3, at 983.

25. *Id.*

uisite degree of brevity.[26] Because the length of oral arguments had frequently been longer than necessary, the Court decided that in the future the dates for oral arguments would be based on what the parties reasonably required in order to avoid unnecessarily protracted oral arguments.[27] Second rounds of oral arguments, if any, would be brief.[28] The Court further indicated that it intended to use the Rules "to give specific indications to the parties of areas of focus in the oral proceedings, and particularly in any second round of oral arguments."[29]

Given that oral proceedings continue to be quite protracted, the effect of these more recent attempts at reform appears to have been minimal. Amidst the numerous measures and practice directions issued by the Court, it has never emphasized, let alone taken up, its ability under the Rules to question representatives of parties. The following therefore examines the potential utility of such questioning as well as the Court's entrenched reluctance to engage the parties in this manner.

III. THE POTENTIAL UTILITY OF QUESTIONING PARTIES DURING ORAL PROCEEDINGS

Despite the considerable breadth of the written pleadings typically submitted by parties to the ICJ, oral proceedings may still hold some value as well as symbolic meaning. Amid volumes of written submissions, oral proceedings provide the parties with an opportunity to focus the attention of the judges in a memorable way on the core issues at stake in their dispute. Through oral arguments a party may provide the judges with a more concise, yet also more nuanced version of its case.[30] Given that years may elapse between written and oral submissions, these proceedings also allow the parties to update their factual and legal arguments if necessary.[31] On a more symbolic level, the presentation of argu-

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25. Press Release, Int'l Court of Justice, The International Court of Justice Decides to Take Measures for Improving its Working Methods and Accelerating its Procedure, ICJ Press Release No. 2002/12 (Apr. 4, 2002).

26. *Id.*

28. *Id.*

29. *Id.*

30. Malcom N. Shaw, *The International Court of Justice: A Practical Perspective*, 46 INT'L & COMP. L.Q. 831, 857 (1997).

31. For example, in *Armed Activities on the Territory of the Congo* (Congo v. Uganda), at 11, 14 (Dec. 19, 2005), *available at* http://www.icj-cij.org/docket/files/116/10455.pdf, oral hearings on the merits took place in April 2005, more than two years after the last written submission in February 2003. Similarly, in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malays./Sing.), at 8-9 (May 23, 2008), *available at* http://www.icj-cij.org/docket/files/130/14492.pdf, oral hearings on the merits took place in November 2007, approximately two years after the last written submission in

ments before an audience and the press brings into the public light what would otherwise remain a relatively private and obscure administration of justice.[32]

The sheer length and uninterrupted monotony of oral proceedings before the ICJ, however, significantly diminishes their potential value. On occasion, oral proceedings may consist of a "wholesale reiteration" of the arguments previously set forth in written pleadings, such that the hearings effectively become a fourth round of written submissions.[33] In addition, these hearings generate voluminous transcripts which literally function as another set of pleadings.[34] Also, the process of reading from prepared speeches which summarize arguments previously articulated in written pleadings hardly encourages the parties to engage with the arguments put forward by the opposing party.[35] The oral proceedings ultimately bear very close resemblance to scholarly lectures by professors before a silent audience.

A greater dialogue between the judges and the parties during oral arguments would significantly enhance the value of oral proceedings. Questions and follow-up questions on points of law and fact would provide an opportunity for the bench to test the strength of the parties' arguments. Questioning the parties would also allow the judges to exercise greater control over the courtroom by focusing the parties' arguments and preventing them from simply recounting large tangential tracts of their written pleadings.[36] By guiding the parties in this manner, the bench could both shorten and concentrate its oral proceedings, thereby greatly enhancing the value and efficiency of this procedure.

IV. DEFENCES AND CRITIQUES OF THE SILENCE OF THE BENCH

Both judges and practitioners have defended the silence of the bench at the International Court of Justice. They have argued that questioning counsel would be too informal, impracticable, unseemly, and, most importantly, too disrespectful of state sovereignty. None of these arguments, however, withstands close scrutiny.

November 2005.

32. *See* Robert Y. Jennings, *The United Nations at Fifty: The International Court of Justice After Fifty Years*, 89 AM. J. INT'L L. 493, 498 (1995); Richard Plender, *Rules of Procedure in the International Court and the European Court,* 2 EUR.J. INT'L L. 1, 25 (1991).

33. *See* Shaw, *supra* note 30, at 857; *see also* Rosalyn Higgins, *Respecting Sovereign States and Running a Tight Courtroom*, 50 INT'L & COMP. L.Q. 121, 127-28 (2001).

34. *See* Talmon, *supra* note 3, at 1014.

35. *Id.*

36. *See* Plender, *supra* note 32, at 24-25.

In the view of Mohammed Bedjaoui, the President of the Court from 1994 to 1997, oral proceedings ought to be far more formal than when the judges listen and talk with each other.[37] While President Bedjaoui has acknowledged that judges may pose questions themselves or through the President, in his view those on the bench remain appropriately silent for the most part, "like a jury listening to arguments in order to weigh their merits."[38] These views, however, may not reflect the sentiments shared by those ICJ judges who are relatively new to the Court and who have shown a greater tendency to ask questions. Leaving aside some of the necessary formalities of oral proceedings, President Bedjaoui's remarks do not recognize that unlike the members of a jury, the President of the Court has an important role to play in conducting and controlling the proceedings, according to the Rules of Court.

Others have argued that the bench ought to maintain its silence because sustained, insistent questioning from the fifteen members of the bench would be excessive and unmanageable.[39] Incessant questioning by all of the judges, however, would be highly unlikely. Not all, or even most, of the judges would, in fact, pose questions on any given issue, especially because the practice of questioning counsel from the bench does not exist in many legal cultures, particularly in civil law jurisdictions.[40] Even in the United States, where such questioning does form part of the legal culture, not all of the justices of the Supreme Court consistently question counsel.

Some have also argued that it would be inappropriate for the judges to posit questions during oral proceedings because the parties would be able to discern the judges' opinions on given issues and the judges might appear to have prejudged the case.[41] Here the underlying presumption is that probing questions would be likely to signal bias on the part of the judges. Indications that the judges are predisposed to rule one way or another, however, would primarily demonstrate their awareness of the critical issues in the cases before them and their interest in guiding the parties accordingly.

The most forceful arguments in defence of the status quo presume that questioning the counsels, advocates, and agents who appear before the bench would be inappropriate given their status

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37. Mohammed Bedjaoui, *The "Manufacture" of Judgments at the International Court of Justice*, 3 PACE Y.B. INT'L L. 29, 42 (1991).

38. *Id.*

39. *See* Higgins, *supra* note 33, at 127-28.

40. *Cf. id.*

41. Bedjaoui, *supra* note 37, at 44.

as representatives of sovereign States. Some argue that sovereign States should not be denied the opportunity to present their arguments to the fullest extent.[42] According to Professor Allain Pellet, who frequently appears before the bench:

> [t]he judges must not forget that these are sovereign States that come before them, and one cannot treat sovereign States as being in the service of the Court. . . . I do not think you can threaten a sovereign State, saying that their case will not be heard to the end in the way it wishes.[43]

While Pellet concedes that it would be advisable for the Court to indicate to the parties before oral proceedings which issues are of importance to the bench, he still defends the parties' prerogative to speak about whatever they see fit.[44] In other words, sovereign States should have the last word.[45]

Another sovereignty-based objection to such questioning could be made by arguing that a representative of a State should not be required to provide immediate answers to questions put to them by judges without an opportunity to seek the approval of their foreign ministry. This line of reasoning suggests that, in a worst case scenario, a representative who answers questions without obtaining prior authorization could inadvertently commit his State to an authorized legal strategy or contribute to binding his State to an emerging customary international norm, even though the government he represents may actually object. Statements made by State representatives during oral proceedings could therefore have the unintended and potentially adverse effect of contributing to the formation of customary international law through state practice and *opinio juris*.

In contrast to Judge Bedjaoui and Professor Allain Pellet, other ICJ judges and practitioners have critiqued the Court's deeply engrained tendency to defer to State sovereignty at the expense of controlling its proceedings.[46] President Higgins argues that in its next wave of procedural reforms, the Court should move away from a culture of excessive "deference to the litigants by virtue of

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42. Higgins, *supra* note 33, at 127-28.

43. *Modernizing the Conduct of the Court's Business*, *in* INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE: PROCEEDINGS OF THE ICJ/UNCITAR COLLOQUIUM TO CELEBRATE THE 50TH ANNIVERSARY OF THE COURT 117-19 (Connie Peck & Roy S. Lee eds., 1997).

44. *Id.* at 119.

45. *Id.*

46. *See, e.g.*, Higgins, *supra* note 33, at 124, 131-32.

their rank as sovereign States."[47] Such deference is unwarranted given that States appearing before the ICJ have already consented to the jurisdiction of the Court.[48] Thereafter, the Court should be in control of its proceedings because the "privileged position [of the litigants before it] is sufficient by way of sovereignty-based deference."[49]

According to President Higgins, "[t]he Court will only have proper control over its own procedures if it changes the legal culture that underlies its dealings with its clients."[50] Such change could be effected in part through the issuance of practice directions, which impose requirements rather than requests upon the parties.[51] In support of this position, President Higgins notes that the parties in the *Legality of the Use of Nuclear Weapons* case and the *Kosovo* case accepted, without complaint, the Court's imposition of time restrictions on oral proceedings.[52] President Higgins points out that States have welcomed restraints on their ability to demand the fullest possible oral argument because these limitations not only help them closely focus their arguments, but also allow the Court to render its judgments within reasonable time frames.[53]

Prominent international lawyers who have frequently appeared before the bench have similarly advocated greater control by the Court over its proceedings. In contrast to Professor Pellet, Professor Elihu Lauterpacht has argued that while due respect must be paid to the sovereignty of the litigants, once they have come to the ICJ, nothing should prevent the Court from telling them just how long they may plead orally, and just how long their submissions may be.[54] Sir Franklin Berman and Sir Ian Sinclair have also emphasized that States appear before the Court in the capacity of litigant, and as such, they have specifically consented to the Court's jurisdiction and submitted themselves to an ordered and disciplined procedure.[55]

However much individual judges and practitioners may wish for a greater dialogue between the bench and the bar, a significant obstacle to change is the institution's long-standing deference to State sovereignty. Yet such institutionalized deference is mis-

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47. *Id.* at 124.
48. *Id.* at 131-32.
49. *Id.* at 132.
50. *Id.* at 124.
51. *Id.*
52. *Id.* at 128.
53. *Id.*
54. *Modernizing the Conduct of the Court's Business*, *supra* note 43, at 120.
55. *Id.* at 121, 125.

placed and counterproductive. If nothing should prevent the Court from restricting the length of oral pleadings, then similarly, nothing should impede the Court's exercise of its ability under the Rules to question parties during oral proceedings. Given that States consent to appear before the Court as litigants in often large and complex disputes, it would be highly appropriate for the Court to ask questions which clarify legal and factual issues. Parties tend to speak at length during oral proceedings about somewhat tangential issues which have already been fully addressed in the written pleadings, but this is not an exercise of State sovereignty which should continue to go unfettered. Finally, because of the relatively well-defined legal parameters of the disputes which come before the ICJ, it would be very unusual for representatives of parties to face broad, unexpected questions, the answers to which might inadvertently bind States to emerging customary international norms. In this unlikely event, however, the practice of the Court would certainly permit representatives to consult with their foreign ministries before providing the Court with an answer.

V. ORAL ARGUMENTS AT OTHER INTERNATIONAL AND DOMESTIC COURTS

Questioning during oral proceedings is hardly unprecedented, as dialogues between judges and counsel play significant and useful roles at other international courts, as well as in domestic common law courts. The following therefore examines the similarly limited questioning which takes place at the European Court of Justice, as well as the degree to which the United States Supreme Court demonstrates the potential utility of a dialogue between the bench and the bar.

A. Oral Arguments at the European Court of Justice

Because sovereign States also litigate before the European Court of Justice (ECJ) in Luxembourg, the ECJ's experience with oral proceedings forms a useful basis for comparison with the ICJ. In some respects, oral proceedings at the European Court differ significantly in practice from proceedings at the International Court, even though the ECJ's Statute and Rules are based on those of the ICJ.[56] Unlike the ICJ, the European Court of Justice presides over much shorter, hour-long oral proceedings in which the differences between the parties have been substantially nar-

56. *See* Plender, *supra* note 32, at 1.

rowed.[57] In addition, questions during oral hearings have assumed an increased importance in recent years due to the influence of common law members of the Court.[58]

However, oral hearings at the European Court of Justice still suffer in general from a lack of interaction between counsel and the bench.[59] By contrast to oral hearings at the Court of First Instance, where the judges' concerns emerge through debate between the bench and counsel, the judges of the ECJ tend to sit in silence, posing no questions during oral arguments.[60] This reticence may partly reflect the practical constraints on proceedings before the ECJ. The Court's heavy case load requires judicial business to proceed efficiently and without prolonged questioning, during which time interpreters may struggle to keep up with unexpected interruptions.[61]

From the advocate's perspective, however, the bench's silence is regrettable and may suggest that the judges are unengaged and lacking familiarity with the cases before them.[62] In the absence of any guidance from the bench, counsel may inadvertently miss an opportunity to clarify issues of importance to the judges while instead investing time in discussing uncontroversial points.[63] From the judges' vantage point, oral arguments are unproductive and time-wasting when counsel merely reads from a prepared script which bears close resemblance to the party's written submissions, but has little relevance to the issues of importance to the judges.[64] Meanwhile, time constraints and

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57. Article 56(1) of the Rules of Procedure of the European Court of Justice provide that: "The proceedings shall be opened and directed by the President, who shall be responsible for the proper conduct of the hearing." Rules of Procedure of the Court of Justice of the European Communities art. 56(1), 1991 O.J. (L. 176) 19. In addition, Article 57 of the Rules of Procedure of the Court of Justice and Article 58 of the Rules of Procedure of the Court of First Instance provide that: "The President may in the course of the hearing put questions to the agents, advisers or lawyers of the parties." *Id.* art. 57; Rules of Procedure of the Court of First Instance of the European Communities art. 58, 1991 O.J. (L. 136) 11.

58. BUTTERWORTH'S EUROPEAN COURT PRACTICE 108 (K.P.E. Lasok & David Vaughan eds., 1993).

59. During oral hearings at the Court of First Instance and the European Court of Justice, each party has 15 minutes for their main speech in a three-judge case, and 30 minutes in a five-judge case. JANET DINE, SIONAIDH DOUGLAS-SCOTT, & INGRID PERSAUD, PROCEDURE AND THE EUROPEAN COURT 68 (1991). Questions and answers and replies to the other party are on top of this basic allowance. *Id.* The CFI has been substantially more generous than the ECJ in granting extensions to the parties of the time allowed for oral hearings. *Id.*

60. Ian S. Forrester, *The Judicial Function in European Law and Pleading in the European Courts*, 81 TUL. L. REV. 647, 714 (2007).

61. *Id.*

62. *Id.* at 715.

63. *Id.*

64. *Id.*

considerations of courtesy may dissuade the judges from interrupting counsel or posing questions after arguments have been presented.[65]

Ian Forrester, a practitioner who has appeared before the European Court, has proposed that the judges abandon their tradition of silently listing to the parties during oral arguments. Instead, they should put questions directly to counsel, as do the Justices of the United States Supreme Court.[66] Forrester argues that:

> questions and interruptions, far from being a discourtesy, are a welcome means of assisting counsel to do the job of being an advocate. There is no discourtesy in voicing a doubt to, or seeking a clarification from, someone who is paid to remedy doubts and dispel uncertainties . . . the judge is helping counsel to do a better job by asking that the relevant points be addressed and in a manner that is technically compatible with the ECJ's constraints of language and time.[67]

In comparison to practitioners before the ICJ, Forrester has thereby taken his call for reform one step further by pointing to how debate between the bench and the bar would significantly enhance the quality of oral hearings at the ECJ.

Although the judges of the ICJ and the ECJ similarly refrain from questioning counsel during oral proceedings, their shared silence stems from markedly different institutional concerns. While the ICJ's stance towards national sovereignty poses a barrier to questioning during oral arguments, practical considerations appear to preclude this practice at the ECJ.

The ICJ's deferential attitude towards State sovereignty reflects its status as the principal judicial organ of the United Nations, an institution based on the principle of the sovereign equality of all of its members and the protection of their territorial integrity and political independence.[68] In keeping with an institution whose Charter precludes it from authorizing interventions in matters which are essentially within a State's domestic jurisdiction, the ICJ refrains, generally speaking, from adopting proce-

65. *Id.*
66. *Id.* at 716.
67. *Id.*
68. U.N. Charter art. 2, para. 1; Plender, *supra* note 32, at 3. *See generally* U.N. Charter ch. 1 (concerning the purposes and principles of the United Nations).

dures which would in any way restrict the exercise of State sovereignty.[69]

By contrast, the European Court of Justice reflects the European Union's overall emphasis on eliminating rather than protecting the barriers separating the sovereign States of Europe. The Single European Act of 1986 provides that Europe may make its own contribution to the preservation of international peace and security in accordance with the United Nations Charter by "speaking ever increasingly with one voice and . . . act[ing] with consistency and solidarity in order more effectively to protect its common interests and independence."[70] In 1964 the European Court of Justice starkly portrayed the implications of such unity:

> By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation in the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the community, the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.[71]

Thus, the Court held that a State's transfer of powers from its domestic legal system to the community legal system results in a permanent limitation of its sovereign rights.[72] By comparison, the States appearing before the ICJ have transferred a relatively minute degree of sovereignty to the Court.

Ultimately, a more formidable institutional barrier stands in the way of reform at the ICJ as opposed to the ECJ. While judges and practitioners at both Courts advocate reforming oral proceedings, the ECJ's practical concerns about efficiency may be more surmountable than the ICJ's institutionalized tendency to defer to the sovereign status of its litigants.

B. Oral Arguments at the Supreme Court of the United States

Oral arguments at the Supreme Court of the United States are of somewhat lesser relevance to oral proceedings at the ICJ because of the Supreme Court's role as a domestic rather than inter-

69. U.N. Charter art. 2, para. 7.
70. Single European Act pmbl., Feb. 17-28, 1986, 1986 O.J. (L. 169) 1, 2.
71. Case 6/64, Flaminio Costa v. E.N.E.L., 1964 E.C.R. 585 (1964).
72. *Id.*

national court. For our purposes, however, oral arguments at the Supreme Court are significant because they amply demonstrate the utility of questioning counsel during oral arguments. Despite the relative brevity of the hour-long oral arguments at the Supreme Court, the Justices regularly pepper counsel with a range of questions which probe the legal and policy implications of the cases before them.

According to conventional wisdom, oral arguments at the Supreme Court have little if any impact on how the nine justices decide whether to affirm or reverse lower court decisions.[73] In a recent book on oral arguments and decision making at the Supreme Court, however, Timothy Johnson counters this assumption with empirical data showing that the Supreme Court justices use oral arguments as an information gathering tool to help them make legal and policy decisions.[74] While the justices already receive an abundance of information through lower court decisions, briefs on *certiorari*, and briefs on the merits (including *amicus curiae* briefs), oral arguments present the sole opportunity for the justices to exercise control over the information which it obtains.[75] The data gathered by Johnson shows that the justices use oral arguments to obtain information beyond that which the parties have provided.[76] In fact, the justices raise a strikingly large number of new issues during oral arguments pertaining to the extent of their policy decisions, the preferences of external actors such as Congress, and how external actors might react to their decisions.[77] Therefore, although oral arguments may not affect the dispositive outcomes of cases before the Supreme Court, they do have a significant impact on how the justices reach their substantive decisions.[78]

Finally, John Harlan, a former Justice of the United States Supreme Court offers anecdotal evidence of the significance of questioning during oral arguments.[79] While acknowledging that some judges may harmfully interrupt counsel by asking too many questions,[80] Justice Harlan stresses the important role that oral arguments play in "the hard business of decision."[81] Justice Harlan writes that

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73. TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 122 (2004).

74. *Id.* at 122-23.

75. *See id.* at 55-56.

76. *Id.*

77. *Id.* at 54.

78. *Id.* at 3.

79. *See* John M. Harlan II, *The Role of Oral Argument, in* JUDGES ON JUDGING: VIEWS FROM THE BENCH (David M. O'Brien ed., 2003).

80. *See id.* at 106-07.

81. *Id.* at 104.

> the job of courts is not merely one of an umpire in disputes between litigants. Their job is to search out the truth, both as to the facts and the law, and that is ultimately the job of the lawyers, too. And in that joint effort, the oral argument gives an opportunity for interchange between court and counsel which the briefs do not give. For my part, there is no substitute, even within the time limits afforded by the busy calendars of modern appellate courts, for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies.[82]

While the judges of the ICJ will most likely never engage with counsel to the same extent as do Supreme Court justices, oral arguments at the Supreme Court still stand as an important example of what exchanges between the bench and counsel may achieve.

CONCLUSION

Institutional inertia may currently pose the largest obstacle to the reform of oral proceedings at the International Court of Justice. Reform at the Court has historically been stymied in large part by its anxieties about placing procedural requirements upon sovereign states. Now, however, both ICJ judges and practitioners support questioning during oral proceedings, or, at the very least, shorter and more efficient hearings. Perhaps the Court's longstanding deference to the sovereign status of its litigants has now morphed into a general institutional reluctance to alter its proceedings in any really significant manner. Unsurprisingly, change comes slowly to this relatively old and conservative institution. While many of the judges of the International Court of Justice may wish to see the bench actively question counsel during oral proceedings, a consensus on this point may not come easily to a bench composed of 15 judges from very different legal backgrounds. Moreover, the Court's Rules do not necessarily lend themselves to this kind of change. Because the Rules require the judges to make their intention to ask questions known to the President, questioning counsel during oral proceedings may never be rapid and spontaneous. Nonetheless, a greater dialogue between the bench and the bar could still play an important role in the Court's modernization of its working methods. The critical question remains whether

82. *Id.* at 105.

the International Court of Justice possesses the necessary institutional will to effect such change.

THE CASE OF THE ERODING SPECIAL IMMIGRANT JUVENILE STATUS

WENDI J. ADELSON*

This Article provides a case study of a larger problem in American administrative law: the creation of unexecuted rights, with a focus in particular on the recent degradation of the Special Immigrant Juvenile Status (SIJS). Nearly twenty years ago, Congress drafted legislation providing for a pathway to citizenship for unaccompanied minors. In subsequent years, the Department of Homeland Security has ignored Congress' mandate to issue policy directives implementing the benefits and privileges associated with SIJS in a manner that would allow eligible persons to take advantage of this status. After explicating the nature of this creeping erosion of the SIJS mandate, especially as it impacts former foster youth with disabilities, the Article calls for DHS to create clear guidelines that can be implemented in a uniform fashion, treating all applicants in a fair and effective manner to clarify and extend the reach of SIJS.

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I. BACKGROUND

Nearly twenty years ago, Congress drafted legislation providing for a pathway to citizenship for unaccompanied minors.[1] This special immigrant juvenile visa (SIJ or J Visa) enables a child who has been abused, abandoned or neglected, in whose best interest it is not to reunite with family members or to return to his/her country of origin or "last habitual residence," to eventually become a United States citizen.[2] Without SIJ relief, children without a home to return to in their country of origin, not enough money to pay for out-of-state or international tuition to attend a state college or university, and no means of achieving lawful work authorization are left without a means of legal support or ability to receive an education. Additionally, such children are vulnerable to all kinds of pernicious influences: traffickers, commercial sexual exploitation, drugs, and gangs, just to name a few. While family ties are often a good way to obtain lawful resident status and eventually to naturalize, a seventeen-year old child is too old to qualify for the kind of adoption by a U.S. citizen aunt or uncle through which one could adjust status as a means to acquire citizenship.[3]

The Department of Homeland Security (DHS) detains several thousand unaccompanied minors who attempt to enter the United States illegally each year, sometimes up to 8,000 minors.[4] Only estimations exist on just how many children enter the U.S. legally,

1. Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005-06 (1990) (codified at 8 U.S.C. § 1101(a)(27)(J) (2006)).

2. § 1101(a)(27(J); Zabrina Aleguire & Gregory Chen, *Special Immigrant Juvenile Status for Children in Legal Guardianships*, 23 CHILD LAW PRACT. 12, 12 (2004). It is important to note that Congress first added the criteria for abuse, abandonment, or neglect in 1997 to limit the number and scope of children eligible for SIJ.

3. See *Report of the Working Group on Lessons of International Law, Norms, and Practice*, 6 NEV. L.J. 656, 664 (2006), for the principle that "a valid state adoption finalized after a child reaches age 16 does not create a parent-child relationship for immigration purposes."

4. Catholic Legal Immigration Network, Unaccompanied Minors, http://www.cliniclegal.org/Advocacy/unaccompaniedminors.html (printout on file with Journal). In 2005, the U.S. government had almost 8,000 unaccompanied minors in its custody (7,787 unaccompanied children, "up 25% from the previous year"). Maria Woltjen, *Looking out for the Best Interests of Unaccompanied Immigrant Children in the U.S.*, CHILDREN'S RIGHTS (ABA/Children's Rts. Litig. Committee, Washington, D.C.), Fall 2006. For some individual stories of these children, see Jennifer Ludden, *Child Migrants in U.S. Alone Get Sheltered, Deported*, NAT'L PUB. RADIO, Nov. 17, 2006, http://www.npr.org/templates/story/story.php?storyId=6469224.

then overstay their visas, and are not picked up by immigration authorities.[5] In 2005, 660 children received SIJ Status (SIJS).[6] Do the math: 8,000 unaccompanied children in DHS custody, another untold amount in guardianship-type situations, and only 660 children receiving green cards through SIJS. The low numbers of J Visas awarded relative to the number available for children in this situation[7] appears incongruous. What explains this discrepancy? First, access to information concerning the J Visa is a hurdle. A child must be fortunate enough to have heard of SIJS, and such information often filters through contact with a social worker, attorney, case manager, or other child advocate.[8] Unfortunately, sometimes this vital information filters too late or not at all, and an otherwise eligible child becomes ineligible through aging-out. In Florida, for example, a child must apply and at least establish dependency on a juvenile court before reaching eighteen years old.[9] Aging out is a problem for dependent immigrant children, but certainly not the only risk they face when anticipating an application for SIJS. Applying for a J Visa exposes a child not in DHS custody—a child who has otherwise flown under the immigration radar—to potential deportation. It is vitally important that both the client and the attorney be aware of the risks involved with bringing a SIJ petition; namely, alerting the immigration authorities to an otherwise "invisible" child.

660 children received lawful immigration status through the Special Immigrant Juvenile visa in 2005.[10] Exact data is currently

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5. Of the approximately 8,000 children that pass through the immigration system, some portion of these children stay in the country and disappear, becoming part of the underground undocumented world. *See* Ludden, *supra* note 4. Also, approximately 1.8 million children (some residing in families and some arriving unaccompanied) live in the United States without legal immigration authorization. *See* JEFFREY S. PASSEL, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 8 (Pew Hispanic Ctr., Mar. 7, 2006). Some portion of these children may be eligible for special immigrant juvenile status.

6. OFFICE OF IMMIGR. STAT., DEP'T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 22 tbl. 7 (2006) [hereinafter 2005 YEARBOOK], *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf.

7. The quota as outlined in 8 U.S.C. § 1153(b)(4) (2006) extends to all special immigrants, not just juveniles. The quota for special immigrants as outlined in § 101(a)(27) is 7.1% of worldwide immigration for employment-based category (which is 140,000 under 8 U.S.C. § 1151(d) (2006)), meaning that 9,940 special immigrants are eligible for potential citizenship each year.

8. *See* Aleguire, *supra* note 2, at 12.

9. *See* § 39.5075(6), FLA. STAT. (2008). Section 39.013(2) of the Florida Statutes (2008) expressly authorizes a Motion for Extension of Jurisdiction to be granted in any cases where the application for SIJ status and adjustment of status is pending past the child's eighteenth birthday.

10. In fiscal year 2005, U.S. Citizenship and Immigration Services made 660 grants of Special Immigrant Juvenile Status. 2005 YEARBOOK, *supra* note 6, at 22 tbl. 7; in fiscal year 2004, 624 grants were made, OFFICE OF IMMIGRANT STAT., DEP'T OF HOMELAND SEC., 2004

unavailable as to exactly how many juveniles applied for SIJS and how many applications were approved.[11] That said, 660 is a small number considering that over 9,000 spots are reserved for special immigrants each year.[12] Given that few SIJ petitions are approved for adjustment to lawful permanent resident status each year, one might wonder why anyone would oppose these applications filed by children deemed dependent by the juvenile court system.

A recent internal memorandum from U.S. Citizenship and Immigration Services (USCIS) written by William Yates (Yates Memo) sheds some light on possible reasons for the newly increased resistance to SIJ petitions.[13] The Yates Memo states that the "[USCIS] adjudicator generally should not second-guess the [juvenile] court's rulings or question whether the court's order was properly issued."[14] Such language indicates that while "generally" USCIS will support the findings of juvenile court judges who are statutorily granted the authority to make specific findings of fact in relation to the juveniles in question,[15] exceptions could exist where an adjudicator would have the freedom to substitute his/her opinion for that of a juvenile court judge.[16] The juvenile court is,

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YEARBOOK OF IMMIGRATION STATISTICS 18 tbl. 5 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2004/Yearbook2004.pdf; in fiscal year 2003, 445 grants were grant, OFFICE OF IMMIGRANT STAT., DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 23 tbl. 5 (2004), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003Yearbook.pdf; in fiscal year 2002, 510 grants, OFFICE OF IMMIGRANT STAT., DEP'T OF HOMELAND SEC., 2002 YEARBOOK OF IMMIGRATION STATISTICS 24 tbl. 5 (2003), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2002/Yearbook2002.pdf; in fiscal year 2001, 541 grants, OFFICE OF IMMIGRANT STAT., DEP'T OF HOMELAND SEC., 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 29 tbl. 5 (2003), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2001/yearbook2001.pdf; in fiscal year 2000, 658 grants, OFFICE OF IMMIGRANT STAT., DEP'T OF HOMELAND SEC., 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 31 tbl. 5 (2002), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2000/Yearbook2000.pdf.

11. The author has filed a FOIA request on the matter that has not yet been answered.

12. *See* discussion *supra* note 7.

13. *See* Memorandum from William R. Yates on Field Guidance on Special Immigrant Juvenile Status Petitions (May 27, 2004), *available at* http://www.uscis.gov/files/pressrelease/SIJ_Memo_052704.pdf.

14. *Id.* at 4-5.

15. *See* 8 U.S.C. § 1101(a)(27)(J)(ii) (2006). All of these findings should be clearly set forth in the order, and the court should also make clear that the findings and determinations were made as a result of the neglect, abuse, or abandonment of the child. *See* Memorandum from William R. Yates, *supra* note 13, at 4. Such a finding can be made by the court or an administrative agency. *See id.*

In Florida dependency proceedings, these findings can only be made by a Circuit Court Judge, pursuant to section 39.5075(4) of the Florida Statutes (2008).

16. For example, the Yates Memo outlines the procedure a USCIS adjudicator would follow if s/he suspects that the juvenile court performed insufficient oversight over the facts presented by the juvenile in question:

> If an adjudicator encounters what s/he believes to be a fraudulently obtained order s/he should promptly notify a supervisor, who should imme-

however, the proper place for a "best interest of the child" analysis to occur.[17] In light of that expertise, and given that Congress intended the juvenile court to be the sole finders of fact and authority to grant best interest orders, this wiggle room for USCIS to insert itself into the fact finders' seat without Congressional authority begins a dangerously slippery slope toward second guessing of juvenile courts that lawfully grant SIJ Status to eligible juveniles.

Although this Article uses the example of SIJ status as the core case study, the inability of otherwise qualified juveniles to receive SIJ status is certainly not the only instance of unexecuted administrative rights, especially as it relates to immigration law. Some other examples include Freedom of Information Act requests, U Visas before the regulations arrived in September 2007,[18] and the situation of unclear regulations with respect to unaccompanied immigrant children who languish in detention awaiting decisions with regard to their immigration status.[19] These other instances of unexecuted rights are equally important, but for the purpose of this Article, this author will focus exclusively on the problem with rights associated with SIJS.

A. *Jean's Story*[20]

In recent cases, DHS has maintained that certain foster care eligible children are ineligible for SIJS. Jean Toussaint is a seventeen year old child from Haiti. Jean has never known his father and was orphaned by his mother at a very young age. When he was approximately six years old, Jean came to the United States

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> diately notify USCIS Headquarters, Office of Field Operations and Office or Program and Regulation Development, through designated channels, to coordinate appropriate follow-up.

Memorandum from William R. Yates, *supra* note 13, at 5.

17. *See* Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Arrangements; Adjustment of Status, 58 Fed. Reg. 42843, 42847 (Aug. 12, 1993). The comments also state that the INS "believes it would be both impractical and inappropriate for the [INS] to routinely readjudicate judicial or social service agency administrative determinations as to the juvenile's best interest." *Id.*

18. Even at the time of this publication, few if any U Visas have been approved, given the immense backlog predating 2007. *See* OFFICE OF THE OMBUDSMAN, U.S. CITIZENSHIP & IMMIGRATION SERVICES, IMPROVING THE PROCESS FOR VICTIMS OF HUMAN TRAFFICKING AND CERTAIN CRIMINAL ACTIVITY: THE T AND U VISA 1 (2009), *available at* http://www.aila.org/content/default.aspx?docid=27793.

19. For more information on this legal action, see Hernan Rozemberg, *Unaccompanied Immigrant Minors Face Major Consequences*, SAN ANTONIO EXPRESS-NEWS, Sept. 4, 2007, *available at* http://www.mysanantonio.com/news/MYSA090207_01A_Immigrant_kids_3a416eb_html708.html.

20. All names have been changed to protect the identities of those involved. This case is currently pending and the omission of sources is necessary to protect the integrity of the outcome.

and was placed with his aunt. He no longer speaks nor understands Haitian Creole. When Jean was eleven years old, the Florida Department of Children and Families removed him from his aunt's abusive and neglectful care and placed him under state custody in the Florida foster care system. Jean was adjudicated dependent on the juvenile court in 2002,[21] and the Court terminated rights for both parents in March of 2003.

On April 22, 2003, the former Immigration and Naturalization Service (INS) approved Jean's Petition for Special Immigrant Juvenile Status (SIJS).[22] Here is how SIJS works.[23] To qualify, a child must first be adjudicated dependent by the state court.[24] The state court then makes findings as to whether: reunification with the child's parents is likely, the child is eligible for long-term foster care,[25] and if it would be in the "best interests" of the child to remain in the U.S. in the care of a legal guardian.[26]

After the juvenile court approved Jean's SIJ petition, the Department of Homeland Security (DHS) denied his Application for Adjustment of Status, and Jean was placed into removal proceedings before the Miami Immigration Court. DHS then referred some of Jean' delinquency, educational, and mental health records to the Centers for Disease Control and Prevention (CDC). Based on the documents provided by the DHS, the CDC determined in 2005 that Jean has Attention Deficit Hyperactivity Disorder (ADHD) and Disruptive Behavior Disorder, NOS (312.9), both of which are considered Class A medical conditions by the CDC.[27] Having a Class A medical condition precludes the obtainment of legal permanent residency in the United States pursuant to Section 212(a)(1)(A)(iii) of the Immigration and Nationality Act.[28]

A Class A medical condition renders an individual inadmissible to the U.S. unless the applicant is otherwise eligible for a waiver.[29]

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21. An adjudication of dependency signifies that a juvenile court has made findings of fact regarding a child's abuse, abandonment, or neglect by his parental figures. *See, e.g.*, § 39.507, FLA. STAT. (2008). In Florida, dependency is outlined in Chapter 39 of the Florida Statutes.

22. *See* 8 U.S.C. § 1101(a)(27)(J) (2006).

23. For a more detailed account of the SIJS process, see WENDI J. ADELSON, SPECIAL IMMIGRANT JUVENILE STATUS IN FLORIDA: A GUIDE FOR JUDGES, LAWYERS, AND CHILD ADVOCATES (2007), http://www.law.miami.edu/pdf/SIJ_Manual.pdf.

24. *Id.*

25. "*Eligible for long-term foster care* means that a determination has been made by the juvenile court that family reunification is no longer a viable option" and that the child will normally go on to foster care, adoption or guardianship. 8 C.F.R. § 204.11(a) (2008) (emphasis in original).

26. *See* 8 U.S.C. § 1101(a)(27(J)(ii) (2006).

27. Under authority from 8 U.S.C. § 1182 (a)(1)(A)(iii)(II) (2006).

28. *See* Hebrew Immigrant Aid Soc'y, Immigration Glossary, http://www.hias.org/immigration/glossary.html (last visited Mar. 4, 2009).

29. *Id.*

These conditions are labeled communicable diseases of public health significance. Currently, this list includes any of the following diseases: "(1) Chancroid, (2) Gonorrhea[,] (3) Granuloma inguinale, (4) Human immunodeficiency virus (HIV) infection, (5) Leprosy, infectious, (6) Lymphogranuloma venereum, (7) Syphilis, infectious stage, and (8) Tuberculosis, active."[30] Also included in Class A, and particularly germane to Jean's case, are labels concerning individuals who possess:

> a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others or . . . have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or lead to other harmful behavior, or . . . [an individual] . . . determined to be a drug user or addict.[31]

The CDC has internal procedures for re-examining an immigrant that it deems to have a Class A medical condition.[32] Upon an appeal by the alien child who has been certified as possessing a Class A condition, the CDC must convene a panel to re-examine the evidence submitted, and hear additional evidence and testimony regarding the condition.[33] The panel must then determine if it concurs with the Class A medical condition classification placed on the child by a prior medical specialist.[34]

Jean's legal representatives appealed the CDC's determination that Jean currently suffers from a Class A medical condition. The lawyers argued that the CDC had insufficient information on which to base an informed determination of Jean's condition. Specifically, the board of examiners relied on limited information provided solely by DHS, and neither evidence nor testimony was provided on Jean' behalf. Jean's legal team believed that upon re-examination, if the board of medical examiners had current and accurate information regarding Jean's theoretical psychiatric condition, it would recognize that he does not currently suffer from a

30. *Id.*

31. Immigration and Nationality Act §212(a)(1)(A)(iii)-(iv), 8 U.S.C. § 1182(a)(1)(A)(iii)-(iv) (2006).

32. *See* 42 C.F.R. § 34.8 (2007).

33. *See id.*

34. *Id.* § 34.8(h).

Class A illness, and, as such, the CDC's initial determination would not preclude Jean from gaining permanent residency in the U.S.[35]

That said, the juvenile court retained jurisdiction over his case, and representatives for Jean Toussaint gathered experts in psychology and psychiatry to clarify the existence or extent of Jean's present relationship with ADHD. Authorities on the condition are divided as to whether an individual can ever "grow out" of ADHD.[36] Jean's representatives collaborated with medical experts to ascertain whether Jean was initially correctly diagnosed with ADHD, since his lengthy records did not contain information as to which individual first diagnosed him at age five, and what their professional qualifications were for determining whether Jean had this disease.

Upon reflection, the CDC found that Jean did not at that time have ADHD. His case was then remanded to the Immigration Judge who ruled to adjust Jean's status to that of a lawful immigrant. DHS has appealed, and Jean's legal team has filed an amicus on his behalf. At this juncture, it is unclear how the court will decide this case.

If decided in his favor, Jean's case could have potentially far-reaching effects. Jean's attorneys hope that since the CDC decided that Jean was misdiagnosed and is not afflicted with a Class A disease, rendering him eligible for adjustment of status, then perhaps the enormous resources garnered to achieve his legal victory will have a chilling effect on DHS officials who would seek to remove a similarly SIJS-eligible individual. The fear is that if Jean loses his case, then other foster children—a group that disproportionately suffers from mental disabilities[37]—who receive SIJS may similarly be unable to naturalize. The systemic consequences are impressive: for Jean, a CDC refusal to overturn its findings regarding his Class A status would mean that a boy who left Haiti at age six, who does not speak Creole, and who has not a single living relative in Haiti to care for him might be forced to return to his country of origin. A loss for Jean could have had potentially far-

35. This legal strategy is not without complications. Given the impact that Jean's case could have on all foster children afflicted with various mental illnesses or disorders, the litigation strategy chosen in this case had to exclude children eligible for SIJ status who were rendered ineligible because of a Class A diagnosis. Accordingly, the legal team for Jean asserted that Jean never had ADHD in the first place.

36. *See* FamilyDoctor.org, ADHD: What Parents Should Know, http://familydoctor.org/118.xml (last visited Mar. 4, 2009).

37. SHARON VANDIVERE ET AL., CHILD TRENDS, CHILDREN IN FOSTER HOMES: HOW ARE THEY FARING? (2003) (demonstrating more health problems for foster children than similarly disadvantaged children and a higher incidence of behavioral and emotional problems), *available at* http://www.childtrends.org/Files/FosterHomesRB.pdf.

reaching and catastrophic effects for both the populations of foster and undocumented children residing in the U.S.

Just because Jean was found not to have ADHD and thus not to be inadmissible does not leave other similarly situated young people with ADHD and other disabilities free and clear. This is not a class action case; instead, its potentially positive outcome is for Jean alone to enjoy, unless the enormous time and expense of litigation prevents DHS from wanting to do battle on this contentious SIJ issue again.

As mentioned, the CDC made a conclusive finding that Jean neither has ADHD in combination with a behavioral disorder, nor is he a threat to himself or to society, as DHS had claimed. The CDC board went further to question whether Jean ever had a disease in the first place, the assumption being that he was misdiagnosed. Even after the CDC ruled in Jean's favor, U.S. Immigration and Customs Enforcement (ICE) continued its efforts to deport Jean, by trying to subpoena additional school records, even though the immigration judge who gave the final ruling agreed that he already had all the school records. No doubt ICE viewed this case as an entree into setting bold precedent for other like cases. Because most abused, abandoned, and/or neglected children have also been traumatized, and most traumatized children frequently experience mental conditions resulting from exposure to trauma, then this population of children could also have mental conditions that present a danger to society. However, this is the very group of children that Congress saw fit to protect through SIJ legislation.[38] Without the ability to access the rights that Congress created for them, children eligible for SIJ relief are left with unexecuted rights.

1. ADHD as a Class A Illness

ADHD should not be considered a Class A illness. As mentioned before, DHS asserted that Jean suffered from ADHD which should be considered a Class A illness that would render Jean unable to adjust his status. The CDC has found that 7.8% of all children in the U.S. have been diagnosed with ADHD.[39] The CDC lists ample information on its websites concerning ADHD and explains what the disorder means for individuals, families and communities afflicted.[40] Some of that information is as follows:

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38. *See* discussion *infra* Part I.

39. Centers for Disease Control & Prevention, ADHD Home, http://www.cdc.gov/ncbddd/adhd/ (last visited Mar. 4, 2009).

40. *See, e.g.*, Centers for Disease Control & Prevention, What is Attention-

- ADHD is one of the most common neurobehavioral disorders of childhood thought to affect about 5% of U.S. children aged 6-17[41] and can persist through adolescence and into adulthood.[42]
- "ADHD manifests as an unusually high and chronic level of inattention, impulsive hyperactivity, or both. A person with ADHD may struggle with impairments in crucial areas of life, including relationships with peers and family members, and performance at school or work. Increases in unintentional injuries and health care utilization have been noted in some studies of people with ADHD."[43]

On its face, given the large number of children in the U.S. who are diagnosed with this illness each year, it seems a stretch to label ADHD a disorder or behavior "that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others."[44] Certainly, the CDC and others with intimate knowledge of the disease acknowledge that it has the capacity to cause injury and harm both to the individuals afflicted, to their families, and others.[45] The CDC also noted that "[c]hildren with ADHD appear to have significantly higher medical costs than children without ADHD."[46] However, many diseases and disorders, like cancer, for example, require protracted periods of care and medical attention without amounting to a public health risk.

Why is ADHD different? Attorneys for DHS who would like to see Jean and similarly situated children deported might argue that ADHD in and of itself is not as great a threat to the safety and welfare of others as is ADHD in combination with other disorders, like the oppositional defiance disorder with which Jean was origi-

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Deficit/Hyperactivity Disorder (ADHD)?, http://www.cdc.gov/ncbddd/adhd/what.htm (last visited Mar. 4, 2009).

41. Miranda Hitti, WebMD Health News, CDC: About 5% of Kids of ADHD, http://www.webmd.com/add-adhd/news/20080723/cdc-about-5-percent-of-kids-have-adhd (last visited Mar. 4, 2009).

42. *See* Adult ADD Help, Adult ADD, http://adultaddhelp.net/adult-add (last visited Mar. 4, 2009).

43. Centers for Disease Control & Prevention, ADHD – a Public Perspective, http://www.cdc.gov/ncbddd/adhd/publichealth.htm (last visited Mar. 4, 2009).

44. Immigration and Nationality Act §212(a)(1)(A)(iii)-(iv), 8 U.S.C. § 1182(a)(1)(A)(iii)-(iv) (2006).

45. *See* Centers for Disease Control & Prevention, ADHD and Risk of Injuries, http://www.cdc.gov/ncbddd/adhd/injury.htm (last visited Mar. 4, 2009); *International Consensus Statement on ADHD*, 5 CLINICAL CHILD & FAM. PSYCHOL. REV. 89, 90 (2002).

46. ADHD and Risk of Injuries, *supra* note 45.

nally diagnosed.[47] Oppositional defiance disorder (ODD) is a condition marked by "aggressiveness and a tendency to purposefully bother and irritate others."[48] As a society, it is understandable that we would prevent certain harmful individuals from entering our borders. We would purposely seek to exclude those who intended to harm individual citizens and the political and economic structures of U.S. government. Given the aggression exhibited by individuals with ODD in combination with ADD and ADHD, and the potential danger they could pose to others,[49] perhaps they should also be excluded from admission into the U.S.

That said, ODD is the "most common psychiatric problem in children," and a solid percentage of children with ODD exhibit ADHD as well.[50] Research has demonstrated that early detection, in combination with various kinds of therapy, can greatly reduce the negative impact of ODD and ADHD on the lives of the children afflicted, as well as friends, family and communities impacted by the disease.[51] Moreover, Congress in no way contemplated that DHS would make an exception for abused, abandoned and/or neglected juveniles diagnosed with ADHD and/or ODD who were otherwise eligible for SIJ status. This disorder does not rise to the level of dangerousness to society to justify exclusion of a non-violent juvenile who has not been found delinquent by a juvenile court.

Part of what is most troubling about DHS making decisions as to what diseases or disorders are considered admissible and which are excludable is that these types of large-scale policy decisions are not within the province of individual adjudicators to make. On the contrary, it is the legislature that is tasked with making these kinds of policy decisions. The juvenile court judges also have a role to play in designating which juveniles are dangerous and need to be detained, and which minors require dependence on the court for preservation of their best interests. Under *Chevron*, DHS as an administrative agency of the U.S. government is entitled to deference for its decisions based on statute.[52] However, this level of deference does not extend to the decisions of individual decision-makers when they seek to make independent decisions without authority to do so.

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47. *Cf.* James Chandler, Oppositional Defiant Disorder (ODD) and Conduct Disorder (CD) in Children and Adolescents: Diagnosis and Treatment, http://www.klis.com/chandler/pamphlet/oddcd/oddcdpamphlet.htm#_Toc121406159 (last visited Mar. 4, 2009).

48. *Id.*

49. *See* 4 ADHD, ADHD and Oppositional Defiance Disorder (ODD), http://www.4-adhd.com/adhd-odd.html (last visited Mar. 4, 2009).

50. Chandler, *supra* note 47.

51. *See* 4 ADHD, *supra* note 49.

52. *See* Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

B. The Government's Position and Congressional Intent

For the government to maintain this position flies in the face of congressional intent. The enactment of the 1990 SIJ provision of the Immigration and Nationality Act[53] demonstrates Congress' recognition that children who have experienced maltreatment in their families deserve special protection. During the creation of this provision, twenty-eight different commentators to the proposed statute expressed concern about how juveniles eligible for SIJ visas would adjust their status to that of lawful permanent residents.[54] One commentator asked about whether the adjustment of status would be an automatic process or whether a SIJ would be required to go through the regular immigration channels to adjust their status.[55] Further, "several [of the] commentators indicated that, since Congressional intent was to allow special immigrant juveniles to become permanent residents, the [USCIS] should revise the rule to allow adjustment regardless of whether the applicants were ineligible for adjustment under existing statutes."[56] Although Congressional intent is never uniform or easy to divine, this commentary sheds at least a little light on the underlying discussions surrounding the creation of SIJS.

Many Congressional members in support of the creation of SIJS thought that a juvenile who had received a best interest order from a juvenile court judge rendering them eligible for a J visa would sail through a seamless pathway to citizenship.[57] For a long time, that certainly was the case.[58] Part of the reason for the streamlined nature of the J visa was that most exclusionary provisions are waived for special immigrant juveniles "for humanitarian purposes, family unity, or when it is otherwise in the public interest."[59] The only exclusionary provisions that cannot be waived are those involving criminal and security related grounds.[60] After a quick reading of the statute, it would not seem legally possible that someone in Jean's position—that of a juvenile granted SIJ status

53. Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005-06 (1990) (codified at 8 U.S.C. § 1101(a)(27)(J) (2006)).

54. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Arrangements; Adjustment of Status, 58 Fed. Reg. 42843, 42848-49 (Aug. 12, 1993).

55. *Id.* at 42848.

56. *Id.*

57. Interview with Professor Bernard P. Perlmutter, Univ. of Miami Sch. of Law in Miami, Fla. (Mar. 15, 2007).

58. *Id.*

59. 8 U.S.C. § 1255(h)(2)(B) (2006).

60. The grounds that persist for exclusion of special immigrant juveniles are laid out in 8 U.S.C. § 1182 (a)(2)(A), (2)(B), (3)(A), (3)(C), (3)(E) (2006).

who was diagnosed with a commonplace disability—would be unable to adjust his status. Yet, Jean is just one of many juveniles whom the juvenile courts have found eligible for an SIJ visa and then found ineligible by the USCIS.[61]

1. Lack of Any Congressional Indication

Congress never indicated that SIJS should be unavailable to kids with certain medical conditions. Nowhere in the legislative history surrounding the enactment of SIJS does it mention medical illness as a ground for excludability or inadmissibility. The absence of such a reference is noticeable given the other grounds of inadmissibility that are explicitly mentioned and waived. For example, as the Yates Memo provides, "SIJ beneficiaries are excused from many requirements that other applicants for adjustment must meet."[62] SIJ applicants are excused from "provisions prohibiting entry for those likely to become a public charge,"[63] "those without proper labor certification,"[64] "and those without a proper immigrant visa."[65] However, certain grounds of inadmissibility are not waivable for SIJ applicants. These grounds are listed in the Immigration and Nationality Act § 212(a)(2)(A), (B), and (C), as well as (3)(A), (B), (C), and (E) and cover offenses such as multiple criminal convictions and controlled substance trafficking.[66]

Certainly it would seem that a child like Jean, who has no family left in Haiti and who has already been recommended by a juvenile court for SIJ status, would be in the very kind of situation that USCIS contemplated when it wrote clarifying Yates Memo on the SIJ Visa, which articulated "humanitarian purposes" as a potential route for going around another potential inadmissibility.[67] However, DHS considered Jean inadmissible due to his Class A characterization on account of his ADHD. Congressional intent underlying the creation of SIJ Status was to create a permanent option in the U.S. for undocumented, state-dependent minors.[68] The absence of mention of commonplace medical conditions like ADHD as grounds for inadmissibility in the SIJ statute indicates

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61. See Holland & Knight, Children's Rights, http://www.hklaw.com/id146/#2 (under "Special Immigrant Juvenile Status Secured in Florida") (last visited Mar. 4, 2009), for an explanation of this litigation in Florida.

62. Memorandum from William R. Yates, *supra* note 13, at 6.

63. *Id.* (citing Immigration and Nationality Act § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2006)).

64. *Id.* (citing Immigration and Nationality Act § 212(a)(5)(A), 8 U.S.C. § 1182(a)(5)(A) (2006)).

65. *Id.* (citing Immigration and Nationality Act § 212(a)(7)(A), 8 U.S.C. § 1182(7)(A) (2006)).

66. *Id.*

67. *Id.*

68. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified in scattered sections of 8 U.S.C.).

that USCIS officials are carrying out the SIJ mandate for state-dependent unaccompanied juveniles in a way different from that envisioned by Congress.

2. SIJS

Given that a separate court system was created for juveniles, the juvenile court seems the most appropriate place to make findings as to a child's welfare in the context of his or her family situation.[69] Until Congress intervened in 1990, one group of children remained outside the purview of state court jurisdiction; namely, undocumented children who had been abused, abandoned and neglected.[70] The impetus for the creation of the SIJS arose primarily out of a desire to provide relief for this discrete group of young people.[71]

No administrative regulations aid in implementation of the SIJS. Several law review articles have called for such aid and guidance in interpreting various portions of the statute.[72] The lack of administrative regulations has been made more problematic by the 1997 amendments to SIJ law.[73] For example, the 1997 amendments to SIJ law make it necessary for a child in DHS detention to seek the "specific[] consent" of the Attorney General to a state juvenile court exercising jurisdiction over undocumented children in "actual or constructive custody of the Attorney General."[74] Because neither "consent" nor "actual or constructive custody" have been clearly defined through administrative regulation,[75] children and their legal advocates remain uncertain as to how to properly follow the law.

Confusion regarding this question of Attorney General consent, which arose from the 1997 amendments, also persists in cases where the juvenile is no longer in DHS custody. Absent regulations, these questions of consent must be resolved on a case by case basis. For example, in a letter dated February 13, 2007, the John Pogash, Chief of the National Juvenile Coordination Unit of ICE Office of Detention and Removal Operations sought to clarify the

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69. *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909) (discussing the early movement toward treating juvenile offenders differently than adult offenders by, among other things, creating a separate justice system for them).

70. *See* Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children From Their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L.J. 237, 237-38 (2006).

71. *See id.* at 238.

72. *See, e.g.*, *id.* at 261.

73. *See id.* at 244-47.

74. *See* 8 U.S.C. § 1101(a)(27)(J)(iii)(I); Lloyd, *supra* note 70, at 245-46.

75. Lloyd, *supra* note 70, at 240.

consent conundrum.[76] Pogash emphasized in this letter to an attorney for an SIJ applicants that the specific consent of the Attorney General is not needed for minors who have been released from federal custody.[77] The letter is definitely a step in the right direction toward greater clarity. However, such a policy lacks uniformity if attorneys are still confused as to how the 1997 amendments apply to their clients and see the need to write to the Chief of ICE in the first place. Administrative regulations are still necessary, and still missing.

3. Congress' Clear Intent

Congress' intent of SIJS is clear that SIJS should be implemented fairly, clearly, and robustly. When Congress promulgated SIJ law in 1990, it clearly intended to create a legal right for undocumented abused, abandoned or neglected children residing in the U.S. Although the 1997 amendments have obfuscated a few of the original provisions, such as the issue of Attorney General consent mentioned above, the general intent remains intact. That said, cases like that of Jean, and others currently on appeal, chip away, at the least, at one remedy available to vulnerable children residing in our nation.

One way in which practice belies the intent underlying SIJ law is when the system is overwhelmed by applications for adjustment of status, such that many individuals applying, including a few applications for SIJ status, fall to the wayside. This result undermines congressional intent that SIJ applicants be processed quickly, fairly and accurately so that the benefit of legal status arrives in time to aid juveniles aging out of public school to lawfully enter advanced education and/or the work force. The case of *Yu v. Brown* addressed such an issue.[78] In this class action, Yu was the named plaintiff representing a group of individuals that had been approved for SIJ Status, but had been waiting more than one year for the former Immigration and Naturalization Service (INS) to process their applications for adjustment of status.[79] The court held that, "regardless of the ultimate decision, [the] INS ha[d] a

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76. Letter (redacted) from John J. Pogash, Chief of the Nat'l Juvenile Coordination Unit, Office of Detention & Removal Operations, U.S. Immigration & Customs Enforcement, to counsel Mr. X (Feb. 13, 2007) (regarding Mr. X's request for more information about how Attorney General consent would function in his client's case), *available at* http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Pogash%20Letter%20_2007.pdf.

77. *See id.*

78. Yu v. Brown, 36 F. Supp. 2d 922 (D.N.M. 1999).

79. *Id.* at 925.

non-discretionary, mandatory duty to act on [the class's] applications."[80] In terms of the agency's role in carrying out congressional intent, the court in *Yu* also cites a related case for the proposition that the court's "function in such cases is to assure the vitality of the congressional instruction that agencies conclude matters within a reasonable time."[81]

The need to process the immigration paperwork portion of the J visa expeditiously is certainly an important facet of adhering to congressional intent with regard to SIJ. Another manner in which congressional intent regarding SIJ has been thwarted relates to the challenges that USCIS has made to the juvenile court's findings of abuse, abandonment or neglect. Federal law governing a child's eligibility for SIJ legal relief requires that a child be declared dependent upon a juvenile court due to his or her abuse, abandonment, or neglect.[82] When administrative officers insert their own opinions, displacing those of juvenile court judges who are experienced in fact-finding on abuse, abandonment, and neglect regarding juveniles, the potential for accurate SIJ determinations is undermined.

USCIS declared in the Yates Memo that immigration officials should not attempt to substitute their judgment for that of the juvenile court judges.[83] The Yates Memo clearly states that the USCIS "adjudicator generally should not second-guess the court rulings or question whether the court's order was properly issued."[84] It is possible that the word "generally" was carefully placed to permit the kind of second-guessing that currently takes place by USCIS adjudicators with regard to juvenile court best interest orders for SIJ. In fact, the Miami Office of USCIS has repeatedly readjudicated cases decided by juvenile court judges based on their perceptions of improper decisions on abuse, abandonment, and neglect.[85] Such actions run counter to DHS's policies and practices wherein the agency acknowledges its limitations in the field of dependency law. According to its own policy, the former INS

> does not intend to make determinations in the course of deportation proceedings regarding the "best inter-

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80. *Id.* at 931.

81. *Id.* at 930 (citing *In re* Amer. Fed. of Gov. Employees, AFL-CIO, 790 F. 2d 116, 117 (D.C.Cir. 1986) (citation omitted)) (internal quotation marks omitted).

82. 8 U.S.C. § 1101(a)(27)(J) (2006).

83. Memorandum from William R. Yates, *supra* note 13, at 4-5.

84. *Id.*

85. *See* Letter from Cheryl Little, Executive Dir., Fla. Immigrant Advocacy Ctr., to Cheryl Phillips, U.S. Citizenship & Immigration Services 5 (Dec. 20, 2006) (on file with the *Journal*).

> est" of a child for the purpose of establishing eligibility for special immigrant juvenile classification. . . . *[I]t would be both impractical and inappropriate for the Service to routinely readjudicate judicial . . . administrative determinations as to the juvenile's best interest.*"[86]

II. SIJ AND JEAN

A. Precedent of Courts Applying SIJS to Folks Like Jean Elsewhere

Jean's case is most likely one of first impression. The attorneys involved in the case have yet to uncover any prior case law regarding children eligible for SIJ visas who have been denied based on Class A inadmissibility. The juvenile court in this case looked to Jean's attorneys to inform the judge as to whether she had the authority to order that Jean receive an expert evaluation before his hearing in front of the CDC. Further, the CDC actually had to write its own rules of procedure to govern this precedent-setting case, whereby a child would be reevaluated by the CDC and other medical specialists.

While it seems precedent does not exist on the exact issue present in Jean's case, similar erosions of congressional intent underlying SIJ law are occurring in pockets around the United States. The U.S. Committee for Refugee and Immigrant Children diligently manages these flare-ups nationwide.[87] The Committee has mentioned that a few juvenile court judges in New Jersey and northern Florida have refused to adjudicate a child dependent who otherwise appeared eligible for dependency because the judge assumed that the child would later seek immigration relief.[88] Such a belief undermines congressional intent concerning SIJ law in that the law exists as a form of immigration relief for qualified juveniles; therefore, a juvenile who seeks the immigration relief that SIJ affords after being adjudicated dependant is well within his or her right.

Jean's case has especially important precedential value because his situation involves a child formerly in foster care, quali-

86. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Arrangements; Adjustment of Status, 58 Fed. Reg. 42843, 42847 (Aug. 12, 1993) (emphasis added).

87. Telephone Conversation with Eric Sigmon and Carolyn Seugling (Apr. 30, 2007) (regarding problems nationwide with SIJ adjudications in juvenile courts).

88. *Id.*

fied for SIJ, and who, because of a medical illness or disability, is being denied immigration relief. Social science research has demonstrated that current or former foster children are more likely to suffer from mental illness and disability.[89] Current case law has also exposed the increased likelihood that foster children will suffer from a lack of necessary medical or mental health treatment.[90] Given that abused, abandoned and/or neglected children eligible for foster care are the very children most likely to suffer from these disabilities, it does not follow that having such a disorder like ADHD could keep a child from accessing U.S. citizenship through SIJ status, which is what just as Congress intended.

B. Policy Reasons for Applying SIJS Properly

In addition to the legal reasons for carrying out congressional intent with regard to SIJ law, policy reasons to uphold this legislation abound. One of the core reasons for properly effectuating SIJ law and ensuring that those juveniles eligible for SIJ receive this form of legal relief is found in the "best interests of the child" standard borrowed from family law.[91] As David Thronson has asserted, "the ubiquitous 'best interests of the child' standard that governs or influences many decisions affecting children in other arenas does not drive immigration law."[92] Thronson notes, however, that this standard, otherwise absent from immigration law, is readily apparent in SIJ legislation where dependency was explicitly made the province of the juvenile court, which is a more appropriate body than an immigration court to decide matters relating to a ju-

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89. *See generally* Sandra K. Cook-Fong, *The Adult Well-Being of Individuals Reared in Family Foster Care Placements*, 29 CHILD & YOUTH CARE F. 7 (2000); John G. Orme & Cheryl Buehler, *Foster Family Characteristics and Behavioral and Emotional Problems of Foster Children: A Narrative Review*, 50 FAM. REL. 3 (2001); VANDIVERE, *supra* note 37 (demonstrating more health problems for foster children than similarly disadvantaged children and a higher incidence of behavioral and emotional problems).

90. *See, e.g.*, Kenny A. *ex rel.* Winn v. Perdue, 218 F.R.D. 277, 286 (D. Ga. 2003) (alleged failures by Georgia's foster care system including failing to provide necessary mental health and medical services to foster children); Braam *ex rel.* Braam v. State, 81 P.3d 851, 856 (Wash. 2003) (findings made by the trial court against Washington's Department of Social and Health Services included the denial of necessary mental health services to foster children and the provision of inappropriate services).

91. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 68 (2000) ("[T]here is a presumption that fit parents act in the best interests of their children."); 47 AM. JUR. 2D *Juvenile Courts, Etc.* § 53 (2008) ("The best interests of the child must be considered, and the court cannot disregard that the purpose of juvenile laws is to provide for the care, protection, and welfare of the child in a family environment whenever possible, separating the child from his or her parents only when necessary." (footnote omitted)).

92. David B. Thronson, *You Can't Get Here From Here: Toward A More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 67-68 (2006).

venile's welfare.[93] To have a juvenile court grant an best interest order for SIJ informed by the best interests of the child standard and then not grant the concomitant forms of immigration relief due to incorrect implementation undermines the policy goals associated with this important legislation.

Correct implementation of SIJ legislation also serves a humanitarian function. This space for humanitarian principles to override other potential minor deficiencies in the application is written into the statute. For example, most other exclusionary provisions generally applicable in immigration law are waived for special immigrant juveniles "for humanitarian purposes, family unity, or when it is otherwise in the public interest."[94] In Jean's case especially, both the law and humanitarian concerns underlying public policy support his receipt of a SIJ visa.

Another reason to grant SIJ visas for juveniles who have already received best interest orders from the juvenile court is that, in many states, SIJ relief is the only legal option for abandoned, abused, and neglected foreign-born children to have an opportunity to lead safe, healthy, and productive lives. Children who lack legal immigration status who would like to attend college in the U.S. currently are eligible to do so only—if they can afford the tuition—as international students. The mechanism by which non-citizens could afford to attend school is through the Development, Relief and Education for Alien Minors Act (DREAM Act) legislation.[95] The DREAM Act would repeal Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[96] and would thereby remove limits on a state's ability to provide in-state tuition to students lacking legal immigration status.[97] This piece of bipartisan legislation died with the last round of efforts for comprehensive immigration reform in the U.S. Congress.[98] If enacted, the DREAM Act would provide a great help to children eligible for SIJ status who either age out of eligibility or are otherwise ineligible because of their married status,[99] or because their applications

93. *See id.* at 68 n.41.

94. *See* 8 U.S.C. § 1255(h) (2006).

95. Development, Relief, and Education for Alien Minors Act of 2007, S. 774, 110th Cong. (2007).

96. *Id.* § 3(a).

97. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 505, 8 U.S.C. § 1623 (2006) (prohibiting illegal aliens residing in a state or political subdivision from being eligible for "any postsecondary education benefit" unless a United States citizen, regardless of his or her residence, can claim the same benefit).

98. GovTrack.us, S. 1438[110th]: Comprehensive Immigration Reform Act of 2007, http://www.govtrack.us/congress/bill.xpd?bill=s110-1348 (last visited Mar. 4, 2009).

99. Non-eligibility because of marriage occurs in Florida where that person, although under eighteen, would no longer be considered a juvenile. *See* § 743.01, FLA. STAT. (2008).

were denied by USCIS for any number of reasons. Until the DREAM Act becomes national legislation, the J visa remains the best hope for this vulnerable population of immigrant youth.

C. *Other Relevant Legal Instruments: Americans with Disabilities Act?*

Jean's case has the potential to affect a large class of children—those who have been abused, abandoned, or neglected; who have been in foster care or would be eligible for such state-based care; who cannot be reunited with their families; who cannot return to their countries of origin; and who suffer from mental illnesses like ADHD. Given that some of Class A inadmissibility seems to unfairly target those with non-communicable infirmities that do not affect the health or welfare of U.S. citizens but simply affect the individuals themselves, reading this type of inadmissibility into the SIJ statute unfairly discriminates against an already vulnerable population. If these children were citizens, they could be eligible for a claim of discrimination under the Americans with Disabilities Act (ADA).[100] The statute states that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our society is justifiably famous."[101] Although the ADA does not apply to non-citizens, the statute's underlying goals should be similarly applicable to children in Jean's situation.

III. DHS SHOULD REMEDY THE SIJS PROBLEM IMMINENTLY

Every day that passes without clarification from DHS and USCIS on their policies and procedures regarding SIJ implementation causes problems for SIJ applicants and the attorneys who represent them. The Florida Immigrant Advocacy Center has encountered situations where their clients' SIJ applicants are denied based on what the Miami Office of USCIS ("Miami Office") terms their own "federal" standards of "abuse, abandonment[,] and neglect."[102] The Miami Office has refused to provide any clarification of these standards.[103] In addition, the Miami Office has cited to

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Also, if they were adjudicated dependent on the state, but then the court extends jurisdiction until age twenty-two, they could be twenty-one years old, and if they marry they will lose the ability to get SIJ.

100. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101-12213 (2000).

101. *Id.* §12101(a)(9).

102. *See* Letter from Cheryl Little to Cheryl Phillips, *supra* note 85, at 6.

103. *Id.*

unpublished USCIS Administrative Appeals Office decisions to support their denials of candidates otherwise ostensibly eligible for SIJ relief.[104] This secrecy and lack of clarity shrouds in mystery a process that should otherwise be a transparent and straightforward form of legal relief for a vulnerable population of children residing in this country.

A. DHS's Specious Reasoning

DHS has offered no adequate reasoning to support its current parsimony with respect to SIJS. As previously mentioned, fewer than 700 SIJ visas were granted in 2005 nationwide.[105] Often during heated debates over immigration, the side that favors stronger controls on U.S. citizenship will decry the opening of the floodgates if a certain measure is implemented. Given the small numbers of juveniles applying for SIJ status, the strong level of resistance that child advocates face from USCIS appears both surprising and disproportionate.

One possible source for this blowback is the new anti-fraud directive issued from USCIS national headquarters.[106] Certainly fear over a juvenile trying to game the system and receive a benefit to which they are not lawfully entitled could inspire those in the USCIS adjudicators' seats to closely scrutinize SIJ applications. A careful reading of SIJ applicants is warranted; however, second-guessing a juvenile court judge is just plain unlawful. Although it would appear a fine line to walk between close scrutiny and overzealous reinterpretation of a juvenile's application for SIJ, the path USCIS adjudicators walk with regard to courts' decisions should be one of fairness, clarity and transparency. Denials are appropriate where an individual fails to fulfill the necessary requirements for a J visa and not because bad faith or fraud is assumed by default.

B. DHS's Meritless Objections

When USCIS denies the grant of SIJ status to a child who has been recommended for such status by a juvenile court, child advocates scramble to understand such a decision. In a few recent cases, USCIS has simply misunderstood and misapplied the law. For example, in a recent case in Miami, USCIS found that because Jo-

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104. *Id.*

105. 2005 YEARBOOK, *supra* note 6, at 22 tbl. 7.

106. Press Release, U.S. Immigration & Customs Enforcement, ICE expands document and benefit fraud task forces to six more cities (Apr. 25, 2007), http://www.ice.gov/pi/news/newsreleases/articles/070425washingtondc.htm.

seph's[107] father, who was abusive to Joseph for many years, had died, Joseph could no longer be adjudicated dependent on the juvenile court based on his past abuse. Such a reading is an incorrect application of SIJ law. The statute concerning dependency is disjunctive, in that abuse, abandonment or neglect could qualify a minor for dependent status, and based *alone* on suffering prior abuse (or abandonment or neglect, for that matter), Joseph was correctly declared dependent on the Juvenile Court, and continues to remain dependent, rendering him eligible for SIJ status.

In Jean's case, however, the situation is a bit more complex because it does not involve such a clear misreading of the statute. The question amounts to this: should a child who is otherwise eligible for SIJ relief be rendered ineligible because their medical disability renders them inadmissible under a Class A determination? Given that medical disability was not one of the grounds of mandatory ineligibility (i.e. those that cannot be waived) mentioned in the Yates Memo,[108] it seems that this medical problem would be one resolved under the elastic clause that permits the Attorney General to waive inadmissibility when it amounts to a humanitarian issue or it is otherwise in the public interest to do so.[109]

C. Clear, Fair, and Effective Guidelines

DHS should create clear guidelines that can be implemented in a uniform manner, treating all applicants in a fair and effective manner. Waivers are used to respond to various categories of inadmissibility in the field of immigration law. Given Jean's situation, the waiver could be broadened to encompass those diseases or deficiencies that children eligible for SIJ suffer from and that arise from abuse, abandonment, and/or neglect. Although ADHD should not be considered a Class A illness, if it is characterized as such, then a waiver for an individual whose ADHD (or perhaps ADHD in combination with another disorder) does not rise to the level of harm to the health and welfare of the society as a whole should receive a waiver.

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107. Names have been changed and sources omitted to protect the identity of the juvenile involved.

108. Memorandum from William R. Yates, *supra* note 13, at 6.

109. 8 U.S.C. § 1255(h)(2)(B) (2006).

IV. CONCLUSION

In order to properly execute congressional intent to create a legal benefit for abused, abandoned, and neglected children who come from outside the United States, who cannot return to their home countries, and who require the protection of our state juvenile courts to ensure a viable future in the U.S., DHS should cease chipping away at the right to Special Immigrant Juvenile Status. This right is especially important to former foster youth who disproportionately suffer from mental illness and disability. To effectuate this goal of protection of the right to SIJ relief for eligible non-citizen juveniles, DHS should enact regulations that reflect the current practices and policies of the department with regard to current and former foster youth in their application for SIJ Status. These regulations must be clear and unambiguous, and reflect congressional intent to preserve the right to SIJS for this country's burgeoning population of abused, abandoned, and neglected immigrant youth.

PAINTED INTO A CORNER: REMBRANDT'S BANKRUPTCY TODAY

BRIAN LOGAN BEIRNE*

This Article analyzes the development of the concept of bankruptcy by examining Rembrandt's insolvency through the lens of modern law. To lay a foundation, it provides the historical context of Rembrandt's bankruptcy and his specific actions most pertinent to modern bankruptcy proceedings. This analysis then transitions into the modern era with a comparison of the seventeenth-century Dutch insolvency to modern bankruptcy law. It then proceeds to analyze this famous insolvency had it occurred today. This case demonstrates the means by which insolvency law serves society's interests by providing debtors such as Rembrandt with a second chance to contribute to the world.

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INTRODUCTION

> Art, that noble thing, it never shall abandon me,
> Even if I wander penniless, seeking out back alleys, . . .
> Art is a glorious jewel, worth more than any treasure[1]

It was not uncommon in seventeenth-century Netherlands for Dutch merchants engaged in trade to suffer great losses and be driven into bankruptcy,[2] for their success was affected by weather, piracy, market conditions, and other factors entirely outside of their control. In contrast, the artist had a source of success that was wholly within himself: his talent.[3] As a result, of the thousands of Dutch artists of the era, the vast majority were financially sound.[4] However, despite possessing arguably the most talent of them all, a fate befell Rembrandt "which is seldom told about other painters, namely, that he went bankrupt."[5]

Rembrandt Harmensz van Rijn is generally considered one of the greatest painters of all time.[6] With a talent admired throughout seventeenth-century Europe, he received large sums from the sale of his paintings, portraits, and sketches, and those of the students in his school.[7] Despite his pecuniary successes, the great artist's lavish spending and sometimes irrational investments caused his wealth to dwindle even as his international fame grew.[8] With Rembrandt's patrons abandoning him and his creditors demanding repayment, the man once deemed "one of the great prophets of civilisation"[9] applied for *cessio bonorum*, or "surrender of goods" insolvency, in 1656.[10]

This study analyzes the circumstances of Rembrandt's insolvency from the perspective of modern bankruptcy law. It begins by providing the historical context of Rembrandt's bankruptcy and his specific actions most pertinent to modern bankruptcy proceedings. The study then transitions into the modern era by means of a

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1. PHILIPS ANGEL, PRAISE OF PAINTING (1642), *in* 24 SIMIOLIUS 227, 241 (1996) (Michael Hoyle trans.).
2. PAUL CRENSHAW, REMBRANDT'S BANKRUPTCY 17 (2006).
3. *See id.* at 18.
4. *Id.* at 17.
5. *Id.* (quoting FILIPPO BALDINUCCI, COMINCIAMENTO E PROGRESSO DELL'ARTE DELL'INTAGLIARE IN RAME, COLLE VITE DI MOLTI DE' PIÙ ECCELLENTI MAESTRI DELLA STESSA PROFESSIONE 80 (1686)).
6. E. H. GOMBRICH, THE STORY OF ART 420 (16th ed. 1995).
7. *Id.* at 28-29, 32. Rembrandt taught nearly every important Dutch painter during the twenty years his school operated. KENNETH CLARK, CIVILISATION 203 (1969).
8. *See* CRENSHAW, *supra* note 2, at 1.
9. CLARK, *supra* note 7, at 205.
10. CRENSHAW, *supra* note 2, at 1.

comparison of the *cessio bonorum* insolvency of Rembrandt's time with modern bankruptcy law. Lastly, the study analyzes this famous insolvency had it occurred today. Rembrandt's case triggered immediate reforms in the Netherlands and may even have ramifications that continue to reverberate through bankruptcy law.

I. REMBRANDT'S *CESSIO BONORUM*

Artists of the "Dutch Golden Age" were typically from privileged families who provided cushions against the swings of the sometimes-volatile Dutch art market.[11] Whether they used their craft as their main source of income or supplemented it with mercantile endeavors,[12] relatively few artists of the era became insolvent.[13] G. J. Hoogewerff's study of St. Lucas guilds throughout the northern Netherlands concluded that such organizations successfully provided economic security to local artists.[14] Such guilds, if powerful and well-organized, were able to keep prices high and afford the area artists the luxury of living off their works. In fact, those artists who suffered bankruptcy "worked in Amsterdam and other places where the guild system had largely deteriorated – or never existed."[15] Rembrandt was one such case.

A. *The Artist's Rise and the Foundations of His Fall*

Rembrandt was born into "embarrassingly humble" beginnings.[16] Despite being part of the lower-middle class, Rembrandt's family income[17] provided him with the privilege of attending the University of Leiden before taking on apprenticeships with painters to learn the craft.[18] He enjoyed early success in Leiden and then in Amsterdam, where he became a respected member of society.[19] His paintings fetched thousands of guilders and his school was filled with students, from whom he received tuition and part

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11. *See id.* at 20.
12. Or merely lived off inherited wealth.
13. *Id.* at 17-20.
14. *Id.* at 20.
15. *Id.*
16. CLIFFORD S. ACKLEY ET AL., REMBRANDT'S JOURNEY 12 (2003).
17. EMILE MICHEL, REMBRANDT, HIS LIFE, HIS WORK AND HIS TIME 5-6 (Frederick Wedmore ed., Florence Simmonds trans., 1918).
18. *Id.* at 7, 12-15. Whatever the family's social standing, Rembrandt's father was a relatively prosperous miller and his mother was the daughter of a baker. Worldwide Gallery of Art, Rembrandt Harmenszoon van Rijn (1606 – 1669), http://www.theartgallery.com.au/ArtEducation/greatartists/Rembrandt/about/ (last visited on Mar. 4, 2009).
19. *See* ACKLEY, *supra* note 16, at 12.

of the revenue from the sale of their works.[20] However, Rembrandt's income dwindled in the 1640s and 1650s due to three interrelated causes: 1) a decline in Rembrandt's production that followed his decision to retire from the lucrative portrait market; 2) the negative impact on his standing in the community that resulted from the chaos in his personal life; and 3) a general economic downturn following the First Anglo-Dutch War that tempered demand for luxury goods.[21]

Ironically, Rembrandt's success hastened his economic demise. The popularity of his style in the 1630s diluted the market as his maturing students began offering similar works at much lower prices.[22] The merchant class increasingly purchased these similar, albeit far less expensive, paintings and portraits that glutted the market.[23] This, in turn, led the Rembrandtesque style to be deemed unfashionable by the elite;[24] however, rather than cater to the new fashions, "Rembrandt expected his patrons to cater to him."[25]

This shift in tastes coincided with problems in Rembrandt's personal life.[26] After the deaths of his first three children and his wife, Rembrandt "retire[d] from society"[27] and became embroiled in various publicly-known affairs with women of lower social standing.[28] This led to further declines not only in his production but also demand for his works, as his reputation among the elite, who were the most able to afford his work, soured.[29] With his income stream waning throughout the 1640s, Rembrandt was particularly vulnerable to the effects of the economic depression that hit the Netherlands following the First Anglo-Dutch War in the 1650s.[30] This downturn had a detrimental impact on the merchants who formed the core of his clientele.[31] In such hard times, "[l]uxury goods stood little chance of making a profit."[32] However, despite his income dwindling over this period, Rembrandt's spending habits

20. CRENSHAW, *supra* note 2, at 28-29.
21. *See id.* at 31-43.
22. *Id.* at 32.
23. *See id.*
24. *See id.*
25. *Id.* at 33.
26. *Id.* at 40-43.
27. *Id.* at 31.
28. After his romantic relationship with Geertje Direx, his son's nurse, soured she sued him for payment. The next year "he was instrumental in having Geertje confined to a . . . house of correction." This scandal damaged his reputation among the community. *Id.* at 41-42.
29. *Id.* at 43.
30. *See id.* at 38.
31. *See id.*
32. *Id.*

were escalating.[33]

Upon finding success in the 1630s, Rembrandt quickly began living well beyond his means. His financial difficulties began when he purchased a rather large townhouse in Amsterdam in 1639.[34] Taking on enormous debt for the purchase, he had to scramble to make his mortgage payments.[35] Had he invested his significant earnings prudently, he likely would have had few difficulties paying off this primary liability. However, instead of paying down his debt and investing in the booming worldwide trade and manufacturing of the 1640s with his significant earnings,[36] he enjoyed a lavish lifestyle and filled his home with items that were exorbitantly expensive but possessed little income potential.[37] An obsessive collector of all types of art, he spared no expense.[38] In fact, with a narrow focus on restoring the value of his art, he reportedly spent exorbitant amounts on repurchasing his own paintings from all over Europe at inflated prices in a failed attempt to make them more scarce and coveted.[39] Not only was he spending lavishly and imprudently, he was also taking on additional debt to do so.

Infatuated with his art and collecting aesthetically pleasing things, Rembrandt saw his financial obligations as mere distractions.[40] When he was forced to address issues outside of his artistic realm, he consistently took the most expedient measures to resolve them. When creditors came to collect, he borrowed more money from elsewhere, repaid just the amount immediately due and spent the rest of the new loan elsewhere.[41] For example, in 1653, he needed to repay 7,000 guilders of the 8,100 owed for his house mortgage.[42] He quickly borrowed 9,000 guilders elsewhere and, rather than paying off this debt, he repaid only the 7,000 immediately owed. "[I]t is unclear what happened to the remaining" 2,000 guilders.[43] "This priority of spending proved to be typical for the painter . . . . Rembrandt's continual neglect for his debts eventually debilitated the confidence of his creditors and opened him

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33. *See id.* at 38-39, 92-108.

34. *Id.* at 44.

35. *See id.* at 46.

36. *Id.* at 37.

37. His spending on a lavish lifestyle was derided by some as "typical of the nouveau riche." *Id.* at 2.

38. *See id.* at 92-109.

39. *Id.* at 36-37. Note, however, that the source of this assertion has been characterized as unreliable; consequently, this account may be apocryphal. *See id.*

40. *See id.* at 92-108.

41. *Id.* at 54-55.

42. *Id.*

43. *Id.*

up to litigation."[44] Rembrandt's unsustainable lifestyle eventually began to catch up with him.

B. Rembrandt's Spiral

As creditors began to close in during the mid-1650s, Rembrandt resorted to underhanded maneuvers and "clandestine deals" as quick fixes to his troubles.[45] Resorting to tactics described by his contemporaries as "narrowly within legal bounds" and "socially disreputable."[46] On one occasion, he attempted to liquidate assets without the knowledge of his creditors. In one rumored scheme, two art dealers acting on Rembrandt's behalf attempted to sell one of his paintings, with the stipulation that the transaction not be mentioned to a certain creditor of Rembrandt's.[47] Ironically, the deal apparently fell through when the buyer attempted to pay with an uncollectible debt from a bankrupt merchant.[48] In 1656, Rembrandt again resorted to what the Dutch considered shameful activity: knowing "that a declaration of bankruptcy was inevitable," he transferred the deed of his house to his son Titus less than two months before applying for *cessio bonorum*.[49] While this was technically legal at the time, "it ran so contrary to customary and accepted practice that it was quickly outlawed" two weeks later.[50] Rembrandt was becoming increasingly desperate as he ran out of financing.

Although Rembrandt had been able to accumulate debt for years, a small, court-ordered sum may have been the immediate trigger that drove him into insolvency. This obligation stemmed from a romantic affair with his son's nurse, Geertje Dircx. When the relationship soured, Geertje took her case for financial support before the Chamber of Marital Affairs.[51] While the two were not technically married, the commissioners ruled that he was required to pay her 200 guilders a year.[52] However, Rembrandt "was instrumental in having Geertje confined to a . . . house of correction,"[53] which happened to relieve him of this court ordered obliga-

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44. *Id.* at 55-56.

45. *Id.* at 57.

46. *Id.* at 2.

47. *Id.* at 57; John Michael Montias, *A Secret Transaction in Seventeenth-Century Amsterdam*, 24 NETH. Q. FOR HIST. ART 1, 5 (1996).

48. CRENSHAW, *supra* note 2, at 57.

49. *Id.* at 68-69.

50. *Id.*

51. *Id.* at 41.

52. WALTER STRAUSS & MARJON VAN DER MEULEN, REMBRANDT DOCUMENTS 276 (1979).

53. CRENSHAW, *supra* note 2, at 42.

tion for a time.[54] Once Geertje was released, she sought resumption of payment in 1656 and Rembrandt, so incredibly overleveraged, was unable to acquire the necessary cash.[55] While he had put off payment to creditors for years, he could no longer circumvent the Chamber's order.[56] Two months later, he applied for *cessio bonorum*.[57]

C. Cessio Bonorum *in Action*

In pre-modern Europe, insolvency carried with it great moral condemnation.[58] It was not always this way. A Roman practice attributed at times to both Emperor Augustus or Caesar,[59] *cessio bonorum* was not accompanied by great shame during Roman times.[60] Instead, it was seen as a demonstration of "princely grace toward debtors"[61] that allowed them "to escape imprisonment through a public ceding of all their goods, saving a few life necessities, to their creditors."[62] Insolvents were typically jailed but *cessio* allowed them immunity from imprisonment, although the Roman *cessio* typically did not provide discharge.[63] However, when the practice was revived in the Middle Ages, it was merged with heavy sanctions of dishonor.[64] While it came with the added benefit that "a debtor insolvent through no fault of his own could receive a full discharge by declaring *cessio*," it nevertheless required a shameful path.[65] Pre-modern Europe incorporated into the Roman tradition certain public shaming rituals, often including bizarre practices involving heckling crowds and public nudity.[66] In fact, a legal text,

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54. *Id.* at 67.

55. *Id.*

56. *See id.*

57. *Id.* at 67, 69.

58. James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841, 1877-79 (1996).

59. *Id.* at 1872.

60. *See* G. Eric Brunstad, Jr., *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 BUS. LAW. 499, 514 (2000).

61. Whitman, *supra* note 58, at 1872.

62. *Id.* For a full description, see MAX KASER, DAS R'MISCHE ZIVILPROZESSRECHT 316-17 (1966).

63. *See* Whitman, *supra* note 58, at 1872-73 (citing MATTEO BRUNO, TRACTATUS MATTHAEI BRUNI ARIMINENI DE CESSIONE BONORU 115[v] (Venice 1561)); Robert T. DeMarco, Bankruptcy in a Word (2004), http://www.thrushandrohr.com/history.htm.

64. *See* DeMarco, *supra* note 63.

65. Roman law as interpreted by early-sixteenth-century canon lawyers. Whitman, *supra* note 58, at 1873 (citing BRUNO, *supra* note 63, at 115[v]).

66. *See id.* (citing BRUNO, *supra* note 63, at 115[v]). In one of the more colorful punishments,

> [t]he custom has grown up, in parts of Italy, that the insolvent who wishes to declare a *cessio bonorum* must go naked in a public and notorious place. There he strikes his backside three times against a rock or column, crying

written contemporarily to Rembrandt's application, described an old law on the books in the artist's hometown, Leiden: "those that want the benefit of a *cessio* must expose themselves in their underclothes before the city hall for an hour at midday, for several days, at a certain raised spot called 'the jaws' [i.e., the stocks]."[67] Luckily for Rembrandt, this law had fallen into disuse.[68]

By the seventeenth century, "traditional, and brutal, shame sanctions died away in the commercializing Lowlands."[69] The Dutch had sought to develop a more Romanesque, shame-free view of *cessio*.[70] In this period, it was typically not the lower classes that used the practice, but instead merchants, who were of higher social station,[71] a circumstance that may have helped promote this more favorable opinion of insolvency. Viewing their practices as more enlightened, Dutch authors of the day contrasted their nation's unique *cessio* with that of France's more common setup.[72] For example, while France required the debtor declare *cessio* himself in a "humiliating" way, the law adopted in Amsterdam[73] sought to remove the "public scandal" from the practice and allowed for legal representatives to declare in the debtor's place.[74] While a difference such as this may seem subtle from today's perspective, some even saw the Dutch approach as so liberalized that Ioost de Damhouder van Brugge wrote, in 1626, that "some debtors even gloried in having performed a *cessio bonorum*."[75]

Even with the Netherlands' determined shift away from public shaming for insolvency, "many members of society would have viewed Rembrandt's declaration of bankruptcy unfavorably on moral grounds, and some would have denounced him for it."[76] Despite the progressiveness of the legal system, religious institutions still held the notion that shame was the rightful price to be paid for violating the demands of the Bible.[77] The Calvinist Church of the era delineated between *faillissement*, in which the debtor was

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out, I DECLARE BANKRUPTCY.

Id.

67. *Id.* at 1878 (citing SIMON VAN LEEUWEN, MANIER VAN PROCEDEREN IN CIVILE EN CRIMINELLE SAAKEN 104 (1666)).

68. *Id.* at 1879.

69. *Id.* at 1877.

70. *Id.* at 1871.

71. CRENSHAW, *supra* note 2, at 68. And higher station meant higher social esteem. *Id.*

72. Whitman, *supra* note 58, at 1877-78.

73. Calvinist Amsterdam adopted Flemish law in this area. *Id.* at 1878.

74. *Id.* at 1879 (citing SIMON VAN LEEUWEN, MANIER VAN PROCEDEREN IN CIVILE EN CRIMINELLE SAAKEN 104 (1666)).

75. *Id.* at 1878 n.140.

76. CRENSHAW, *supra* note 2, at 69.

77. Whitman, *supra* note 58, at 1874-75.

seen as "unfortunate but faultless," and *bankroet*, where the insolvency was "considered to have been brought on by deception and fraud."[78] Rembrandt likely fell nearer the *bankroet* end of the spectrum, as "[t]he church was wary of people like Rembrandt who left their debts unresolved."[79] A case like Rembrandt's likely caused much embarrassment and "aroused ill-will from neighbors," such that many who went bankrupt fled town in order to gain a fresh start.[80] However, Rembrandt was an eccentric artist who was so fixated on his art that personal shame was likely of secondary importance.[81]

Within this context, Rembrandt applied to the High Court in The Hague for *cessio bonorum* in July of 1656.[82] This would allow him to cede all of "his assets to his creditors with the condition that they could make no further claims on him."[83] Hoping that his house was safely out of reach in his son's hands, he applied to the court for protection from his creditors.[84] It is likely he "knew that his collection of art and artificialia would not bring enough money to satisfy his debts, but he showed little concern for providing fair recompense to his creditors."[85] He was apparently only interested in the protection from imprisonment and harassment that the court could grant him.[86]

Adhering to the typical *cessio* process, the court appointed a trustee from Amsterdam's Desolate Boedelskamer (Chamber of Insolvent Estates). The trustee commenced by taking a thorough inventory of all of Rembrandt's possessions.[87] While it is unproven, scholars suspect Rembrandt successfully hid some of his possessions. As evidence, they first cite the absence of Rembrandt's printing plates from the inventory.[88] While arguably of professional necessity, such items were not protected under *cessio*, as evidenced by other artists' bankruptcies of the period.[89] Scholars also point to the absence of most of his own prints even though other artists' works in his albums were duly catalogued.[90] The most damning evidence involves reports that Rembrandt sold certain items out-

78. CRENSHAW, *supra* note 2, at 69.
79. *Id.*
80. *Id.* at 70.
81. *Id.* at 54-55.
82. *Id.* at 69.
83. *Id.*
84. *Id.* at 69.
85. *Id.*
86. *See id.*
87. *Id.* at 70.
88. *Id.* at 75.
89. *Id.* Specifically, those of Jan Blom and Pieter Willemsz. *Id.*
90. *Id.* Only one album of Rembrandt's prints was catalogued. *Id.*

side the jurisdiction of the Desolate Boedelskamer.[91] Specifically, he reportedly sold uninventoried sculptures to the Elector Palatine in 1658.[92]

Although the Desolate never took action against Rembrandt for such alleged conduct they did react to his transfer of house title to Titus immediately prior to his bankruptcy. While his transfer had been legal at the time, it was found to be of such a "mendacious nature" that new regulations forbade it.[93] Further, finding Rembrandt's act so "patently evasive," the Desolate Boedelskamer overrode the transfer of title to Titus and liquidated Rembrandt's Amsterdam townhouse in 1658.[94] This revulsion is indicative of the Dutch attitude towards asset concealment.[95]

As it developed, Dutch bankruptcy law displayed "a movement from penalizing insolvency[, as discussed above,] to penalizing asset concealment."[96] Dutch moralists of the day explained that "[i]f insolvency came, merchants were simply, and honestly, to declare a *cessio*. Above all, they were not to conceal assets."[97] There are many instances where Dutch debtors, in an effort to later provide for themselves and families, "[b]efore they ma[de] an ostensible *cessio bonorum*, they conceal[ed] all the assets that they c[ould]."[98] This practice was described, in no uncertain terms, as "com[ing] from Satan."[99] This shift from viewing declaring *cessio* as reprehensible to only condemning violations of the process marked a profound change.[100] In this way, the Dutch had altered the institution to better conform to its increasingly commercial society, even as the rest of Europe still viewed *cessio* declaration itself as profoundly objectionable.[101]

Once catalogued, Rembrandt's items were sold at auction.[102] The law technically provided priority to those creditors with official loans registered with the magistrates.[103] However, political influence seemingly played an important role, as Rembrandt's most powerful creditors were paid first, leaving little for the oth-

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91. *Id.*
92. *Id.*
93. *Id.* at 87.
94. *Id.* at 78.
95. Whitman, *supra* note 58, at 1882-83.
96. *Id.* at 1882.
97. *Id.*
98. *Id.* at 1881 (quoting GODFRIED UDEMANS, 'T GEESTELYK ROER VAN 'T COOPMAN'S SCHIP 14[r] (1638)).
99. *Id.*
100. *Id.* at 1882.
101. *See id.* at 1882-83.
102. CRENSHAW, *supra* note 2, at 75.
103. *Id.* at 80.

ers.[104] Even after his house was included in the estate, his assets were still far from equaling his total debt, and even some of his major creditors received nothing.[105] Throughout the rest of his life, Rembrandt continued, to a degree, to treat his finances as an afterthought to his art. He never made great efforts to repay his creditors. To the day he died, Rembrandt refused to relinquish his artistic control and paint his way out of his subsequent debt.[106]

II. THROUGH THE LOOKING GLASS: REMBRANDT'S BANKRUPTCY TODAY

"At a time when French or Italian debtors faced fearsome shame sanctions, and German and English ones faced hellish prisons, this Dutch practice was stunningly liberal, a long step on the road toward modern bankruptcy."[107] Dutch debtors took full advantage of this, "with rates of the declaration of *cessio* noticeably high in the seventeenth century."[108] With nearly 1.5 million individuals and over 50,000 businesses filing for bankruptcy in 2006 and 2007, it would appear that modern Americans have more in common with the seventeenth-century Dutch than one would think.[109] Based upon *cessio bonorum*, modern bankruptcy continues the Dutch-pioneered movement away from shaming.[110] In fact, the United States has taken additional steps relatively recently to continue to move away from the shroud of public shame long associated with bankruptcy. The Bankruptcy Act of 1978 continued moving in the direction begun centuries ago in Holland by helping to lessen the stigma associated with bankruptcy via such measures as using the word "debtor" instead of "bankrupt"[111] and creating

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104. *See id.* at 80, 87-88.

105. *See id.* at 88.

106. While there are accounts of him seeking to paint more lucrative portraits and finish paintings to raise funds, *id.* at 134, 142, he nevertheless refused to paint certain portraits, *id.* at 142, and "[t]he artist's determination to maintain a high level of control in all aspects of production, revealed most acutely when disputes arose, left him with few consistent and reliable patrons," *id.* at 135.

107. Whitman, *supra* note 58, at 1881.

108. *Id.*

109. AMANDA LOGAN & CHRISTIAN E. WELLER, CTR. AM. PROGRESS, BUSH'S BANKRUPTCY LEGACY (Apr. 17, 2008), http://www.americanprogress.org/issues/2008/04/bankruptcy_column.html; MARK DOUGLAS, UNITED STATES: THE YEAR IN BANKRUPTCY: 2007 (Mar. 12, 2008), http://www.jonesday.com/files/Publication/34b19d7b-0c3f-4c53-bfe3-6217cf0e6e9d/Presentation/PublicationAttachment/2bb4b1df-21aa-411a-bca2-023da0d4a175/2007YearinReview.pdf.

110. *See* Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 OHIO ST. L.J. 855, 870-76 (2003).

111. Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121, 163 (2004) (citing Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 148 (1986)).

Chapter 13, which provides a means of avoiding the stigma of liquidation.[112] Despite the centuries between them, modern bankruptcy law holds much in common with the Dutch *cessio bonorum*.

A. General Similarities Between the Systems

U.S. bankruptcy proceedings and seventeenth-century Dutch *cessio bonorum* possess similar policy goals. Both share the general, overarching objectives to both provide debtors with a fresh start and rehabilitate viable endeavors, all while providing creditors with equality of distribution.[113] In doing so, both promote future productivity by restoring incentives.[114] Similar to the manner in which Dutch *cessio* was seen as an "act of princely grace toward debtors"[115] that sought to remedy the debtors' insolvency without shame, modern bankruptcy likewise aims to provide debtors with a financial "clean slate."[116] Both provide discharge, which allows the debtor the chance to reinvigorate his livelihood, rather than condemning him to prison or some kind of indentured servitude. Further, while extremely limited in the case of *cessio*, certain life necessities are exempted from the creditors' reach, thereby permitting the debtor to emerge from insolvency as a productive citizen.[117]

From the creditors' perspective, both *cessio bonorum* and modern bankruptcy provide a centralized proceeding with a focus on gathering accurate information for creditors to use. The court then develops a plan to best utilize the debtor's assets (liquidation in both *cessio* and Chapter 7 in modern bankruptcy[118]) and divides the proceeds among the creditors with the objective of distributing the funds in the fairest way possible.[119] Although in Dutch *cessio* the politically powerful often received the most repayment, both systems nevertheless strive to more efficiently allocate the debtor's resources through a centralized process.[120]

While a far cry from historic British and German remedies of incarceration, ear-cutting, or even execution, both systems' lenien-

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112. MODERN REAL ESTATE PRACTICE IN NEW YORK 364 (Edith Lank et al. eds., 7th ed. 2001).

113. *See* Brunstad, *supra* note 60, at 499.

114. Nicholas L. Georgakopoulos, *Bankruptcy Law for Productivity*, 37 WAKE FOREST L. REV. 51, 58 (2002).

115. As derived from its Roman predecessors.

116. Whitman, *supra* note 58, at 1872, 1881-82.

117. *See* Brunstad, *supra* note 60, at 514 n.50.

118. And potentially in the case of Chapter 11 as well.

119. *See id.* at 524-30.

120. *See generally id.*

cy is not without bounds.[121] Both reserve the privilege of bankruptcy protections for honest but unfortunate debtors.[122] While the modern concept of the "honest but unfortunate debtor" is a new one, the seventeenth-century Dutch system was similar in that it contained the requirement that debtor claiming *cession* be honest and forthcoming.[123] Those who did not act honestly received fierce retribution from the court. Although the Dutch tradition of branding for such a transgression had fallen into disuse by Rembrandt's time, a debtor caught acting dishonestly faced great shame and imprisonment.[124] As was the case with the Dutch merchants who followed what was seen as Satan's call to hide assets,[125] Americans today also attempt to underhandedly circumvent the system and are punished for it. The majority in *Marrama v. Bank of Massachusetts* found that "a debtor who acts in bad faith prior to, or in the course of, filing a Chapter 13 petition by, for example, fraudulently concealing significant assets, thereby forfeits his right to obtain [bankruptcy] relief."[126]

B. Differences: Rembrandt Before the Judge

Despite the many general similarities between the two systems, Rembrandt's bankruptcy would have unfolded differently in modern times. This section traces the artist's actions from the vantage of U.S. bankruptcy law in 2009. It relies primarily upon the information known to the High Court in The Hague and the Desolate Boedelskamer. For example, the court knew of Rembrandt's house transfer but was not seemingly aware of those occasions when he sought to hide assets. After laying this foundation, this study goes further to interject the probable consequences of Rem-

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121. *See* Georgakopoulos, *supra* note 114, at 56.

122. Douglas G. Baird, *Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Creditor Law*, 73 U. CHI. L. REV. 17, 17 & n.2 (2006) (citing 11 U.S.C. § 727 (2000) (" 'The court shall grant . . . a discharge, unless' the debtor commits any of several forms of falsehood").

> [T]he characterization of the "honest but unfortunate debtor" as the one for whom the bankruptcy discharge is intended is a twentieth century development. The phrase itself can be traced to *Local Loan Co v. Hunt*, 292 US 234, 244 (1934) (explaining that the Bankruptcy Act "gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt").

Id. at 17 n.2.

123. Whitman, *supra* note 58, at 1882 ("Concealment of assets had traditionally been penalized . . . through the awesome shame sanction of branding.").

124. *Id.*

125. *Id.* at 1881.

126. Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 286-87 (1991)).

brandt's more notorious actions that went seemingly undetected by the court.

Prior to his proceeding, Rembrandt transferred his house to his son, Titus.[127] While technically legal at the time, this was seen as quite unethical.[128] In modern times, this transfer would likely be unnecessary. Under 11 U.S.C. § 522's homestead exemption, Rembrandt's townhouse would be exempted because it likely qualifies as "personal property that the debtor or a dependent of the debtor uses as a residence."[129] Although the *cessio* process sought to enable a fresh start once discharged, it nevertheless left the debtor with little to do so. In fact, the *cessio* proceedings took Rembrandt's home, furniture, all of his (known) paintings, and tools. This process left him with little except food, linens, and some of his clothes. He would have fared far better under modern bankruptcy. Aside from retaining his home, he would likely have retained his non-antique furniture, his late wife's jewelry worth less than the equivalent of $550, and the tools of his art trade.[130] While his large collection of other artists' work would be accessible to creditors, he would likely argue that the art he created should be exempt under the Code's § 522 (B)(i), which protects such possessions. However, it would be open to the court to decide whether to treat Rembrandt's works as business inventory, since Rembrandt was running a profitable business of teaching students and selling art.[131]

Rembrandt's attorney would likely have no choice but to file for Chapter 11 on his behalf.[132] While it is difficult to compare with certainty, Rembrandt would likely fail the means test for Chapter 7.[133] "While there's no accurate way to render [it] in today's greenbacks," a wealthy merchant in seventeenth-century Netherlands would earn roughly 3,000 guilders annually, which would already comfortably surpass the median income for the time.[134] In comparison, Rembrandt's net worth was appraised at 40,000 guilders in 1647.[135] With Rembrandt selling multiple paintings in the mid-1650s, one even fetching over a thousand guilders,[136] this analysis assumes that his income surpassed the median income of similar

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127. CRENSHAW, *supra* note 2, at 68.
128. *Id.* at 68-69.
129. 11 U.S.C. § 522(d)(1) (2007).
130. *See* 11 U.S.C. § 522(d) (2007).
131. CRENSHAW, *supra* note 2, at 29-32.
132. *See* Toibb v. Radloff, 501 U.S. 157 (1991) (citing section 109(d) as the source of an individual debtor's right to file Chapter 11).
133. *See* 11 U.S.C. § 707(b) (2008).
134. Mike Dash, *When the Tulip Bubble Burst*, BUS. WK., Apr. 24, 2000, *available at* http://www.businessweek.com/2000/00_17/b3678084.htm.
135. CRENSHAW, *supra* note 2, at 2.
136. *Id.* at 29-30.

households. While it is entirely possible that Rembrandt had not sold any paintings immediately prior to bankruptcy,[137] it is unlikely that he had below median income over the six months prior to his bankruptcy, as documents show that he still operated an art school with "very high tuition fees" and received a portion of his students' sales.[138]

In addition to ruling out Chapter 7, his circumstances would also likely prohibit Rembrandt from filing for Chapter 13. Under 11 U.S.C. § 109(e), a debtor may only file for Chapter 13 if his or her unsecured debts are less than $336,900 and his or her secured debts are less than $1,010,650.[139] While the entire extent of Rembrandt's debt is unknown, the fact that the more than 16,000 guilders raised by the Desolate Boedelskamer's sale of Rembrandt's house, furniture, and extensive art collection left even some of his primary creditors with nothing suggests that Rembrandt's debt was extremely large.[140] Thus, Rembrandt's only option today would be Chapter 11.

Rembrandt's artistic endeavors were much more valuable as a going concern,[141] and Chapter 11 reorganization would potentially give his creditors substantially more money than *cessio bonorum's* straight liquidation and discharge.[142] Were he facing a Chapter 11 proceeding, he would have to provide the bankruptcy court with extensive financial information and work with his creditors and the court to develop a plan for reorganization.[143] However, with

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137. The history suggests that he was busy negotiating with creditors and attempting to hide assets. *See supra* text accompanying notes 46-50.

138. *Id.* at 28-29.

139. 11 U.S.C § 109(e) (2006); Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(b) of the Code, 72 Fed. Reg. 7082 (Feb. 14, 2007).

140. *Id.* at 76-79. As a means of comparison, if the "wealthy merchant", *see supra* text accompanying note 134, made the equivalent of $200,000 a year, that would mean that the 16,000 guilders were worth $1.01 million.

141. It is difficult to draw the line between Rembrandt's personal life and his business, which was basically an art sole proprietorship.

142. Unless, of course, the court allows Rembrandt to hold most of his future earnings, as discussed in the following paragraph.

143. Unless the court orders otherwise, the debtor must file with the court: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a schedule of executory contracts and unexpired leases; and (4) a statement of financial affairs. FED. R. BANKR. P. 1007(b)(1).

> If the debtor is an individual, there are additional document filing requirements. Such debtors must file: a certificate of credit counseling and a copy of any debt repayment plan developed through credit counseling; evidence of payment from employers, if any, received 60 days before filing; a statement of monthly net income; any anticipated increase in income or expenses after filing; and a record of any interest the debtor has in an education individual retirement account or qualified State tuition program.

11 U.S.C. § 521(a)(1)(B)(iv)-(vi), (b)-(c) (2006).

Rembrandt's history of "continual neglect for his debts,"[144] and "resist[ance to] making arrangements with his creditors that would sacrifice his personal authority,"[145] it is likely his role as "debtor in possession"[146] would be short-lived. Even if Rembrandt's asset concealment and illegal transfer went undetected, as it largely did in 1658,[147] it is still rather likely the creditors or the U.S. Trustee would motion for appointment of a trustee due to "incompetence or gross mismanagement."[148] After consultation with parties in interest and subject to the court's approval,[149] the Trustee would be appointed to manage the property of Rembrandt's estate, oversee the operation of his art business, and file the plan of reorganization.

If *In re Cooley*[150] or *In re FitzSimmons* [151] are any indications, the plan would likely leave Rembrandt in a comfortable financial position. Ironically, Rembrandt's wasteful spending tactics may actually play in his favor in modern proceedings, as the "burden of proof rests upon the creditor as movant to show that the purported individual debtor's earnings are in actuality '[p]roceeds, product, offspring, rents [or] profits' derived from those assets or other property interests which have previously accrued to the estate by operation of Section 541."[152] Rembrandt spent almost all of his creditors' money on a lavish lifestyle, buying non-income-bearing furniture and artwork, and paying interest payments to other creditors. His earnings, on the other hand, primarily stemmed from his own human capital: his artwork and teaching students.[153] The court in *FitzSimmons* held that "[t]o the extent that the law practice's earnings are attributable not to FitzSimmons' personal services but to the business' invested capital, accounts receivable, good will, employment contracts with the firm's staff, client relationships, fee agreements, or the like, the earnings of the law practice accrue to the estate."[154] In *FitzSimmons*, the court split his earnings with creditors because the sole proprietorship was not composed of just him alone.[155] However, with the exception of contracts that may have been made possible by the creditors, Rem-

144. CRENSHAW, *supra* note 2, at 55-56.
145. *Id.* at 88.
146. 11 U.S.C. § 1101(1) (2006).
147. *See supra* Part I.C.
148. 11 U.S.C. § 1104(a)(1) (2006).
149. FED. R. BANKR. P. 2007(a).
150. *In re* Cooley, 87 B.R. 432 (S.D. Tex. 1988).
151. *In re* FitzSimmons, 725 F.2d 1208 (9th Cir. 1984).
152. *In re* Cooley, 87 B.R. at 441 (quoting 11 U.S.C. § 541(a)(6) (2006)).
153. *See* CRENSHAW, *supra* note 2, at 28-59.
154. *In re* FitzSimmons, 725 F.2d at 1211.
155. *Id.*

brandt's income is largely attributed to services he personally performed.[156] Following the logic employed in *Cooley* and *FitzSimmons*, it is likely that Rembrandt would be able to retain the bulk of his future earnings under a reorganization plan.

If the reorganization plan is accepted, § 1141(d)(1) provides that confirmation of a plan discharges Rembrandt from the enormous debt that he accumulated before the date of confirmation.[157] Rembrandt would then be bound by the plan and required to make the provided payments.[158] The creditors would receive pro rata distribution—not based upon their political influence, as in the Dutch *cessio* system, but based on a formula developed in accordance with the court's policy goal of providing equality of distribution among creditors. If Rembrandt "behaved" himself, which may be unlikely in light of his penchant for blatantly disregarding his finances, the estate could eventually be fully administered.[159] In this best case scenario, Rembrandt would retain his beloved house as well as much of his earnings while achieving a fresh start to begin running up debts once again. However, this is all assuming the court never learned of Rembrandt's more underhanded actions.

Before filing for *cessio bonorum*, Rembrandt attempted to manipulate his financial position. If Rembrandt's secret attempt to exchange a painting for cash, as described in Part I. B., had been successful and undiscovered, he might be deemed to have made a fraudulent transfer under § 548 (a)(1)(A).[160] The trustee would likely use his or her avoiding powers to nullify the transfer and make the paintings available to all of Rembrandt's creditors.[161] This practice of "avoiding transfers" is analogous to what the Desolate Boedelskamer did in "avoiding" Rembrandt's property transfer to his son, Titus.[162] Although the modern court would not likely find fault with Rembrandt transferring his homestead to Titus, if the Desolate Boedelskamer did find the transfer objectionable, it had the power to avoid the transfer. The aforementioned painting transfer may have been only one of Rembrandt's objectionable dealings.

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156. *See* CRENSHAW, *supra* note 2, at 28.

157. 11 U.S.C. § 1141(d)(1) (2006).

158. Further, "Sections 1106(a)(7) and 1107(a) of the Bankruptcy Code require a debtor in possession or a trustee to report on the progress made in implementing a plan after confirmation." Chapter 11 – Bankruptcy Basics, http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter11.html# work (last visited Mar. 4, 2009).

159. *See* FED. R. BANKR. P. 3022.

160. As long as he made the sale with the intent to defraud, although this may be hard to prove.

161. Provided the transfer occurred within the statutory window before filing the petition. 11 U.S.C. § 548(a)(1) (2006).

162. *See* Chapter 11 – Bankruptcy Basics, *supra* note 158.

During his liquidation, Rembrandt allegedly hid assets, as discussed in Part I.B. If caught, he would be dealt with harshly under both *cessio bonorum* and modern U.S. bankruptcy law. Under seventeenth-century Dutch law, hiding assets, if detected, would likely have led to branding.[163] Under modern U.S. law, such action would place Rembrandt outside of "the class of 'honest but unfortunate debtor[s]' that the bankruptcy laws were enacted to protect."[164] As such, his case could "be dismissed . . . because of . . . bad-faith conduct," thereby denying Rembrandt any bankruptcy protection.[165] The U.S. Code and the Federal Rules of Bankruptcy Procedure were designed "to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction."[166] Therefore, "dishonesty among debtors in failing to completely disclose their financial affairs undermines the civil bankruptcy system, and certain dishonest acts committed by debtors may even constitute bankruptcy crimes under 18 U.S.C. §§ 151-157.6."[167] Specifically, 18 U.S.C. § 152(1) makes it a criminal offense for a debtor to "knowingly and fraudulently" conceal from a trustee or "other officer of the court" any property "belonging to the estate of a debtor."[168] While historians may never know for sure, Rembrandt reportedly attempted to sell a sculpture, which he hid well enough to escape the Desolate Boedelskamer's inventory, outside the *cessio* proceedings.[169] This sculpture, since it was not Rembrandt's work, would most likely not be exempted under § 522 and therefore would be included in the estate. Under similar circumstances, Harry Herbert Wagner, Jr. was sentenced to six months imprisonment when the Sixth Circuit upheld his conviction for concealment of assets under § 152(1).[170] Rembrandt would likewise face imprisonment if his transaction were discovered today.

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163. Whitman, *supra* note 58, at 1882.

164. Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 374 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 287 (1991)).

165. *See id.*

166. *In re* Marrama, 430 F.3d 474, 478 (1st Cir. 2005) (quoting Boroff v. Tuley, 818 F.2d 106, 110 (1st Cir. 1987)).

167. Michael D. Sousa, *The Crime of Concealing Assets in Bankruptcy: An Overview and an Illustration*, 26 AM. BANKR. INST. J. 20, 20 (Mar. 2007).

168. 18 U.S.C. § 152(1) (2006).

169. CRENSHAW, *supra* note 2, at 75.

170. United States v. Wagner, 382 F.3d 598, 602-03 (6th Cir. 2004).

CONCLUSION

This study analyzed Rembrandt's insolvency from the perspective of modern U.S. bankruptcy law. It focused on Rembrandt's most pertinent—and allegedly unscrupulous—actions leading up to and during his bankruptcy. The study then compared the Dutch *cessio* process with bankruptcy law today and, despite the overall similarities between the two systems, determined that Rembrandt would have fared better under the more lenient modern system. As long as he was honest in the eyes of the court, bankruptcy would enable him to escape the yoke of his unwieldy debt and once more serve society as a productive citizen.

Rembrandt was an unbelievably gifted artist but also an unbelievably inept businessman. He painted and sketched his way into history, earning great fame and riches. However, his poor financial management led him to squander his wealth and lose almost everything he amassed over his lifetime. Luckily, the Netherlands had a liberal interpretation of the Roman concept of *cessio bonorum* that enabled Rembrandt to retain his freedom by surrendering his goods. Possessing many of the same general goals as modern U.S. bankruptcy law, the Dutch *cessio bonorum* insolvency law provided Rembrandt with discharge and a fresh start with which to resume his art business. Had he been caught circumventing the system, he would have likely been imprisoned under either system. However, for those who act honestly, the law provides a second chance. This Article focuses on a man who used that second chance to produce cherished works of art that now line museum walls. In this way, insolvency law enabled Rembrandt to utilize his tremendous gift and grace the world with more of his masterpieces.

FREE TO FOLLOW THE RULES?: A GLIMPSE AT THE ROLE OF IRAQI MEDIA, PAST, PRESENT, AND FUTURE

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The Iraqi media has always reflected the social attitudes of the people who controlled it and, to a much lesser degree, those of its recipients. This Comment is a brief foray into a few of the reasons for the recent changes in that dynamic. It is a discussion of how the transition of the native Iraqi media into a semblance of a free press has been affected by conditions both inside and outside of Iraq, public perception, and the U.S. government's varying influence over the Iraqi media. This short work as a whole underscores an uneasy symmetry between old attitudes that were a product of the Ba'ath media machine and current concerns that have arisen under much different circumstances.

The policy towards media within Iraq during Saddam's presidency was one of suppression, censorship, and government-controlled content. Despite having to overcome numerous hurdles in the post-Saddam era, the Iraqi media's development is ongoing. Legal impediments for Iraq's fledgling media still exist on many levels even with the regime change, from religious-based libel laws on one end of the spectrum to the U.S.-imposed media restrictions on the other, with multiple layers of local and national law in between. Compounding the difficulties of obtaining and relaying information within present-day Iraq are safety concerns that raise the stakes for Iraqi journalists far beyond mere harassment or detention. The technologically-savvy insurgency's presence in the Iraqi media scene is also a facet of the new era of Iraqi communications; countering their efforts remains a challenge.

Noting the level of a nation's media encumbrance is more than a general remark on social progress. It is a telling reflection of both the people and the government within the community it serves. The underpinnings of change likely lie not only with how, and through whom, the message is relayed to the Iraqi people, but by whether or not the Iraqi government takes notice of Iraqi public opinion.

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I. INTRODUCTION

Iraq is experiencing a media revival characterized by hostility, manipulation, courage, and, above all, the facilitation of intense discourse for a voracious public. Many scholars have epitomized the creation of a free media within Iraq as the ideal vehicle for conveying the country into democracy, but the implications of an unrestricted local voice within the country extend far beyond that role. This paper will only briefly touch on the media's function as a facilitator of democracy. The main focus will be the Iraqi media's journey from dictatorial mouthpiece to a semblance of a free press, and how this transition has been affected by dynamic conditions both inside and outside of Iraq, public perception, and the reduced influence of the U.S. government on the Iraqi media. This discussion as a whole illuminates an uncanny and perhaps unexpected symmetry between past concerns that were a product of the Ba'ath media machine and current problems that have arisen under much different circumstances.

In order to gain a more complete understanding of the significance and possible repercussions of the recent changes in Iraqi media dialogue, this paper will address four topics that broadly cover the magnitude of the Iraqi media's evolution. The first point of discussion sets the stage for understanding the current tone of mass communications within Iraq. That point explores the conditions under which both the Iraqi and the wider pan-Arab media operated during the period of Saddam's presidency. The attitude towards media within Iraq during this era was clearly one of suppression, censorship, and government-controlled content. Conversely, the pan-Arab media operating outside Iraq flourished, rapidly expanding during the post-Gulf War era. Despite Iraq's absence as a participant in the Arab media scene, the country and its leadership were ever-present as a contentious topic of discussion, leading to unexpected consequences for the Iraqi media's development in the post-Saddam era.

The second section covers the new Iraqi media identity, shaped

both by the United States' efforts and the multitude of news outlets that sprang up, seemingly overnight, to feed an insatiable Iraqi public. While the initial efforts of the U.S. to both influence and enter Iraqi media were at first largely ineffective, proving to be a disappointment to the Iraqi public, new strategies and tactics have made U.S. presence in the media less of a puppet show and more of a legitimate dialogue. The public's reaction and receptiveness may be the best measure of effective reporting by both the U.S. and local media. Accurate portrayals of current events were, and in some respects still are, likely located somewhere between the two points of view.

The third section reviews the legal and personal security challenges faced by Iraq's fledgling media. Legal hurdles exist on many levels, from religious-based libel laws on one end of the spectrum to the U.S.-imposed media restrictions on the other, with multiple layers of local and national law in between. Compounding the difficulties of obtaining and relaying information within present-day Iraq are safety concerns that raise the stakes for Iraqi journalists beyond mere harassment or detention; in some instances, reporting has lead to serious injury or the death of journalists or possibly their families. The Iraqi media's unflagging efforts to report the news despite these obstacles are a testimony to their resolve, endurance, and dedication to bringing the story home.

The final section covers the entry of insurgent reporting into the mainstream Iraqi media. Technology, slick production, and branding lend an air of authenticity to messages designed to create the perception of a well-organized and well-funded insurgency. While attempts to counter these messages are ongoing, the ease with which the prolific insurgency's messages reach the population is a serious cause of concern for both the Iraqi and the U.S. governments.

II. THE IRAQI AND PAN-ARAB MEDIA IN SADDAM'S TIME

The Iraqi and pan-Arab[1] media operated in spheres virtually exclusive of each other during Saddam Hussein's rule. The technology that allowed for the creation of a wider Arab identity was largely banned in Iraq, which remained a self-contained and isolated nation even though a communications renaissance was occurring all around it. Despite this absence of active participation in

1. Pan-Arab here refers mainly to the other Arab states within the Middle East. For more information regarding the nations that comprise the "*new Arab public*", see MARC LYNCH, VOICES OF THE NEW ARAB PUBLIC: IRAQ, AL-JAZEERA, AND MIDDLE EAST POLITICS TODAY 2-5 (2006).

the discourse, the plight of the Iraqis, the state of affairs within their country, and their leader were all contentious topics of discussion in pan-Arab media outlets well before the U.S. invasion of 2003. This discussion, coupled with the Arab world's inaction regarding the plight of the Iraqi people, may have contributed to the explosion of homegrown media in Iraq after the fall of Saddam's regime.

The freedom to report events in Iraq contemporaneously and truthfully, restricted as it was in the first half of the twentieth century,[2] succumbed completely to the Ba'ath regime, which acceded to power in Iraq in 1968.[3] Ofra Bengio, author and Senior Research Fellow at Tel Aviv University, unabashedly refers to the news reporting apparatus during the period following the coup as the "Ba'[a]th media," leaving little room for doubt as to where the message was being formulated.[4] In 1969, the regime officially annexed the media as a branch of the government,[5] effectively placing all forms of media dialogue under the Ba'ath's exclusive purview and control. To further ensure communications continued to comport with Ba'ath policy, Saddam Hussein's son, Oudai, was given substantial control over both broadcast and print media in the 1990s[6] and became chairman of the journalist's union.[7] Reporters Without Borders notes that from the time Saddam Hussein rose to the presidency in 1979 through the 1990s, numerous journalists in Iraq who were suspected of holding views contrary to those of the Ba'ath Party were prosecuted, tortured, or killed.[8] It is estimated that nearly 400 journalists were in exile during this period, having fled Iraq to protect themselves, their families, and their communities from retribution.[9] Those who tried to leave the country were denied visas for no apparent reason.[10] These measures effectively removed the power from the journalists' pens, ensuring those who stayed would fall in line with the Party.

Even though this level of domination presented an anathema for those who wished to report news from different perspectives,

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2. OFRA BENGIO, SADDAM'S WORD: POLITICAL DISCOURSE IN IRAQ 8 (1998). The author notes the existence of a handful of privately-owned newspapers that were permitted some degree of freedom during the period preceding the rise of the Ba'ath Party; the press was not nationalized until 1967, a year before the Ba'ath took power. *Id.*

3. *Id.* at 3.

4. *See id.* at 7.

5. *Id.* at 8.

6. BENGIO, *supra* note 2, at 8.

7. REPORTERS WITHOUT BORDERS IRAQ ANNUAL REPORT (2002), http://www.rsf.org/article.php3?id_article=1440 [hereinafter IRAQ ANNUAL REPORT 2002].

8. *See id.*

9. *Id.*

10. *Id.*

the resulting unbroken unity of the message streaming to the public likely had a great deal to do with the survival of the regime.[11] The Ba'ath Party, as one method of securing the loyalty of the populous, went to extreme lengths to turn Saddam Hussein into an icon that embodied virtuous characteristics of mythical proportions.[12] When Saddam Hussein rose to power in 1979, his every word was revered and memorialized by the press in newspapers, pamphlets, and books.[13] According to Bengio, journalists competed to see who could best imitate his speaking style in their work.[14] This form of flattery not only furthered the journalists' careers, but also furthered the spread of the Ba'ath Party's propaganda.[15] One prominent form of propaganda repeatedly used was the "glittering generality," essentially taking words common usage and infusing them with complex, ambiguous, and almost mystical meanings. The words chosen to be labels were often of religious and traditional significance and designed to evoke deep sentiment. With the additional meaning given to them by the Ba'ath through contextual and repetitive usage, these words became powerful components of the Ba'ath regime's propaganda machine.[16]

Controlling the day-to-day message was not the limit of the Ba'ath media's information manipulation within Iraq. *Apparatus of Lies*,[17] a White House publication, acknowledges the sophistication of the Party message and how it was disseminated through the media, but laments the Party's purpose of creating tragedy and exploiting suffering.[18] The dissemination of false reports and forgeries through the media, which then became cemented in the public

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11. BENGIO, *supra* note 2, at 10.

12. *See id.* at 13.

13. *Id.* at 10-11.

14. *Id.* at 11.

15. *Id.* at 4-5, 9-10.

16. *Id.* at 12; Ronald B. Standler, Propaganda and How to Recognize It 4 (Sep. 2, 2005) (unpublished manuscript), http://www.rbs0.com/propaganda.pdf. Bengio notes one of the most commonly used labels by the Ba'ath Party may have been *thawra*, which corresponds in English to "the revolution." BENGIO, *supra* note 2, at 12. The term was broadened from merely referring to one event, the coup, and extended to objects of more permanence, such as a logo or flag. *Id.* It was also burdened with additional meanings of value significance; by using the word *thawra*, a person could theoretically have been referring to a host of ideas such as leadership, the overthrow of evil, or permanence itself. *Id. passim*.

17. *See* WHITE HOUSE OFFICE OF GLOBAL COMMUNICATIONS, APPARATUS OF LIES: SADDAM'S DISINFORMATION AND PROPAGANDA 1990-2003, at 4-5 (2003), http://www.globalsecurity.org/wmd/library/news/iraq/2003/apparatus-of-lies.pdf [hereinafter APPARATUS OF LIES].

18. This "tragic" reporting style may have become ingrained into the culture; many of the current publications take up substantial space with stories about martyrs and the plight of those who stand up against the evils of the occupation and opposing parties. Links to online Iraqi newspapers, some of which are available in English, are located at Iraqi Media, http://www.menavista.com/iraqi_media.htm (last visited Mar. 4, 2009).

record,[19] caused harm from a historical perspective by creating nearly irrefutable deception.

The powerful Ba'ath media may have helped to maintain the regime's power base, but the communication stranglehold also held dangerous, though not unexpected, consequences for all Iraqi citizens.[20] The *Al-Mukhabarat al-'Iraqiyya*, Iraq's former secret police, was comprised of several military, police, and intelligence agencies that created an impressive—and equally repressive—internal security force.[21] The *Mukhabarat* maintained the Ba'ath regime's domination of news and popular spoken opinion through the use of spies and through the swift enforcement of harsh laws.[22] The agency used an extensive network of informants that would relay information from one informant to another quickly, and that would act with no less speed.[23] Certain topics of discussion were legally verboten, such as verbally insulting Saddam, punishable by death, and others became taboo for fear of reprisal.[24] As a result, private conversations were closely guarded, particularly those pertaining in any way to the President or his Party.[25]

This caution extended to any conversation that might possibly be considered disparaging to Saddam. Novelist Jon Lee Anderson had the surreal experience of driving past a massive mosque and palace construction projects in 2000 with Iraqis who refused to acknowledge the construction's very existence out of fear.[26] This occurred during a time when the general population was struggling under the burden of United Nations sanctions, [27] and any reference to the president's lavish expenditures might have been interpreted as a criticism. Anderson describes this adaptive behavior as being similar to that in the story about the emperor's clothes, with "places you saw but pretended not to see, and which you certainly didn't talk about, at least not in loud voices or to people you didn't

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19. *See* APPARATUS OF LIES, *supra* note 17, at 4-5.

20. The information sieve also captured many elements of education, one notable result being that textbooks were only changed every thirty years, thus allowing the government to manipulate both the accuracy and amount of history being taught in the schools. *See* JON LEE ANDERSON, THE FALL OF BAGHDAD 22-23 (2004).

21. Ibrahim al-Marashi, *Iraq's Security and Intelligence Network: A Guide and Analysis*, 6 MIDDLE E. REV. OF INT'L AFF. 1, 1-2 (2002), *available at* http://meria.idc.ac.il/journal/2002/issue3/al-marashi.pdf.

22. *See id.* at 5-7.

23. *See id.* at 6.

24. ANDERSON, *supra* note 20, at 12.

25. *See id.*

26. *Id.* at 12-14.

27. The post-Gulf War U.N.-imposed sanctions had a far more devastating effect on the population of Iraq than on the leadership, the intended target. *See* John Pilger, *Squeezed to Death*, THE GUARDIAN (London), Mar. 4, 2000, http://www.guardian.co.uk/weekend/story/0,3605,232986,00.html.

completely trust."[28]

The population's ability to receive news from sources outside of Iraq was also severely curtailed. Hussein outlawed the ownership of satellite television receivers,[29] effectively cutting off a significant amount of news flow from the rest of the world. Outside newspapers were banned for all except the elite.[30] Cyber-cafés in Baghdad did permit access to the Internet through a government Internet provider; however, all activity was closely monitored.[31] The only remaining peripheral media outlets that reached into the interior of Iraq, which included the BBC and Voice of America, were received via radio transmission.[32]

In striking contrast to the repressive atmosphere within Iraq during this period, the pan-Arab media was thriving and proving to be a force to be reckoned with. What Marc Lynch, an associate professor of political science at George Washington University, calls the "New Arab Public" was, and is, being shaped by the fairly recent flood of political discourse coming from multiple Arab media outlets within the Middle East that are not entirely government controlled.[33] Arguably, the most widely known icon of the early days of the pan-Arab media movement is Qatar-based al-Jazeera, launched in 1996.[34] Al-Jazeera's news programs regularly host guests with opposite views on everything from the U.S. presence in Iraq to the value of martyrdom.[35] Lively debate of political and religious matters is a characteristic of al-Jazeera and many other pan-Arab broadcast outlets, providing a valuable medium for airing conflicting views and uniting viewers across borders.

The use of a shared language by such a large population has served to create a diverse discussion among and about other Arab nations that may have actually permitted the pan-Arab media's survival. Modern Standard Arabic (MSA) is generally spoken in mediums where the message is meant to be transmitted over a large area, while regional media outlets and publications are still usually produced in the local dialect.[36] MSA, a modern variation of the Classical Arabic found in the Qur'an, was formerly limited in

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28. ANDERSON, *supra* note 20, at 12.

29. *See* David Lomax, *Iraq's Television Revolution*, BBC NEWS, Feb. 25, 2005, http://news.bbc.co.uk/2/hi/programmes/newsnight/4298455.stm.

30. *See* LYNCH, *supra* note 1, at 29.

31. IRAQ ANNUAL REPORT 2002, *supra* note 7, at 2.

32. *Id.*

33. *See* LYNCH, *supra* note 1, at 2, 36-37.

34. *Id.* at 41.

35. *Id.* ch. 4.

36. Nat'l Virtual Translation Ctr., Modern Standard Arabic, http://web.archive.org/web/20080203044554/http://www.nvtc.gov/lotw/months/august/ModernStandardArabic.html (last visited Mar. 4, 2009).

use to the educated upper classes, but today MSA is widely aurally understood by the Arabic-speaking population, even if that population cannot read it.[37] As a result of the wide availability of satellite television across the world in the mid-1980s, one of the first formats of Arabic news to be broadcast was actually newspaper headlines and articles read aloud in MSA, a practice that continues today.[38]

With the advent of media forums such as al-Jazeera, the availability of a wide audience outside a host country's borders provides a feast of topics to discuss, and few, if any, actually relate to the state of affairs within a host country.[39] While some Arab governments sponsor, or at least tolerate some of these media outlets, the majority of the leadership maintains tight control, either expressly or implicitly, over the media discourse regarding current events and social issues within their own country.[40] The odd result is that a person looking for open discussion about his or her own country has to look to media outlets operating outside that country's borders. As a result of having a broad audience across several countries, outlets like al-Jazeera can provide news and entertainment for a wide audience and still enjoy a tolerable relationship with their host country's leadership.

Despite the inference of homogeneity in the term "pan-Arab media," the media of the region is actually connected more by a common language and satellite television than by common viewpoints.[41] Iraq was noticeably missing from the media surge occurring in the Arab world, but it did have a presence in the forum as a heated topic of discussion.[42] Some gulf states, particularly Kuwait and Saudi Arabia, saw Iraq as a potential threat and were opposed to rehabilitating the country, while exiled individuals and others who purported to represent the interests of the Iraqi people lamented the state of affairs within the country.[43] Despite the volume and intensity of the discussion, this discourse did not generate assistance for the Iraqi people from the Arab community.[44] Iraqi hostility towards the rest of the pan-Arab world grew as a result of the pan-Arab inaction and the Iraqi people's frustration over not

37. *See id.*

38. *See* LYNCH, *supra* note 1, at 49; Ahmed Abdelali, *Localization in Mordern Standard Arabic*, 55 J. AM. SOC'Y FOR INFORMATION SCIENCE & TECH. 23-28 (2004).

39. *See* LYNCH, *supra* note 1, at 38-40.

40. *Id.*

41. *See id*. at 8.

42. *Id.* at 133.

43. *Id.* at 118, 133.

44. *Id.* at 96.

having their own voice.[45] This created a backlash that arguably kindled the incredible surge of Iraqi media after the fall of Saddam. The Iraqis, however, were not the only voices clamoring to be heard in Iraq in the days following the invasion.

III. SHAPING THE NEW IRAQI MEDIA

The U.S. government had been considering the implications of the Iraqi media's post-war role well before the 2003 invasion. The U.S. National Security Archive, in response to a freedom of information request, released a white paper[46] detailing a "Rapid Reaction Media Team" (RRMT), a concept which proposes having U.S.-educated teams of Iraqi journalists on the ground as soon as the invasion was complete, ready to report in "a new Iraq (by Iraqis for Iraqis)."[47] It appears there were high hopes that this wave of coverage would inspire optimism in the new, democratic future of the country and help ensure future stability.[48] The primary result anticipated by the composers of the paper was the formation of an indigenous Iraqi media as a paragon of free media in the Middle East.[49]

It is because of these and other similar actions that the U.S. has been accused of planning to monopolize communications within Iraq, criticized for not taking into account independent media outlets, which were non-existent in Iraq prior to the invasion, and lambasted for not recognizing the cultural information-gathering methods of the Iraqi people.[50] However, it may be just as plausible that the U.S. wanted to enter the Iraqi media in order to offer a widely accessible alternative voice to all of the sensational coverage in the early days after the invasion. From a strategic standpoint, al-Jazeera and many of the other Arab outlets that were able to broadcast into Iraq after the invasion were certainly not

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45. *Id.* at 133, 223-26. The anger of the Iraqi people was expressed openly and repeatedly in the Arab media shortly after the 2003 invasion. The accusations went as far as to say that the Arab media actually encouraged and sensationalized much of the violence during this period. According to Lynch, the Arab perception was that they had rallied behind the Iraqi people in their time of need, finding the Iraqi response shocking and hurtful. *Id.* at 224-25.

46. A white paper is an official government report or document advocating a particular position or course of action. The OWL at Purdue, White Paper: Purpose and Audience, http://owl.english.purdue.edu/owl/resource/546/01/ (last visited Mar. 4, 2009).

47. NAT'L SEC. ARCHIVE, WHITE PAPER: "RAPID REACTION MEDIA TEAM" CONCEPT 1 (2003), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB219/iraq_media_01.pdf.

48. *See id.* at 5.

49. *Id.*

50. *See* LYNCH, *supra* note 1, at 34-35; NAT'L SEC. ARCHIVE, IRAQ: THE MEDIA WAR PLAN (Joyce Battle ed., 2007) [hereinafter MEDIA WAR PLAN], http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB219/index.htm.

going to give much airtime to coalition messages, nor were they sympathetic to the U.S. agenda.[51] The only effective method for the U.S. to reach the Iraqi population was for the U.S. to enter the media fray. Nonetheless, some of the oft-touted criticism of the methods initially used by the U.S. to present itself to Iraq and the rest of the world may be justified.

The blueprint for Iraq's new media was designed far away from the mosques and dusty souks of Iraq.[52] Much of it was crafted in distant Washington, D.C., prior to the March 2003 invasion.[53] Science Applications International Corporation (SAIC), a self-described "scientific, engineering, and technology applications company that uses its deep domain knowledge to solve problems of vital importance to the nation and the world,"[54] is the San Diego corporation that was awarded a no-bid government contract for the rebuilding of Iraq's media.[55] SAIC's mandates included organizing the reconstruction and modernization of the Iraqi media's aging infrastructure, providing experts on developing democracy, and developing programming for the Iraqi network.[56] The corporation was given control over the Iraqi Reconstruction and Development Council (IRDC), which was comprised of Iraqi exiles who were brought to the United States for the purpose of assisting in the rebuilding process.[57] The group was then returned as planned to Iraq after Saddam was removed from power.[58]

Not all of SAIC's plans came to fruition, however. More than one commentator noted that the company was ill-equipped to take on the challenge of rebuilding the outdated and partially destroyed Iraqi media infrastructure from the ground up in the wake of the invasion.[59] SAIC was also inadequately prepared to handle the burden of creating programming for the new network,[60] which was expected to mirror the type of programming found on PBS and the

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51. *See* LYNCH, *supra* note 1, at 213.

52. A *souk* is a Arab market. Dictionary.com, Entry for Souk, http://dictionary.reference.com/browse/souk (last visited Mar. 4, 2009).

53. *See* Dean Calbreath, *A Blueprint for a Nation*, THE SAN DIEGO UNION-TRIBUNE, July 4, 2004, *available at* http://www.signonsandiego.com/uniontrib/20040704/news_mz1b4nation.html.

54. Science Applications International Corporation, http://www.saic.com (last visited Mar. 4, 2009).

55. MEDIA WAR PLAN, *supra* note 50.

56. *See* Center for Public Integrity, Windfalls of War: Science Applications International Corp, http://projects.publicintegrity.org/wow/bio.aspx?act=pro&ddlC=51 (last visited Mar. 4, 2009).

57. Calbreath, *supra* note 53.

58. *Id.*

59. *See* Center for Public Integrity, *supra* note 56.

60. *Id.*

BBC and was to be named the "Iraqi Media Network" (IMN).[61]

One of the American journalists selected to join the group of Iraqi expatriates and American journalists, Don North, wrote of his experience with SAIC's IMN.[62] The network went live with its first radio broadcast on April 10, 2003, and was on television the following month.[63] North describes the atmosphere at this time as one of anticipation.[64] Hopes were high that the media outlet would be used to promote government accountability, in stark contrast to its former role as solely a propaganda machine.[65] The initial programming fell far short of these expectations.[66] It consisted largely of Coalition Provisional Authority (CPA)[67] meetings and press conferences, not the local news that would have been more appealing and meaningful to the people.[68] This miscalculation disappointingly resulted in Iraqi viewership of little more than 10%.[69]

As of December 2003, North felt IMN had failed in large part because those who were responsible for running the network had no credible journalism or television experience.[70] North pulled no punches in describing IMN as "run[ning] on a shoestring and look[ing] like it."[71] The vision of a network that was to be a model for the Arab world and an outlet "by Iraqis for Iraqis"[72] seemed to be forgotten.

The Iraqi press, however, was not willing to wait for IMN or anyone else to instruct it on how to report the news.[73] After decades of serving as a dictator's mouthpiece, any deficiencies in journalistic expertise, such as unpolished grammar, lack of objectivity, and a deficiency in the basic skills for writing accurate and informative news pieces,[74] did not slow the proliferation of hundreds of

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61. Don North, *Iraq: One Newsman's Take on How Things Went Wrong*, CORPWATCH, Dec. 15, 2003, http://www.corpwatch.org/article.php?id=7891.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*; LYNCH, *supra* note 1, at 216-19.

67. The Coalition Provisional Authority was the name given to the U.S. government body operating in Iraq after 2003. COALITIONAL PROVISIONAL AUTH., AN HISTORIC REVIEW OF CPA ACCOMPLISHMENTS 2 (2004), *available at* http://www.cpa-iraq.org/pressreleases/20040628_historic_review_cpa.doc.

68. *See* North, *supra* note 61.

69. *See id.*

70. *Id.*

71. North, *supra* note 61.

72. NAT'L SEC. ARCHIVE, *supra* note 47.

73. *See* North, *supra* note 61.

74. *See* ZUHAIR AL-JEZAIRY, THE IRAQI PRESS: THE HERITAGE OF THE PAST AND THE CHALLENGE OF THE FUTURE 7-8 (Lotte Dahlmann ed., 2007), *available at* http://portal.unesco.org/ci/en/files/23828/116870779611099_Iraqi_report.pdf/1099%2BIraqi_report.pdf.

newspapers and magazines that filled the streets of Iraq shortly after the invasion.[75] Having been deprived of a domestic voice for so long, the public welcomed even the most crude but enthusiastic delivery of the flood of information streaming from these new sources.[76]

While the volume of available news from Iraqi, U.S., and pan-Arab media was undoubtedly satisfying to the Iraqi people after decades of unadulterated propaganda and censorship, the quality and slant of the news in the months following the invasion left many feeling shorted.[77] The Iraqi media's initial lack of professionalism did not go unnoticed in an environment where people needed good, reliable information to make decisions regarding daily activities.[78] Other news sources, such as al-Jazeera and Iran's al-Alam, were perceived as pushing a divisive political agenda. Specifically, a message that did not correspond with the reality of the situation in Iraq at a time when people were living without electricity, clean water, or functional schools.[79]

The Iraqi citizens also viewed the United State's developing message of glowing optimism as unrealistic.[80] The U.S. methods of disseminating information through IMN's television station, later known as al-Iraqiya, sometimes involved the use of an Arabic-speaking broadcaster relaying information from the CPA in a fashion similar to Iraq's news stations, which created a kind of puppet-show effect, transparent and offensive to many Iraqis.[81] Instead of allaying fears and reaching out to the people directly, communicating in this manner arguably made Iraqis even more suspicious of the United States' plans for their country.[82]

The promising early development of the native Iraqi media began to stagnate with the passing of time. Training opportunities are now available to Iraqi reporters, giving them a chance to learn the art of objective reporting.[83] Unfortunately, financial and political circumstances have limited the spread of less biased news cov-

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75. *Id.*

76. *Id.* at 19.

77. Zamira Eshanova, *Iraq: After 30 Years, News Options Begin to Grow and Diversify*, RADIO FREE EUROPE/RADIO LIBERTY, May 6, 2003, http://www.rferl.org/content/Article/1103136.html.

78. *See id.*

79. *Focus on Reconstruction in Fallujah*, INTEGRATED REG'L INFO. NETWORKS, May 24, 2005, http://www.globalpolicy.org/security/issues/iraq/reconstruct/2005/0524fallujah.htm.

80. *See* Eshanova, *supra* note 77.

81. *See* LYNCH, *supra* note 1, at 216-17, 250-51.

82. *Id.* at 250-51.

83. Jill Carroll, *Letter from Baghdad: Not That Independent*, AM. JOURNALISM REV., June-July 2004, at 63, 63-64, *available at* http://www.ajr.org/Article.asp?id=3687.

erage.[84] Of the roughly 300 publications that originally sprang up in Iraq during the months following the invasion, about half come out regularly.[85] Many still in operation are tied to a political party with a bank account and an agenda; truly independent publications are rare. [86] Some of the newly trained, more objective reporters are being admonished by their editors for writing pieces without inserting their own opinions.[87]

With regards to the U.S.'s current presence in the Iraqi media, the U.S. government has recently stepped out of the shadows and become a more active participant in Iraqi media discourse. Members of the State Department and other U.S. government agencies working in Iraq now appear in press conferences alongside Iraqi officials,[88] fulfilling Marc Lynch's call for the U.S. to engage with the Iraqi public directly, as a clearly identifiable player.[89] Lynch does not see this as a cure-all for the public relations issues that still exist in Iraq, but believes the Iraqi's desire for change can keep the dialogue open as long as the U.S. is an active and respectful participant.[90] The availability of U.S. officials in an open forum likely eases some of the Iraqi suspicions about U.S. intentions and behind-the-scenes control over the new government, which can only serve to improve relations.

Widespread frustration was an unforeseen consequence of the media revival in the pan-Arab world; it remains to be seen if that same concern crops up in Iraq. Lynch notes that from 1998 to 2003 the powerful pan-Arab media collided with a wall of disappointment when it realized that all of its vibrant and passionate discourse did not clearly result in any political gains, democratic or otherwise.[91] The true test of whether or not Iraq is on its way to becoming a democracy may be measured equally both by whether the press has freedom to report what they choose and by whether the Iraqi government actually feels compelled to respond and react to the people's concerns.

IV. LEGAL & SAFETY HURDLES

The Iraqi media environment does not currently embody the principles of freedom hoped for by the U.S. and coalition govern-

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84. *Id.*
85. *Id.*
86. *Id.*
87. Carroll, *supra* note 83, at 64.
88. Transcripts from recent press conferences are on file with the author.
89. LYNCH, *supra* note 1, at 250.
90. *See id.* at 250-51.
91. *Id.* at 131.

ments prior to March 2003. Despite advances made by the native Iraqi media, Iraq's 2007 rankings by Freedom House were unimpressive and reflected significant limitations on the media's ability to report the news from inside the country.[92] *Freedom of the Press 2007* lists Iraq as "not free" despite post-Ba'ath progress, with the political, legal, and economic environments all being ranked poorly.[93] A lack of professionalism,[94] funding,[95] and adequate support combined with legal and safety concerns[96] are adding miles onto the long road to a free Iraqi media.

Even though Iraqis no longer face threats of reprisal from the *Mukhabarat* under the current regime, they still face opposition by militias and politicians that create a need to censor themselves.[97] It appears that Iraqi government officials do not understand the nature of a free media and, out of fear, are trying to limit it as much as possible.[98] New government regulations, lingering Ba'ath era directives, U.S.-imposed laws, and fear of reprisal from opposition groups are creating self-censorship that is oddly reminiscent of the attitude under the Ba'ath regime, although certainly not as extreme. The rules and regulations governing the media in Iraq are so vast and complex that only a brief overview can be provided here.

The basis for freedom of expression can be found in the Iraqi Constitution itself. The Constitution allows for freedom of expression as long as it is respectful of public order and morality.[99] This is a broad umbrella indeed. Theoretically, judges would be allowed enormous power to determine what the limitations of this provision entail, as neither public order nor morality are terms with simplistic meanings.[100] This is particularly true of a culture where religion is deeply ingrained in many aspects of daily life. What apparently is acceptable under these exceptions to free speech are Ba'ath era laws that are still in force and which can be used in the prosecution of journalists in Iraq today.[101] One of the most com-

92. *See* FREEDOM HOUSE, FREEDOM OF THE PRESS 2007, at 167-68 (2007).

93. *Id.* at 167.

94. Press Release, Int'l Fed'n of Journalists, IFJ-FAJ Plan Urgent Programme to Build Unity and Professionalism in Iraqi Journalism (Jan. 26, 2004), http://www.ifj.org/en/articles/ifj-faj-plan-urgent-programme-to-build-unity-and-professionalism-in-iraqi-journalism.

95. Carroll, *supra* note 83, at 63-64.

96. *See id.* at 167-69.

97. *See The Iraqi Media Three Months After the War: A New but Fragile Freedom*, REPORTERS WITHOUT BORDERS, July 23, 2003, http://www.rsf.org/article.php3?id_article=7587.

98. *On the Media: Protection Racket* (WNYC radio broadcast Oct. 20, 2006) (recording and transcript available at http://www.onthemedia.org/transcripts/2006/10/20/03).

99. ARTICLE 19, FREE SPEECH IN IRAQ: RECENT DEVELOPMENTS 4 (2007), http://www.article19.org/pdfs/publications/iraq-free-speech.pdf.

100. *See id.* at 4-5.

101. *On the Media; Protection Racket*, *supra* note 98.

monly used criminal sanctions against journalists is public insult of a public official.[102] Several journalists have been charged with this crime in the last few years, challenging the very foundations of what it means to have a free press.[103]

Numerous stories have been printed in Western news reporting what seems to be arbitrary enforcement of antiquated laws. One example is the case of Twana Osman, editor-in-chief of a major newspaper, who was given a six-month suspended sentence and fined approximately fifty dollars for publishing an article alleging that a high-ranking public official had two employees of the phone company fired for cutting off his phone when he did not pay the bill.[104] It appears as though these cases will be handled on an individual basis, hopefully taking into consideration public opinion in favor of media autonomy, until legislation can be written to strengthen the media freedoms guaranteed by Iraq's Constitution (approved in 2005),[105] or the old laws are repealed.

While the move to a new government has significantly changed the political landscape of the country, there are many Ba'ath era laws lingering past their time. According to Article 19, an organization supporting a "Global Campaign for Free Expression," the Iraqi Constitution's provision that preserves Ba'ath-era laws unless specifically amended or appealed extends the life of an oppressive body of law aimed at silencing expression.[106] Even the knowledge that these laws exist likely produces a chilling effect on speech, and the threat of arrest and conviction only adds to the burden of caution carried by those who are trying to satiate the public's need for current, accurate information.

In addition, the U.S. government contributed to these difficulties through orders enacted by the Coalition Provisional Authority (CPA), which was charged with maintaining law and order until power could be transferred to the Iraqi people.[107] Despite the dissolution of the CPA on June 28, 2004,[108] the orders it passed have

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102. *Id.*

103. *See* Charles Levinson, *Iraq's 'PBS' Accused of Sectarian Slant*, CHRISTIAN SCI. MONITOR, Jan. 10, 2006, at 6, *available at* http://www.csmonitor.com/2006/0110/p06s01-woiq.html.

104. Comm. to Protect Journalists, Attacks on the Press 2006: Iraq, http://www.cpj.org/attacks06/mideast06/iraq06.html (last visited Mar. 4, 2009).

105. ARTICLE 19, *supra* note 99, at 3.

106. *Id.* at 12, 16.

107. *See* COALITIONAL PROVISIONAL AUTH., *supra* note 67, at 2. For more information regarding the mission and accomplishments of the CPA, please see the official U.S. government website for the CPA, Coalitional Provisional Auth., http://www.cpa-iraq.org (last visited Mar. 4, 2009).

108. Gulf-Law.com, Iraq Update August 2004, http://gulf-law.com/iraq_0408.htm (last visited Feb. 7, 2009). The Iraq Transition Assistance Office (ITAO) is the current incarnation of the U.S. government in Iraq. For information regarding its mission, see Embassy of

not been repealed and currently have the effect of law.[109] CPA Order 14 is of particular concern for journalists because it prohibits the media from disseminating information that would incite violence or civil disorder.[110]

It is the utilization of this CPA Order that led to the much-publicized closing of the Iraqi offices of al-Jazeera and another pan-Arab media outlet, al-Arabiya.[111] These closures, however, have been characterized as retaliatory actions designed to send a message[112] and were largely ineffective: both channels continue to broadcast from other Arab countries and are received in Iraq via satellite.[113] The closure of al-Jazeera, in particular, has been linked to a desire for retribution against the pan-Arab media for creating an atmosphere that encouraged violence and accusations that al-Jazeera had been another of Saddam's mouthpieces during the Ba'ath era.[114]

Another major concern for Iraqi journalists comes not from laws passed by the Iraqi government over the last several years, but instead from insurgent and sectarian threats as well as actual violence. It is estimated that 113 Iraqi journalists have been killed as a result of hostile action since March 2003.[115] While the Ba'ath era secret police are no longer a threat, the even more insidious non-governmental entities that comprise the insurgency have taken the *Mukhabarat*'s place as the retaliatory arm of the conflict between the media and those factions who wish to be in power.

A 2008 Reporters Without Borders report states that, as of March 2008, hundreds of Iraqi journalists are in exile to protect themselves and their families from this new threat.[116] Some fled the country after surviving assassination attempts.[117] Many jour-

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the United States in Baghdad, Iraq, http://iraq.usembassy.gov/iraq/itao.html (last visited Mar. 4, 2009).

109. *See, e.g.*, ARTICLE 19, *supra* note 99, at 15-16.

110. *Id.*

111. *Id.*

112. *See* Joel Campagna, *Arabic Satellite Channels and Censorship*, TRANSNAT'L BROADCASTING STUD. (Int'l Div. of the Broad. Educ. Ass'n) Fall/Winter 2004, http://www.tbsjournal.com/Archives/Spring05/campagna.htm.

113. *See* LYNCH, *supra* note 1, at 229; Allied Media Corp., Al Arabiya TV Viewer Demographic, http://www.allied-media.com/ARABTV/AlarabiyaDEMOG.htm (last visited Mar. 4, 2009); Allied Media Corp., Al Jazeera TV Viewer Demographic, http://www.allied-media.com/aljazeera/JAZdemog.html (last visited Mar. 4, 2009).

114. *See* LYNCH, *supra* note 1, at 64-65, 225.

115. Comm. to Protect Journalists, Iraq: Journalists in Danger, http://www.cpj.org/Briefings/Iraq/Iraq_danger.html (last visited Mar. 4, 2009). This figure does not include the Iraqi media support staff who have been killed. *See id.*

116. ANGÉLIQUE FERRAT & HAJAR SMOUNI, REPORTERS WITHOUT BORDERS, HUNDREDS OF JOURNALISTS FORCED INTO EXILE IN FIVE YEARS SINCE LAUNCH OF US-LED INVASION OF IRAQ 2-3, 5 (2008), http://www.rsf.org/IMG/pdf/RapportRefugies_GB.pdf.

117. *Id.* at 6.

nalists who flee to other Arab countries are permitted to continue their careers as journalists, but in some of those countries they are unsurprisingly forbidden to criticize their hosts.[118] Those who stay in Iraq work with the uncomfortable knowledge they may be targeted by someone close to home, like one reporter who found his name on a target list in his neighborhood bakery.[119] This pattern is not likely to change until laws protecting journalists are enacted and enforced.

Meanwhile, the international community is unwilling to stand idly by and wait for the Iraqi government to take measures to protect citizen journalists. It has mobilized to bring awareness to the efforts and plights of reporters who dare report from within the new Iraq. For example, the International News Safety Institute (INSI), which is sponsoring the Iraqi Media Safety Group (IMSG) from within Iraq, is one of many organizations that has rallied to this cause.[120] The Group is tasked with the tasks of providing safety training and lobbying the Iraqi government to pass laws that protect journalists' well-being.[121] While the current state of affairs in Iraqi media is a far cry from where the U.S. government envisioned it would be, post-invasion, proponents of change hope that the efforts of the international community and those working from the inside to facilitate change can succeed in removing these potentially paralyzing disincentives.

V. INSURGENT PRESENCE WITHIN THE IRAQI MEDIA

Any discussion of the current media environment within Iraq would not be complete without addressing the insurgency's and militia's use of mass media to further their own ends. With the new availability of a variety of print, radio, television, and Internet sources of information, the Iraqi people have greater choices regarding where they get their mass-produced news. Insurgents in Iraq and across the Arab world are reaching out to potential audiences with technological savvy, using these same media. The pervasiveness of this output and the impressions of legitimacy are difficult to counter, and remain a challenge to Iraqi and U.S. counter-insurgency efforts.

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118. *Id.* at 10-11.

119. *Id.* at 5-6.

120. Press Release, Int'l News Safety Inst., Journalists and Safety Advocates Welcome Launch of Iraqi Campaign over Violence against Media, (Sept. 21, 2007), http://www.newssafety.com/index.php?view=article&catid=314%3Apress-room-news-release&id=5893%3Ajournalists-and-safety-advocates-welcome-launch-of-iraqi-campaign-over-violence-against-media&option=com_content&Itemid=100077.

121. *Id.*

The impetus behind the insurgency's need to terrorize likely stems, at least partially, from the power shift in Iraq between the two most prominent branches of the Muslim faith following the U.S. invasion. The insurgents being discussed here are primarily Sunni, the largest of the two main branches of Islam, although a significant number of insurgent groups are Shi'a.[122] Iraq's general population is predominately Shi'a.[123] The Sunni were the more powerful of the two branches of Islam represented in the Ba'ath Party, in spite of being far less numerous than the Shi'a.[124] In Iraq, the minority wielded tremendous power over the majority.[125] Now that the Iraqi leadership better reflects all religious, ethnic, and tribal groups within the country, the Sunni have, to a degree, been displaced from their position of power.

It is important to note that a number of Sunni insurgency groups within Iraq are recent arrivals and actually originated in other Muslim countries,[126] such as al-Qaeda, which is a transplant from Afghanistan.[127] The messages of these groups, combined with those of the native Sunni insurgents that are operating from within Iraq, range from religious superiority over other sects to a call for removal of the infidel invaders.[128] Their actions, portrayed in videos and explained in press releases, include martyring oneself in a public area and planning and executing attacks against foreign soldiers.[129]

Perhaps the most succinct and accurate description of "the Sunni insurgent media network is lean, mean and fast-moving."[130] The widely cited publication by Radio Free Europe Radio Liberty, *Iraqi Insurgent Media: The War of Images and Ideas*, analyzes many of the insurgent groups' sophisticated use of mainstream media formats for disseminating ideologies and informing others about their activities.[131] According to the authors, insurgent access

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122. Febe Armanios, *Islam: Sunnis and Shiites* 1-2 (Cong. Research Serv., CRS Report for Congress Order Code RS21745, Feb. 23, 2004), http://www.fas.org/irp/crs/RS21745.pdf.

123. *Id.* at 1.

124. Sharon Otterman, Council on Foreign Relations, IRAQ: The Sunnis (Dec. 12, 2003), http://www.cfr.org/publication/7678/.

125. *Id.*

126. Ahmed S. Hashim, The Sunni Insurgency in Iraq (Aug. 15 2003), http://www.mideasti.org/scholars/editorial/sunni-insurgency-iraq.

127. Jayshree Bajoria, Council on Foreign Relations, al-Qaeda (a.k.a. al-Qaida, al-Qa'ida) (Apr. 18, 2008), http://www.cfr.org/publication/9126/.

128. DANIEL KIMMAGE & KATHLEEN RIDOLFO, RADIO FREE EUROPE/RADIO LIBERTY, IRAQI INSURGENT MEDIA: THE WAR OF IMAGES AND IDEAS 40-42 (2007) [hereinafter WAR OF IMAGES], *available at* http://realaudio.rferl.org/online/OLPDFfiles/insurgent.pdf.

129. *Id.* at 7-8, 25-30, 40-42.

130. Daniel Kimmage & Kathleen Ridolfo, *Iraq's Networked Insurgents*, FOREIGN POL'Y, Nov.-Dec. 2007, at 88, 88.

131. *See generally* WAR OF IMAGES, *supra* note 128.

to the public appears to be achieved largely through written press releases, magazines, films, and the Internet, giving them the ability to distribute a variety of information while retaining an unknown location.[132] Mimicking the practice of official organizations, the various groups use their formal logos when issuing statements and closely follow the format of official releases, keeping to the facts in a prescribed fashion.[133]

While distribution of the Sunni insurgency's message is primarily found in printed publications and films, the Internet is proving to be a useful weapon in the insurgency's arsenal of media forums.[134] The Jamestown Foundation's publication, *Terrorist Focus*, notes one alarming effect of insurgent internet usage, the ability for insurgents to anonymously discuss tactical and strategic knowledge. This includes advice on how to build explosive devices and how to conduct target selection.[135] The prospective audience for these educational messages, along with communications espousing the virtuous nature of the insurgency's struggle, is no longer limited to the Arabic-speaking world.[136] Although the implications of the use of the Internet in this manner are not unique—the web is a cornucopia of information for many who wish to create an incendiary device—it is still a disturbing thought that would-be jihadists can now reach out from across the globe to an Islamist online support group in order to find the necessary motivation and skills to become killers. [137]

Satellite television was also an outlet for at least one insurgent group, albeit for a short period of time. Al-Zawraa was a Sunni insurgent satellite program relayed from an unknown location in Iraq and then transmitted via satellite to Cairo, where it was broadcasted to the Middle East.[138] The group behind the network was the Islamic Army of Iraq, which has become a haven for many members of the former Ba'ath Party, including one previous parliamentarian.[139] The channel content consisted mainly of low-quality video footage of brutal attacks and American anti-war videos.[140] Egypt cancelled the station in February 2007, citing interfe-

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132. *Id.* at 3-4.

133. *Id.* at 8.

134. *Id.* at 7, 46.

135. Chris Zambelis, *Iraqi Insurgent Media Campaign Targets American Audiences*, TERRORISM FOCUS (Jamestown Found., Washington, D.C.), Oct. 16, 2007, at 2, 2.

136. *Id.*

137. *See id.*

138. Posting of Lawrence Pintak to Public Diplomacy Blog, http://uscpublicdiplomacy.com/index.php/newsroom/pdblog_detail/070110_war_of_ideas_insurgent_channel_coming_to_a_satellite_near_you/ (Jan. 10, 2007, 4:40 PDT).

139. *Id.*

140. *Id.*

rence with other channels, although diplomatic pressure may have been behind the government's action.[141] It is also plausible that the Egyptian government was concerned that the programming might provoke more violence within its own borders.

In *Iraqi Insurgent Media: The War of Images and Ideas*, the authors note that the way in which the insurgent groups depict themselves in their publications, broadcasts, and websites is of paramount importance because it shapes public opinion about their movement.[142] In television broadcasts, available for viewing online, insurgents use sophisticated production equipment and techniques that imply they are well-organized and well-funded.[143] These broadcasts sometimes feature programs with an anchorman who recites news in a format very similar to mainstream television news, albeit with a covered or blurred face.[144] Some of the websites offer films of a group's activities, many of them with voice-over commentary and songs.[145] Modern Standard Arabic is used in many of the video clips and downloadable music,[146] for the same reason it is used in mainstream pan-Arab media—to reach a wide audience.

The theme in these videos is generally keyed back to the message of the insurgent group, which commonly includes either a rally for pushing the U.S. invaders out of Iraq or a call for jihad, a war between nonbelievers and holders of the faith.[147] It is notable that most of the insurgent's songs refer to a global jihad movement, not just Iraq's, although there are some nationalist songs that contain elements of propaganda reminiscent of the Ba'ath regime.[148] This trend of using music with global appeal likely reflects another means by which the movement attempts to make itself appear omnipresent.

If censorship is an anathema to free press and free speech, can this type of message be countered in Iraq without sacrificing newfound basic principles of a semi-free media? Outright barring of

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141. *Egypt Pulls Plug on Al Zawraa*, AME INFO, Feb. 26, 2007, http://www.ameinfo.com/111837.html.

142. *See* WAR OF IMAGES, *supra* note 127, at 7, 26.

143. *See id.* at 26-28.

144. *Id.* at 27, 30.

145. *Id.* at 27.

146. *Id.* at 31.

147. *Id.* at 37-38. It should be noted that the correct translation of jihad is not "holy war," as it is commonly interpreted. The term actually means something closer to the struggle to do good. The U.S. government has been advising diplomats to not use the term "jihadist" because it implies that the persons committing acts of terrorism are legitimate fighters. For an overview of this topic, see Matthew Lee, *"Jihadist" Booted from Government Lexicon*, ASSOCIATED PRESS, Apr. 24, 2008, http://www.msnbc.msn.com/id/24297050/.

148. WAR OF IMAGES , *supra* note 128, at 31-32, 38 n.22.

information reception is certainly no longer a viable option with the proliferation of cyber cafés and satellite receivers in Iraq.[149] Whether or not the insurgency will continue to grow depends largely to the Iraqis themselves; fortunately, insurgent tactics have become distasteful to many Iraqis.[150] The support insurgents still draw from some people, however, is largely drawn from a united dislike of the U.S. occupation.[151] Measures that the U.S. can and has taken to improve and clarify the boundaries of its relationship with the new Iraqi government, including entering the mainstream media as an identifiable figure, will hopefully reduce the attractiveness of the insurgency's message.

VI. CONCLUSION

Making a transition of this magnitude cannot be done quickly, painlessly, or easily. To quote H.L. Menchken, "[f]or every complex problem, there is a solution that is simple, neat[,] and wrong."[152] Censorship and propaganda, the bread and water of the Ba'ath regime, are not the correct approaches for the governments of Iraq and the U.S. to take in shaping the new Iraqi media. While there are valid concerns regarding the professional standards of the Iraqi press, granting it a free environment that allows it to evolve into a dependable voice can only hasten its progress. It would be extremely beneficial to Iraq and the Arab world as a whole if the Iraqi media were able to develop into the seemingly elusive paragon of free media that was originally envisioned. Perhaps it would instill a much-needed national pride in the Iraqi people, who after the fall of Saddam had rebelled against those in the Arab-speaking world who had made hollow claims of representing their interests for so long.

Noting the level of a nation's media encumbrance is more than a general remark on social progress. It is a telling reflection of both the people and the government within the community. The Iraqi government would be better served if it permitted the press to report accurately about the country's leadership, even if the reports were unpleasant. Having an open environment, devoid of oppressive laws, means government officials are more likely to be held accountable, as long as the government takes interest in the

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149. OpenNet Initiative, Iraq, http://opennet.net/research/profiles/Iraq (last visited Mar. 4, 2009).

150. *See* Think & Ask, Iraq's Insurgency Builds, Grows Alliances, http://www.thinkandask.com/2006/021806-insurgent.html (last visited Mar. 4, 2009).

151. *Id.*

152. Gary Green, Famous Quotes in Law, http://ggreen.com/just-for-fun/quotes/ (last visited Mar. 4, 2009) (quote attributed to H.L. Menchken).

people's reactions and concerns with government activity. Such government notice of public opinion may prove to be a valuable benchmark of democratic progress.

If the Iraqi people feel as though their interests, and those of the U.S., are acknowledged by the Iraqi government and accurately represented in the country's mainstream discourse, perhaps efforts to push the insurgency out of Iraq will be more effective. While a freer Iraqi press will not immediately create a democratic society, an environment where the voracious public can get it's information from journalists who are protected by the law, instead of being repressed by it, will construct a foundation for the remarkable transformations yet to come.

AGREEMENTS THAT DIVIDE: TRIPS VS. CBD AND PROPOSALS FOR MANDATORY DISCLOSURE OF SOURCE AND ORIGIN OF GENETIC RESOURCES IN PATENT APPLICATIONS

JONATHAN CARR*

In an attempt to unify the regulation of intellectual property, the TRIPS Agreement sets forth standards for intellectual property law. Recently, however, many countries have become divided on the issue of whether member countries should be required to disclose the source and origin of genetic resources used in patented technologies. Developing countries claim that enforcement of such a requirement would help remedy the global biopiracy problem. This article reviews and assesses the many proposals to amend the TRIPS Agreement as well as the responses from countries, such as the United States, opposing the proposals. Included is a brief discussion about the potential economic ramifications of such an amendment to TRIPS and discussion of alternative international agreements as potential venues for a similar disclosure requirement.

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I. INTRODUCTION

The ownership of life always sparks debate and controversy, with no exception in the intellectual property realm. With recent years of rapidly advancing science, the world has struggled with not only defining life, but also determining how to deal with the patentability of the building blocks of life and their uses. In a decision that would dramatically impact U.S. patent law, Chief Justice Burger determined that a live, human-made microorganism is patentable, stating that "anything under the sun that is made by man" is subject matter worthy of patent protection.[1] After *Diamond v. Chakrabarty*, the United States and nations throughout the world raced to keep up with the influx of biotechnology and gene sequence patent applications encompassing living forms.

Biotechnology and genetic breakthroughs have added to the international controversy over such subject matter. Developing countries fear that patenting biological resources hands the world's most valuable assets over to large corporations of the wealthy, industrialized nations. The United States and other developed countries benefit greatly from patenting biotechnology and claim that patent protection is vital to the advancement of science, technology, and global economic development. The tension between the two positions has grown significantly as developing countries claim their resources are wrongfully taken under acts of biopiracy, where corporations and industrialized nations allegedly steal and commercialize genetic resources of other biologically diverse countries.

At the center of the biopiracy debate are two international agreements that attempt to resolve the concerns of both sides, but in some ways have only widened the gap between them. The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and the Convention on Biological Diversity (CBD) expose the dividing lines between the biodiversity-rich developing countries and the technology-rich industrialized countries.[2] While TRIPS advocates stronger patent protection, the CBD promotes fair and equitable sharing of biological resources. In an attempt to reconcile the two agreements, developing countries have proposed an amendment that would require disclosure of genetic source and origin in patent applications. This paper discusses the general debate among countries about the relationship between TRIPS and the CBD, the proposed amendment, and reactions to the proposal.

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1. Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980) (citation omitted).
2. Charles R. McManis, *Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally*, 11 CARDOZO J. INT'L & COMP. L. 547, 548 (2003).

A brief discussion of the potential effects of the proposed amendment is also included.

II. THE CONVENTION ON BIOLOGICAL DIVERSITY (CBD)

The CBD and TRIPS are evidence that, in recent years, there has been growing worldwide concern for the protection of biological resources and rights to such resources. This concern has manifested itself strongly in the global debate over intellectual property rights regarding biological resources. At the United Nations Environment Programme (UNEP), in 1987, the United States proposed that UNEP "establish an 'umbrella' convention" to make the different conservation agreements throughout the world compatible with one another.[3] Two years later, an Ad Hoc Working Group of Experts was created to draft a harmonized document for the conservation and sustainable use of biological diversity, while considering "the need to share costs and benefits between the developed and developing countries and the ways and means to support innovation by local people."[4] The three pillars of the CBD are conservation of biodiversity, sustainable use, and adoption of access and benefit sharing.[5]

The CBD aims to regulate biodiversity and the use of biological resources. Article I of the CBD states that " 'equitable sharing of benefits' includes access to genetic resources and 'the appropriate transfer of relevant technologies.' "[6] In Article 15(7), the CBD mandates that use of biological resources be "fair and equitable":

> Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such

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3. Dominic Keating, *Access to Genetic Resources and Equitable Benefit Sharing Through a New Disclosure Requirement in the Patent System: An Issue in Search of a Forum*, 87 J. PAT. & TRADEMARK OFF. SOC'Y 525, 528 (2005).

4. *Id.* at 528 (citation omitted).

5. Greg K. Venbrux, *When Two Worlds Collide: Ownership of Genetic Resources under the Convention on Biological Diversity and the Agreement on Trade-Related Aspects of Intellectual Property Rights*, 6 U. PITT. J. TECH. L. & POL'Y. 5, 5 (2005).

6. *Id.*

sharing shall be upon mutually agreed terms.[7]

Although this section does not specifically reference intellectual property rights, Article 16 of the CBD requires that "access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights."[8] Also, the CBD asserts that genetic resources are the "common heritage of mankind" and that States have sovereign rights over their genetic resources.[9] In Article 16(3), countries of origin, especially developing countries, are given access to technology that incorporates the use of that country's biological resources.[10] This includes patentable biotechnology.[11] A key aim of the CBD is to promote the sustainable use of natural resources, while incorporating power to impact the application of intellectual property rights on the biotechnological industry.[12]

Controversy over the CBD was evidenced through a mixed international response from developed and developing countries. The United States has taken varying views in regards to the CBD. At first, the United States refused to sign the CBD, reasoning that the provisions about intellectual property and technology transfer were unbalanced.[13] The United States viewed the CBD as potentially forcing a developed country to transfer technology, while at the same time allowing a developing country to not recognize patent protection for a United States biotechnology corporation.[14] Not surprisingly, the United States and other developed countries saw the CBD as harmful to the competitiveness of biotechnology corporations and as potentially giving developing countries the right to completely keep industrialized countries from accessing important resources in biodiverse countries.[15] Developing countries, however, expressed their strong desire for the protection of their right to control access to their own countries' biological resources. These countries were specifically appalled at the injustice of making royalty payments to foreign biotechnology companies that used

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7. Convention on Biological Diversity art. 15(7), *opened for signature* June 5, 1992, 31 I.L.M. 818, 828.

8. *Id.* art. 16(2).

9. *Id.*

10. *Id.* art. 16(3).

11. Venbrux, *supra* note 5, at 6.

12. *Id.* at 5.

13. *Id.* at 6.

14. Michael D. Coughlin, Jr., *Recent Development, Using the Merck-INBio Agreement to Clarify the Convention on Biological Diversity*, 31 COLUM. J. TRANSNAT'L L. 337, 345-46 (1993).

15. *See* Venbrux, *supra* note 5, at 6.

their countries' genetic resources.[16]

Many companies in the United States later expressed fear that a refusal to sign the CBD could be even more detrimental than participating in the agreement, even though these companies were strongly opposed to the CBD.[17] This change in sentiment led to the United States signing the CBD, but still not becoming a Party to the Agreement.[18] As a result of the many contrasting views, the CBD ultimately incorporated some contradictory language and became known by both developing and developed countries as a "vague and confusing document with strictly exhortatory powers."[19] However, the CBD helped begin worldwide discussions and negotiations over the trade of biotechnology and international intellectual property.[20]

III. THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

Regulation of intellectual property rights has progressed significantly in the past one hundred years, since its beginnings in the Berne Convention and the Paris Convention of the 19th Century.[21] In 1994, after efforts to bring together global ideas about intellectual property rights, the Uruguay Round under the General Agreements of Tariffs and Trade (GATT) culminated in the creation of the World Trade Organization (WTO) and the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which is administered by the World Trade Organization.[22] Prior to the TRIPS Agreement, issues of international intellectual property rights were handled through the World Intellectual Property Organization (WIPO) treaties, bilateral agreements, and the GATT.[23] The TRIPS Agreement is binding on all members of the WTO and sets forth standards for intellectual property rights protection.[24] One such TRIPS standard is that patents must be awarded in all fields of technology, including products and processes.[25] Also, to be eligible for a patent, the invention must "involve an inventive step"

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16. Coughlin, *supra* note 14, at 347-48; *see also* Venbrux, *supra* note 5, at 6.
17. Venbrux, *supra* note 5, at 6.
18. *See* Keating, *supra* note 3, at 529.
19. *See* KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 225 (2000).
20. *See* Venbrux, *supra* note 5, at 6-7.
21. *See* Doris E. Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L L. & COM. REG. 229, 247-54 (1998).
22. Keating, *supra* note 3, at 532.
23. *Id.*
24. Venbrux, *supra* note 5, at 7.
25. *Id.*

and have "industrial application."[26] Developed member countries are obligated to provide incentives for corporations within the country to transfer technology to other developing member countries.[27] TRIPS also requires developed countries to assist developing countries in implementing a legal infrastructure for intellectual property rights protection.[28]

One view is that TRIPS benefits only the United States and other large industrialized nations. India in particular has experienced violent protests by farmers in reaction to the TRIPS agreement, due, *inter alia*, to its grant of monopolies on plants and seeds.[29] Some developed countries ignore TRIPS and patent laws of the United States and the European Union by locally producing essential medicines.[30] For example, in Argentina, domestic drug manufacturers often market generic drugs domestically at prices fifteen to eighty percent lower than the global market price.[31] In addition to claiming economic disadvantage due to TRIPS, developing countries assert that compliance with TRIPS imposes huge burdens.[32] Formal compliance with TRIPS requires countries to establish industrial property registries, develop enforcement mechanisms, combat piracy, and prosecute criminals.[33] The United Nations Conference on Trade and Development (UNCTAD) reported that in Bangladesh the fixed cost of establishing a TRIPS-compliant administration for intellectual property rights is approximately $250,000, with annual costs for associated expenses, such as judicial work and equipment, over $1 million.[34] In Chile and Egypt, the cost predictions are similar.[35] For a small or developing country, this can be a burdensome expense.

IV. REACTIONS TO THE RELATIONSHIP BETWEEN CBD AND TRIPS

Shortly after the CBD and TRIPS were adopted, several ideas surfaced regarding the incompatibility of the two international

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26. Agreement on Trade-Related Aspects of Intellectual Property Rights art. (27)1, Apr. 15, 1994, 33 I.L.M. 1197 [hereinafter TRIPS]; Venbrux, *supra* note 5, at 7.
27. *Id.* art. 66.
28. *Id.* art. 67.
29. McManis, *supra* note 2, at 548-49.
30. Mark Ritchie et al., *Intellectual Property Rights and Biodiversity: The Industrialization of Natural Resources and Traditional Knowledge*, 11 ST. JOHN'S J. LEGAL COMMENT. 431, 442 (1996).
31. Venbrux, *supra* note 5, at 9; Ritchie, *supra* note 30, at 442.
32. Venbrux, *supra* note 5, at 9.
33. Coenraad J. Visser, *Making Intellectual Property Laws Work for Traditional Knowledge*, *in* POOR PEOPLE'S KNOWLEDGE, PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 207-08 (J. Michael Finger & Philip Schuler eds., 2004).
34. MASKUS, *supra* note 19, at 173.
35. *See id.*

agreements. At the center of the debate, Article 27 specifically calls for the review of the TRIPS Agreement itself, four years after its entry into force.[36] Ethiopia was one of the first members of the CBD to propose that the CBD "examine the relationship between TRIPS and the CBD."[37] Specifically, Ethiopa recommended that the secretariat of the CBD

> [r]equest the WTO/TRIPS Council to take into account and accommodate the concerns of the Contracting Parties to the [CBD] before taking any decisions or measures in relation with the TRIPS Agreement that may affect biological diversity and the protection of knowledge, innovations, and practices of local and indigenous communities.[38]

In 1996, India became the first country to formally propose, directly to the WTO, that the Committee on Trade and the Environment (CTE) review the consistency between the CBD and TRIPS.[39] India's argument was based upon the premise that the TRIPS Agreement would cause limited competition for "environmentally sound technologies and products," driving up prices and reducing supplies of such technologies.[40] This led to India's proposal that the CBD and TRIPS Agreement could be reconciled through a genetic resource disclosure requirement in patent applications, effectuated by means of an amendment to TRIPS.[41] This proposal sparked ongoing international discussions regarding the controversial disclosure of genetic resources issue.[42]

A strange event at a recent UN meeting demonstrated these divergent views. At the opening of this Ad Hoc Open-Ended Working Group on Access and Benefit Sharing meeting, a statement favoring amendment to TRIPS was presented on behalf of United Nations Environment Program (UNEP) Executive Director Klaus Töpfer.[43] Specifically, the statement argued that TRIPS and the CBD were inconsistent and that TRIPS must be amended to promote "access and benefit sharing."[44] Australia, the European Un-

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36. TRIPS, *supra* note 26, art. 27(3)(b).

37. Keating, *supra* note 3, at 530.

38. *Id.* at 531.

39. *See id.* at 533.

40. *Id.* at 533-34; *see also* Lara Ewens, *Seed Wars: Biotechnology, Intellectual Property, and the Quest for High Yield Seeds*, 23 B.C. INT'L & COMP. L. REV. 285, 305 (2000).

41. Keating, *supra* note 3, at 533-34.

42. *Id.* at 534.

43. *Report of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing on the Work of its Third Meeting*, para. 11, UN Doc. UNEP/CBD/WG-ABS/3/7 (Mar. 3, 2005).

44. *See* Keating, *supra* note 3, at 531 n.24.

ion, Switzerland, New Zealand and the United States strongly opposed the statement, arguing instead that the two agreements are compatible.[45] After hearing the objections from these countries, the UNEP Secretary General stated that the previous Statement did not reflect the position of the UNEP Executive Director.[46]

The Doha Declaration adopted in November, 2001 mandates further review of Article 27:

> We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.[47]

Many countries have subsequently submitted proposals and responses about how TRIPS can be reconciled with the UN Convention on Biological Diversity.[48]

V. GENERAL VIEWS ABOUT THE CONFLICT BETWEEN AGREEMENTS

Generally speaking, the overriding question is whether there is any conflict at all between the CBD and TRIPS Agreement. If yes, then the question is whether TRIPS must be amended to resolve the conflict between the two documents.[49] More specifically, there are four categories of views expressed by Member States regarding the conflict issue: (1) there is no conflict and national governments can implement the two in a mutually supportive way; (2) there is no

45. *Id.* at 531.
46. *Id.* at 537 n.43.
47. World Trade Organization, Ministerial Declaration of 14 November 2001, art. 19, WT/MIN(01)/DEC/1, 41 I.L.M. 746, 749 (2002).
48. Council for Trade-Related Aspects of Intellectual Property Rights, *Note by the Secretariat: The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity*, 3, IP/C/W/368/Rev.1 (Feb. 8, 2006) [hereinafter *Relation between TRIPS and CBD*].
49. *Id.* at 3.

conflict, yet further study regarding the patent system is required; (3) there is no inherent conflict; however, international intervention is needed in order to ensure the two Agreements are mutually supportive; (4) there is inherent conflict, thus requiring an amendment to TRIPS to resolve the conflict.[50]

The fourth view is the subject of the most intense international debate on the issue and will be the focus of this paper. In general, the suggested amendment to TRIPS incorporates certain requirements of the CBD, such as: (1) patent applicants disclose the source and country of origin of any biological resources or traditional knowledge used in inventions, and (2) the applicants both obtain prior informed consent from the appropriate authority and enter into a fair and equitable benefit-sharing arrangement.[51] The United States and other developed countries oppose the proposal, while developing countries such as Bolivia, Brazil, Columbia, Cuba, India, and Pakistan strongly support the TRIPS amendment.

VI. THE PROPOSED TRIPS AMENDMENT

It is no surprise that proponents of the proposed amendment are developing countries, whose biological resources are diverse and generally used by commercial enterprises of more industrialized, developed countries.[52] Also, the developed countries are typically more likely to afford intellectual property rights to organic innovations than the developing countries.[53] Brazil, the most biodiverse country on the planet and the first signatory to the CBD, has been a strong proponent of the amendment.[54] Proposals from developing countries address the problem of biopiracy:

> The hypocrisy of western demand for intellectual property protections is twofold: not only do developing countries pay a high premium for the patented products that are reintroduced in their countries (yet made from local resources), but developing countries are unable to use the intellectual property framework to protect against the piracy of their own indigenous

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50. *Id.* at 4.

51. *Id.* at 7.

52. Burton Ong, *Harnessing the Biological Bounty of Nature: Mapping the Wilderness of Legal, Socio-Cultural, Geo-Political, and Environmental Issues*, *in* INTELLECTUAL PROPERTY AND BIOLOGICAL RESOURCES 11 (Burton Ong ed., 2004).

53. *Id.*

54. *See generally* Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Brazil: Review of the Provisions of Article 27.3(b)*, IP/C/W/164 (Oct. 29, 1999).

and local resources and knowledge.[55]

The specific proposals for amendment to the TRIPS Agreement have come from the African Group, the Andean Community, Bolivia, Brazil, China, Columbia, Cuba, Ecuador, India, Indonesia, Kenya, Pakistan, Peru, Thailand, Venezuela, and Zimbabwe.[56]

Along with Bolivia, Columbia, Cuba, India, and Pakistan, Brazil submitted a paper to the WTO in 2005 regarding the relationship between the TRIPS Agreement and the Convention on Biological Diversity.[57] The countries summarize the three types of disclosure requirements: "(1) disclosure of source and country of origin of the genetic materials and associated traditional knowledge used in developing the invention claimed in the patent application; (2) disclosure of the evidence of prior informed consent; and (3) disclosure of the evidence of a benefit-sharing agreement."[58] The Source is defined as the country from where the applicant received the genetic material, while country of origin is the country to which the genetic resource is indigenous.[59] The paper claims that the intent of the disclosure requirement is to prevent the grant of bad patents and promote greater legal certainty.[60] Revocation of an erroneously granted patent is more expensive and burdensome than disclosure requirements.[61] The disclosure requirement "would act as a crucial factor in the determination of the patentability of biotechnological inventions," according to the proponents.[62] The paper also contends that disclosure of origin would help build databases to aid in "the prior art information available to patent examiners and the general public."[63] The amendment would make inclusion of the disclosure requirement mandatory in national laws and regulations.[64]

Three proposed amendments to the TRIPS Agreements have been suggested, each with unique wording. First, an amendment to Article 27 itself has been suggested, adding an exception

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55. Ewens, *supra* note 40, at 305 (citing Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-so-brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL STUD. 11, 47-50 (1998)).

56. *Relation between TRIPS and CBD*, *supra* note 48, at 28 n.135.

57. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Bolivia, Brazil, Colombia, Cuba, India and Pakistan: The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge*, IP/C/W/459 (Nov. 18, 2005) [hereinafter *Communication from Bolivia*].

58. *Id.* para. 5.

59. *Id.* para. 8.

60. *Id.* para. 6.

61. *Id.*

62. *Id.* para. 7.

63. *Id.*

64. *Relation between TRIPS and CBD*, *supra* note 48, para.72.

to patentability:

> Members may also exclude from patentability: (c) products or processes which directly or indirectly include genetic resources or traditional knowledge obtained in the absence of compliance with international and national legislation on the subject, including failure to obtain the prior informed consent of the country of origin or the community concerned and failure to reach agreement on conditions for the fair and equitable sharing of benefits arising from their use.
>
> Nothing in TRIPS shall prevent Members from adopting enforcement measures in their domestic legislation, in accordance with the principles and obligations enshrined in the Convention on Biological Diversity.[65]

The second method is an amendment to Article 29, including one of the following wordings:

> (1) Members shall require an applicant for a patent to disclose the country and area of origin of any biological resources and traditional knowledge used or involved in the invention, and to provide confirmation of compliance with all access regulations in the country of origin.[66]
>
> (2) Where appropriate, Members shall require the disclosure of origin and legal provenance in the patent applications to be submitted.[67]

In general, the proposals are an attempt to alleviate the developing countries' fear of continued biopiracy by increasing transparency regarding the use of genetic resources and responsibility to share benefits of their use.

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65. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Peru: Article 27.3(B), Relationship Between the TRIPS Agreement and the CBD and Protection of Traditional Knowledge and Folklore*, pt. VII, IP/C/W/447 (June 8, 2005) [hereinafter *Communication from Peru*].

66. Council for Trade-Related Aspects of Intellectual Property Rights, *Joint Communication from the African Group: Taking Forward the Review of Article 27.3(b) of the TRIPS Agreement*, 6, IP/C/W/404 (June 26, 2003).

67. *Communication from Peru*, *supra* note 65, at 14.

VII. OTHER FORUMS FOR THE MANDATORY DISCLOSURE REQUIREMENT: PCT, IGC, AND SPLT

Primarily because of strong opposition to the TRIPS amendment proposal, proponents of the mandatory disclosure requirement have sought other places to effectuate such a requirement. Cuba has strongly supported the proposal that the Patent Cooperation Treaty (PCT) of WIPO be amended with essentially the same requirement as the TRIPS proposal.[68] Switzerland has suggested that the amendment allow for optional participation by Members, allowing a gradual change while both the national and international communities gain experience with the disclosure requirement "without prejudice to further international efforts."[69] Switzerland has also stated that the disclosure requirement would not be a substantive requirement, but rather a formal one.[70] If the applicant fails to disclose, a sufficient period of time would be allowed for the applicant to satisfy the requirement before the PCT application process is either stalled or considered withdrawn for non-compliance.[71]

If a failure to disclosure the source based on fraudulent intent is discovered after a patent has been granted, then the patent may be invalidated.[72] National sanctions may include fines for such nondisclosure.[73] The PCT proposal states that the invention must be "directly based" on a "specific genetic resource to which the inventor has had access."[74] A method of communication and notification about applications with foreign sources has been envisioned by the PCT amendment proposal. Switzerland has suggested that patent offices contact government agencies of the claimed source country when a patent application names the country as a source of the biological material.[75] This would relieve countries of the burden of monitoring worldwide patents to determine whether the

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68. *See* World Trade Organization, Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting*, para. 117, IP/C/M/40 (June 4-5, 2003).

69. World Trade Organization, Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting*, para. 74, IP/C/M/46 (Dec. 1-2, 2004).

70. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Switzerland: Further Observation by Switzerland on its Proposals Regarding the Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications*, para. 7, IP/C/W/433 (Nov. 25, 2004).

71. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Switzerland: Additional Comments by Switzerland on its Proposals Submitted to WIPO Regarding the Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications*, para. 25, IP/C/W/423 (June 14, 2004).

72. *Id.* para. 26.

73. *Id.*

74. *Relation between TRIPS and CBD*, *supra* note 48, para. 85.

75. *Id.* para. 86.

country is being declared as a source of particular genetic materials and determine whether the patent applicant had fulfilled access and benefit sharing requirements.[76]

The European Communities have proposed a change be rendered through the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of WIPO. This proposal requires that each country enforce a country of origin or source of genetic resources disclosure requirement in patent applications.[77] Like the PCT proposal, this would also be a formal and not substantive requirement. Once a patent is granted which has failed to disclose source or origin of genetic resources, the legal effect of nondisclosure would fall outside the power of patent law.[78] Sanctions in civil or administrative law would be needed to enforce the requirement.[79] Just like the PCT proposal, the invention must be directly based on the specific genetic resource.[80] WIPO and the CBD are the proposed keepers of a list of government agencies that would be used to obtain information about applications containing a declaration of the source of genetic resources; patent offices would send information or inquiries to theses agencies upon receipt of an application.[81]

The draft Substantive Patent Law Treaty (SPLT) is another forum in which developing countries are generating debate over biopiracy and mandatory disclosure requirements. Article 2 of the draft upholds the freedom of countries to protect "genetic resources, biological diversities, traditional knowledge and the environment."[82] The draft SPLT also supports disclosure of genetic resources in patents:

> A contracting party may also require compliance with the applicable law on public health, nutrition, ethics in scientific research, environment, access to genetic resources, protection of traditional knowledge and

76. World Trade Organization, Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting*, para. 115, IP/C/M/49 (Jan. 31, 2006).

77. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from the European Communities: Review of Article 27.3(B) of the TRIPS Agreement, and the Relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge and Folklore*, para. 45-58, IP/C/W/383 (Oct. 17, 2002) [hereinafter *Communication from European Communities*].

78. *Relation between TRIPS and CBD*, *supra* note 48, para. 88.

79. *Communication from European Communities*, *supra* note 77, paras. 45-58.

80. *Relation between TRIPS and CBD*, *supra* note 48, para. 89.

81. *Id.* para. 91.

82. World Intellectual Property Organization, Standing Committee on the Law of Patents, *Draft Substantive Patent Law Treaty*, art. 2(2), WIPO Doc. SCP/10/2 (Sep. 30, 2003) [hereinafter *Draft SPLT*].

> other areas of public interest in sectors of vital importance for their social, economic, and technological development.[83]

Although the language in the draft SPLT may sound like a significant change to the international regulation of intellectual property, the disclosure language simply outlines "a permissive requirement for [countries] to adopt if they so choose."[84] In addition, there has been significant debate over these provisions of the draft SPLT, and the substantive discussions have been postponed or eliminated from the agenda.[85] Developing countries are having little success moving forward with the disclosure requirement in the WIPO arena.

VIII. OPPOSITION TO THE PROPOSAL

The U.S. strongly opposes the proposal for the TRIPS amendment. In 2001, the U.S. submitted one of its first papers to the WTO stating its position that the U.S. sees no conflict between the TRIPS Agreement and the CBD.[86] The U.S. reasoned that the WTO review called for under Article 27(b)(3) should be limited to its own subparagraph and not encompass other international treaties.[87] However, the U.S. stated that a "serious discussion of the provisions of both agreements, rather than negative rhetoric" would be helpful in understanding the issue.[88] The paper thoroughly discussed particular sections of the CBD and concluded that it and the TRIPS Agreement are mutually supportive, not conflicting.[89] For example, the U.S. argues that the absence of provisions regarding theft and misappropriation of genetic resources in the TRIPS Agreement is not a conflict, but rather evidence that such issues are not within the purview of the TRIPS Agreement and "are appropriately the domain of a separate regulatory system."[90]

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83. *Id.* arts. 13(4), 14(3).

84. Cynthia Ho, *Biopiracy and Beyond: A Consideration of Socio-Cultural Conflicts with Global Patent Policies*, 39 U. MICH. J. L. REFORM 433, 501 (2006).

85. Ho, *supra* note 84, at 501; *Draft SPLT*, *supra* note 82, art.2(2), n.1.

86. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from the United States: Views of the United States on the Relationship Between the Convention on Biological Diversity and the TRIPS Agreement*, IP/C/W/257 (June 13, 2001).

87. *Id.* at 1.

88. *Id.* at 2.

89. *See id.*

90. Council for Trade-Related Aspects of Intellectial Property Rights, *Communication from the United States: Article 27.3(B), Relationship Between the TRIPS Agreement and the CBD, and the Protection of Traditional Knowledge and Folklore*, para. 4, IP/C/W/469 (Mar.

A theme throughout the U.S. arguments is that member countries must enact national access and benefit sharing systems and that any disclosure requirement in TRIPS would create "legal uncertainty and other negative consequences."[91] The U.S. supports and has proposed national contract-based systems to deal with issues of prior informed consent and access and equitable benefit sharing.[92] Throughout its papers submitted to the WTO, the U.S. argues for a fact-based discussion, centered on an analysis of national experiences regarding access and benefit sharing systems already in place.[93]

In its most recent submission, the U.S. responds to specific assertions made by developing countries-particularly Peru-and papers submitted to the WTO which list "bad patents" and claim benefits of the TRIPS amendment proposal.[94] The United States perceives that other countries assume that because an applicant got a genetic resource from a foreign country, the resource must have been obtained "illegally, irregularly, or questionably."[95] Of course, the U.S. views this assumption by developing countries as illogical.[96]

The U.S. also addresses the difficulty of determining the exact origin or source of genetic material. For example, many biological resources are sold throughout the world for purposes of industrial processing, which even Peru recognizes as making it difficult to assess source and origin, thus identifying illegal access.[97] This raises the question of whether "commercial channels" are a legitimate way of procuring genetic resources.[98] The "bad patents" that Peru cited in an earlier submission are found to have actually contained disclosures of genetic source and origin and therefore the U.S. claims that such a disclosure requirement would have had no effect or benefit.[99] A vital issue to the debate is whether extracts or other products isolated from large quantities of raw material, legitimately exported from foreign countries, that have "travel[ed] through the normal channels of commerce," are exempt from access and benefit sharing agreements and disclosure requirements. The U.S. suggests that this issue would not be covered by

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13, 2006) [hereinafter *Communication from US: Article 27.3(B)*].

91. *Id.* para. 5.
92. *Id.* para. 7.
93. *See id.* paras. 6, 9.
94. *Id.* paras. 6-29.
95. *See id.* para. 12.
96. *See id.*
97. *Id.* para. 13.
98. *See id.*
99. *Id.* para. 14.

the current proposed TRIPS amendment.[100]

The U.S. repeatedly argues that source and origin rarely are relevant to patentability and would not prevent the issuance of what India calls "bad patents," such as in the turmeric case.[101] Turmeric (curcurma longa), a plant found in India, is well known there for both culinary use and as a traditional medicine.[102] Apparently, the plant was also used medicinally by Greeks and Romans.[103] Two expatriate Indian scientists at the University of Mississippi patented turmeric, in 1995, for use in wound healing.[104] The patent was then challenged by the Council of Scientific and Industrial Research in India and subsequently invalidated by the United States Patent and Trademark Office (USPTO) for lack of novelty due to prior art in Indian traditional knowledge.[105]

The turmeric case is the first instance where the USPTO invalidated a patent based on traditional knowledge.[106] The U.S., in its paper to the WTO, claims that any disclosure of genetic resources would not have remedied the problem of the erroneously granted turmeric patent, given that the country of origin was identified in the patent application.[107] According to the U.S., origin had little to do with patentability in the turmeric case.[108] In place of a specific genetic resource source and origin disclosure requirement in the patent application, the U.S. argues for improvement upon existing procedures, such as post-grant opposition and re-examination practices, along with a general requirement that the applicant disclose all information relevant to patentability.[109]

The U.S. emphasizes that what is known about a genetic resource before the invention occurs is not typically relevant to the reasoning behind using that resource in the invention.[110] The U.S. claims that mandatory "disclosure requirements . . . may upset the careful balance created by the patent system to promote innovation."[111] The U.S. fears that developing countries are overlooking

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100. *Id.* para. 15.

101. *Id.* paras. 6, 28.

102. Murray Lee Eiland, *Patenting Traditional Medicine*, 89 J. PAT. & TRADEMARK OFF. SOC'Y 45, 61 (2007).

103. *Id.*

104. *Id.*

105. Reexamination Certificate of U.S. Patent No. 5,401,504 (issued Apr. 21, 1998); Graham Dutfiend, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 248 (2001).

106. R.A. Mashelkar, *Intellectual Property Rights and the Third World*, 81 CURRENT SCI. 955, 960 (2001) (sidebar).

107. *Communication from the U.S.: Article 27.3(B)*, *supra* note 90, para. 28.

108. *Id.*

109. *Id.* para. 29.

110. *See id.* para. 31.

111. *Id.* para. 35.

the massive risk of investing in research and development activities, where commercialization of products as a result of research is arguably uncommon.[112] To demonstrate this principle, the United States cites the development of the anti-cancer drug TAXOL®, a story well known to many at Florida State University, where the final stages of the research took place.[113] Bristol-Meyers Squibb (BMS) reportedly invested more than $1 billion USD over 30 years, using the results of a mass-screening program of more than 100,000 plant and 16,000 animal extracts.[114] Finally, the extract from the Pacific Yew, originally found in Washington State, was determined to have the needed anti-cancer properties, which were entirely unknown before the research and trial-and-error type testing had begun.[115] The U.S. claims that the TRIPS Agreement proposal completely ignores the risks involved in developing a commercially successful product.[116]

Contracts between countries and national access and benefit sharing systems appear to be the solution, according to the U.S. Merck Sharp and Dome (Merck) and the National Institute of Biodiversity of Costa Rica (InBio) entered into a contract agreement where InBio supplied "10,000 samples of plants, animals, and soil to Merck" in exchange for $1 million USD up front.[117] The agreement also gave Merck receiving rights to research the samples for two years with retention rights to any resulting patents and Merck agreed to pay royalties to BIO for any products commercialized from the samples.[118] InBio has since claimed significant benefits from this original agreement and the two subsequent extension agreements between Merck and InBio.[119] The U.S. views such international contract agreements as the ultimate "way to trace an intangible asset, such as the intellectual contribution of a biological resource."[120]

Noting that the Merck and InBio agreement has not yet produced any patentable inventions, the U.S. claims that such contracts created under access and benefit sharing systems are effective in producing all the benefits sought by developing countries

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112. *Id.*

113. *See* Frank Stephenson, *A Tale of Taxol*, FLA. ST. U. RES. IN REV., Fall 2002, *available at* http://www.rinr.fsu.edu/fall2002/taxol.html.

114. *Communication from the U.S.: Article 27.3(B)*, *supra* note 90, para. 32.

115. *Id.*

116. *See id.* paras. 35, 36.

117. Coughlin, *supra* note 14, at 356.

118. *Communication from the U.S.: Article 27.3(B)*, *supra* note 90, para. 34.

119. Letter from the Biotechnology Industry Organization to Ambassador Rob Portman, U.S. Trade Representative (Dec, 6, 2005) (on file with author).

120. *Communication from the U.S.: Article 27.3(B)*, *supra* note 90, para. 36 (citation omitted).

(prior informed consent, equitable sharing of benefits, and monitoring of the use of the resource) even absent a patentable invention.[121] The European Communities have argued that it would not be feasible for a patent office to verify evidence of prior informed consent, especially since terms and conditions of a contract often remain confidential.[122] Japan has argued that a disclosure requirement would violate multiple provisions of the TRIPS Agreement.[123] Specifically, the disclosure requirement is proposed to be applicable to only particular fields of technology, violating Article 27.1, which provides for non-discrimination in patent availability between fields of technology.[124] Japan also argues that the proposed amendment would violate Article 62.1 of the Agreement since only reasonable procedures and formalities are provided for under TRIPS.[125]

IX. RESPONSE TO THE OPPOSITION

Strong opposition to the proposed TRIPS amendment from developed countries such as the U.S. and Japan has been met with equally powerful support for the amendment from Bolivia, Brazil, Columbia, Cuba, India, Pakistan, and other developing countries. In a paper submitted to the WTO in 2005, developing countries in favor of the proposed TRIPS amendment argued that the nation-based contract systems proposed by the U.S. is by no means sufficient to deal with the problems of misappropriation, bad patents, and illegitimate bioprospecting.[126] Referring to the original claim of conflict between the CBD and TRIPS, the countries argue that the current TRIPS Agreement treats all biological resources as if they are part of the public domain and open to appropriation by anyone.[127] Bolivia and fellow proponents reason that the U.S. is misguided in its view of the burden of the proposal. A disclosure requirement would only require "reasonable efforts on the part of patent applicants" to acquire the source and origin information, which would already be a component of a larger set of information submitted by the applicant.[128]

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121. *Id.* para. 34.
122. *See* Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting*, para. 34, IP/C/M/44 (July 19, 2004).
123. Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting*, para. 155, IP/C/M/29 (Mar. 6, 2001).
124. *Id.*
125. *Id.*
126. *Communication from Bolivia*, *supra* note 57, para. 4.
127. *Id.* para. 2.
128. *Id.* para. 6.

Without specifically addressing the turmeric case, Bolivia and other developing countries argue that a new disclosure requirement is essential to determination of the novelty and inventive step and would prevent patent offices from issuing patents, like the US turmeric patent, erroneously.[129] Also, as countries build databases about origin, source, and perhaps agreements between countries, the burden on patent offices regarding verification will lighten.[130] Developing countries counter the U.S. argument about confusion of goods that have traveled through the normal channels of commerce by stating that the source is simply the country from where the applicant received the genetic material and the country of origin is the country to which the genetic resource is indigenous.[131] After the patent office has received the origin and source information from the applicant, it may request further information from the source or origin countries and the applicant to ensure that bad patents are not granted.[132]

As far as contracts and national access and benefit sharing systems, the developing countries defend the proposed TRIPS amendment by arguing that a contract-based system will not ensure international enforcement and a binding international obligation is necessary.[133] Also, proponents of the proposal offer reassurance that the requirement is not overly burdensome, since a simple statement by the patent applicant of compliance with prior informed consent and benefit sharing requirements will serve as prima facie evidence of compliance with the requirement.[134]

X. EXPERIENCES OF OTHER COUNTRIES WITH DISCLOSURE LEGISLATION

Several nations and groups have implemented national rules regarding disclosure of genetic resources. In 1998, the European Communities adopted a directive regarding legal protection of biotechnological inventions.[135] The directive states that patent applications for inventions based on biological material of plant or animal origin, or inventions using such material, should include information on the geographical origin of the genetic material, if

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129. *See id.* para. 7.
130. *See id.* para. 6.
131. *Id.* para. 8.
132. *Id.* para. 11.
133. *Id.* para. 10.
134. *Id.* para. 27.
135. World Trade Organization, Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting*, para. 127, IP/C/M/49 (Jan. 31, 2006).

known and where appropriate.[136] Disclosure is not a requirement; rather, the directive is "regarded as an encouragement to mention the geographical origin of biological material in the patent application."[137] According to the European Communities, this directive supports the CBD in terms of equitable benefit sharing.[138] It is important to note, however, that the directive is not an obligation and no penalties are associated with failure to disclose origin or source.[139]

Peru also has passed two specific laws regarding disclosure of genetic resources, both carrying more force than that of the European Communities.[140] Peru's Law Establishing the Regime for Protection of the Collective Knowledge of Indigenous Peoples Relating to Biological Resources states:

> Where a patent application relates to products or processes obtained from collective knowledge, the applicant shall be required to submit a copy of the licence contract, as a prerequisite for the granting of the relevant right, unless the collective knowledge concerned is in the public domain. Failure to comply with this obligation shall be grounds for refusing to grant the patent or, where appropriate, declaring it void.[141]

Peru claims that the purpose of the Law is to protect the traditional knowledge of Peru's indigenous peoples.[142] In 2004, Peru passed the Law on Protection of Access to Peruvian Biological Diversity and to the Collective Knowledge of the Indigenous Peoples, establishing a specific commission to deal with the issue of biopiracy. Peru defines biopiracy as access and use without authorization from and compensation to the indigenous people, which Peru states specifically violates the CBD.[143] The Commission for Prevention of Acts of Bio-piracy, established by the 2004 law, has several far-reaching purposes:

> To identify and follow up patent applications made or patents granted abroad that relate to Peru-

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *See Relation between TRIPS and CBD*, *supra* note 48, para. 101.
141. *Id.*
142. *Id.*
143. *Id.* paras. 102, 103.

> vian biological resources or collective knowledge of the indigenous peoples of Peru . . . [t]o lodge objections or institute actions for annulment concerning patent applications made or patents granted abroad that relate to Peruvian biological or genetic material or the collective knowledge of the indigenous and native peoples of Peru.[144]

Unlike the European Communities law, Peru makes disclosure mandatory and provides for penalties and investigatory means to ensure compliance with the requirement.

An Andean Community decision mandates that member countries implement access requirements for patent applicants.[145] The decision on a Common Regime on Access to Genetic Resources of 1996 mandates that national offices require that the applicant give the registration number of the access contract and supply a copy of the contract.[146] The national patent offices are to require such information when it is reasonably perceived that the invention contains "genetic resources or their by-products originating in any one of the Member Countries."[147] Also, the Andean Community decision includes an enforcement clause, stating:

> The Member Countries shall not acknowledge rights, including intellectual property rights, over genetic resources, by-products or synthesized products and associated intangible components [including traditional knowledge], that were obtained or developed through an access activity that does not comply with the provisions of this Decision.[148]

Another Andean Community decision requires a copy of the access contract and, if applicable, a copy of the document certifying the license or authorization to use the traditional knowledge where either genetic resources or knowledge originated from any of the member countries.[149] Under the decision, no patent is valid where the applicant failed to submit either a copy of the access contract or the licence or authorization documents.[150]

Another country has also passed national legislation to further

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144. *Communication from Peru*, *supra* note 65, at 10.
145. *Relation between TRIPS and CBD*, *supra* note 48, para. 99.
146. *Id.*
147. *Id.* (citation omitted).
148. *Id.* para. 99.
149. *Id.* para. 100 (citation omitted).
150. *Id.*

the aims of the CBD. Under new amendments to the country's patent laws, Norway requires that patent applicants include the country of origin of biological material.[151] Evidence of prior informed consent should also be provided in the patent application, if the source country requires.[152] Civil penalties associated with giving false testimony are enforced against applicants who fail to meet the disclosure requirement.[153]

XI. CONCLUSION

The TRIPS Agreement and the CBD attempt to strike a balance among the interests of nations within the global economic community. However, these international agreements appear to divide as much as they unite. As can be seen from the constant debate and skepticism among countries, it is obvious that the intellectual rights for genetic resources will not be won or lost easily, and the solution is still far from reach. A disclosure requirement, however, must be advanced to realize any progress in protecting the developing countries' interests of maintaining biodiversity and preserving rights to the resources located within their own countries.

Certainly, industrialized countries have a valid fear of losing protection and revenues if more barriers to patent protection are implemented. A recent study by the Pacific Research Institute estimates that uncertainty about patent protection would create a twenty-seven percent decrease in biotechnical and pharmaceutical research throughout twenty-seven industrialized nations by the year 2025.[154] Approximately 150 to 200 drugs would be lost, with a cost of over $144 billion to those twenty-seven countries alone. Also, the proposed TRIPS amendment and its accompanying, potentially burdensome, requirements may dramatically impede the investment flows to biotechnological start-up companies and investment in important drugs.[155] The economic impacts for developing countries, however, are likely just as serious if no action is taken to remedy the existing biopiracy issues. With over eighty percent of

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151. *Communication from Peru*, *supra* note 65, at 12 (quoting Norwegian Patents Act § 8(b) (in effect since March 2004)).

152. *Id.*

153. *Id.*

154. TIMOTHY A. WOLFE & BENJAMIN ZYCHER, BIOTECHNOLOGICAL AND PHARMACEUTICAL RESEARCH AND DEVELOPMENT INVESTMENT UNDER A PATENT-BASED ACCESS AND BENEFIT-SHARING REGIME 2 (2005).

155. *See* Jonathan Curci, *The New Challenges to the International Patentability of Biotechnology: Legal Relations Between the WTO Treaty on Trade-Related Aspects of Intellectual Property Rights and the Convention on Biological Diversity*, 2 INT'L L. & MGMT. REV. 1, 37 (2006).

the world's biodiversity, developing countries are perhaps helplessly foreseeing the inevitable, unauthorized, use of their resources continuing into the future.[156]

With no absolute answer in the foreseeable future, it may be a matter of waiting to see the effect of national legislation in Norway, Peru, and other nations that have begun to implement a local version of the proposed amendment. Whether the proposed TRIPS amendment is a "flawed approach" and only gaining popularity among WTO, WIPO, and CBD members because of "well-orchestrated" political efforts by developing countries, is yet to be determined.[157] An amendment to TRIPS is not, however, a simple matter since an agreement by two-thirds of member states is required.[158] In addition, there is the "political reality" disfavoring any amendments, given that TRIPS already reflects the existing laws of industrialized nations, giving no incentive to alter the Agreement.[159] Other evidence, such as the lengthy debate preceding the only other TRIPS amendment, and movement of the disclosure requirement discussion to other forums may even suggest that an amendment to TRIPS is even less likely.[160]

As proposed by some countries, an alternative to a TRIPS amendment is likely to be the more successful avenue for accomplishing the disclosure requirement objective. The developing countries' three part amendment to the PCT incorporates the essential elements of the proposed TRIPS amendment: disclosure of source and country of origin, evidence of prior informed consent, and evidence of a benefit-sharing agreement. Although the focus is on international patent applications, this would constitute substantial progress in combating large corporations that gain patent protection in countries from which the resources were obtained without consent and then assert patent rights in those foreign countries.

An effective amendment would call for automatic invalidation of any patent not in noncompliance with the disclosure requirement. Sanctions in civil or administrative law may not adequately deter nondisclosure. Although developed industrialized countries argue that the disclosure would be overly burdensome in light of the quantity of materials used for genetic and biotechnological research, these institutions likely document such resource information meticulously and could comply with a disclosure requirement

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156. *See* Venbrux, *supra* note 5, at 16.
157. *See* Keating, *supra* note 3, at 547.
158. Ho, *supra* note 84, at 490.
159. *Id.*
160. *Id.* at 491.

with less effort than is claimed. Whether the corporations had permission to use material obtained through commercial means or channels, as a resource for scientific research and development, is an issue that must be resolved.[161] As with the vast majority of multilateral legislation, an amendment incorporating a genetic resource disclosure requirement would take years to implement effectively, but it is a necessary step in the movement toward appropriate protection of countries' rights to their own biological resources.

161. *See Communication from the U.S.: Article 27.3(B), supra* note 90, para. 13.