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**INTERNATIONAL CONVERGENCE ON THE NEED
FOR THIRD PARTIES TO BECOME INTERNET
COPYRIGHT POLICE (BUT WHY?)**

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I. INTRODUCTION

The inexpensive, rapid, and massive copying possibilities that digital technologies and the Internet make available have brought issues of enforcement of copyright and related intellectual property rights into strong focus. Rightowners, of course, retain all of the rights they have always had against infringers whom they can identify and who are amenable to enforcement measures, such as litigation. The infringers are often not so easy to find, however, so rightowners would like to be able to engage the assistance of other participants in the processes in which infringements are taking place. Most of the initial focus was on Internet Service Providers (ISPs) and website operators, but recently banks, advertisers, and other participants in Internet commerce have been the object of judicial and legislative attention aimed at inducing greater responsibility on the part of these participants to uncover and prevent copyright infringement on the Internet.

Governments, too, have been active in both civil and criminal enforcement.

The fundamental question is the extent to which copyright owners should be able to enlist the assistance of third parties or government in the enforcement of their rights under copyright law.¹ In the United States, a major “hook” for inducing private enforcement activity by third parties is the notion of secondary liability: contributory infringement and vicarious liability. Applying law from the analog world, courts have developed a kind of “rule of reason” approach to secondary liability, which is now partially codified and supplemented in the case of ISPs by § 512 of the U.S. Copyright Act. Courts in other countries, however, have addressed many of the same issues as the U.S. courts and largely seem to be arriving at similar conclusions. Courts everywhere are trying to balance the interests of content owners in intellectual property rights enforcement against user interests in matters like privacy, free expression, transparency in regulatory processes, and third party interests in being free to adopt business models with minimal interference from government. In that sense, we are seeing something of an international “convergence” in the approach to third party liability. The question then arises, however, why we are involved in this kind of policy balancing at all: How did it become accepted that private third parties should be part of the copyright enforcement scheme?

II. BACKGROUND ON U.S. APPROACHES

United States law has long separated primary and secondary copyright infringement. Primary infringement occurs when the accused, without authorization, performs acts that lie within one of the copyright owner’s exclusive rights.² Secondary infringement is further divided into contributory infringement and vicarious liability.³ Both

¹ I refer herein often to copyright rights, but trademark rights too have been the focus of judicial activity in some important cases. Other intellectual property rights, such as those arising under trade secret or patent law, have yet to raise most of the questions that we are seeing with respect to drafting third parties into the intellectual property enforcement effort in the context of the internet.

² These are the exclusive rights to make “copies” of the work, to produce derivative works based upon the protected work, and to publicly distribute, perform, and display the work. 17 U.S.C. § 106(1)-(5). In addition, § 106(6) gives a limited public performance right for digital sound recordings.

³ Recent Supreme Court jurisprudence has introduced a third category of secondary liability, generally known as “inducement.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 935-37 (2005). Few object to finding liability when the level of subjective encouragement of copyright infringement required for inducement liability is demonstrated. Unless otherwise noted, I assume herein that facts sufficient for an inducement liability holding are absent.

require that there be a primary infringement by someone other than the accused. A person is liable for contributory infringement if he has knowledge of the primary infringing activity and, in light of that knowledge, materially contributes to the primary infringement.⁴ A person is vicariously liable if he has the right and ability to control the primary infringer's acts and receives a direct financial benefit from the infringement.⁵ Courts attempting to apply these long-standing principles in the digital age have struggled both to distinguish between primary and secondary liability and to apply the various elements of contributory infringement and vicarious liability to the facts before them.

The seminal Internet case got no further than the District Court for the Northern District of California, but it has served as the model for most subsequent judicial interpretations and for the specific statutory amendment that now constitutes section 512 of the Copyright Act. *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*⁶ involved the unauthorized posting of copyright protected materials to a digital bulletin board that was accessible via the Internet. The primary infringer was one Erlich, whose Internet access provider Klemesrud operated the bulletin board in question. Klemesrud, in turn, connected to the Internet through Netcom, the ISP.

The court first held that storage by the primary infringer of uploaded copies on an ISP's computer system was not a direct infringement by the ISP of the copyright owner's exclusive right to make copies. Direct infringement of the reproduction right requires a volitional act that is lacking where a defendant's system is used by a third party to create a copy.⁷ The court was worried that any other approach "would hold the entire Internet liable for activities that cannot reasonably be controlled."⁸ The question of *who* makes the infringing copy when a customer uses the defendant's system has arisen with some frequency, and courts have uniformly followed *Netcom* in requiring a degree of volitional activity⁹ for a finding of direct infringement.¹⁰

⁴ *E.g.*, *Gershwin Pub. Co. v. Columbia Artists Mgt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

⁵ *E.g.*, *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 306 (2d Cir. 1963).

⁶ *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

⁷ *Id.* at 1369-70.

⁸ *Id.* at 1372.

⁹ *E.g.*, *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131-32 (2d Cir. 2008); *Costar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 548 (4th Cir. 2004).

¹⁰ The *Netcom* court also held that Netcom did not directly infringe the exclusive rights of public distribution or display. Emphasizing that Netcom neither created

The primary focus now, however, is on secondary liability, and here again the *Netcom* case established the analytical framework. For vicarious liability, the court concluded that Netcom's right and ability to control its downstream users, like Erlich and Klemesrud, involved material issues of fact but that, in any event, Netcom's policy of charging a fixed fee regardless of whether the material was copyright infringing precluded a finding of direct financial benefit.¹¹ This is another point on which most, if not all, U.S. courts have concurred.

The trickiest issue in *Netcom* was that of contributory infringement. On the sub-issue of whether Netcom had knowledge of Erlich's infringement, the court concluded that notice from the copyright owner at least raised a fact question of whether Netcom learned about the infringing activities in time to do something about them. If that was the case, Netcom could be liable contributorily because Netcom always had control of its system. Moreover, Netcom's participation in the infringing activity would constitute a material contribution if the facts showed that Netcom was "able to take simple measures to prevent further damage to Plaintiffs' copyrighted works."¹² Thus, after *Netcom*, the contributory infringement question was whether the ISP had received actual notice of specific infringing activity and was in a position to take reasonable action to do something about it.

Logically, it is unclear how the simplicity or reasonableness of the defendant's actions to prevent infringement is related to the issue of materiality. The importance of the ISP's contribution to the infringing activity seems independent of how easy or difficult it is for the ISP to stop the infringement once it has knowledge. In such approaches we see the growth of the law. The court could have said that the ISP's contribution is simply not material, much as the Ninth Circuit did later with respect to the participation of credit card companies in payments schemes for copyright-infringing materials.¹³ This would leave the ISP out of the copyright enforcement picture altogether. Or the court could have held that supplying the means to copy and widely

nor controlled the content of the posting but only provided access to the internet, the court concluded that it would not make sense to hold the ISP liable. Netcom did no more than what every other internet server does, and to hold Netcom liable would expand the net of copyright infringement much too broadly. As a matter of legal doctrine, the court held that where the system merely stores and passes the information on as a conduit, the system does not "cause" the information to be distributed or displayed. Rather, it is the infringing user of the system who causes these effects and is the one who should be directly liable for copyright infringement. Consequently, the ISP was not a direct infringer of copyright. See *Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. at 1371.

¹¹ *Id.* at 1376-77.

¹² See generally *id.*

¹³ See *infra* notes 44-50 and accompanying text.

distribute materials, some of which are known to be infringing, was clearly material. This might make a good deal of sense in the abstract, but could easily end up “holding the entire Internet liable,” throwing out the baby of millions of perfectly valid Internet transactions with the bath water of relatively few infringements. So, the court sought and found a middle ground, namely, a requirement that the ISP with knowledge take reasonable measures to stop the infringing activity. As shown through most of the rest of this article, the court seems to have struck a responsive chord, as both Congress and the courts have followed closely.

Congress relied on the *Netcom* case to draft a much more precise, and complex, amendment to the Copyright Act to cover ISP liability. Adopted in 1998 as part of the so-called “Digital Millennium Copyright Act,” section 512 of the Copyright Act¹⁴ protects any ISP that meets the conditions of one or more of the section’s four “safe harbors” from liability for monetary damages for copyright infringements that take place using parts of the ISP’s system. The statute also limits the availability of injunctive relief against ISPs who are immunized from monetary liability under one of the safe harbors.¹⁵

Section 512 is a complex statutory provision, but its basic operation can be understood by breaking it down into its constituent pieces.¹⁶ It begins, in subsections 512(a), (b), (c), and (d), with the four safe harbors themselves, which apply, respectively, to (a) “conduit” ISPs who connect customers to the Internet and make no permanent copies or any selection of transmitted material or recipients, (b) ISPs who “cache” or temporarily store material at their sites for increased technological efficiency, (c) web hosts or bulletin board operators, such as Klemesrud in the *Netcom* case, and (d) ISPs involved in providing Internet links. Each subsection defines the types of activity that are immunized from damages claims and the specific conditions that must be met to qualify for each of those particular immunities. Several of these safe harbors require the ISP to take affirmative action to disable access to or remove infringing material of which it is given notice, and section 512(g) permits ISPs to replace the material or re-enable access to it upon receipt of an appropriate counter-notice affirming that the material was removed or disabled by mistake or misidentification. Section 512(i) then sets additional conditions for eligibility that are applicable to all four safe harbors, the most important of which requires

¹⁴ 17 U.S.C. § 512.

¹⁵ 17 U.S.C. § 512(j).

¹⁶ Dennis S. Karjala, *Liability of Internet Service Providers under United States Law*, JURISPRUDENCIA, 2006, at 11.

that ISPs implement a policy of terminating clients who are repeat infringers.¹⁷ Other provisions supplement this basic structure.

Many cases have litigated the detailed provisions of section 512. Of primary interest here is the requirement under subsections (b)-(d) that the ISP (A) not have actual knowledge of infringing material, be unaware of facts from which infringing activity is apparent (“red flag” knowledge), or, upon obtaining such knowledge, act expeditiously to remove or disable access to the infringing material; (B) not receive any financial benefit directly attributable to the infringing activity; and (C) upon receiving notice of infringement, respond expeditiously to remove or disable access to the infringing material. We can think of this provision as a codification of *Netcom*’s conclusion that an ISP would be contributorily liable if it had knowledge of infringing activity and failed to take simple or reasonable steps to stop it. This is important because the fundamental issue has appeared in trademark cases, and liability has been asserted against actors in the Internet commerce environment who are not ISPs. The issue has also arisen, of course, in countries outside the United States. Section 512 only applies to copyright claims against ISPs under U.S. law, whereas the general principles of *Netcom* can be, and have been, applied more generally. In all these instances, the fundamental issue is the degree to which we as a society do and should compel third parties to contribute time, effort, and money to the enforcement of intellectual property rights held by content owners.

A. U.S. Copyright Cases under Section 512¹⁸

The Second Circuit in *Viacom Int’l, Inc. v. YouTube*,

¹⁷ 17 U.S.C. § 512.

¹⁸ For convenience, Section 512(c)(1) is set out here in its entirety:

(c) Information Residing on Systems or Networks At Direction of Users.—

(1) In general.— A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

- (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

*Inc.*¹⁹ held that the statutory requirement to remove infringing materials upon learning of their existence at the site contemplated knowledge of specific infringing material, because otherwise the ISP would not know how to remove it.²⁰ The *Viacom* court, indeed, found *two* instances under section 512 in which the degree of specificity of the ISP's knowledge was at issue. The first was in section 512(c)(1)(A), which provides a safe harbor if the ISP (i) lacks actual knowledge of the infringing activity, (ii) lacks "red flag" knowledge of the infringing activity (that is, is unaware of facts or circumstances from which infringing activity is apparent), or (iii) upon obtaining actual or "red flag" knowledge, acts expeditiously to remove or disable access to the infringing material.²¹ The court concluded that (A)(i)'s "actual knowledge" element contemplated knowledge of specific infringing material.²² *Viacom* then argued that "red flag" knowledge under (A)(ii) did not require awareness of specific infringing activity, because if it did the provision would be superfluous. Under this reasoning, knowledge of generalized infringing activity would disqualify the ISP from the protection of the safe harbor. The Second Circuit, however, thought that losing the safe harbor upon the acquisition of only generalized knowledge of infringing activity would contradict the plain meaning of the statute, especially the removal requirement that kicks in once the ISP has the requisite degree of knowledge.²³ The difference between (A)(i) and (A)(ii), according to the Second Circuit, was not in the specificity of the knowledge but between an objective and subjective standard: If the ISP is subjectively aware of the infringing activity under (A)(i), a removal obligation is triggered under (A)(iii) regardless of whether the content owner has sent a notice.²⁴ On the other hand, (A)(ii) is an objective provision that looks to whether subjective awareness of the specific facts would have made the infringing activity "apparent" to a reasonable person.²⁵

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.,17 U.S.C.A § 512(c)(1)(West 2010)

¹⁹ *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

²⁰ *Id.* at 30-31.

²¹ *Id.* at 30.

²² *Id.* at 32.

²³ *See generally id.*

²⁴ *Id.* at 41.

²⁵ *Viacom Int'l, Inc.*, 676 F.3d at 30-31.

The second instance in which the degree of specificity of the ISP's knowledge is at issue under section 512 arises from section 512(c)(1)(B), which denies the safe harbor to an ISP that receives a direct financial benefit from the infringing activity and that has the "right and ability to control" such activity. This portion of the statutory safe harbors verbally mimics the traditional common law standards for vicarious liability, which include no knowledge requirement. The *Viacom* court noted the theoretical difficulty posed by importing a specific knowledge requirement into the "right and ability to control" provision of section 512(c)(1)(B), in that such an approach would arguably make that provision duplicative of the actual knowledge provision of section 512(c)(1)(A).²⁶ On the other hand, to treat "right and ability to control" under the statute as a codification of the common law vicarious liability rule (which does not require knowledge of specific infringing activity, or even general knowledge that infringing activity is taking place) results in an even greater problem, because the very ability to do what the statute requires once the ISP has actual knowledge – that is, remove or disable access to the infringing material – is sufficient to show liability under traditional vicarious liability law by showing right and ability to control the activity. Thus, compliance with the *requirements* for the safe harbor under section 512(c)(1)(A) and (C) would *deny* the availability of the safe harbor under 512(c)(1)(B).

Because the safe harbor is available only when the requirements of each of its pieces, namely, 512(c)(1)(A), (B), and (C) are satisfied, the safe harbor would never be available where the elements of traditional vicarious liability are shown. The Second Circuit did not believe that this was the congressional intent and concluded that "right and ability to control" under 512(c)(1)(B) "requires something more than the ability to remove or block access to materials posted on a service provider's website."²⁷ The Second Circuit in *Viacom* declined to set a specific knowledge standard, however; it remanded the case for further consideration by the trial court of both the "right and ability to control" prong and the "direct financial benefit" prong of section 512(c)(1)(B).²⁸

²⁶ *Id.* at 36.

²⁷ *Id.* at 38 (quoting *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011)). Actually, the *Viacom* court's reasoning on this point ignores the second prong of vicarious liability, namely, direct financial benefit. Even if "right and ability to control" does not contain a knowledge element, many ISPs would fall outside the reach of § 512(c)(1)(B), namely, those who charge customers on a flat-rate basis regardless of the amount of use. It might arguably even exclude those who charge on a per/bit basis, provided the charges are the same for all materials sent, whether infringing or non-infringing.

²⁸ The court suggested that monitoring for the purpose of giving instructions on appearance and content as well as inducement of infringement might be the kind

*UMG Recordings, Inc. v. Shelter Capital Partners LLC*²⁹ involved the use by consumers of the system of the defendant, Veoh Networks, to upload and share video files. Some of these user-uploaded videos allegedly infringed UMG copyrights, and UMG asserted both direct and contributory infringement against Veoh. Veoh claimed a defense under section 512(c), the web host safe harbor, and the court first held that the eligibility language “by reason of the storage [on the defendant’s system] at the direction of a user” applied even where, as in this case, the system not only stored exactly what was uploaded but also automatically reformatted the submissions to make them more accessible to others.³⁰

UMG did not send any DMCA-compliant notices to Veoh, which would have given Veoh the URL information about infringing videos that would have made it easy for Veoh to take them down.³¹ Rather, UMG argued that Veoh had general knowledge that many of the millions of videos available on its system contained copyright-protected material and were uploaded without authorization to the Veoh system.³² This, UMG asserted, was “actual knowledge” of infringement under section 512(c)(1)(A)(i) and was also sufficient to raise a “red flag” under section 512(c)(1)(A)(ii) that infringing activity was “apparent.” Because Veoh had not acted to remove such infringing materials in the face of such purported actual or “red flag” knowledge, as required by 512(c)(1)(A)(iii), it was not entitled to the benefit of the safe harbor. In other words, UMG’s position was that general knowledge of *some* level of infringement was sufficient to trigger an obligation on the part of the ISP to find the offending material and disable access to it. The Ninth Circuit concluded that copyright owners were in

of “substantial influence” that could show a “right and ability to control.” *Viacom Int’l, Inc.*, *supra* note 19, at 38. A district court has interpreted “right and ability to control” in section 512 as going beyond the mere technological ability to remove or block access and requiring some participation like prescreening content, rendering “extensive” content advice to users, or editing content. *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 748 (S.D.N.Y. 2012) (involving a photo-sharing service allowing users to upload and share photographs and videos).

²⁹ *UMG Recordings, Inc. v. Shelter Capital Partners*, 667 F.3d 1022 (9th Cir. 2011), *superseded* *UMG Recordings, Inc. v. Shelter Capital Partners*, No. 09-55902, *slip opinion* (9th Cir. March 14, 2013). The superseding opinion was issued after rehearing by the panel but does not change the analytical approaches adopted by the court in its earlier opinion. For purposes of this article, the primary change is to follow closely the Second Circuit’s decision in *Viacom*, if anything heightening the case for convergence.

³⁰ *UMG Recordings, Inc.*, No. 09-55902 at 28.

³¹ Indeed, it seems that whenever Veoh did get a DMCA-compliant notice, it removed the offending files. *Id.* at 28-29.

³² *See id.* at 29-30.

a better position to identify infringing copies than ISPs, as evidenced by the notice provisions of section 512, and therefore that general knowledge that one's system was being used to share infringing materials was insufficient to deny the benefit of the statutory safe harbor to ISPs.³³ The court placed emphasis on section 512(m), which forbids statutory construction of the safe harbors as requiring ISP monitoring of its system for infringing activity.³⁴ The court also explicitly adopted the Second Circuit's distinction in *Viacom* between actual knowledge in 512(c)(1)(A)(i) and "red flag" knowledge in (A)(ii): (A)(i)'s actual knowledge standard is subjective and is met when the ISP is subjectively aware of specific infringing activity, while (A)(ii)'s "red flag" knowledge simply requires subjective awareness of facts that would make specific infringement apparent to a reasonable person.³⁵

Veoh might still have been denied the safe harbor under section 512(c) had it received a direct financial benefit from the infringing activities (user uploads) and had the "right and ability to control" such activities.³⁶ As the Second Circuit concluded in *Viacom*,³⁷ if the statutory meaning is the same as the common law meaning, the safe harbor would never be available whenever the ISP would be vicariously liable under the common law test, because ISP agreements with users always give ISPs the legal right to police user activity.³⁸ Disabling access would in itself show the "ability to control," so the very requirement for protection of the safe harbor under (A)(iii) and (C) would *disqualify* from the safe harbor under (B).³⁹ The court believed Congress intended the safe harbor to apply even where the traditional elements of vicarious liability were present⁴⁰ and went on to conclude, following *Viacom*, that "right and ability to control" in the statute means "something more" than general ability to locate infringing material and terminate access.⁴¹

³³ *Id.* at 31.

³⁴ *Id.* at 32.

³⁵ *Id.* at 39.

³⁶ 17 U.S.C. § 512(c)(1)(B).

³⁷ *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 36-38 (2d Cir. 2012).

³⁸ See Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101, 104 (2007).

³⁹ *UMG Recordings, Inc.*, No. 09-55902 at 42-43.

⁴⁰ *Id.* at 45-47.

⁴¹ *Id.* at 48. The court recognized that willful blindness – deliberate actions aimed at avoiding specific knowledge of infringing activity – would count as "knowledge" and deny the availability of the safe harbor. *Id.* at 34. Given the court's conclusion that the "right and ability to control" prong of vicarious liability was not satisfied, because of the absence of proof that Veoh had specific knowledge of infringing activity, the court did not address the other requirement of direct financial benefit. *Id.* at 40, n.16.

The important principle to be gleaned from the holdings of *Viacom* and *Shelter Capital* is that secondary liability on *both* traditional branches – contributory infringement and vicarious liability – requires knowledge of specific infringing activity and not merely generalized knowledge that some unidentified users have employed the system in an unidentified way to infringe copyrights.⁴² The onus is on the copyright owner to inform the system operator not only of the general fact of infringement but also of specific information sufficient to permit the ISP to take action to stop the infringement by denying access to or disabling the infringing site. We might note that requiring action by the ISP after receiving notice does place a nontrivial burden on the ISP to participate in the enforcement of other people’s copyright rights. It is, however, closely analogous to what we have long required under secondary liability principles in the analog world of people who are, in one way or another, connected to the activities of a copyright infringer.

A recent district court decision hints at the kind and level of surveillance courts may require of ISPs under section 512. In *Capitol Records, Inc. v. MP3Tunes, LLC*,⁴³ the defendant operated a system that allowed users to store music files in virtual lockers, from which the files could be played by the user with any Internet-connected device. Users could upload files stored on their personal hard drives and could transfer music files to their lockers from third party websites. A second website operated by the defendant allowed users to search for music files on the Internet and “sideload” such files into their individual lockers. Plaintiffs identified websites from which Defendant’s users had sideloaded protected music files and gave section 512 compliant notices to Defendant demanding the removal from users’ lockers of the songs that had been sideloaded from the identified websites. Because Defendant kept track of the source and web address for each sideloaded song, the court concluded the notice gave sufficient information to permit finding the infringing music in individual lockers and removing or disabling access to it. The court generalized by saying that where ISPs allow the searching and storing of protected works in private accounts, the ISPs must keep track of the source and web address of stored protected material, and they must take down such content upon receipt of a Section 512 compliant notice.⁴⁴

⁴² It is perhaps worth noting that if the traditional law of vicarious liability were to apply, not even the generalized knowledge of infringement on the defendant’s system would be necessary to state a claim. Both *Viacom* and *UMG* vigorously asserted such knowledge, perhaps because they sensed that a court would not be sympathetic to what would otherwise amount to a strict liability claim.

⁴³ *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627 (S.D.N.Y. 2011).

⁴⁴ *See id.* at 642-43. The court went on to hold that the safe harbor was available to defendant for works stored on or linked to defendant’s system, other than works

The U.S. cases under section 512 thus show continued viability of the general approach in *Netcom* that ISPs must take reasonable steps to avoid or reduce infringing activity using their facilities; however, there is no ongoing general obligation to patrol the system to discover and root out infringement of which the ISP is otherwise unaware.⁴⁵ Section 512 has added many technicalities to make the notion of “reasonable steps” more precise. In most ways the statute has been highly successful, but the basic, intuitive approach of the *Netcom* court remains largely undisturbed.

B. U.S. Cases Outside of Section 512

In *Perfect 10, Inc. v. Visa International Service Association*,⁴⁶ the plaintiff sued various credit card companies for contributory and vicarious copyright infringement based on the processing of credit card payments by customers of third party websites that offered infringing copies of the plaintiff’s copyright-protected photographs. Because the credit card companies did not qualify as ISPs under section 512,⁴⁷ the court applied the common law of secondary liability. Over a vigorous dissent, the Ninth Circuit majority found no contributory infringement because processing a credit card payment was not a material contribution to the actual infringing acts of reproducing and distributing the protected photos.⁴⁸ Similarly, the court found no vicarious liability be-

sideloaded from links identified in the takedown notices. *Id.* at 646. Defendant was, however, held contributorily liable for failing to block user access to infringing material in individual user lockers that had been identified in the notices. Defendant’s system made a substantial contribution to the infringement and the notices gave actual knowledge of the infringement. *Id.* at 648-49.

⁴⁵ See also *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 729 (9th Cir. 2007). The Ninth Circuit did not reach the Section 512 issue but held that Google could be held contributorily liable to Perfect 10 under general secondary liability law “if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10’s copyrighted works, and failed to take such steps.” *Id.*

⁴⁶ *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788 (9th Cir. 2007).

⁴⁷ An earlier case in the Ninth Circuit also raised the issue of liability of a credit-card processor CCBill for handling payments relating to infringing photographs. *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir. 2007). In this case, section 512 was raised as a shield, and the Ninth Circuit remanded for a determination of whether CCBill qualified as an ISP under section 512(a). The court concluded that CCBill did not qualify under Section 512(d), because its services went far beyond mere information location and linking, and the infringement claim was not for the linking but for the processing of monetary payments. *Id.* at 1116-17.

⁴⁸ *Visa Int’l Serv. Ass’n*, 494 F.3d at 796. Because it found that defendants did not make a material contribution to the infringement, the court did not reach the issue of whether they had the requisite knowledge for contributory infringement. *Id.* at 795.

cause while the credit card companies had the right and power to cut off payments to operators of websites identified as infringers, they had neither right nor power to control operation of the actual systems that were used to effect the infringements by reproducing and distributing the protected photos.⁴⁹ While the arguments were necessarily set forth in doctrinal terms, the court was clearly worried that a decision against the credit card companies might have a drastic and negative effect on Internet commerce: “We evaluate Perfect 10’s claims with an awareness that credit cards serve as the primary engine of electronic commerce and that Congress has determined it to be the ‘policy of the United States (1) to promote the continued development of the Internet and other interactive computer services and other interactive media [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.’”⁵⁰

It is clear, as Judge Kozinsky’s dissent in *Visa* repeatedly emphasizes,⁵¹ that cutting off payments to websites that are allegedly offering infringing materials would likely help reduce the level of infringing conduct on the Internet. It is also clear that processing credit card payments makes a material contribution to concluding the transaction (whether the deal is for infringing material or not), at least in the sense that, but for the credit card payment, the transaction likely would not occur at all. Further, the nature of Internet transactions concerning photographs almost invariably means that the transaction itself involves multiple infringements (if unauthorized), as the digital file moves from the server on which it is stored (probably illegally), through multiple digital devices before ending up on the purchaser’s hard drive. Nevertheless, the credit card companies have no way of knowing whether any *particular* transaction involves infringing material or, if it is infringing, whether the current plaintiffs are the copyright owners. Their choice, therefore, is either to cut off a given site’s transactions completely or to process all of them, despite knowing that some of the processed transactions allegedly involve infringing materials. Framed this way, the issue is whether a third party credit card company lacking knowledge that any specific transaction

⁴⁹ *Id.* at 805. Having found that defendants lacked the right and ability to control the infringing activities, the court did not reach the issue of whether the credit card companies derived a direct financial benefit from the transactions. *Id.* at 806. It would seem, however, that they did have such an interest, because they charge a percentage of every transaction, so the more infringing transactions there are, the more money they make. Indeed, the dissent pointed to allegations that the defendants gave special treatment to the infringing sites because of the “unusual and substantial profits” they earned from such transactions. *Id.* at 820.

⁵⁰ *Id.* at 794 (citing 47 U.S.C. §§ 230(b)(1), (2)).

⁵¹ *Id.* at 810 (Kozinsky, J. dissenting).

involves infringing material must cut off *all* transactions with the allegedly infringing site, including those in which the complaining party has no interest and including many that at least potentially are perfectly legitimate.

It is not surprising that the *Visa* case resulted in a deep division on the three-judge panel that heard it. Suppose money-laundering transactions are known to be going through a specific bank but there is no way to identify which specific transactions are illegal and which ones (presumably the majority) are not. Should a court, without legislative authority, order another bank to stop all business with the first bank – the one known to be used for money laundering? If this is problematic, it is even more so where the court order to stop doing business with a particular website is aimed at protecting *private* commercial interests, as in the case of infringing content.⁵² Selecting between (1) allowing the payment processing for at least some infringing transactions and (2) closing down a site completely and thereby eliminating *all* transactions at that site going through that payment processor, whether infringing or not, forced the *Visa* court to go a step beyond the approach of *Netcom*. In *Netcom*, the ISP would have been liable had there been sufficiently specific knowledge of infringing activity and reasonable steps, which were available to the ISP, were not taken to stop the infringing activity.⁵³ *Visa* essentially says that shutting down an entire site to protect copyright rights of a single copyright owner is not a “reasonable step.”⁵⁴

Tiffany (NJ) Inc. v. eBay, Inc.,⁵⁵ was a trademark case, outside of section 512, that raised the same issue as the copyright cases dis-

⁵² The Ninth Circuit majority expressly worried about the slippery slope – other providers of goods and services to businesses alleged to be copyright infringers, such as electric power companies and software services. *Id.* at 800. Judge Kozinsky, in dissent, dismissed this fear saying that utilities have an obligation to deliver services independent of contract and that software services generally have no contract that permits them to stop providing services on account of illegality. *Id.* at 821-22. Judge Kozinsky’s argument may be relevant to the “right and power to control” prong of vicarious liability, although it would hardly seem to be determinative. It is wholly unconvincing on the “material contribution” prong of contributory infringement, because once either the power company or the software servicer has notice of infringement, each makes a material contribution to that infringement by supplying indispensable elements to the system used to effect the infringement.

⁵³ *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1373 (N.D. Cal. 1995).

⁵⁴ *See Visa Int’l Serv. Ass’n*, 494 F.3d 7886.

⁵⁵ *Tiffany (NJ), Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010).

cussed above.⁵⁶ Here, the well-known online auction site eBay was sued by the famous designer and seller of high-end jewelry and other items, Tiffany's, for contributory trademark infringement by failing to stop allegedly widespread sales on the eBay site of counterfeit Tiffany products.⁵⁷ Given the absence of any statutory provision for contributory trademark infringement, the Second Circuit followed the Supreme Court's test looking to whether the alleged infringer continued to supply a product to a person who he knew or should have known was engaging in trademark infringement.⁵⁸ The evidence in the case showed that eBay promptly removed challenged listings, but Tiffany argued that eBay had knowledge that many listings not directly challenged also involved counterfeit Tiffany goods. The Second Circuit agreed with the district court that something beyond general knowledge that the site was used to sell counterfeit goods was necessary for eBay to be held liable for contributory infringement.⁵⁹ The court noted, but did not base its decision on, the incentives eBay already had to make strong efforts to minimize counterfeit transactions on its auction site. Many customers who purchased counterfeit goods complained to eBay, so it was in eBay's general interest to try to stop such activities. Indeed, eBay spent millions of dollars in an effort to minimize counterfeit transactions.⁶⁰

III. NON-U.S. CASES

Cases from outside the United States, primarily Japan and the European Union, provide a general idea of what appears to be a significant degree of convergence in judicial treatment of the basic problem. The discussion herein, outside of Japan, Australia, and the United Kingdom, is based on summaries of decisions that have appeared in the literature.

⁵⁶ For a detailed analysis of this decision, see Justin Nicholas Redman, *Post Tiffany (NJ), Inc. V. eBay, Inc.: Establishing a Clear, Legal Standard for Online Auctions*, 49 JURIMETRICS J. 467 (2009).

⁵⁷ Tiffany also alleged direct trademark infringement, but the sale of at least some legitimate Tiffany goods on eBay was a noninfringing use of the Tiffany mark to describe the goods accurately. Tiffany, *supra* note 55, at 101. eBay's generalized knowledge of *some* counterfeit sales was relevant only to the contributory infringement issue, because it was undisputed that eBay promptly removed all specific listings that Tiffany challenged as counterfeit. *Id.* at 103.

⁵⁸ Tiffany (NJ), *supra* note 55, at 103 (citing *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982)). The *Inwood* Court would also find contributory infringement against one who intentionally induces another to infringe a trademark. *Inwood Labs.*, 456 U.S. at 854. That prong of *Inwood* was not at issue in *Tiffany*. *Id.* at 104.

⁵⁹ *Id.* at 107.

⁶⁰ *Id.* at 109.

A. Australia

The High Court of Australia in *Roadshow Films Pty Ltd v. iiNet Ltd.*⁶¹ faced the question of whether an ISP “authorised” copyright infringement by providing Internet connection services to customers who used the BitTorrent P2P file sharing system to exchange copyright protected films. While Australia has a statutory safe harbor scheme similar to that of the United States,⁶² the defendant iiNet was ineligible for its protection,⁶³ so the court addressed the problem by applying general copyright principles. Under the Australian statute, the issue was whether the defendant had “authorised” the infringing activity.⁶⁴

Plaintiffs argued that iiNet’s technical and contractual relationships with its customers gave it indirect power to control the use of its Internet connection services, that this power to control was equivalent to “authorisation,” and that an injunction should issue restraining iiNet from continuing to provide Internet connection services to each of some eleven specified accounts. The court framed the authorization issue as involving subsidiary questions of whether iiNet had the power to prevent the primary infringements and whether iiNet took reasonable steps to prevent infringements after receiving notice.⁶⁵ At least on the surface, this analysis appears similar to that of the *Netcom* court in the United States.

In the actual case, the Australian High Court concluded that iiNet had limited power to prevent infringement, namely, indirectly by terminating its contracts with infringing customers. Like the *Visa* credit card case in the United States, the Australian court may have deemed it excessive to shut down an entire site – including transactions in which the current plaintiffs had no copyright interest and even legitimate transactions — in the service of stopping a relatively small number of specific infringements. On the “reasonable steps” prong of the analysis, the High Court noted that a terminated account could engage another ISP and continue with the infringing activity, and if iiNet gave warnings it would be obliged to try to monitor the warned customers, which itself would require a detailed technical involvement with the BitTorrent technology.⁶⁶ The court thus seemed to believe that whatever iiNet did, it was unlikely to be effective. Moreover, the

⁶¹ *Roadshow Films Pty Ltd v. iiNet Ltd.*, [2012] HCA 16, ¶ 4.

⁶² See generally Australian Copyright Act §§ 116AA - 116AJ; see *Roadshow Films*, *supra* note 61, ¶ 25. The safe harbor limits remedies against ISPs but allows courts to require the ISP to terminate a specified account. *Id.* ¶ 13.

⁶³ *Id.*

⁶⁴ *Id.* ¶ 5.

⁶⁵ *Id.* ¶ 63.

⁶⁶ *Id.* ¶ 73-74.

High Court found some deficiencies in the notices of infringement that iiNet had received.⁶⁷ Therefore, the High Court dismissed the plaintiffs' appeal.

B. Japan

In the *Internet Mall Case*,⁶⁸ the operator of an Internet shopping mall was sued for trademark infringement based on the unauthorized use of Plaintiff's registered mark on various goods offered by one of the virtual "stores" in Defendant's mall. The lower court held that the Internet mall operator was not a party (*shutai*) to the infringing transactions between the store operator and his purchasing customers. On that ground the lower court found no trademark infringement on the part of the mall operator. The High Court did not directly address the question of whether the mall operator was a party to the transactions but said that the mall operator could be liable if, after getting knowledge of specific infringing activity, he failed to act to shut down or disable the site within a reasonable time. On the actual facts, the mall operator was not liable because he did act within a reasonable time after receiving notice.⁶⁹

The High Court first noted that Internet shopping is a social benefit and most transactions do not involve trademark infringement. Moreover, the High Court reasoned, even where trademark rights are involved, the store owner may be the rightowner, he may be authorized by the rightowner, or the item may be a parallel import, so the fact that the item is available does not itself lead to a high probability

⁶⁷ *Id.* ¶ 78.

⁶⁸ *Perfetti Van Melle S.p.A. v. Rakyten Corp.*, Heisei 22 (ne) No. 10076 (Tokyo Intellectual Property High Court, Feb. 14, 2012). A brief summary of this case, in English, may be found at Toshio Aritake, *Japan IPR Court Holds Internet Shopping Mall Liable for Infringement*, 26 WIPR 23 (Feb. 2012). Unfortunately, this report is not entirely accurate, because it states that the IPR court held both the mall operator and the vendor (virtual "store") liable whereas the lower court held only the vendor liable. In fact, the vendor was not a party to the lawsuit and, therefore, the holding of neither court reached the vendor, although the IPR court did state in dictum that the vendor would be liable. Moreover, as discussed in the text below, the IPR court found *no* liability of the mall operator on the actual facts and overruled the lower court only to the extent of stating that the mall operator *could* be liable if he did not act within a reasonable time after receiving notice of the infringing activity.

⁶⁹ *Intellectual Property High Court Ruled That Internet Shopping Mall Operators Can Be Found Liable for Trademark Infringement*, ITOH INT'L PATENT OFFICE (Feb. 24, 2012), <http://www.itohpat.co.jp/e/ipnews/index.html>. In this case, the mall operator acted within 8 days or less after receiving notice, which the court concluded was a reasonable time (without giving any more specific reasons). *Id.*

that the store owner is infringing.⁷⁰ Nevertheless, trademark infringement is also a crime under commercial law and regulations, so where an ISP has concrete knowledge of trademark infringement by a store operator, there is a possibility of contributory infringement.⁷¹ The Internet mall operator also makes money from the store owner's operations, and where the operator is aware of infringing activity at a particular store, he has power under the contract with the store owner to delete the content or block access to the page. Thus, when the mall operator receives notice of infringement from a trademark owner, he has an obligation to make an immediate investigation. To the extent he fulfills this obligation, he is not liable for trademark infringement, but if he neglects it he bears the same responsibility for infringement as the storeowner.⁷² There seems to be no substantial difference between the approach of the Tokyo IP High Court here and that of the U.S. Second Circuit in the *eBay* case, notwithstanding different statutory language and jurisprudential history.

C. *European Union*

Section 4 of the E-Commerce Directive⁷³ seems to be quite similar to section 512 of the U.S. Copyright Act, discussed above. Articles 12-14 of Section 4 insulate service providers who act as "mere conduits," engage in "caching," or provide information storage services ("hosting"), if the service provider complies with various conditions.⁷⁴ The "hosting" safe harbor applies when the service provider lacks actual knowledge of infringing activity and is unaware of facts or circumstances from which infringing activity is apparent or, upon obtaining such knowledge, acts expeditiously to remove or to disable access to the information.⁷⁵ Article 15 prohibits the establishment of a general obligation on service providers to monitor information that they store or transmit or actively to seek facts or circumstances indicating illegal activity.⁷⁶ The Court of Justice of the European Union has interpreted Article 15 to deny the demand of the Belgian copyright management company SABAM that a social network install a filter system to monitor all users for infringements of music and audiovisual works.⁷⁷

⁷⁰ *See id.*

⁷¹ *See* 2012 (ne) no.10076, *supra* note 68.

⁷² *Id.*

⁷³ Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC).

⁷⁴ *Id.* art. 12-14.

⁷⁵ *Id.* art. 14.

⁷⁶ *Id.* art. 15.

⁷⁷ Case C-360/10, *SABAM v. Netlog NV.*, 2012 EUR-Lex CELEX LEXIS (Feb. 16, 2012).

The Court of Justice of the European Union (CJEU) has also interpreted much of this Directive in the context of alleged trademark infringements on an online marketplace. *L’Oreal SA v. eBay International AG*⁷⁸ involved much the same issue as the *eBay* case in the United States and the *Internet Mall* case in Japan. L’Oreal contended that eBay’s internal procedures for preventing trademark infringement by sellers at its auction site were insufficient and brought suit in the United Kingdom when eBay did not respond satisfactorily to L’Oreal’s demand to take stronger steps to prevent infringing activity. The English High Court held against L’Oreal on the issue of joint trademark infringement but referred that and other issues to the CJEU.⁷⁹

On eBay’s liability for infringing use of trademarks by sellers on eBay’s site, the CJEU looked to the Directive. The court held that it was the sellers and not eBay who made infringing use of the trademarks by displaying goods on the website, so the liability of eBay would depend on the conditions of intermediary liability under the Directive. This harkens back to the *Netcom* court’s refusal to hold the ISP liable for primary copyright infringement based on the posting of material by a customer. The CJEU interpreted Article 14, the “hosting” safe harbor, to apply only where the intermediary’s services were provided “neutrally,” via technical and automatic processing. The intermediary would not fall within Article 14 if it had knowledge or control over the presentation or if it provided assistance to its sellers by, for example, promoting or optimizing the sellers’ offers. Moreover, even where Article 14 applies, the exemption is available by its terms only where the intermediary lacks actual knowledge of the infringement or, having obtained such knowledge, acts expeditiously to remove or disable access to the infringing data. Notice from the trademark owner is not conclusive on the knowledge issue, but it is a factor, presumably an important factor, for courts to consider in determining whether the intermediary should have known of the infringing activity.⁸⁰

The *L’Oreal* case also addressed injunctions against ISPs under the Enforcement Directive, Article 11, which states in part, “Member states shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right.”⁸¹ The court

⁷⁸ Case C-324/09, *L’Oreal SA v. eBay International AG*, 2011 EUR-Lex CELEX LEXIS (July 12, 2011).

⁷⁹ Among the issues were trademark exhaustion, liability for removal of packaging materials, and the use of keyword advertising. *Id.*

⁸⁰ *Id.*

⁸¹ Council Directive 2004/48, art. 11, 2004 O.J. (L 157) 45 (EC).

recognized that this provision was available against intermediaries not only to correct past infringements but also to prevent future infringements, but any such injunction must comport with Article 15 of the E-Commerce Directive, which expressly prohibits establishing a general obligation to monitor or to seek out facts indicating infringing activity. The court suggested suspension of the accounts of known infringers and orders making it easier to identify potentially infringing sellers as examples that might strike a fair balance between various rights and interests.

1. France

The French courts have already interpreted the *L'Oreal* standards and have come to apparently conflicting results for U.S. companies eBay and YouTube. In *eBay Inc. v. LVMH*,⁸² the highest French court found that eBay played an active role in promoting various counterfeit goods and therefore did not qualify for the safe harbor under the E-Commerce Directive. While noting that eBay had knowledge and control over the data stored at the auction site, it is not clear that eBay actually knew that the data in question referred to infringing goods. If such knowledge is not required in France, the French rule for ISPs would be similar to the traditional U.S. rule for vicarious liability, meaning that the safe harbors of the E-Commerce Directive are not available against such claims. As noted above, the Second and Ninth Circuits in the United States have expressly held that the section 512 safe harbors do apply, at least to some extent, even in the context of traditional vicarious liability.⁸³

On the other hand, in *YouTube LLC v. TF1*,⁸⁴ a French television broadcaster unsuccessfully sought liability from YouTube for the posting by YouTube members of infringing content on the YouTube site. Applying the *L'Oreal* standard of active participation, the court concluded that YouTube simply employed a statistical algorithm to rank videos in various categories, which is different from making a conscious choice or playing an active role in determining the content of the postings.⁸⁵

It is not entirely clear how the *YouTube* and *eBay* cases in France are to be distinguished. It is probably true that YouTube is more automated because its primary purpose is to make videos availa-

⁸² *Court of Cassation, May 3, 2012, c eBay. Louis Vuitton Malletier*, JURISCOM.NET (May 3, 2012), <http://juriscom.net/2012/05/cour-de-cassation-3-mai-2012-ebay-c-louis-vuitton-malletier/>.

⁸³ See *supra* text accompanying notes 34-57.

⁸⁴ Tribunal de grand instance de Paris [TGI] [ordinary court of original jurisdiction] Paris, 3e ch., May 29, 2012, No. 10/11205 (Fr.).

⁸⁵ *Id.* at 24-25.

ble, usually on a noncommercial basis. The commercial nature of eBay necessarily pushes it more deeply into the sales transactions that take place there. Still, it is not clear how eBay could determine which of the millions of items that change hands on its site daily are in fact counterfeit, at least without expenditure of a great deal of time and money on monitoring. Article 15 of the E-Commerce Directive says that such monitoring cannot be demanded of ISPs, so the question is whether eBay is different in any relevant respect from an ISP when it comes to the monitoring issue.⁸⁶

2. Germany

The German courts seem to be taking a position that requires more of ISPs once they have notice of specific infringement. In *GEMA v. YouTube*,⁸⁷ the Hamburg Regional Court held that YouTube would not be liable for copyright-infringing content at its website unless, after receiving notice, it did not take immediate action to block the infringing videos. Had the court stopped there, its holding would be in line with the cases we have discussed thus far. However, the court went on to state that, once notice was received, YouTube was obligated to take measures to prevent additional violations, while clarifying that YouTube did not have an obligation to check all content on its site. Similarly, the German Federal Court in Karlsruhe held that a website operator does not have an obligation to check the content of an RSS feed hosted on its site, where the content of the feed is automatically published and its source identified.⁸⁸ In this case, the court said that the decisive factor was whether the website owner “adopted” the content, which could occur via editing the text or failing to clarify that the content came from a third party.

In *Atari v. RapidShare*, the highest court in Germany, the Bundesgerichtshof, affirmed the approach taken by the Hamburg Regional Court.⁸⁹ Atari sued RapidShare, a file hosting website, for copyright infringement based on the availability of infringing copies of some Atari video games on the site. The BGH denied direct infringement by RapidShare, but concluded that RapidShare could be liable if, once notified of the infringement, it failed to take sufficient measures to prevent access to the infringing material and also to prevent its be-

⁸⁶ 85B. Directive 2000/31/EC of the European Parliament and of the Council, *supra* note 73, art. 15.

⁸⁷ Jabeen Bhatti, *German Court Finds YouTube Responsible for Copyrighted Content When Given Notice*, 17 ELEC. COM. & LAW REP. 755 (Apr. 25, 2012).

⁸⁸ Jabeen Bhatti, *Court Rules Operator Not Liable Third Party Content Hosted via RSS Feed*, 26 WORLD INTELL. PROP. REP. 17 (July 1, 2012).

⁸⁹ Jabeen Bhatti, *Supreme Court Rules File Hosting Sites Must Do More to Prevent Infringement*, 26 WORLD INTELL. PROP. REP. 14 (Sept. 1, 2012).

ing uploaded again. The court suggested that RapidShare should have used filters to prevent a repeat infringement of the particular works in question and had a responsibility to search link collections on third party sites for links to the illegal file. Because in both of these German cases the requirement to take preventive measures seems to apply to specific works, this obligation does not directly conflict with Article 15 of the E-Commerce Directive's prohibition on general monitoring requirements, but the obligation is more than has been required of ISPs under section 512 by the U.S. courts.

3. *United Kingdom*

*Twentieth Century Fox Film Corp. v. British Telecommunications PLC*⁹⁰ involved a suit by film studios against the United Kingdom's largest ISP, British Telecommunications (BT), for copyright infringement based on the unauthorized availability for download by others of protected films at the site of one of BT's customers, Newzbin2. BT claimed protection as a "mere conduit" service provider under Article 12 of the E-Commerce Directive, as implemented in the United Kingdom. The main issue in the case was the meaning of "actual knowledge" in the Directive and in the U.K. implementing regulations. BT contended that liability required actual knowledge of a specific infringement of a specific work by an identified individual.⁹¹ The court placed heavy reliance on the language of Article 8(3) of the Information Society Directive,⁹² which is virtually identical to Article 11 of the E-Commerce Directive quoted above,⁹³ as implemented in section 97A of the U.K. statute.⁹⁴ That provision allows injunctions to issue against an ISP where the ISP has "actual knowledge of another person using their service to infringe copyright." It goes on to say that the court determines actual knowledge on the basis of the particular circumstances, including whether the ISP has received a notice of infringement and the extent to which the notice provides "details of the infringement in question."⁹⁵

The court noted that under the E-Commerce Directive, an ISP with actual knowledge loses the benefit of the safe harbors of Articles 13 and 14, but this is not the case for "mere conduit" ISPs under Article 12, which suggested that "actual knowledge" should not be inter-

⁹⁰ *Twentieth Century Fox Film Corp. v. British Telecommunications PLC*, [2011] EWHC 1981 (Eng.).

⁹¹ *Id.* ¶ 116.

⁹² Directive 2001/29/EC of the European Parliament and of the Council 2001 O.J. (L167).

⁹³ *See supra* text accompanying note 81.

⁹⁴ Copyright, Designs and Patents Act, 1988 (Eng.).

⁹⁵ *Id.* c. 6, § 97A.

preted too restrictively.⁹⁶ Moreover, recital 59 of the Information Society Directive states “[R]ightholders should have the possibility of applying for an injunction against an intermediary who carries a third party’s infringement. . . .” Inferring a similar purpose to section 97A of the British statute implementing that part of the Directive, the court found a legislative intent to allow injunctions against an ISP who “carries” infringing material, because the ISP is best positioned to bring the infringing activities to an end.⁹⁷

Perhaps most importantly for the court was the language of the statute in section 97A referring to “actual knowledge of another person using their service to infringe copyright.” On the basis of this language, the court distinguished between *use of the service to infringe* from the infringements actually committed by such use.⁹⁸ The court concluded that, while “actual knowledge” can only be determined based on all the facts and circumstances, it is “not essential to prove actual knowledge of a specific infringement of a specific copyright work by a specific individual.”⁹⁹ Thus, BT had actual knowledge that third parties were using its service to infringe.¹⁰⁰ The court also determined that it had the authority to grant the broad order sought by the film studios, which required the blockage of the entire Newzbin2 site to BT’s subscribers rather than simply ordering BT to ensure that the specific content owned by the litigating studios was blocked.¹⁰¹

While the *Twentieth Century Fox* case in the United Kingdom appears on the surface to accept a lower threshold for “actual knowledge” than we have seen in the cases from the United States and other countries, it is perhaps important to point out that the remedy sought from BT was an injunction, not damages.¹⁰² Even under section 512 in the United States, the DMCA safe harbor provisions apply largely to damages remedies sought against the ISP. Section 512(j)(1)(B) applies to the equivalent of “mere conduit” ISPs like BT, and limits injunctions to orders restraining the ISP from providing access to a subscriber or account holder who is using the service to infringe.¹⁰³ Consequently, the same broad order that was so fiercely contested in *Twentieth Century Fox* would likely be available in the United States without much discussion, assuming proof of similar facts.

⁹⁶ *Twentieth Century Fox Film Corp.*, [2011] EWHC 1981 at ¶ 145.

⁹⁷ *Id.* ¶ 146.

⁹⁸ *Id.* ¶ 147.

⁹⁹ *Id.* ¶ 148.

¹⁰⁰ *Id.* ¶ 157.

¹⁰¹ *Id.* ¶ 204.

¹⁰² *Id.* ¶ 1.

¹⁰³ Digital Millennium Copyright Act (D.M.C.A.), § 512(b)(2)(E) (2012).

IV. NEW STATUTORY SCHEMES

In May 2011, after several years of controversial and somewhat opaque negotiations,¹⁰⁴ the proposed Anti-Counterfeiting Trade Agreement (ACTA)¹⁰⁵ was published. One of the ACTA drafters' major goals was to strengthen the weak enforcement requirements of TRIPS.¹⁰⁶ While it appears that ACTA will not be ratified, two of its provisions seem relevant to the current discussion on the liability of ISPs and other third parties for copyright infringement on the Internet. Article 8(1) would have required each treaty party to insure that "its judicial authorities have the authority to issue an order against. . . , where appropriate, a third party. . . to prevent goods that involve the infringement of an intellectual property right from entering into the channels of commerce."

Article 12 requires similar judicial authority to order "prompt and effective provisional measures" against a third party to prevent infringement. The Electronic Frontier Foundation has criticized ACTA on numerous grounds, one of which is that its language could be interpreted "to legitimize website filtering and blocking and Internet disconnection."¹⁰⁷ Article 12 of ACTA is surely susceptible to such an interpretation, but as the treaty left much to the discretion of the individual treaty parties, we cannot say with certainty that all or even many would have gone as far as feared by the Electronic Frontier Foundation.

The United States had its own legislative battle on many of the issues addressed by ACTA, the most widely discussed of which was Stop Online Piracy Act (SOPA).¹⁰⁸ SOPA first would have given criminal enforcement authority to the Attorney General to go after foreign sites that were directed at U.S. recipients, were violating the U.S. criminal copyright or federal trade secret provisions, and would have been subject to seizure were they U.S. sites.¹⁰⁹ Section 103 of SOPA focused on sites "dedicated to theft of U.S. property," that is, sites directed to users in the United States and designed primarily to infringe

¹⁰⁴ See generally Hilary H. Lane, *The Realities of the Anti-Counterfeiting Trade Agreement*, 21 TUL. J. INT'L & COMP. L. 183, 191-97 (2012) (describing international protests and several controversial effects of the act).

¹⁰⁵ Anti-Counterfeiting Trade Act (ACTA), Oct. 1, 2011, available at <http://www.ustr.gov/acta> (containing the text of the act).

¹⁰⁶ Peter K. Yu, *Enforcement, Enforcement, What Enforcement?*, 52 IDEA 239, 255 (2012). Professor Yu goes on to point out, however, that the ACTA obligations would themselves have been difficult to enforce. *Id.* at 264-65.

¹⁰⁷ *Anti-Counterfeiting Trade Agreement*, ELEC. FRONTIER FOUND., available at <https://www.eff.org/issues/acta> (last visited Feb. 18, 2013).

¹⁰⁸ Stop Online Piracy Act (S.O.P.A.), H.R. 3261, 112th Cong. (2011).

¹⁰⁹ *Id.* § 102(a).

U.S. copyright or trademark law.¹¹⁰ The interesting thing about the civil provisions of SOPA in section 103 is that they were aimed at Internet payment providers and advertisers.¹¹¹ The evident goal of the statute was to enlist the assistance of these third parties in the enforcement of private intellectual property rights. After receipt of a statutory notice, payment providers would have had 5 days to suspend payment services involving U.S. customers and the offending foreign site, while advertisers would have had 5 days to stop advertising on the site, to stop making ads on behalf of the site, and to cease payments in either direction.¹¹²

The notice required by SOPA, among other details, had to identify the offending site either by domain name or Internet Protocol address.¹¹³ The rightholder also had to include in the notice “specific facts” to support its claim that the site was dedicated to the theft of U.S. property and to “clearly show” that failure to take timely action would result in immediate and irreparable injury.¹¹⁴ These requirements, had they been enacted into law and rigorously enforced by the courts, might have been difficult for rightholders to meet outside of the most blatant of infringers. For example, they are more demanding than the notice requirements under section 512 of the DMCA. On the other hand, especially in the case of payment sites, responding to a valid notice would likely require severing *all* transactional relations with the site, even those transactions that are not directed at U.S. users or that are perhaps not infringing at all. This could have resulted in correction measures highly disproportional to the wrong – for example, where an entire site is shut down but only a single page contains infringing materials.¹¹⁵

Lital Helman and Gideon Parchomovsky have recently proposed a new approach to liability for web hosts.¹¹⁶ Under their proposal, hosts would be immune from liability provided they make use of the best filtering technology available on the market. They make a strong case that this approach would reduce costs and result in more rapid improvements in filtering technologies. The argument applies

¹¹⁰ *Id.* § 103(a)(1).

¹¹¹ *Id.* § 103(b).

¹¹² *Id.* § 103(b)(1)-(2).

¹¹³ *Id.* § 103(b)(4)(A)(ii).

¹¹⁴ *Id.* § 103(b)(4)(A)(iii).

¹¹⁵ Jeffrey A. Lindenbaum & David Ewen, *Catch Me if You Can: An Analysis of New Enforcement Measures and Proposed Legislation To Combat the Sale of Counterfeit Products on the Internet*, 32 PACE L. REV. 567, 638 (2012).

¹¹⁶ Lital Helman & Gideon Parchomovsky, *The Best Available Technology Standard*, 111 COLUM. L. REV. 1194, 1194 (2011).

primarily only to web hosts, however, which leaves the problem open for a number of other players.¹¹⁷

V. WHY ARE WE DRAFTING PRIVATE PARTIES INTO THE COPYRIGHT POLICE FORCE?

At a basic level, these judicial and legislative efforts to enlist the assistance of third parties to enforce the copyright and other intellectual property rights held by others seems a bit strange. We do not demand that neighboring landowners assist one another in preventing trespass, and even patent law enforcement is left largely, if not wholly, in the hands of the patent holder. Intuitively, we know that digital technologies have somehow changed the nature of the game, especially in copyright, but we have yet to develop a coherent theory that specifies where the various lines should be drawn. We know that copying and worldwide distribution is easier, cheaper, and faster than was possible in the analog world, so the question is, or should be, how this easier, cheaper, and faster copying changes our feelings concerning who should be responsible for what in enforcing the private intellectual property rights held by content owners.

As the *Netcom* case shows, traditional principles of secondary liability do bring with them some added responsibilities, which is why the battle has been raging over what is meant by “actual knowledge” of the infringement to which one is accused of contributing. That approach seems unproblematic in cases like bulletin boards, at least once the operator of the service has actual notice of a specific infringing item. It becomes more problematic in cases like *Visa International*, where the paying financial institution has actual knowledge of the infringing activity in general and, at least arguably, makes a material contribution in effecting the money transfer between purchaser and infringer. However, as would be the case under SOPA, stopping all payments to the allegedly infringing site runs the risk of cutting off all transactions with that site, not just those that are the subject of the specific infringement complaint.

Further, traditional secondary liability does not generally reach at all the other objects of SOPA’s regulation, namely, advertisers. It is difficult to argue that advertisers on a site that contains or offers infringing material make a material contribution to the infringe-

¹¹⁷ These authors concede that applying their approach to conduit ISPs is considerably more complicated, as its application would involve inspecting huge amounts of internet traffic in real time and the absence of transparency, as a result of which the ISPs would be tempted to sacrifice user interests in the face of demands from rightowners. *Id.* at 1242. The authors do not attempt to apply their model to third parties like payment providers or web advertisers, but it seems that similar objections would apply in those realms, as well.

ment, or that they are in a position to control the actions of the infringer. So, we have moved from a relatively straightforward secondary liability problem for the web host in *Netcom* to giving power to intellectual property rightholders under SOPA to effect a change in otherwise entirely legal business relations between an advertiser and an allegedly infringing website. Had SOPA been enacted but proved with time to be less effective than hoped, it would be surprising if we did not hear demands for yet greater participation by third parties in copyright enforcement.

Many arguments against regulating, or at least against over-regulating, ISPs and other third parties with respect to copyright infringement on the Internet fall into traditional balancing: content owner interest in intellectual property rights enforcement versus user interests in matters like privacy, free expression, loss of rights only after a hearing by an impartial judge, and transparency in regulatory processes. Section 512 of the U.S. Copyright Act and the EU E-Commerce Directive clearly represent a set of policy compromises among various players in the light of these policy considerations, as, indeed, did SOPA and ACTA. The question still remains, however, why we are involved in this kind of policy balancing at all: How did it become accepted that private third parties should be part of the copyright enforcement scheme?

It seems to come down to that favorite weasel word of the law, reasonableness. We have long demanded that people take reasonable care so that their otherwise legal actions do not harm others. The *Netcom* court itself looked to whether the defendant acted reasonably in response to the notice of infringing activity in determining whether the defendant made a material contribution to the infringement. While “acting reasonably” and “material contribution” do not have an obvious logical connection, the infringer in *Netcom* was using Netcom’s facilities, at least arguably, with Netcom’s knowledge. Requiring the ISP to “act reasonably” seemed like a perfectly natural extension of traditional concepts of contributory infringement. However, by what legal theory do we extend this reasoning to Internet advertisers as SOPA would have done? And does it make sense to extend it to credit card companies who participate in the payment transaction, as Judge Kozinsky would have done in the *Visa* case? Perhaps a general rule is evolving in which people simply must do what is reasonable when they have a degree of knowledge of an illegal act and are in a position to stop it. If we limit this new “rule” to intellectual property infringement, the question is, why only intellectual property rights? If we are expanding the obligations of people more generally, the question is, why are we not having a fuller discussion of this radical change in our legal thinking?

THE RULE OF LAW, CONSTITUTIONAL REFORM, AND THE DEATH PENALTY IN THE GAMBIA

*Andrew Novak**

Late in the night on August 23, 2012, Gambian President Yahya Jammeh had nine death row inmates at the notorious Mile 2 Central Prison in The Gambia¹ executed to broad international condemnation.² Of the nine, three were convicted of treason, a notoriously politicized charge in a country under Jammeh's authoritarian hybrid civilian-military rule.³ Prior to this, The Gambia had only carried out a single execution since its independence from Great Britain in 1965.⁴ Specifically, Mustapha Danso was executed for the murder of an army commander during a failed coup attempt in 1981.⁵ At the time of the August 23 executions, there were 47 inmates on death row.⁶ Two of those executed were Senegalese nationals and at least

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¹ See CONSTITUTION OF THE GAMBIA, Ch. 1 (1997) (capitalizing the definite article).

² See Andrew Novak, *Nine Judicial Executions in The Gambia Undermine the Rule of Law*, AFRICLAW (Aug. 30, 2012), <http://africlaw.com/2012/08/30/nine-judicial-executions-in-the-gambia-undermine-the-rule-of-law/>; *Death Row / Gambia: "Stop Arbitrary Stream of Executions," Says UN Expert*, U.N. HUMAN RIGHTS (Aug. 28, 2012), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12461&LangID=E>. Much of the controversy centered on Foreign Minister Mamburay Njie, who was demoted to Minister for Higher Education hours before the executions took place due to his opposition. See Pa Nderry M'Bai, *Jammeh Executed First Bunch of Prisoners Friday!*, FREEDOM NEWSPAPER, Aug. 24, 2012, <http://www.freedomnewspaper.com/Homepage/tabid/36/mid/367/newsid367/7830/Gambia-Breaking-News—Jammeh-Executed-First-Batch-Of-Death-Row-Inmates-Friday-/Default.aspx>.

³ See Adam Nossiter, *Gambia Leader Declares Plans for Mass Executions*, N.Y. TIMES, Aug. 24, 2012, http://www.nytimes.com/2012/08/25/world/africa/president-yahya-jammeh-of-gambia-warns-of-mass-executions.html?_r=0; Novak, *supra* note 2 (showing that three of those executed were convicted of both murder and treason).

⁴ See Saikou Jammeh, *Death Penalty Alive and Well*, INTER-PRESS SERV. NEWS AGENCY, Dec. 14, 2010, <http://www.ipsnews.net/2010/12/death-penalty-alive-and-well-in-the-gambia/>.

⁵ *Id.*

⁶ Jo Adetunji, *Gambia 'Executes Nine Prisoners'*, THE GUARDIAN, Aug. 25, 2012, <http://www.guardian.co.uk/world/2012/aug/25/gambia-executes-nine-prisoners>.

one was placed on death row prior to the enactment of The Gambia's current constitution in 1997.⁷ The Gambia's democratic government had abolished the death penalty in 1993, but President Jammeh reinstated it in 1995 after he took power in a coup the prior year.⁸

The executions came as a shock to the international community, with sharp condemnation from the European Union, the African Union, and the Economic Community of West African States (ECOWAS), of which The Gambia is a member.⁹ The Gambia is a small nation of 1.3 million and explicitly restricts the usage of the death penalty to homicide in its constitution.¹⁰

As from the coming into force of this Constitution, no court in The Gambia shall be competent to impose a sentence of death for any offence unless the sentence is prescribed by law and the offence involves violence, or the administration of any toxic substance, resulting in the death of another person.¹¹

In January 2012, the High Court in Banjul, a trial court, sentenced Amadou Scattered Janneh, a former Minister of Information and Communication, to life imprisonment after finding that the death penalty for treason was unconstitutional.¹² In a separate appeal, however, the Gambian Supreme Court upheld the death penalty for treason in October 2012 in a challenge by convicted coup plotter Lt.

⁷ Novak, *supra* note 2. The execution of a prisoner sentenced prior to the enactment of the 1997 constitution is constitutionally problematic. See CONSTITUTION OF THE GAMBIA (1997), sched. 2, art. 16 (holding that all capital punishment laws that conflicted with the new Constitution were deemed to read "life imprisonment").

⁸ See *African Union Urges Gambia to Stop Prisoner Executions*, BBC News, Aug. 24, 2012, <http://www.bbc.co.uk/news/world-africa-19366101>.

⁹ Both Nigerian President Goodluck Jonathan and Beninois President Thomas Yayi Boni, the current chairs of ECOWAS and the African Union, respectively, have lobbied Jammeh. Jonathan intervened on behalf of the two Nigerians on death row. See Bubacarr Sowe, *Jammeh's Execution Threat 'Would Mean A Genocide'*, THE DISPATCH (Gambia), Aug. 24, 2012, <http://gambiadispatch.com/jammehs-execution-threat-would-mean-a-genocide/> (also noting early condemnation by French government).

¹⁰ Faith Karimi, *Gambia Vows to Execute All Death Row Inmates by September, Sparking Outcry*, CNN, Aug. 23, 2012, <http://www.cnn.com/2012/08/23/world/africa/gambia-inmates-execution>.

¹¹ See CONSTITUTION OF THE GAMBIA (2002), art. 18(2).

¹² See Sanna Jawara & Sidiq Asemota, *Life Sentence for Scattered Janneh*, DAILY OBSERVER (Gambia) (Jan. 18, 2012), <http://observer.gm/africa/gambia/article/life-sentence-for-scattered-jannehallafrica.com/stories/201201190272.html>.

Gen. Lang Tombong Tamba and his accomplices.¹³ The Gambian penal code still punishes treason as a capital crime and, as in other former British colonies in West Africa, the death penalty is mandatory upon conviction for homicide.¹⁴ Tamba's failed constitutional challenge against the death penalty for treason was surprising in light of both the plain text of Article 18(2) and the unanimous repeal of the mandatory death penalty for drug trafficking in April 2011.¹⁵ After all, the repeal was made on the legislature's assumption that the penalty was unconstitutional.¹⁶ Tamba's execution in spite of Article 18(2) and

¹³ See *Badjie v. State*, (2012) SC Criminal Appeal 1-7/2011 (Gambia). Col. Lamin Bo Badjie and Lt. Gen. Lang Tombong Tamba were among the seven appellants in the case. For simplicity's sake in this article, however, the unwieldy case name will be referred to in short form as *Lang Tombong Tamba*. See Press Release, Amnesty Int'l, Seven Men at Imminent Execution Risk in The Gambia (Oct. 19, 2012), available at <http://www.amnesty.org/en/for-media/press-releases/seven-men-imminent-risk-execution-gambia-2012-10-19>.

¹⁴ Upon a conviction for treason, the Penal Code authorizes a judge to choose between life imprisonment and the death penalty; consequently, the death sentence is not truly mandatory. 3 LAW OF THE GAMBIA Ch. 7, § 35 (2009). However, there is one instance where the death sentence for treason is mandatory: where a person "causes or attempts to cause the death of a member of the Government or other citizen of The Gambia with a view to securing the overthrow of the Government or with intent to coerce any other citizen of The Gambia into opposing the Government or otherwise into withdrawing or withholding his or her support for the Government." 3 LAW OF THE GAMBIA § 35(f). In other words, for homicide or attempted homicide carried out during a treasonous act, the death penalty is mandatory (this is the circumstance under which Mustapha Danso was executed in 1981). Attempted homicide committed during a treasonous act is the only circumstance under the current criminal law under which the death penalty may be administered for a crime not resulting in the death of another person. *Id.* See also Amnesty Int'l, *The Gambia – Statement for 52nd Ordinary Session of the African Commission on Human and People's Rights*, AFR 27/011/2012 at 4 (Oct. 24, 2012), available at <http://www.amnesty.org/fr/library/asset/AFR27/011/2012/en/d636ceb8-39fc-4942-9ba2-c215089a17ee/afr270112012en.pdf>; *Report: Gambia Executes First Inmates in About 30 Years*, CNN, Aug. 25, 2010, <http://www.cnn.com/2012/08/24/world/africa/gambia-executions>. But see CONSTITUTION OF THE GAMBIA (2002), art. 18(2). See generally Sidiq Asemota, *Another Murderer To Be Executed by Firing Squad*, DAILY OBSERVER (Gambia), Nov. 1, 2011, <http://observer.gm/africa/gambia/article/another-murderer-to-be-executed-by-firing-squad> ("Passing the sentence, Justice Emmanuel declared that the convict deserves another chance in life, but since the murder was carried out in a violent manner, the court has no discretion but to impose the full penalty of the law").

¹⁵ *Gambia*, DEATH PENALTY WORLDWIDE (Sep. 10, 2012), <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=gambia>.

¹⁶ See Andrew Novak, *Legislative Note: The Abolition of the Death Penalty for Drug Offenses in The Gambia*, 38 COMMONW. L. BULL. 63, 63 (2012), available at <http://dx.doi.org/10.1080/03050718.2012.646816> [hereinafter *Legislative Note*].

the repeal underscores the weakness of the rule of law in the postcolonial enclave.¹⁷

Due to these contradictions, an umbrella organization named Civil Society Associations Gambia (CSAG) brought a death penalty challenge before the ECOWAS Community Court of Justice in December of 2012.¹⁸ The Nigeria-based Socio-Economic Rights and Accountability Project (SERAP) also filed suit in the ECOWAS Court in Abuja on behalf of Michael Ifunanya and Stanley Agbaeze, two Nigerian citizens on death row in The Gambia.¹⁹ SERAP argued that The Gambia denied the two Nigerians due process of law because they had not been permitted to appeal their sentences.²⁰ SERAP is seeking a permanent injunction to stay the executions.²¹ The ECOWAS Court has expanding jurisdiction to hear human rights complaints and its decisions are binding on member states, including The Gambia.²² Activists are skeptical that The Gambia would comply with the ECOWAS Court's decisions. However, it is possible that the tentative death penalty moratorium installed after the international outcry over the August 2012 executions may remain indefinitely.²³ The prospects for total abolition, however, are dim.²⁴

This article explores the murky constitutionality of the death penalty in The Gambia. This article will pay particular attention to the apparent contradiction between the legislature's abolition of the death penalty for drug trafficking as unconstitutional and the Supreme Court's decision in *Lang Tombong Tamba* upholding the death penalty for treason. Given the widespread trend toward abolition within Af-

¹⁷ *Id.*

¹⁸ See Saikou Jammeh, *Gambia: Case to Abolish Death Penalty Falls on Toothless Court*, ALLAFRICA (Dec. 14, 2012), <http://allafrica.com/stories/201212140379.html?viewall=1>.

¹⁹ *Nigerians on Death Row: SERAP Drags Gambia to ECOWAS Court*, NIGERIAN COMPASS, Sep. 13, 2012, <http://www.compassnewspaper.org/index.php/component/content/article/90-front-page/7596-nigerians-on-death-row-serap-drags-gambia-to-ecowas-court>.

²⁰ *Id.*

²¹ See *SERAP Takes the Fight to Stop Executions of Nigerians on Death Row in Gambia to ECOWAS Court*, SOCIAL-ECON. RTS & ACCOUNTABILITY PROJECT (Sep. 12, 2012), <http://serap-nigeria.org/serap-takes-fight-to-stop-execution-of-nigerians-on-death-row-in-gambia-to-ecowas-court>.

²² See James Thuo Gathii, *The Under-Appreciated Jurisprudence of Africa's Regional Trade Judiciaries*, 12 OR. REV. INT'L L. 245, 263 (2010).

²³ See *Gambia: Death Penalty Impositions Temporarily Halted*, GLOBAL LEGAL MONITOR – L. LIBR. OF CONGRESS (Sept. 18, 2012), http://www.loc.gov/lawweb/ser-vlet/lloc_news?disp3_1205403332_text.

²⁴ *Id.*

rica, even in other Islamic-majority countries, The Gambia is one of the few steadfast supporters of capital punishment.²⁵

THE CONSTITUTIONAL FRAMEWORK OF THE DEATH PENALTY: ARTICLE 18

The Republic of The Gambia grew out of the British post of Bathurst, which was built in 1816 in present-day Banjul to control trade on the Gambian River and to suppress the slave trade.²⁶ Today it is an unstable polity despite its relatively strong history of democratic rule and good governance in the early decades after independence. The country's stability was punctured in 1994 when the Armed Forces Provisional Ruling Council (AFPRC) deposed Jawara and the Council's chairman, Yayah Jammeh, became head of state.²⁷ Until a military coup d'état in 1994 ushered in a two-year interregnum of military rule, The Gambia arguably held the record as the longest surviving multiparty democracy in Africa.²⁸ By 1994, however, public support for Jawara's ruling People's Progressive Party was eroding as persistent resource constraints and poor government performance led to a low standard of living and low levels of development.²⁹ For Jammeh's part, while he initially rode a wave of public discontent to carry out populist reforms, declining human rights standards and media censorship have hampered the democratization process.³⁰

Constitutionally, The Gambia operated under a Westminster system for the first five years following independence, with Queen Elizabeth II as head of state as represented in the colony by a governor-general.³¹ In April 1970, a new Republican constitution installed a system of checks and balances, with a president as head of state and

²⁵ See LILLIAN MANKA CHENWI, *TOWARD THE ABOLITION OF THE DEATH PENALTY IN AFRICA: A HUMAN RIGHTS PERSPECTIVE* 3, 53–56 (2005) (stating that two African countries performed executions in 2005, four in 2004, nine in 2003, four in 2002, six in 2001, and two in 2000).

²⁶ See Mark Davidheiser & Niklas Hultin, *Policing the Post-Colony: Legal Pluralism, Security, and Social Control in The Gambia*, in *POLICING IN AFRICA* 123, 125 (David J. Francis ed., 2012).

²⁷ See Abdoulaye S. Saine, *The Military and "Democratization" in The Gambia: 1994-2002*, in *POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES* 179, 179 (Julius Omozuanvbo Ihonvbere & John Mukum Mbaku eds., 2003).

²⁸ See OUSMAN A.S. JAMMEH, *THE CONSTITUTIONAL LAW OF THE GAMBIA 1965-2010*, at 3 (2011).

²⁹ See Saine, *supra* note 27, at 180–81.

³⁰ Abdoulaye Saine, *The Gambia's 2006 Presidential Election: Change or Continuity?*, 51 *AFR. STUD. REV.* 59, 61–71 (2008).

³¹ JAMMEH, *supra* note 28, at 21.

a unicameral House of Representatives.³² The country's early experiences had mixed success and there were significant infringements on civil liberties imposed after the 1981 coup attempt.³³ However, the prosecutions that followed, which included a high-profile acquittal of an opposition leader, were a testament to judicial independence in the country.³⁴ In 1982, in the wake of the coup attempt and instability in Senegal's Casamance region, Senegal and The Gambia formed the Senegambia Confederation with the intention of creating an integrated political union between the two.³⁵ Senegambia, however, failed to make significant progress toward integration and was dissolved in 1989.³⁶ A new constitution replaced the 1970 one after the AFPRC coup in 1994, which strengthened executive power, ousted the jurisdiction of the Privy Council in London as the country's highest court, created a new Supreme Court, and replaced the House with a National Assembly.³⁷ Developing constitutional jurisprudence had profound political consequences under the new constitution. In 1997, the Supreme Court found unconstitutional the provisions of an anti-corruption law that limited the rights of an accused to appeal to the highest court.³⁸ Judicial review was emerging.

Hassan B. Jallow, who later became a Gambian Supreme Court justice and the chief prosecutor at the International Criminal Tribunal for Rwanda, reflected on the abolition of the death penalty during the final year of Jawara's presidency and its reinstatement under the AFPRC military government in 1995.³⁹ According to Jallow, 87 death sentences had been handed down between independence in 1965 and abolition in 1993, of which 23 were for murder and 64 for treason related to the 1981 coup attempt.⁴⁰ These resulted in only a single execution. "By and large . . . the tradition had developed, and with it a public expectation, of the President commuting to life imprisonment, or to a lesser term, all sentences of death on the recommenda-

³² See *id.*, at 21-22; see also Jammeh, *supra* note 28, at 18 (describing how April 1970, how Gambia was governed by a constitution that was of statutory origin and was consequently not supreme, as it was in the form of an annexure to The Gambia Independence Order-in-Council, which is a Schedule to the Gambia Independence Act, an Act of the Parliament of Great Britain until April 1970).

³³ See JAMMEH, *supra* note 28, at 23.

³⁴ See *id.* at 23-24.

³⁵ See JEGGAN C. SENGHOR, *THE POLITICS OF SENEGAMBIAN INTEGRATION, 1958-1994*, at 213 (2008).

³⁶ See *id.* at 253-62.

³⁷ See JAMMEH, *supra* note 28, at 3-4.

³⁸ See *id.* at 27 (discussing the case of Alhaji Ousainou Jeng v. Gambia Commercial and Development Bank, Civil Appeal No. 4/1999 (SC)).

³⁹ See HASSAN B. JALLOW, *JOURNEY FOR JUSTICE* 344-46 (2012).

⁴⁰ See *id.* at 345-46.

tion of the Advisory Committee on the Prerogative of Mercy.”⁴¹ Jallow believed that the death penalty was incongruous with the internationally recognized right to life, and believed that the letter of the law should reflect the country’s customary practice.⁴² He viewed abolition as a “drive to deepen and consolidate our democratic achievements,” but he lamented that, because of the events to follow, abolition had been performed only by statute.⁴³ Almost precisely two years later, the AFPRC military regime reinstated the death penalty and all previously enacted death sentences.

The 1970 Constitution of The Gambia contemplated the continued existence of the common law mandatory death penalty through a savings clause of the right to life provision at Article 14(1), which read as follows:

No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of The Gambia of which he has been convicted.

The 1970 Constitution also included a provision for the executive prerogative of mercy. This included the power of pardoning and commuting criminal sentences in Article 54.⁴⁴ It also included the establishment of an Advisory Committee on the Prerogative of Mercy, to be appointed by the President, in Article 55.⁴⁵ These articles were in *pari materia* with most of the common law constitutions in Sub-Saharan Africa and were generally based on the European Convention on Human Rights, which applied to Britain’s colonies after September 1, 1953, and lapsed at independence in 1965.⁴⁶ Departing colonial officials and the drafters of the 1970 Constitution looked to the ECHR and other international sources in delineating the scope of fundamental rights.⁴⁷

The 1997 Constitution provided a more detailed right to life clause that altered the scope of the death penalty. The relevant portions of Article 18 of the 1997 Constitution of The Gambia read:

(1) No person shall be deprived of his or her life intentionally of right to life except in the execution of a sentence of death imposed by a court of competent

⁴¹ *See id.* at 346.

⁴² *See id.* at 337.

⁴³ *See id.* at 346-47.

⁴⁴ *See* CONSTITUTION OF THE GAMBIA (1970), art. 54.

⁴⁵ *See* CONSTITUTION OF THE GAMBIA (1970), art. 55.

⁴⁶ JENNIFER WIDNER, *BUILDING THE RULE OF LAW: FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA* 161 (2001).

⁴⁷ *See id.*; William Dale, *The Making and Remaking of Commonwealth Constitutions*, 42 INT’L & COMP. L.Q. 67 (1993).

jurisdiction in respect of a criminal offence for which the penalty is death under the Laws of The Gambia as they have effect in accordance with subsection (2) and of which he or she has been lawfully convicted.

(2) As from the coming into force of this Constitution, no court in The Gambia shall be competent to impose a sentence of death for any offence unless the sentence is prescribed by law and the offence involves violence, or the administration of any toxic substance, resulting in the death of another person.

(3) The National Assembly shall within ten years from the date of the coming into force of this Constitution review the desirability or otherwise of the total abolition of the death penalty in The Gambia.⁴⁸

A simple comparison between the text of the 1970 Constitution and the 1997 Constitution indicates a desire to restrict the scope of the death penalty from that contemplated by the original common law mandatory death penalty. This intention is manifest in three ways. First, the additional provision at Article 18(2) prohibits the death penalty for any crime other than an “offence involv[ing] violence, or the administration of any toxic substance, resulting in the death of another person,”⁴⁹ which appears to extinguish the death penalty for rape, armed robbery, and treason, among other capital crimes. Second, the provision at 18(3) mandates a 10 year review of the death penalty, with the hope of encouraging the abolition of the death penalty.⁵⁰ Finally, the provision at Article 82(2) concerns the Advisory Committee for the Prerogative of Mercy.⁵¹ Unlike the 1970 Constitution, the 1997 Constitution does not leave the membership of the Committee solely to the prerogative of the executive, but instead requires that the National Assembly confirm members.⁵²

The Gambia is a party to the International Covenant on Civil and Political Rights (ICCPR), which states that the death penalty may only be reserved “for the most serious crimes.”⁵³ The Gambia has not

⁴⁸ CONSTITUTION OF THE GAMBIA (1997), art. 18.

⁴⁹ *See id.*, art. 18(2).

⁵⁰ *See id.*, art. 18(3).

⁵¹ *See id.*, art. 82(2).

⁵² *Compare id.* art. 82(2) (“There shall be a Committee on the exercise of the prerogative of mercy consisting of the Attorney General and three other persons appointed by the president subject to confirmation by the National Assembly”), *with* CONSTITUTION OF THE GAMBIA (1970), art. 55(2) (“A member of the Advisory Committee shall hold office during the pleasure of the President”).

⁵³ International Covenant on Civil and Political Rights art. 3, ¶ 2, Mar. 23, 1976, 99 U.N.T.S. 85 [hereinafter ICCPR]. The Gambia ratified the ICCPR on March 22,

ratified the Second Optional Protocol to the ICCPR which commits state parties to the abolition of the death penalty. Nonetheless, the United Nations Human Rights Committee has, as early as 1982, held that the ICCPR “strongly suggest[s]. . .that abolition is desirable.”⁵⁴ The U.N. Committee generally holds that a limitation on rights must be established by law, must not be applied in a discriminatory manner, must not be applied in a manner that would undermine the substance of the right, and must be directly related and proportionate to the specific need on which the limitation is predicated.⁵⁵ The African Commission on Human and Peoples’ Rights has come to a similar conclusion and permits limitations only when “strictly proportionate with and absolutely necessary” for the advantages derived from the limitation.⁵⁶ As the Commission explained in a general principle applicable to all fundamental rights, “[g]overnments should avoid restricting rights, and have special care with regard to those rights protected by constitutional or international human rights law.”⁵⁷ The implication of these principles is that constitutional provisions providing for the death penalty should be narrowly interpreted since the death penalty limits the fundamental right to life.

The legislative saga over imposing the death penalty for drug trafficking offenses in The Gambia accords with the plain reading of Article 18(2).⁵⁸ In October 2010, the National Assembly passed a mandatory death sentence for anyone possessing more than 250 grams of cocaine or heroin.⁵⁹ The Gambia is increasingly a transit point for drugs en route from Latin America to Europe because the country’s administrative softness and its substantial tourist trade allow couriers to easily travel on commercial flights.⁶⁰ Massive drug busts, including the June 2010 seizure of two metric tons of cocaine worth about \$1

1979. See Chapter 4 *Human Rights – 4. International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 20, 2013).

⁵⁴ UN Hum. Rights Comm., Office of the High Comm’r for Hum. Rights, CCPR General Comment No. 6, ¶ 6 (Apr. 30, 1982).

⁵⁵ See *id.*, ¶¶ 6-7. See generally UN Hum. Rights Comm., CCPR General Comment No. 22, ¶ 1 (July 30, 1993) (referring to limitations on the freedom of thought, conscience, and religion, is imposing a kind of strict scrutiny on limitations of this fundamental right).

⁵⁶ *Media Rights Agenda v. Nigeria*, [2000] A.H.R.L.R. 200, ¶ 69 (ACHPR 1998).

⁵⁷ *Id.* ¶ 65.

⁵⁸ See CONSTITUTION OF THE GAMBIA (1997), art. 18(2).

⁵⁹ Karimi, *supra* note 10.

⁶⁰ See Stephen Ellis, *West Africa’s International Drug Trade*, 108/431 AFR. AFFAIRS 171, 171-72 (2009).

billion, lent urgency to the country's efforts to combat the drug trade.⁶¹ Critics have said that the drug enforcement agency is too "cozy" with alleged drug traffickers.⁶²

No prosecutions occurred due to the belief that prosecutions were constitutionally inoperable under Article 18(2) and due to protests from the Gambian bar.⁶³ The legislature abolished the penalty by substituting "life imprisonment" instead of "sentence to death" in April of 2011.⁶⁴ The legislature also increased the monetary penalties in the Drug Control Act.⁶⁵ It did not change the lesser penalties in the Drug Control Act of 2003, including a minimum ten years sentence for trafficking smaller amounts of drugs and a presumption of trafficking where a person is found in possession of one gram of heroin or cocaine, ten grams of cannabis resin, or two kilograms of cannabis.⁶⁶

The executions in August 2012 raised some of these constitutional issues. First, the Ministry of the Interior issued a press release afterwards stating that the executions were carried out by firing squad rather than hangings.⁶⁷ Executions by firing squad are exceptionally rare in common law Sub-Saharan Africa. Second, two of those executed would have been entitled to certain internationally recognized diplomatic rights because they were foreign nationals of Senegal.⁶⁸ Because the executions were carried out secretly and suddenly, the lack of warning to diplomatic officers, families, and attorneys of the prison-

⁶¹ See *Legislative Note*, *supra* note 16, at 63.

⁶² Peter Clotey, *Gambian Lawyer Concerned About Death Penalty for Drug Offenses*, VOICE OF AMERICA NEWS (Oct. 8, 2010), www.voanews.com/content/Gambian-lawyer-concerned-about-death-penalty-for-drug-offenses-104537659/156005.html.

⁶³ See, e.g., *Gambian Lawyer Faults Legislation on Drug Trafficking*, JOLLOFNEWS (Nov. 21, 2010) <http://jollofnews.com/human-rights/1503-gambian-lawyer-faults-legislation-on-drug-trafficking>.

⁶⁴ *Gambia: Death Penalty for Drug Offenses Abolished*, L. LIBR. OF CONG. – GLOBAL L. MONITOR (Apr. 11, 2011), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402619_text.

⁶⁵ *Id.*

⁶⁶ Drug Control Act, 3 L. of The Gambia Ch. 13 (2009), *amended by* Drug Control (Amendment) Act of 2011, art. 44, ¶ 4 (Oct. 2011).

⁶⁷ *9 Death Row Inmates Executed*, DAILY OBSERVER (Gambia), Aug. 28, 2012, <http://observer.gm/africa/gambia/article/9-death-row-inmates-executed>.

⁶⁸ See Vienna Convention on Consular Relations art. 37(a), Apr. 24, 1963, 596 U.N.T.S. 261 (protecting the consular notification rights of death row prisoners who are foreign nationals in the country in which they are to be executed). See, e.g., Howard S. Schiffman, *The LaGrand Decision: The Evolving Legal Landscape of the Vienna Convention on Consular Relations in U.S. Death Penalty Cases*, 42 SANTA CLARA L. REV. 1099 (2002).

ers is, at best, contrary to dicta of the African Commission and, at worst, a violation of international law.⁶⁹

Most importantly, one of those executed had been on death row since 1988, prior to the new constitutional provisions at Article 18 and Schedule 2 of the 1997 Constitution.⁷⁰ Schedule 2 of the 1997 Constitution states at Article 16:

Where any law makes provision for a sentence of death in any case other than that provided for in section 18 (2), the law shall have effect as if imprisonment for life were substituted for that penalty.⁷¹

Because the prisoner in question, Lamin Darboe, had been on death row since 1988, his death sentence would have been automatically substituted for life imprisonment if his case involved a death sentence “other than that provided for in section 18 (2).” He was convicted of murder carried out in a violent fashion, so as a technical matter his sentence would survive Article 18(2) under the new constitution. However, Gambian opposition leader Halifa Sallah confirmed in a letter to President Jammeh that all prisoners then on death row had had their sentences commuted to life imprisonment when the then-House of Representatives abolished the death penalty in 1993.⁷² Those death sentences, according to Sallah, were unconstitutionally reinstated in August 1995 when an AFPRC decree again legalized capital punish-

⁶⁹ See, e.g., *Interights v. Botswana*, (2003) AHRLR (ACHPR 2003), Comm. 240/2001, reprinted in 2003 AFR. HUM. RTS. L. REPORTS 55, 60-61 (2005). One challenge in this case was that failure to give reasonable notice of the date and time of execution amounts to cruel, inhuman, and degrading punishment. The Commission did not find a violation, but stated that “a justice system must have a human face in matters of execution” by affording a prisoner an opportunity to arrange his affairs, be visited by family members, and receive spiritual advice. *Id.* at p. 61, ¶ 41. A violation of international law could occur, for instance, if the prisoner had not exhausted appeals or had not had an opportunity to seek clemency or pardon. See, e.g., *Aitken v. Jamaica*, Case No. 12.275, Report No. 58/02, Inter-Am. C.H.R., Doc. 5, rev. 1 ¶¶ 113-14 (2002) (finding violation of Inter-American Convention on Human Rights for failure to permit defendant the opportunity to seek clemency, mercy, or pardon).

⁷⁰ PA NDERRY M’BAI, *THE GAMBIA: THE UNTOLD DICTATOR YAHYA JAMMEH’S STORY* 54, 65-66 (2012). M’Bai is the former editor of *Freedom Newspaper* and lives in exile in the United States. *Id.*, at 180; *Gambia Leader Vows to Execute Death Row Prisoners*, NPR (Aug. 30, 2012, 12:00 PM), <http://www.npr.org/2012/08/30/160314862/gambia-leader-vows-to-execute-death-row-prisoners> (critiquing the government’s press release following the executions).

⁷¹ See CONSTITUTION OF THE GAMBIA, sched. 2, art. 16 (1997).

⁷² Halifa Sallah, *Gambian Opposition Leader Writes to President Jammeh*, JOLLOFNEWS (Aug. 27, 2012), <http://www.jollofnews.com/human-rights/3470-20120827-gambian-opposition-leader-writes-to-president-jammeh>.

ment.⁷³ Certainly, even if Darboe's death sentence could be interpreted as constitutional, his reinstatement to death row when The Gambia reinstated the death penalty in 1995 was not in accordance with ordinary rule of law principles.

Although Darboe's execution was the most constitutionally problematic of the nine, several others raised additional objections. A word must be said about the mental torture or distress that takes place in the mind of a prisoner as he or she awaits final execution.⁷⁴ Courts around the world have recognized that delays longer than several years or demeaning conditions on death row could turn an otherwise constitutional death sentence into a sentence that is cruel, inhumane, and degrading.⁷⁵ Four of those executed in August 2012 had been on death row for more than ten years, and six of them for about five years or more.⁷⁶ These executions were not in accordance with the emerging international consensus that undue delay on death row becomes cruel and degrading punishment.⁷⁷

⁷³ *Id.*

⁷⁴ See Stuart Grassian & N. Freidman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT'L J. L. & PSYCHIATRY 49 (1986) (originally defining death row syndrome based on Grassian's research on the mental deterioration of fourteen death row inmates who were held in solitary confinement); see also Caycie D. Bradford, Note, *Waiting To Die, Dying To Live: An Account of the Death Row Phenomenon from a Legal Viewpoint*, 5 INTERDISC. J. HUM. RTS. L. 77, 82 (2010) (exploring the vast literature and case law that developed around the death row syndrome since Grassian's article). According to Bradford, the death row syndrome has both a temporal component (the length of time a prisoner spends on death row) and a physical one (the harsh conditions to which an individual is subject on death row). *Id.* at 79.

⁷⁵ The iconic cases arose from the European Court of Human Rights in 1989, the Supreme Court of India in 1989, the Supreme Court of Zimbabwe in 1993, the Privy Council in 1993 (appeal taken from Jamaica), the Supreme Court of Canada in 2001, and the Supreme Court of Uganda in 2009. See, e.g., *Soering v. United Kingdom*, Eur. Ct. H.R. (ser. A) No. 161 (July 7, 1989), reprinted in 28 I.L.M. 1053 (1989); *Triveniben v. State of Gujarat*, (1989) 1 S.C.J. 383 (India); *Catholic Comm'n for Justice & Peace v. Attorney-Gen.*, (1993) L.R.C. 277 (Zimb. S.C.); *Pratt v. Attorney-Gen. of Jam.*, (1993) UKPC 1, [1994] 2 A.C. 1 (P.C.); *United States v. Burns*, [2001] 1 S.C.R. 283, 353 (Can.); *Attorney Gen. v. Kigula et al.*, [2009] UGSC 6 at 63-64 (Uganda). Justice Stephen Breyer of the United States Supreme Court has recognized the death row phenomenon may be a violation of the Eighth Amendment of the United States Constitution. See *Knight v. Florida and Moore v. Nebraska*, 528 U.S. 990, 120 S.Ct. 459, 462 (1999) (Breyer, J., dissenting from a denial of certiorari).

⁷⁶ 9 *Death Row Inmates Executed*, supra note 67 (quoting government press release and giving the lengths of time the executed prisoners spent on death row).

⁷⁷ Courts have come to differing conclusions as to when unconstitutional delay on death row begins. Compare *Kigula*, [2009] UGSC, Constitutional Appeal No. 03/2006 (Uganda) (arguing that the delay begins from the time all appeals were ex-

COMPETING INTERPRETATIONS: *AHMADOU SCATTRED JANNEH* AND *LANG TOMBONG TAMBA*

On January 17, 2012, High Court Judge Emmanuel Nkea sentenced former Information Minister Amadou Scattred Janneh to life imprisonment for treason for distributing t-shirts reading “End Dictatorship Now.” According to one witness, these t-shirts were “capable of inciting contempt, hatred and disaffection against the democratically elected government of The Gambia and the person of the President.”⁷⁸ Janneh and his accomplices were duly convicted of unlawfully conspiring and endeavoring to overthrow the Government of The Gambia because they planned to protest President Jammeh’s government. In determining the judgment to be passed on Janneh, Judge Nkea noted that, “[s]ection 35 of the Criminal Code provides for both the death penalty and life imprisonment for treason. The death penalty would have been the proper sentence for this offence.”⁷⁹ He reasoned, however, that Article 18(2) reserved the death penalty for homicides and that the transitional provision at Schedule 16, Article 2, which substitutes the penalty of life imprisonment for any Criminal Code provision authorizing the death penalty, was outside the scope of Article 18(2).⁸⁰ Judge Nkea’s ultimate sentence for Janneh was life imprisonment with three years hard labor:

My understanding of the above is that for a court to be competent to impose a death sentence, it must be shown that the offence committed by the convict involved violence or the administration of toxic substance which in any case results in the death another.

These constitutional limitations warrant this Court to spare the 1st convict [Janneh] his life; I have no option than to follow the Constitution.⁸¹

Judge Nkea’s interpretation of Article 18(2) is the correct one even if imposing life imprisonment for printing one hundred t-shirts is otherwise objectionable. Amnesty International considered Janneh, a dual citizen of The Gambia and the United States, a prisoner of con-

hausted) *with Catholic Comm’n v. Attorney-Gen. of Zim.*, (1993) L.R.C. (Zimb.) (arguing that the delay begins from the time the sentences were initially handed down). In this case, however, ten years would be too long under either standard, and five years may be as well.

⁷⁸ *State v. Janneh*, Crim. Case No. HC/323/11/CR/101/AO at 4 (Gambia).

⁷⁹ *Id.* at 37.

⁸⁰ *Id.* at 37-38.

⁸¹ *Id.* at 38. See also Sanna Jawara & Sidiq Asemota, *Life Sentence for Scattred Janneh*, DAILY OBSERVER (Gambia), Jan. 18, 2012, <http://observer.gm/africa/gambia/article/life-sentence-for-scattred-janneh>.

science.⁸² He was ultimately released and granted asylum in the United States after international pressure resulted in his pardon.⁸³

The Supreme Court of The Gambia had an opportunity to interpret Article 18 in its October 2012 decision in the treason trial of Lang Tombong Tamba and six co-defendants.⁸⁴ The High Court imposed a death sentence for Tamba for plotting a coup attempt against Jammeh's regime and the Court of Appeal subsequently affirmed the sentence. Tamba's conviction was based on testimony that he and the other appellants sought to procure arms and train mercenaries.⁸⁵ However, Tamba and the others did not bring a constitutional challenge to the death penalty for treason until after their conviction at the trial court level.

After upholding the merits of the convictions, the Court addressed the constitutional challenge by first turning to the definition of "violence" in Article 18(2). According to the Court, "violence" was a constitutional element that must be proven in lieu of poisoning to trigger the death penalty.⁸⁶ Lawyers for the appellants argued that the crime did not involve actual violence that resulted in the death of another person. After some discussion of the definition of the word "violence," the Court found that violence "does not have to be actualized; it is sufficient if violence is intended" to satisfy the requirements of Article 18(2).⁸⁷ In the Court's defense, it is reasonable to question whether one could ever commit homicide without violence. However, the answer is likely yes as the provision separates out poisoning ("administration of a toxic substance") as being *non-violent*. This makes it likely that the drafters intended to separate out a type of aggravated homicide (i.e., homicide with violence) and premeditated homicide (i.e., poisoning) from other types of homicide such as mercy killing or infanticide by abandonment.

As to the appellants' objection that Article 18(2) only permits the death penalty where the "death of another person" has resulted from the poisoning or violent act, the Court's decision is critically flawed. As Justice Sock writes (paying special attention to his placement of the commas):

⁸² Amnesty Int'l, *Dr. Amadou Scattred Janneh – Serving Life Imprisonment for the Printing and Distribution of T-shirts in The Gambia*, AFR 27/004/2012 at 1 (July 2012), available at <http://www.amnesty.org/fr/library/asset/AFR27/004/2012/fr/d99cd4a8-b7a7-4f31-b627-87699c189c27/afr270042012en.pdf>.

⁸³ Adam Nossiter, *Jesse Jackson Helps Free 2 From Gambia Prison*, N.Y. TIMES, Sept. 22, 2012, at A7.

⁸⁴ See *Badjie et al. v. State*, [2012] SC Criminal Appeal 1-7/2011 (Gambia).

⁸⁵ *State v. Lang Tombong Tamba*, [2010] Crim. Case No. HC/153/10/CR/058/AO (Gambia).

⁸⁶ See *Badjie et al. v. State*, [2012] SC Criminal Appeal 1-7/2011 at 14 (Gambia).

⁸⁷ *Id.* at 15.

Counsel's argument that the violence must result in the death of another person is in my opinion a misinterpretation of section 18(2) arising from a misconstruction of the word "or." There are in my opinion two conditions that must be met under the section, to wit, (i) the sentence of death must be prescribed by law for the offence and (ii) the offence must involve violence "or" the administration of any toxic substance, resulting in the death of another person.⁸⁸

As explained below, even if this construction is reasonable under a fair reading of Article 18(2), this holding violates ordinary principles of constitutional interpretation, international customary law on fundamental rights, and legislative intent as expressed in the repeal of the mandatory death penalty for drug offenses.

As a textual matter, this holding violates ordinary principles of constitutional interpretation because it manipulates the commas in such a way that it merges two clauses. In essence, Justice Sock removed the second comma from the clause by writing that Article 18(2) permitted the death penalty where an offense "involves violence, or the administration of any toxic substance[] resulting in the death of another person" (second comma removed). To restate this, according to the Court, Article 18(2) permits the death penalty where an offense (a) involves violence, *or* (b) involves poisoning that results in the death of another person. Furthermore, Justice Sock's *misquoted* the actual text by writing "the offence must involve violence 'or' the administration of any toxic substance, resulting in the death of another person."⁸⁹ By failing to use the first comma, and by placing the word "or" in quotes, he ignored the importance of the *second* comma that set apart the poisoning clause and clearly linked the phrase "involves violence" to the phrase "resulting in the death of another person."

Assuming that Article 18(2) is ambiguous, the position that more narrowly infringes on fundamental rights is preferred where two interpretations of a clause are possible. As the International Covenant on Civil and Political Rights restricts the penalty only to the "most serious crimes," the Court should have read Article 18(2) in a manner that would have been most consistent with international law.⁹⁰ The right to life in international human rights instruments is typically one

⁸⁸ *Id.*

⁸⁹ Compare *id.*, with CONSTITUTION OF GAMBIA, art. 18, ¶ 2 (1997).

⁹⁰ International Covenant on Civil and Political Rights art. 6, Dec. 19, 1966, 999 U.N.T.S. 85; see also Second Optional Protocol to the International Covenant on Civil and Political Rights art. 1, ¶ 2, July 11, 1991, 1642 U.N.T.S. 414 ("Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.").

of the most fundamental human rights, which means that limitations must be read narrowly while the obligations on states must be read expansively.⁹¹ Indeed, the death penalty for crimes other than homicide or serious bodily injury is heavily disfavored in international law.⁹² The death penalty for treason warrants the strictest of limitations because such prosecutions, like Lt. Gen. Tamba's, could be politically motivated.

Finally, the Court's holding also conflicted with legislative intent. The legislature made clear in its repeal of the mandatory death penalty for drug trafficking in April 2011, only eighteen months after the provision became law, that it considered requiring the death penalty for crimes other than homicides to be constitutionally inoperable. The determination that the death penalty may be permissible for all violent crimes, not just homicide, under Article 18(2) could sweep in large numbers of people convicted of crimes, such as rape or aggravated assault, which involve "violence" (or at least the intent of violence) even though the Gambian penal code does not currently contemplate the death penalty for these crimes.

The Court next addressed a novel argument raised by appellants' counsel concerning the problem posed by Article 18(3). Article 18(3) says that, "[t]he National Assembly shall within ten years from the date of the coming into force of this Constitution review the desirability or otherwise of the total abolition of the death penalty in The Gambia."⁹³ The Court acknowledged that this constitutionally required review never took place. In 2007, a Gambian newspaper questioned whether the National Assembly had abdicated its responsibility in letting the ten year deadline pass.⁹⁴ Appellants' representatives argued that the death penalty was abolished in Gambian law as a consequence of this sunset provision. However, Justice Sock wrote that the failure of the legislature to comply with this provision "cannot by any stretch of the imagination equate to an abolition of [the] death penalty

⁹¹ Elizabeth Wicks, *The Meaning of "Life": Dignity and the Right to Life in International Human Rights Treaties*, 12(2) HUM. RTS. L. REV. 199, 201 (2012). Although the right to life may seem "primary" in some sense, that is not formally the case in international instruments and the right is less absolute than, for instance, prohibitions on torture and slavery in international law. See PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 130 (1983). But even though some balancing is contemplated by the right due to competing considerations such as self-defense, as with all fundamental rights, derogations and limitations must be looked at with a skeptical eye.

⁹² ELIZABETH WICKS, *THE RIGHT TO LIFE AND CONFLICTING INTERESTS* 70 (2010).

⁹³ CONSTITUTION OF THE GAMBIA, art. 18, ¶ 3 (1997).

⁹⁴ Ousman Njie, Editorial, *The Death Penalty, When Will There Be A Review?*, FOROYAA, Oct. 1, 2007, <http://www.foroyaa.gm/editorial/732-gambia-news-archive>.

in The Gambia.”⁹⁵ He reasoned that the outcome of such a review could have been either retention or abolition, which therefore made it impossible to guess what the outcome would have been.⁹⁶ However, the simple existence of the constitutional clause in the first place shows that the drafters had some discomfort with the death penalty.⁹⁷ A decision giving due weight to the drafters’ intentions may not have dismissed the argument so easily.

Chief Justice Emmanuel Akomaye Agim came to substantially the same conclusions as Justice Sock in his concurring opinion. In his analysis of Article 18(2), Chief Justice Agim explained that the word “or” is a disjunctive that separates the preceding clause from the clause that follows. “There is nothing in that provision requiring that the offence involving violence must result in death,” he explained.⁹⁸ The only requirement that applies to both violent crimes and poisoning is that they be prescribed by law. He also agreed with Justice Sock that treason for coup plotting was a crime involving violence even though no actual physical violence had occurred in Tamba’s case. “The use of violence is inherent in the nature of the offences,” he wrote.⁹⁹ He also confirmed that the National Assembly’s failure to review the death penalty’s legality under Article 18(3) within 10 years did not make the death penalty unconstitutional, because the drafters would have included such a provision if that was their intention.¹⁰⁰ The other three justices on the five-justice panel of the Supreme Court, Ade Renner-Thomas, Henrietta Abban, and Emmanuel Abeyi, concurred in the reasoning and the judgment. Lt. Gen. Tamba and his accomplices still have the ability to seek judicial review of the decision of the five-justice panel before the full seven-member Supreme Court.¹⁰¹ At the time of this writing, it is unclear whether they have sought this type of review.

⁹⁵ *Badjie v. State*, [2012] SC Criminal Appeal 1-7/2011 at 16 (Gambia).

⁹⁶ *Id.* at 16-17.

⁹⁷ See Lamin J. Darbo, *The Constitution Vs. The Killer President*, THE GAMBIA ECHO (Sept. 17, 2012), <http://thegambiaechos.com/index.php/permalink/3380.html>. Darbo, who presumably has no relation to the executed prisoner, argues that the death penalty in The Gambia became unconstitutional on January 17, 2007, ten years after the coming into force of the 1997 Constitution, as the National Assembly never performed the ten year review.

⁹⁸ *Badjie v. State*, [2012] SC Criminal Appeal 1-7/2011 at 46 (Gambia).

⁹⁹ *Id.* at 48.

¹⁰⁰ *Id.* at 49.

¹⁰¹ *7 Gambians Risk Execution: Amnesty International Blows Whistle*, KIBAARO NEWS (Oct. 19, 2012), <http://kibaaro.com/7-gambians-risk-execution/> (“Ordinarily, a panel of seven judges can review Supreme Court decisions”).

THE DEATH PENALTY CHALLENGE AT THE ECOWAS
COMMUNITY COURT OF JUSTICE

The ECOWAS Community Court of Justice in Abuja, Nigeria, is a supranational tribunal with expanding jurisdiction to hear human rights complaints from its West African members. Established by treaty in 1975, the ECOWAS Community Court is relatively dynamic and has a fairly broad jurisdiction compared to other African regional tribunals.¹⁰² The Gambia, however, has a record of failing to enforce judgments from the Court and has refused to honor the judgments awarded to two journalists, Musa Saidykhan and Chief Ebrima Manneh, who were illegally arrested and tortured in The Gambia.¹⁰³ Jammeh's regime does engage with ECOWAS in other forums, but it risks ECOWAS sanctions since a failure to enforce the judgments violates the ECOWAS Treaty.¹⁰⁴

Following the August 2012 executions, The Gambia was the subject of two suits before the ECOWAS Court. SERAP brought the first on behalf of two Nigerian death row prisoners in September 2012.¹⁰⁵ CSAG brought the second in October 2012 on behalf of all death row prisoners and on behalf of the families of the executed, who sought monetary damages and the return of the deceased prisoners' bodies.¹⁰⁶ SERAP argued that the two Nigerian nationals did not exhaust their rights of appeal and risked secret execution. It sought an order of perpetual injunction restraining The Gambia from carrying out the executions.¹⁰⁷ Both suits claimed that The Gambia violated the right to life, the prohibition on cruel and degrading punishment, the right to a fair trial, and other provisions of the African Charter and the ICCPR.¹⁰⁸ A hearing date of May 7, 2013, was set in the SERAP challenge, after the presiding judge, Anthony Benin, rejected the de-

¹⁰² JAMES THUO GATHII, *AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES* 279-282 (2011).

¹⁰³ Andrew W. Maki, *Gambia's Compliance with the ECOWAS Court*, HUM. RTS. BRIEF (Mar. 16, 2010), <http://hrbrief.org/2010/03/africacourts-17-3-1/>.

¹⁰⁴ *ECOWAS Sanctions Against Gambia Looms*, DAILY NEWS (Gambia) (Aug. 8, 2012), <http://dailynews.gm/africa/gambia/article/ecowas-sanctions-against-gambia-looms>.

¹⁰⁵ *Nigerians on Death Row: SERAP Drags Gambia to ECOWAS Court*, NIGERIAN COMPASS (Sept. 13, 2012), <http://www.compassnewspaper.org/index.php/component/content/article/90-front-page-/7596-nigerians-on-death-row-serap-drags-gambia-to-ecowas-court>.

¹⁰⁶ Press Release, Civil Soc'y Ass'ns Gam., CSAG Sues Gambia Government over Execution of Death Row Inmates (Oct. 12, 2012), available at <http://civilsociety-gambia.org/csag-sues-gambia-government-over-execution-of-death-row-inmates/>.

¹⁰⁷ SERAP v. The Gambia, ECW/CCJ/AAP/11/12 (ECOWAS Sept. 2012) (Nigeria), available at <http://serap-nigeria.org/the-filed-court-paper/>.

¹⁰⁸ See *id.*; Press Release, Civil Soc'y Ass'ns Gam., *supra* note 106.

defendants' initial jurisdictional challenge and found that the Court's human rights jurisdiction was proper.¹⁰⁹

CONCLUDING REMARKS

Article 18(2) of the 1997 Gambian constitution has considerable promise as the only constitutional provision in Africa to explicitly restrict the death penalty to homicides involving violence or premeditated poisoning. While the lower courts have interpreted this provision as precluding the death penalty for treason, the Supreme Court of The Gambia upheld the death penalty for treason in the constitutional challenge brought by Lang Tombong Tamba and his co-defendants. The Court found that Article 18(2) contemplated the death penalty for all crimes involving "violence," including non-homicide crimes, as well as homicide by poisoning. This interpretation violated principles of statutory construction, legislative intent as expressed in the abolition of the mandatory death penalty for drug trafficking in 2011, and international human rights laws that strongly disfavor the death penalty and require the narrowest interpretation of limitations on the right to life.

While international law permits the death penalty for the "most serious crimes," the human rights instruments to which The Gambia is a party prohibit arbitrary deprivation of life and mandate that limitations to the right to life be interpreted in the narrowest possible fashion. While it may be a matter of opinion as to whether the executions of August 2012 were carried out in accordance with the 1997 Gambian constitution, the government sharply undermined its commitment to the rule of law when it failed to treat the death penalty as an exceptional punishment to be applied only in the narrowest and surest cases. The execution of Lamin Darboe, whose death sentence had been commuted to life imprisonment and then reinstated, was particularly troubling in light of international and regional human rights standards. The two challenges pending before the ECOWAS Community Court of Justice may not give closure in light of The Gambia's non-compliance with earlier judgments of the tribunal. However, they may provide the final say as to whether the death penalty, even if technically compliant with the blurry constitutional parameters of Article 18, was in conformity with international law.

¹⁰⁹ *ECOWAS Court to Review Death Sentence on Two Nigerians by Gambian Court*, PREMIUM TIMES (Nigeria), Feb. 5, 2013, available at <http://allafrica.com/stories/201302061024.html?viewall=1>.

LEGAL STABILITY CONTRACTS IN COLOMBIA: AN APPROPRIATE INCENTIVE FOR INVESTMENTS?

Historical Causes and Impact Analysis of Law 963 of 2005

*Álvaro Pereira**

ABSTRACT

Current global economic order is openly dependent on foreign direct investment (FDI). At least since the 1990's, developing countries have competed to attract FDI because it is considered the best source of technology, employment, and financial resources. Colombian Law 963 of 2005, which is a response to said competition, allows the signature of Legal Stability Contracts (LSCs) between the State and investors for the purpose of stabilizing the rules guiding investment decisions, for up to 20 years. Legal stabilization has successfully proven to increase FDI inflows. Nevertheless, incentives for FDI have been subject to several critiques that stress the excess of benefits for foreign investors in exchange for weak commitments.

Wanting to examine the suitability of Law 963 in attracting FDI to Colombia and in increasing its positive impact, I studied the "state of art" of FDI and legal stabilization, the historical causes of incentives in Colombia, and the LSCs signed in the light of said Law. The results of my study reveal that the law successfully met the expectations of increasing investments. However, there is also evidence that early reforms and a deficient application of the law prevented it from increasing the positive social impact of investments.

Key words: Legal Stability Contracts, Foreign Direct Investment, Investment Incentives, Stabilization Clauses, Colombia, Latin America.

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LIST OF ABBREVIATIONS

CAN	Comunidad Andina (<i>Andean Community</i>)
COP	Colombian Pesos
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
ISI	Import Substitution Industrialization
LSC	Legal Stability Contract
TNC	Transnational Corporation
UN	United Nations
UNCLAC	United Nations Economic Commission on Latin America and the Caribbean
UNCTAD	United Nations Conference on Trade and Development

INTRODUCTION

On July 8, 2005, the Congress of Colombia approved Law 963, which created Legal Stability Contracts (“LSCs”). The purpose of LSCs is to attract foreign and local investments¹ by having the State commit to stabilize rules that were determinant for the investment decision for up to twenty years.² Investors, in turn, are required to invest a minimum of approximately USD \$1.5 million and to comply with other specifications related to the type of project and their economic and social impact.³

LSCs are part of a wider national policy aimed at attracting foreign direct investment (“FDI”).⁴ FDI is important due to its generation, *inter alia*, of technology, employment, and financial resources.⁵ Consequently, less industrialized countries can acquire amounts and qualities of assets that would otherwise be impossible to achieve without FDI.⁶ This also explains the fierce competition between states for FDI, which is described as “*both intense and widespread.*”⁷

Colombia began the 21st century with major social and economic challenges, some of which could be resolved with FDI’s contributions. These challenges, such as the country’s internal armed conflict and legal instability, were a few of the main forces preventing an increase in foreign investments.⁸ After other states in the region successfully implemented incentives, the Colombian government quickly encouraged LSCs with the purpose of raising FDI inflows despite the nation’s deficiencies.

Law 963 of 2005 has been subject to critiques since it entered into force. It is often condemned for, among other things, violation of competition standards, for restricting legislators’ constitutional pow-

¹ Juliana Castaño & Paola Galeano, *Los Contratos de Estabilidad Jurídica en Colombia: ¿Una verdadera Herramienta Para la Protección de los Intereses del Inversionista Extranjero y del Estado Colombiano?*, 2 EAFIT J. OF INT’L L. 68, 69 (2011).

² L. 963, julio 8, 2005, DIARIO OFICIAL [D.O.] art. 6 (Colom.).

³ *Id.* art. 2; MINISTERIO DE COMERCIO, INDUSTRIA Y TURISMO, 1 GUÍA LEGAL PARA HACER NEGOCIOS EN COLOMBIA, no. 3, Jun. 2011, at 13.

⁴ Castaño, *supra* note 1, at 69.

⁵ See Robert E. Lipsey, *Foreign Direct Investment and the Operations of Multinational Firms: Concepts, History, and Data 8-9* (Nat’l Bureau of Econ. Research, Working Paper No. 8665, 2001).

⁶ See Gordon Hanson, *Should Countries Promote Foreign Direct Investment?* 11 (U.N. Conference on Trade & Dev., G-24 Discussion Paper Series No.9, Feb. 2001).

⁷ CHARLES OMAN, ORGANISATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, POLICY COMPETITION FOR FOREIGN DIRECT INVESTMENT 77 (2000), available at <http://www.oecd.org/mena/investment/35275189.pdf>.

⁸ See CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, CONSIDERACIONES TÉCNICAS PARA LA EVALUACIÓN DE SOLICITUDES DE CELEBRACIÓN DE CONTRATOS DE ESTABILIDAD JURÍDICA 1 (Documento Conpes, No. 3366, Aug. 1, 2005).

ers, and for long-term stabilizations that do not guarantee a significant impact. Incentives for FDI, particularly the ones contemplating legal stability, are per se controversial because they enlarge investors' powers and require major sacrifices by host economies.⁹

The main purpose of my study was to evaluate whether Law 963 effectively addresses its own purposes (increasing investments and their social impact) and to identify the causes of possible flaws. Results will also contribute to the discussions on the suitability of incentives for FDI and of agreements for stabilization.

My research integrates three types of analysis to accomplish this purpose. The first form of analysis consists of a review of literature on FDI and development, and of both Colombian and Latin American economic history. The aim is to identify general and specific causes behind investment incentives in Colombia and the region. The second method of analysis concerns the study of all available signed contracts. I studied the sixty-four LSCs that were signed as of September of 2010 with the intent of evaluating the impact of the law and the ways it has been applied. I chose these particular contracts because they are publicly accessible. However, the number of signed contracts has not significantly increased since then (68 as of December of 2012), which validates the results and the inferences based on them. The last group of resources consists of two interviews with key players in the negotiation of LSCs, with the purpose of identifying patterns in the application of the law and perceptions of the reforms.

Hence, the first section of the text briefly introduces FDI and why it is increasingly important in both the global and the Colombian economy. The second and third sections, respectively, explain the role of FDI within Colombia during the 20th and 21st centuries, with particular emphasis on the policies that affected it, since that history was the basis for current incentives. The fourth section introduces the relation between legal stability and investment, and concludes with a comparative analysis of the different instruments that address it. Section five presents Law 963 of 2005 and all relevant information related to the establishment of LSCs, while the sixth and seventh segments examine results and conclusions.

⁹ The biggest controversy arises from the confrontation between developing countries in need of capital and investors' interests in profitability, a relation in which evidence shows the host States to be weaker. Recent studies have found that alternatives like strengthening negotiation skills and capacity, and pressure on multinational corporations to comply with environmental and social standards can significantly improve the negotiation of stabilization clauses in favor of the host economy. See U.N. Secretary-General, *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development*, § 41, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

I. FOREIGN DIRECT INVESTMENT

Foreign Direct Investment is the transfer of assets from one country to another “for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.”¹⁰ Investors who own 10 percent or more of the equity stake, ordinary shares, or voting power of a company, are generally considered to have control or management authority.¹¹ Emphasizing this control is not anecdotic because it reflects “lasting interest,” which is a positive element of FDI that refers to the host country’s aptitude for permanency.¹² This characteristic also differentiates it from other types of foreign investments, such as portfolios, in which the interest is solely on a future return like dividends or capital.¹³

FDI is noteworthy because, by definition, it is expected to generate wealth in the receiving country. It is not restricted to the transfer of financial resources, but is considered a source of technology, know-how, employment, and generally everything needed to make the investment profitable.¹⁴ All of these in turn are considered to have positive social impact.¹⁵

FDI’s increasing importance to the world’s economy,¹⁶ especially for developing countries,¹⁷ might be related to that positive social impact. As Jensen explains, the lasting interest inherent in FDI suggests a long-term relation with the host country, which maximizes its benefits and its impact in economic growth and development.¹⁸

The participation of transnational corporations (“TNCs”) could be another cause for the proliferation of FDI. These enterprises, also known as multinational corporations, have operations in different

¹⁰ See MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 8 (3d ed. 2004).

¹¹ United Nations Conference on Trade & Development [UNCTAD], *WORLD INVESTMENT REPORT 2012 – METHODOLOGICAL NOTE 3* (2012), available at http://unctad.org/en/PublicationChapters/WIR2012MethodologicalNote_en.pdf.

¹² See SORNARAJAH, *supra* note 10, at 8 n.19.

¹³ IMAD A. MOOSA, *FOREIGN DIRECT INVESTMENT: THEORY, EVIDENCE AND PRACTICE* 1 (2002).

¹⁴ See Lipsey, *supra* note 5, at 8-9.

¹⁵ *Contra* Hanson, *supra* note 6, at 13 (“This interpretation, however, is subject to the same concerns about omitted variables and endogeneity bias. . .”).

¹⁶ According to 2011 World Investment Report, FDI represents 5% or more of the GDP in most countries. See UNCTAD, *WORLD DEVELOPMENT REPORT - NON-EQUITY MODES OF INTERNATIONAL PRODUCTION AND DEVELOPMENT 2-38* (2011) [hereinafter *WORLD DEVELOPMENT REPORT*]; see also *infra* p. 11, Chart 1.

¹⁷ *WORLD DEVELOPMENT REPORT*, *supra* note 16, at 21.

¹⁸ NATHAN M. JENSEN, *NATION-STATES AND THE MULTINATIONAL CORPORATION* 32-39 (2006).

countries,¹⁹ a particularity that has changed the traditional notion of FDI, which was composed primarily of firms.²⁰ Their dominant position in FDI flows worldwide is so apparent that recent studies have found FDI “in virtually every nation in the world.”²¹ It is common for governments to seek to attract TNC investments and to give these enterprises wide negotiation powers because TNCs typically are leaders in innovation and have millions of dollars in resources.²²

According to contemporary economic theory, FDI is the most effective engine for development when compared to previous alternatives such as aid or credit.²³ The main reason is that it is a good source of financial resources,²⁴ new jobs,²⁵ and technology,²⁶ all of which are linked to improving export competitiveness.²⁷

Nevertheless, there is an increasing contention that FDI has an uncertain impact on development.²⁸ One line of argument asserts that for FDI to have a positive impact it is necessary to direct FDI through policy. Alternatives like promoting FDI for specific sectors²⁹

¹⁹ See S. Lall & P. Streeten, *TNCs and Welfare of Host Countries: Analytical Considerations*, in U.N. LIB. ON TRANSNAT'L CORP., TRANSNATIONAL CORPORATIONS AND ECONOMIC DEVELOPMENT 43, 43-45 (Sanjaya Lall ed., 1993).

²⁰ See FOREIGN DIRECT INVESTMENT AND THE MULTINATIONAL ENTERPRISE 2-3 (Steven Brakman & Harry Garretsen, eds., 2008).

²¹ See JENSEN, *supra* note 18, at 1; see also UNCTAD, *supra* note 11.

²² See JENSEN, *supra* note 18, at 32-33.

²³ Economic theory highlights that, compared to other forms of finance, FDI has certain advantages. These advantages include providing capital inflows that may exceed the domestic savings capacity of least developed countries, and the aptitude to do so without submitting to fixed interests. See Hanson, *supra* note 6, at 10-11.

²⁴ *Id.* Financial resources are also crucial to economic growth since they have a direct effect on production capacity. See Eliana Cardoso & Rudiger Dornbusch, *Foreign Private Capital Flows*, in 2 HANDBOOK OF DEVELOPMENT ECONOMICS 1388, 1388 (H. Chenery & T.N. Srinivasan eds., 1989).

²⁵ See David Greenway & Holger Görg, *Much Ado About Nothing? Do Domestic Firms Really Benefit from Foreign Direct Investment?*, 19 WORLD BANK RESEARCH OBSERVER 171, 174 (2003) (discussing how FDI not only increases employment rates, but improves the skills and capabilities of workers).

²⁶ See Katherin Marton, *Technology Transfer to Developing Countries via Multinationals*, 9 THE WORLD ECON. 409, 409 (1986).

²⁷ See THEODORE H. MORAN, FOREIGN DIRECT INVESTMENT AND DEVELOPMENT 20 (1998).

²⁸ See Helen V Milner & Tim Bütke, *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?*, 52 AM. J. POL. SCI. 741, 741 (2008).

²⁹ See Diana Bozhilova, *When Foreign Direct Investment is Good for Development: Bulgaria's Accession, Industrial Restructuring and Regional FDI* 6-9 (The Hellenic Observatory, The Euro. Inst., GreeSE Working Paper No. 33, Apr. 2010), available

and improving human resources³⁰ have increased capabilities to absorb FDI benefits. Although complementary, incentives have also contributed to increasing FDI inflows in a variety of economies.³¹

Another series of more critical studies argue that FDI is not an engine for development, but a source of economic crisis.³² An even more radical position holds that FDI is a strategy for developed countries to control the resources and markets of developing nations.³³

Regardless of these critiques, development projects have transformed since the mid-1980s from aid or credits to the promotion of market-oriented legal reforms in which FDI is essential.³⁴ The idea that it was necessary to transform protectionist economies into market economies to allow the flow of technologies and capital, and to eventually increase savings to comply with past credits, advanced these legal reforms.³⁵ The evident failure of closed economies in Latin America and the former Soviet Union, compared to the success of open ones in southeastern Asia and in emergent economies like Chile, reaffirms that idea.

In this new strategy, FDI is both desirable and necessary for developing countries in that it represents new capital, technology, and employment that would otherwise be unachievable. The results are de-

at <http://www2.lse.ac.uk/europeanInstitute/research/hellenicObservatory/pdf/GreeSE/GreeSE33.pdf>.

³⁰ See DIRK WILLEM TE VELDE, OVERSEAS DEV. INST., FOREIGN DIRECT INVESTMENT AND DEVELOPMENT - AN HISTORICAL PROSPECTIVE 2 (2006), available at <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/850.pdf>.

³¹ WORLD DEVELOPMENT REPORT, *supra* note 16, at 97, Box III.2 (referring to the Report on Non-Equity Modes).

³² See David Woodward, *Financial Effects of Foreign Direct Investment in the Context of a Possible WTO Agreement on Investment* 19 (Third World Network Trade & Dev. Ser. No. 21, 2003) ("FDI flows may be seen as equivalent to borrowing at an interest rate of 16-18% p.a. for developing countries as a whole, and 24-30% in sub-Saharan Africa, so that net outward resource transfers can only be avoided by allowing inward FDI stocks to grow at this rate. This implies a rapid expansion relative to the ability to meet the foreign exchange costs.").

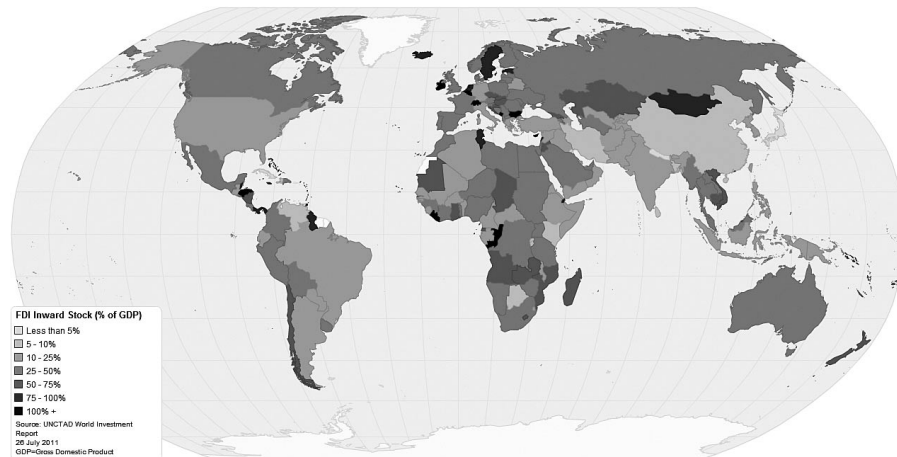
³³ Tandon explains that profitability crisis is inherent to the capitalist system and responds to the tension between labor and capital. To counter these effects, one might lower worker wages and deny their demands, or export capital to reduce production costs. See Yash Tandon, *What is Foreign Direct Investment (FDI)?*, SEATINI (Sept. 2004), <http://www.seatini.org/publications/factsheets/fdishort.htm>.

³⁴ Ashoka Mody, *Is FDI Integrating the World Economy?*, 27 THE WORLD ECON. 1195, 1195 (2004); Andrew Sumner, *Is Foreign Direct Investment Good for the Poor? A Review and Stocktake*, 15 DEV. IN PRACTICE no. 3/4, June 2005, at 269, 269.

³⁵ JORGE REINEL PULECIO, LA APERTURA EN COLOMBIA, COSTOS Y RIESGOS DE LA POLÍTICA ECONÓMICA 19-20 (1991).

cisive: FDI has increased even after the 2009 global economic crisis. It currently represents at least 5 percent of the GDP in more than half of the countries in the world, and at least 50 percent of the GDP in an increasing number of states.³⁶ In 2010, developing economies absorbed close to half of global FDI inflows.³⁷

CHART 1. FDI INWARD STOCK AS A PERCENTAGE OF GDP (GLOBAL)



Source: ChartsBin (2011)

As shown in Chart 2, FDI has represented more than 20 percent of Colombian GDP since 2002 with an average growth of 1 percent between 2002 and 2007.³⁸ Furthermore, recent studies show that companies with FDI invest more in research and development, which in turn allows them to pay better salaries.³⁹

To reach these rates, Colombia has implemented a series of reforms to improve the investment environment. The reforms promoted by former president Álvaro Uribe Velez deserve special attention since some established incentives for FDI.

To understand the causes, purposes, and expectations for creating incentives, it is important to briefly summarize the changing role of FDI in Colombian economic history. After concluding said summary and performing a comparative analysis of instruments for legal stabil-

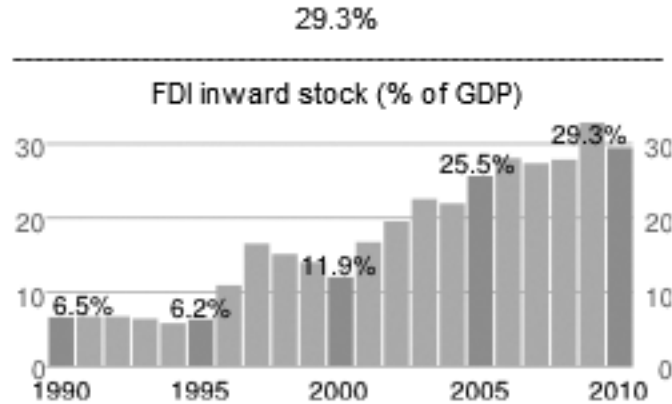
³⁶ See *infra* Chart 1.

³⁷ WORLD DEVELOPMENT REPORT, *supra* note 16, at x.

³⁸ Mauricio Reina, *Impacto de la Inversión Extranjera en Colombia*, presented for Fedesarrollo Centro de Investigación Econ. y Social (Apr. 28, 2009), available at <http://www.probarraquilla.org/documento/Presentaci%C3%B3n%20Mauricio%20Reina%20-%20Fedesarrollo.pdf>.

³⁹ *Id.*

CHART 2. FDI INWARD STOCK AS A PERCENTAGE OF GDP (COLOMBIA)



Source: ChartsBin (2011),
with information from UNCTAD World Investment Report (2011)

ity, I will present the LSCs, a key incentive for FDI in Colombia and the purpose of this text. I will then conclude with an analysis of the law that established them and its impact.

II. FDI IN COLOMBIA – 20TH CENTURY: *FROM AN ISI STRATEGY TO A MARKET ECONOMY*

The industrialization process in Colombia took place at the beginning of the 20th century, decades after it started in other Latin American countries.⁴⁰ Some argue that this industrialization process is related to the major crisis of the 1930s, which also occurred in some other economies of the region.⁴¹ In any case, the consensus is that little attention was paid to foreign investment at that time and that dependency theories⁴² increasingly influenced policies toward national investment.

⁴⁰ See generally Decsi Arévalo, *Misiones Económicas Internacionales en Colombia 1930-1960*, 14 *HISTORIA CRÍTICA* 7 (1997).

⁴¹ See Mauricio Villamizar & Juan José Echavarría, *El Proceso Colombiano de Desindustrialización* 3 (Banco de República de Colombia, Borradores de Econ. No. 361, 2006).

⁴² Dependency theory refers to a series of theories supporting the idea that resources flow from the “periphery” (least developed states) to the “core” (wealthy states). It played a major role in discussions on development, industrialization and economic growth. In the second half of the 20th century “[t]he Latin American ‘dependentistas’ produced a knowledge that criticized the Eurocentric assumptions of the cepalistas, including the orthodox Marxist and the North American modernization theories.” Ramon Grosfoguel, *Developmentalism, Modernity, and Dependency Theory in Latin America*, 1 *VIEWS FROM SOUTH* 347, 347 (2000).

From the end of World War II until the late 1980s, Colombia adopted a protectionist development model⁴³ based on an import substitution industrialization strategy (“ISI”). Under ISI, foreign investments should be restricted and replaced with domestic production.⁴⁴ Its goal is to avoid dependency and to reach development through local industry.⁴⁵ As in many other countries, Colombia followed the development ISI strategy promoted by the United Nations Economic Commission on Latin America and the Caribbean (“UNCLAC”) in the 1960s.⁴⁶

Regional agreements also influenced national legislation. For instance, the Comunidad Andina (“CAN”), a regional international organization created in 1969 by Colombia, Chile, Bolivia, and Ecuador,⁴⁷ released Decision 24 of 1971, which prohibited FDI to strategic sectors. Decision 24 of 1971 was introduced through national legislation, that strengthened protectionist regulation (*e.g.* Decreto Ley 444, 1967).⁴⁸ Hence, foreign investments were allowed only for specific and limited sectors. Legislation in other related topics have included interventionist measures to restrict FDI flows.⁴⁹

In 1987, CAN decisions 220 and 244 established a new regional development strategy that relaxed foreign investment restrictions, particularly in the industrial sector. This period right before the 1991 Constitution of Colombia, frequently known as *transition*, was characterized by timid changes in the regulation that allowed foreign investments while maintaining rigid interventionist measures as well as control over inflows.⁵⁰ There was flexible regulation, but no incentives for FDI.

⁴³ María Claudia Uribe Pineda, *Colombia: Política de IED*, Comisión Económica para América Latina y el Caribe – Ministerio de Comercio Exterior (2002), <http://www.eclac.org/ddpe/noticias/noticias/7/9067/Colombia.pdf>.

⁴⁴ See Werner Baer, *Import Substitution and Industrialization in Latin America: Experiences and Interpretations*, 7 *LATIN AM. RES. REV.*, No. 1, Spring, 1972, at 95, 95.

⁴⁵ See Jinwoo Kwon, *Import Substitution at the Regional Level: Application in the United States* 9 (Oct. 26, 2010) (unpublished manuscript) (on file with the Fed. Reserve Bank of Atlanta), *available at* http://www.frbatlanta.org/documents/news/conferences/10smallbusiness_kwon.pdf.

⁴⁶ See Mario A. Gutterrez, *Economic Growth in Latin America: The Role of Investments and Other Growth* 14 (U.N. Econ. Comm’n for Latin Am. & the Caribbean, *Macroeconomía del Desarrollo Serie No. 36*, June 2005).

⁴⁷ Venezuela adhered to it in 1973 and was a member until 2006. Chile retired in 1976.

⁴⁸ See L. 1900, agosto 19, 1990, *DIARIO OFICIAL [D.O.]* (Colom.).

⁴⁹ See JANG-YUNG LEE, *STERILIZING CAPITAL INFLOWS* 6-7 (Int’l Monetary Fund, *Econ. Issues* No. 7, 1997).

⁵⁰ See LUIS JORGE GARAY, *COLOMBIA: ESTRUCTURA INDUSTRIAL E INTERNACIONALIZACIÓN 1967-1996* (2004).

Most countries in the world had to make transcendental economic reforms during the 1980s to integrate into the newborn global economy as a consequence of the failure of previous development strategies (e.g. ISI, aid, and credit).⁵¹ Latin America in particular did not experience significant economic growth.⁵² In Colombia, low growth was accompanied by high fiscal and external deficits. The World Bank also pressured Colombia to make structural economic changes.⁵³

In this context, ISI was inexorably seen as an obstacle of economic development. Traditional protection strategies were proving to be ineffective and Chile's success was evidence that market-oriented reforms were the panacea.

Consequently, Colombia began a gradual liberalization of commerce in 1985 that concluded with important tariff reductions in 1990 and 1991.⁵⁴ The 1991 Constitution was the final and definitive turn in the country's development from protectionism to a small government. In this sense, a series of profound reforms took place, with impact, among others, in commerce, labor regulation, taxation, and in the institutional frame.⁵⁵

With respect to commerce, trade tariffs were reduced on average between 10 percent and 27 percent from 1984 to 1998.⁵⁶ Regarding labor, it was clear that the purpose was to reduce unemployment from the economic perspective because the Constitution gave special treatment to social rights. Reforms were thus twofold: reduction of labor

⁵¹ See REINEL PULECIO, *supra* note 35, at 21.

⁵² The "lost decade" of the 1980s had a devastating impact in the region. With the exception of Chile, the average growth was below 2%, which contrasts with the average 5% between 1950 and 1980. See JOSÉ ANTONIO OCAMPO, *UN FUTURO ECONÓMICO PARA COLOMBIA* 6 (2001).

⁵³ "The decade of 1980 meant to Colombia a strong deceleration of growth and high fiscal and external deficit (. . .) In April of 1989 the World Bank published the study of the Colombian economy denominated 'Commercial Policy Survey 1986-1987', in which it points out the necessity to make this structural change, which was evaluated and defined by the government of the president Virgilio Barco (. . .)" (own translation). ÁLVARO ALBAN MORENO & JORGE ALBERTO RENDON VELEZ. *CRECIMIENTO, DESAROLLO DEMOCRACIA EN COLOMBIA: LOS CONTRAPESOS DE UN PROCESO INCOMPLETO* 120 (2009); See, e.g., *Support for Adjustment in Colombia*, THE WORLD BANK GROUP (2012), <http://lnweb90.worldbank.org/oed/oeddoelib.nsf/DocUNIDViewForJavaSearch/EDB98EFC8A6C8286852567F5005D8378>.

⁵⁴ Eduardo A. Hadad et al., *Efectos Regionales de una Mayor Liberación Comercial en Colombia* 1 (Banco de la Republica – Sucursal Cartagena, Documentos de trabajo sobre Econ. Reg. No. 104, Aug. 2008), available at <http://www.banrep.gov.co/documentos/publicaciones/regional/documentos/DTSER-104.pdf>.

⁵⁵ See César Gaviria Trujillo, *Prólogo*, in *UNA APERTURA HACIA EL FUTURO* ix (Rudolf Hommes et al. eds., 1994).

⁵⁶ Hadad et al., *supra* note 54.

costs and relaxation of the structure on one hand, and growth of the non-salary costs as a proportion of the payroll on the other.⁵⁷

Tax reforms were also encouraged and implemented with the foreseeable intention of increasing collection, which declined in the 1980s, fairly called the *lost decade*.⁵⁸ Different reforms of the same nature were required during the 1990s for identical purposes because the Constitution enlarged the demand for services.⁵⁹

Colombia became progressively more dependent on international trade and financial transactions as it entered the global economy, which made FDI crucial.⁶⁰ This is why the reforms that accompanied the 1991 Constitution included important modifications to promote FDI. For example, the issuance of an exchange regime with the passage of Ley 9 in 1991 liberalized determinant rights such as return capital.

The regime included FDI principles (fair and equitable treatment, universality, and automatic approval of investment), a guarantee of stability of exchange rights,⁶¹ and full access to local credit.⁶² Colombia also became part of different treaties that provided protection to investments against political risk.⁶³

Despite these efforts, liberalization of the economy injured the local industry, the country's competitiveness, and formal employment.⁶⁴

⁵⁷ See Alan Gilbert, *Globalization and Latin America: Understanding the Global Links of Colombia's Capital*, in GLOBALIZATION AND URBAN DEVELOPMENT – ADVANCES IN SPATIAL SCIENCE 165, 170 (Harry W. Richardson & Chang-Hee Christine Bae, eds, 2005).

⁵⁸ See Fabio Sánchez & Silvia Espinosa, *Impuestos y Reformas Tributarias en Colombia, 1980-2003* at 11 (CEDE – Uni. de los Andes, Documentos CEDE 2005-11, Feb. 2005).

⁵⁹ Francisco Azuero et al., *Contratos de Estabilidad Jurídica en Colombia (CEJ): ¿Información Asimétrica, Inconsistencia Intertemporal o Captura de la Autoridad Tributaria?* 4 (Uni. de los Andes – Facultad de Admin., Galeras de Admin. No. 31, 2011).

⁶⁰ Rudolf Hommeset et al., *Reformas Estructurales – Política de Inversión Extranjera*, in UNA APERTURA HACIA EL FUTURO 70 (1994).

⁶¹ L. 9, enero 17, 1991, DIARIO OFICIAL [D.O.] art. 15 (Colom.).

⁶² See Sebastián Nieto-Parro & Mauricio Olivera, *Making Reform Happen in Colombia: The Process of Regional Transfer Reform* 3 (Fedesarrollo – Centro de Invest. Econ. y Social, Working Paper No. 57, Dec. 2011), available at <http://www.fedesarrollo.org.co/wp-content/uploads/2011/08/WP-No.-57-Making-reform-happen-in-Colombia.pdf>.

⁶³ See MAURICIO REINA & SANDRA ZULUAGA, CTR. FOR HEMISPHERIC POLICY, THE IMPACT OF GLOBALIZATION ON LATIN AMERICA: THE CASE OF COLOMBIA 4 (2012), available at https://umshare.miami.edu/web/wda/hemisphericpolicy/Task_Force_Papers/Reina-GlobalizationTF.pdf.

⁶⁴ See Carlos Enrique Londoño Rendón, *La Apertura Económica en Colombia*, 4 PENSAMIENTO HUMANISTA 41, 49 (1998).

The internal armed conflict sparked by drug traffic⁶⁵ and the global financial crisis at the end of the decade also negatively impacted the economy and FDI inflows.⁶⁶ In an effort to increase FDI implementation, former president Andrés Pastrana promoted Acto Legislativo 001 (1999) to reform the Constitution and subsequently issued Decreto 2080 (2000), a presidential decree with binding character.⁶⁷ The first Act eliminated the possibility of expropriation without compensation. The second established a new regime for foreign investments and for Colombians' investments abroad.

The aforementioned reforms created economic growth and propitiated the signature of investment treaties, but their social impact did not meet expectations. Key indicators of development, such as employment and wealth distribution, are still waiting for relevant improvements. Hence, investments in the 21st century are not only important, but necessary. Those circumstances are where incentives that matter for this study appear.

III. FDI IN COLOMBIA – 21ST CENTURY: *NECESSITY OF INCENTIVES, CONTEXT FOR LEGAL STABILITY CONTRACTS*

In the context of investment, incentives are governmental measures from which foreign investors can benefit,⁶⁸ “in order to encourage them to behave in a certain manner.”⁶⁹ Even though the

⁶⁵ Colombia has experienced an internal armed conflict for more than 40 years. The situation began in the middle of the 20th century when socialist guerrillas, influenced by Communist ideas and following the example of the Cuban Revolution, fought for a change in the distribution and use of the land. In the 1980s, violence intensified due to the increasing power of drug cartels and of a dangerous *joint venture* between the two “forces”. With time, as cartel and guerrilla leaders have diminished, political ideas have evaporated and the structure of violence has gotten complex. See Nazih Richani, *The Political Economy of Violence: The War-System In Colombia*, 39 J. OF INTERAMERICAN STUD. & WORLD AFF. 37, 37 (1997).

⁶⁶ See Bruce Michael Bagley, *Narcotráfico, Violencia Política y Política Exterior de Estados Unidos hacia Colombia en los Noventa*, 49-50 COLOM. INTERNACIONAL 5, 24 (2000).

⁶⁷ See Pres. Andrés Pastrana, Address at the 13th Andean Presidential Council (June 23, 2001) (transcript available at <http://www.comunidadandina.org/ingles/press/speeches/pastrana23-6-01.htm>).

⁶⁸ See Jean-Yves P. Steyt, Comparative Foreign Direct Investment Law: Determinants of the Legal Framework and the Level of Openness and Attractiveness of Host Economies (May 2006) (unpublished LL.M. Graduate Research Papers, Cornell University), available at http://scholarship.law.cornell.edu/lps_LLMGRP/1/.

⁶⁹ United Nations Conference on Trade & Development, Geneva, Switz., *Tax Incentives and Foreign Direct Investment: A Global Survey*, 11, UNCTAD/ITE/IPC/Misc.3 (2000), available at http://unctad.org/en/Docs/iteipcmisc3_en.pdf.

literature and UNCTAD consider them complementary to other determinants for investment like market size or access to raw materials,⁷⁰ most emerging economies rely on incentives to compensate the areas in which they are less competitive to attract FDI. In Colombia, former president Álvaro Uribe Velez (2002-2010) insisted on the necessity of increasing foreign investment despite the internal armed conflict and ever-changing tax legislation. That partially explains why his government was a pioneer in the effective implementation of investment incentives in the country.

Still, there are three main causes for creating incentives for investment in Colombia: legal instability, a new global economic order (with subsequent international financial institutions' pressure and competition for attracting FDI), and the negative consequences of a newborn development model based on a market economy.

At least since the 1980s, the literature recognizes the importance of a stable legal and political structure for an investment environment.⁷¹ Diverse studies have found that political volatility reduces FDI inflows⁷² and that legal stability is crucial in an investment decision.⁷³ The negative impact of an unstable legal framework in investment (especially tributary-related) can only be compared to internal violence, which makes it one of the main deficiencies for FDI in Colombia.⁷⁴

⁷⁰ See *id.* at 3. See generally Rafaelita M. Aldaba, *FDI Investment Incentive System and FDI Inflows: The Philippine Experience* 14 (Phil. Inst. for Dev. Studies, Discussion Paper Ser. No. 2006-20, Nov. 2006), available at http://www.eastasiaforum.org/testing/eaber/sites/default/files/documents/PIDS_Aldaba_2006.pdf (discussing foreign investors' use of tax credits on raw materials).

⁷¹ See William H. Davidson, *The Location of Foreign Direct Investment Activity: Country Characteristics and Experience Effects*, 11 J. OF INT'L BUS. STUDIES, No. 9, Autumn 1980, at 9.

⁷² See Bruno S. Frey & Friedrich Schneider, *Economic and Political Determinants of Foreign Direct Investment*, 13 WORLD DEV. 161, 173 (1985); Zhen Quan Wang & Nigel J. Swain, *The Determinants of Foreign Direct Investment in Transforming Economies: Empirical Evidence from Hungary and China*, 131 WELTWIRTSCHAFTLICHES ARCHIV 359, 370 (1995).

⁷³ Amanda Perry-Kessaris, *Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence*, 49 INT'L & COMP. L. Q., No. 4, Oct. 2000, at 779, 779 ("There are well developed theoretical arguments why the effectiveness of legal systems should be a determinant of FDI.").

⁷⁴ See Hernán Felipe Trujillo Quintero, *Decisiones de Inversión de las Empresas Transnacionales: Un Caso para Colombia* 11-12 (Aug. 2009) (unpublished manuscript) (on file with Consejo de Ciencia y Tecnología del Estado de Guanajuato), available at http://www.concyteg.gob.mx/formulario/MT/MT2009/MT6/SESION2/MT62_HTRUJILLO_099.pdf; CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, *supra* note 8, at 1.

The competition for FDI and pressure from the international financial system have also urged the creation of incentives,⁷⁵ which are seen as a necessary tool to compete. According to a study by Agarwal, “[t]he evidence on the influence of incentives on the inflow of FDI is clearer than that on the influence of political instability.”⁷⁶

Colombia competed with similar economies in the region while simultaneously having to mitigate the adverse effects of liberalization, such as low wages and unemployment.⁷⁷ Incentives thus gained acceptance, especially considering the assertion that FDI is the most effective source of capital and new jobs.⁷⁸

As clear as it might have been, policymakers must take into account all available options when planning to implement an incentive since there is no one-size-fits-all formula. In the late 1980s and during the 1990s, developing countries implemented a variety of strategies to attract FDI. Although subject to the specific needs of each economy, reducing taxation and cutting import tariffs have been the main responses to globalization.⁷⁹

With respect to security, insurance instruments quickly adapted to the specific needs of countries and projects, to the point that insurance is now almost a prerequisite for investing in certain regions.⁸⁰ The Multilateral Investment Guarantee Agency (“MIGA”), an entity member of the World Bank offering insurance to foreign investors against losses caused by “noncommercial risks,”⁸¹ is involved in virtually all big investment projects worldwide and has more than 170 member States, including Colombia.⁸²

⁷⁵ See OMAN, *supra* note 7, at 3.

⁷⁶ See Jamuna P. Agarwal, *Determinants of Foreign Direct Investment: A Survey*, 116 WELTWIRTSCHAFTLICHES ARCHIV 739, 761 (1980).

⁷⁷ See generally RICARDO ARIAS TRUJILLO, HISTORIA DE COLOMBIA CONTEMPORÁNEA (1920-2010) at 181 (2011) (exploring the history of Colombia’s modernization efforts).

⁷⁸ See ORG. FOR ECON. CO-OPERATION & DEV. (OECD), FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT - MAXIMISING BENEFITS, MINIMISING COSTS 122 (2002) (“[T]he major impact of FDI on human capital appears to have occurred not so much through the efforts of individual MNEs (multinational enterprises) as from government policies designed to attract FDI via enhanced human capital.”).

⁷⁹ See generally Eduardo Lora, *Trends and Outcomes of Tax Reforms, in THE STATE OF STATE REFORM IN LATIN AMERICA* 185, 185 (Eduardo Lora ed., 2007).

⁸⁰ See Hadiza Tijjani Mato, *The Role of Stability and Renegotiation in Transnational Petroleum Agreements*, 5 J. POL. & L. 33, 34 (2012).

⁸¹ See Convention Establishing the Multilateral Investment Guaranty Agency (MIGA), *Preamble* (Apr. 12, 1988), available at http://www.miga.org/documents/miga_convention_november_2010.pdf.

⁸² See *MIGA Members*, WEB.WORLDBANK.ORG (Sept. 6, 2012), <http://go.worldbank.org/76NJ98JCM0> (providing an updated list of members and noting that, as of May 2012, the MIGA had 176 member States).

Among the incentives for FDI, the ones providing stabilization (like LSCs) vary not only in shape, but also in purpose, object, conditions, parties, and effects.⁸³ In fact, plenty of instruments allowing investors to stabilize legislation are not part of a strategy to attract FDI, but rather are risk-management mechanisms used by foreign investors mainly in the primary sector.⁸⁴

In view of the latter, I will introduce the relationship between investment and legal stability in the next section. Keeping in mind that instability was directly related to Colombia's low FDI flows, and with the purpose of providing a spectrum in which to locate *Law 963 of 2005*, I will conclude with a comparative chart of similar legislation in the region that sheds some light for the analysis in section 5.

IV. LEGAL STABILITY: LAW 963 OF 2005 IN THE STABILIZATION SPECTRUM

Legal stability is almost a prerequisite for investment decisions in long-term projects.⁸⁵ That is why foreign investors seek countries that minimize the risks associated with unpredictable changes in their legislation. However, that risk is always a variable since it is part of the sovereign right of a state to set up the rules that it considers appropriate.⁸⁶ Hence, although the threat is higher in undeveloped economies, legal stability is a shared concern for all countries intending to attract FDI.

Foreign investors experienced the threat of political and legal instability before the topic was an issue for states and even before FDI was an accepted development tool.⁸⁷ The matter was particularly important in the primary sector where these types of projects generally require years to produce beneficial results.⁸⁸ A wave of nationalizations of foreign projects in oil and mining during the 1960s and 1970s

⁸³ See *infra* Table 2.

⁸⁴ See Tijjani Mato, *supra* note 80, at 34 (describing private investors using stabilization clauses in petroleum agreements).

⁸⁵ See Davidson, *supra* note 71, at 1; see also Frey, *supra* note 72, at 161; Wang, *supra* note 72, at 359; Perry-Kessaris, *supra* note 73, at 781-84.

⁸⁶ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 531-32 (2005).

⁸⁷ See generally Samuel K. B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT'L & COMP. L.Q. 588 (1988) (exploring the status of foreign investments in light of ongoing political disputes).

⁸⁸ See UNCTAD, *WORLD INVESTMENT REPORT 2012 OVERVIEW – TOWARDS A NEW GENERATION OF INVESTMENT POLICIES* 6 (2012), available at http://unctad.org/en/PublicationsLibrary/wir2012overview_en.pdf.

was the main reason to include a clause protecting investors from legal reforms annulling or limiting their rights.⁸⁹

The Special Representative of the Secretary General of the UN on business and human rights, John Ruggie, carried out a global study on such provisions and found that they are currently “widespread across industries and regions of the world.”⁹⁰ “Stability clauses,” as they are commonly known, address changes in the host country’s legislation and attribute different effects to it. Ruggie’s report, submitted in 2008, identifies three types of stability clauses, which can also appear in a “restricted version.” Table 1 summarizes findings on the most common clauses.

TABLE 1. TYPES OF STABILIZATION CLAUSES

Full Freezing Clauses freeze both fiscal and non-fiscal law with respect to investment for the duration of the project. Exemptions are required.	Limited Freezing Clauses freeze more limited sets of legislative actions. Exemptions are required.
Full Economic Equilibrium Clauses protect against the financial implications of <i>all changes of law</i> , by requiring compensation or adjustments to the deal to compensate the investor when any changes occur.	Limited Economic Equilibrium Clauses protect against financial implications of some <i>limited set</i> of changes of law or after specified costs are incurred. They require compensation or adjustments to the deal to compensate the investor only when the covered changes occur.
Full Hybrid Clauses protect against the financial implications of <i>all changes of law</i> , by requiring compensation or adjustments to the deal, including exemptions from new laws, to compensate the investor when any changes occur.	Limited Hybrid Clauses protect against the financial implications of <i>some limited set</i> of changes of law or after specified costs are incurred. They require compensation or adjustments to the deal, including exemptions from new laws, to compensate an investor only when the covered changes occur.

Source: Andrea Shemberg (2009)

In spite of the differences between them, stability clauses clearly address a traditional concern for foreign investors after the 1960s: the threat that legal instability presents for their profits. Even though said clauses are still used in a variety of agreements, develop-

⁸⁹ ANDREA SHERBERG, INT’L FIN. CORP., STABILIZATION CLAUSES AND HUMAN RIGHTS 4 (2009), available at <http://www.oecd.org/investment/globalforum/40314647.pdf>.

⁹⁰ See INT’L FINANCE CORP., STABILIZATION CLAUSES AND HUMAN RIGHTS – A RESEARCH PROJECT CONDUCTED FOR IFC AND THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON BUSINESS AND HUMAN RIGHTS at vii (2009), available at <http://www1.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES&CACHEID=9feb5b00488555eab8c4fa6a6515bb18>.

ing countries have found a stabilization mechanism to improve their investment environment when competing for FDI.⁹¹

Chile was one of the first countries in the world to openly offer stabilizing tax laws to virtually any foreign investor. Decreto 600, which has been in force since 1974, is a binding presidential decree that established a national regime for foreign investments that stabilizes income tax for up to 10 years.⁹² This legislation separated the country from others in the region,⁹³ but efficiently attracted foreign investments that had positive impacts on development and growth.⁹⁴

Decreto 600 requires foreign investors, and any foreign capital in general, to sign a contract with the State that authorizes the entrance of investments into the country.⁹⁵ Investments that meet the requirements (transnational money transfer for a project in Chile) are entitled to include a provision stabilizing the income tax for up to 10 years.⁹⁶ A committee, created by the same decreto and integrated by ministers and the president of the Central Bank, ultimately decides whether these requirements are met.⁹⁷ The resulting agreement is known as a Contrato de Estabilidad Tributaria (Contract for Tax Stability). Its committee creation process distinguishes it from other contracts merely authorizing the investment and from the aforementioned stability clauses.

The practice changed in the 1990s with the introduction of new stabilizing instruments, despite Chile's proven success at attracting quality FDI during a period in which most countries of the region were avoiding it.⁹⁸ That is the case in Panama where stabilization of different types of legislation was permitted without subjecting them to the approval of a reviewing entity. For example, according to Panamanian Ley 54 (1998), any foreign or non-foreign investment with \$2 million Panamanian Balboas⁹⁹ (which is equivalent to US dollars)¹⁰⁰ or more has the right to stabilize national and municipal legislation in areas

⁹¹ See generally David A. Jodice, *Sources of Change in Third World Regimes for Foreign Direct Investment, 1968-1976*, 34 INT'L ORG. 177, 177 (1980).

⁹² Decreto Ley 600, julio 13, 1974 [Presidential Decree] art. 7 (Chile).

⁹³ See *supra* pp. 12-17 (noting that Chile retired from the CAN and left the import substitution industrialization strategy behind two years later).

⁹⁴ See Raphael Bergoeing et al., *A Decade Lost And Found: Mexico and Chile in the 1980s*, 5 REV. OF ECON. DYNAMICS 166, 198 (2002) (finding that, compared to Mexico, Chile experienced a faster recovery from the economic crises of the 1980s, due to its reforms toward an open market and the attraction of FDI).

⁹⁵ See Decreto Ley 600, *supra* note 92, art. 3.

⁹⁶ *Id.* art. 7.

⁹⁷ *Id.*, arts. 3, 12; see also *infra* Table 3.

⁹⁸ Bergoeing, *supra* note 94, at 1-2.

⁹⁹ L. 54, julio 22, 1998, art. 16 (Pan.).

¹⁰⁰ See L. 84, junio 28, 1904, art. 1 (Pan.).

such as labor, tax, and customs.¹⁰¹ In this case, the benefit is also granted for up to 10 years¹⁰² and does not require the signing of a contract. Ecuador has implemented this model as well.¹⁰³

It is important to mention that the Contracts for Tax Stability were issued as a deep tax reform collection in Colombia in 1995. The article allowing their subscription was included in the national Tax Regime¹⁰⁴ and was quite similar to Chilean legislation. However, it was applied only during its five years in force.¹⁰⁵ Additionally, there are three main reasons not to include them in the incentive analysis or to even consider them an incentive for FDI:

Context

As stated in section II, Colombia adopted a new development model based on a market economy in the 1990s. This required a set of reforms to mitigate the adverse effects of such a change and to increase its capacity to compete in a global market.¹⁰⁶ Ley 223 (1995) was part of the body of legislation designed to increase collection through changes in existing taxation and the introduction of new taxes.¹⁰⁷ With respect to investment, the concern was with improving the legal base for national enterprises and making them more competitive, rather than attracting FDI.

Purpose

Contrary to the 2005 LSCs, the contracts created in 1995 did not have the purpose of incentivizing the entrance of FDIs, but of allowing existing legal entities to secure the profitability of their enterprises by “postponing” the application of future reforms regardless of the type of project or its life.

Experience

Although attributable to a restricted interpretation imposed by the national tax authority,¹⁰⁸ the National Tax and Customs Office

¹⁰¹ L. 54, julio 22, 1998, art. 10 (Pan.).

¹⁰² *Id.*, art. 10, § 2.

¹⁰³ In Ecuador, investors are automatically entitled to stabilization when they register their investment in the Central Bank. However, the legislation also allows the signature of contracts, but with the same content. *See* Decreto Ejecutivo 1525, June 24, 1998, arts 19, 30 (Ecuador).

¹⁰⁴ L. 223, diciembre 22, 1995, Diario Oficial [D.O.] art 169 (Colom.).

¹⁰⁵ *See* L. 633, diciembre 29, 2000, Diario Oficial [D.O.] (Colom.).

¹⁰⁶ *See* Trujillo, *supra* note 55, at ix-x.

¹⁰⁷ *See* L. 223, diciembre 20, 1995, Diario Oficial [D.O.], art. 169 (Colom.).

¹⁰⁸ According to the dominant interpretation applied by the national tax entity, stabilization could only be granted for 1 year. *Consejo de Estado*, the highest judi-

(DIAN), less than ten contracts were signed, most of which aim to prevent the application of a tax on the movement of funds.¹⁰⁹

It is thus evident that legal stabilization responds to multiple needs, such as the threat from stabilization, the need to attract FDI, the promotion of all types of investments, or even the intent to increase collection. The evolution into instruments with diverse purposes and effects is also apparent. Table 2 shows some of these differences and Table 3 compares relevant legislation in the region.¹¹⁰ Table 4 illustrates fundamental differences in the two types of contracts for stability in Colombia, and the reasons not to consider the ones created in 1995 as FDI incentives.¹¹¹

TABLE 2. LEGAL STABILITY FOR INVESTMENTS

	Stabilization Clauses	Stability Contracts	Stabilization Laws
Definition	Clauses in private contracts that address changes in legislation.	Agreements between a state and an investor providing the stabilization of legislation, subject to specific requirements.	Laws that guarantee the stability of certain legislation to investments that comply with pre-established requisites.
Parties	Investor (generally foreign) and state.	Investor (generally foreign) and state.	No.
Purpose	To guarantee the profitability of a project (risk-management).	To attract foreign investments and to promote investments in long-term projects.	To attract foreign investments and to promote investments in long-term projects.
Term	Life of the project.	Established by the parties, subject to limits imposed by the state.	Established in the law. Generally not negotiable.
Dispute Resolution	Generally, international investment arbitration.	International investment arbitration, national conciliation, and arbitration.	National administrative proceedings, conciliation, and arbitration.

Source: *Author*

cial entity for public law, abolished said approach, perhaps too late. The text of the decision provides a summary of the subject. *See* Sentencia de 24 de agosto del 2001, Exp. 11636, C.P. Dr. Germán Ayala Mantilla.

¹⁰⁹ *See supra* note 105.

¹¹⁰ *See infra* Table 2, Table 3.

¹¹¹ *Infra* Table 4.

TABLE 3. LEGISLATION FOR LEGAL STABILITY IN THE REGION¹¹²

	Chile	Peru	Panamá	Ecuador	Venezuela
Legislation	Decreto 600 (1974) Ley 27342 (2000)	Decreto Ley 662 (1991)	Ley 54 (1998)	Ley 46 (1997) Decreto Ejecutivo 1525 (1998)	Decreto Ley 356 (1999)
Mechanism or Instrument Granting the Stability	Contract. (Art. 3)	Contract. (Art. 10, DL 662)	Law. (Art. 6)	Law. (Art. 19, DE 1525) Contract. (Art. 30, DE 1525)	Contract. (Art. 17)
Beneficiaries	Foreign investments and investments from Chilean nationals residing abroad. (Art. 3)	Foreign investments. (Art. 10, DL 662)	Foreign and national investments. (Art. 1)	Foreign and national investments. (Art. 22, Ley 46)	Foreign and national investment. (Art. 18)
Minimum Amount of Investment	Not required. US\$50 million, for investments in the primary sector. (Art. 3)	US\$5 million. US\$10 million for the primary sector. (Art. 2, Ley 27342)	US\$ 2 million. (Art. 16)	US\$ 500,000. (Art. 23, Ley 46)	Not required.
Sector of the Economy	All. (Art. 3)	All. (Art. 11, DL 662)	All. The law provides a wide list of activities and adds " <i>any approved by the Committee</i> " (Art. 5)	All. (Art. 22-27, Ley 46)	All. (Art. 17)
Entity in Charge of Applying the Law	Special Committee, integrated by Ministers and the president of the Central Bank. (Art. 3 and 12.)	National entity, depending on the sector in which the investment is made. (Art. 43, DL 757)	Special entity, attached to the Ministry of Commerce, but integrated by representatives of private entities, such as Commerce Chambers and Labor Unions. (Art. 14.)	None stabilization is automatic. (Art. 19, Ley 46) If the investor decides to sign the contract, the Ministry of Commerce. (Art. 30, Ley 46)	National entity, depending on the sector in which the investment is made. It must have the approval of the national tax agency and Congress. (Art. 17)

¹¹² Some of cited states have more laws regulating foreign investment and establishing benefits for its attraction, even related to legal stability. The legal instruments chosen for this table are the ones that more specifically deal with the topic. *See infra* Table 3.

Object of Stabilization	Income tax. (Art. 7)	Income tax, exchange regime and the guarantee of equal treatment. (Art. 10, DL 662)	National and local tax legislation, labor and customs. (Art. 10)	Income tax. (Art. 24, Ley 46)	Export tax. (Art. 17)
Term	3 years. For the primary sector, 8 years that can be extended to 12 with authorization of the Committee. (Art. 7)	10 years. (Art. 15, DL 662)	10 years. (Art. 10)	10 years for reinvestments not directed to increase production. 20 years for new projects or investments to enlarge existing ones. The Counsel can authorize an addition of 5 years to the term, depending on the sector. (Art. 24, Ley 46)	10 years. (Art. 17)
Dispute Resolution	Not specific. Administrative proceedings are available.	International investment arbitration. (Art. 16, DL 662).	National conciliation and, alternatively, arbitration. (Art. 20)	International investment arbitration. (Art. 32, Ley 46)	National commercial arbitration. (Art. 18)

Source: *Author*

V. LEGAL STABILITY CONTRACTS: TO ATTRACT NEW INVESTMENTS OR TO ENLARGE EXISTING ONES

In the beginning of the 21st century, the Colombian government knew that the country's ever-changing tax legislation limited the possibility of attracting foreign investments.¹¹³ Additionally, other countries in the region had successfully mitigated those effects with legislation allowing for stabilization.¹¹⁴

Former president Álvaro Uribe Velez prioritized attracting FDI from his first day in office and deemed it one of the three main policies of his government.¹¹⁵ He named this policy "Confianza Inversionista" (Investors' Reliance), which he justified with the saying: "la inversión

¹¹³ Azuero, *supra* note 59, at 2.

¹¹⁴ See *supra* Table 3.

¹¹⁵ See V. Meija & Jose Manuel, *Santos Cerca de la Independencia: Preámbulo a la Desintegración de la Unidad Nacional*, 1 *Revista Andina de Estudios Pol.*, No. 5, Apr. 2011, at 5.

TABLE 4. CONTRACTS FOR TAX STABILITY (1995) VS. LEGAL STABILITY CONTRACTS (2005)

	Ley 223 de 1995 Contracts for Tax Stability (Contratos de Estabilidad Tributaria)	Ley 963 de 2005 Legal Stability Contracts (Contratos de Estabilidad Jurídica)
Context	Deep tax reforms and internal security problems.	Improve national security and commercial relations with other states, and proliferation of treaties for the protection and promotion of FDI.
Purpose	To allow legal entities not to be subjected to new taxes or interpretations established in further reforms.	To attract new investments or to enlarge existing ones.
Beneficiaries	All legal entities.	Investments that meet two requirements: certain amount of money, payment of a prime.
Entity in Charge of Applying the Law	National tax entity.	Special Committee.
Object of Stabilization	Income tax and to prevent the application of new taxes.	All national legislation, with few exceptions.
Term of Stabilization	10 years.	Between 3 and 20 years.
Number of Signed Contracts	Less than 10.	More than 60.

Source: *Author*

fluye a donde hay confianza” (investments flow where there is reliance).¹¹⁶

Open exchange legislation (Ley 9, 1991), a competitive foreign investment regime (Decreto 2080, 2000), and a successful military strategy¹¹⁷ were the basis for increasing investors’ reliance through incentives. Given this, the government presented the project for the

¹¹⁶ See “Colombia Quiere Ser Líder Mundial en Confianza Inversionista,” *Afirma el Presidente Uribe*, SECRETARÍA DE PRENSA – SP – Noticias (May 7, 2009), <http://web.presidencia.gov.co/sp/2009/mayo/07/16072009.html>.

¹¹⁷ See Alejandro Santos, *El año que volvió la esperanza*, REVISTA SEMANA (July 27, 2003), www.semana.com/nacion/articulo/el-ano-volvio-esperanza/59576-3; See also *Victories, but No Waterloo*, THE ECONOMIST (July 15, 2004), www.economist.com/node/2926049 (describing the Colombian army’s growing military successes over the Revolutionary Armed Forces of Colombia).

promotion of “Investors’ Reliance,” and LSCs were introduced to Congress in 2003.

The project provided stabilization for new investments and compensation in case of non-compliance.¹¹⁸ Congress partially modified the text to allow both national and foreign investments. It also amended the text to reaffirm its right to maintain the application of the rules stipulated in the contract, leaving compensation as a last resort, and not as a right of the state.¹¹⁹

It is important to note that Congress’ inclusion of national investments reaffirmed FDI’s fair and equitable treatment standard.¹²⁰ It also motivated local investments to have a similar social impact and capital as FDI.¹²¹ This in turn maintained the incentive appearance that was vital to attracting FDI. It also maximized the Law’s possibilities for increasing economic and social benefits in that it was not restricted to FDI, but was also available to local investors. In a nutshell, this resulted in more investments with high positive impact on development.

After these modifications, the project became a law of the Republic (Ley 963) on July 8, 2005.¹²² The purpose of Ley 963 is to promote new investments and to enlarge existing ones.¹²³ Some contend that its ulterior intent is to stimulate national and foreign investments.¹²⁴ This position is consistent with the problems identified

¹¹⁸ See Proyecto de Ley 15 de 2003, “Por la cual se instaura una Ley de Estabilidad Jurídica para los inversionistas en Colombia [Ley de Estabilidad Jurídica para inversionistas]”, julio 20 de 2003, *available at* <http://congresovisible.org/proyectos-de-ley/por-la-cual-se-instaura-una-ley-de-estabilidad-juridica-para-los-inversionistas-en-colombia-ley-de-estabilidad-juridica-para-inversionistas/3223/#tab=2>.

¹¹⁹ According to specialized literature, renouncing to the right to modify the law (with compensation) is less protective of the State’s sovereignty. See Christoph Schreuer & Rudolf Dolzer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 75-77 (2008) (finding that renouncing to the right to modify the law (with compensation) is less protective of the State’s sovereignty).

¹²⁰ See *id.* at 139-48 (Equitable treatment is a standard of protection according to which foreign investors should not be treated in a discriminatory manner, with respect to national investors. In this sense, it includes elements such as due process, good faith and freedom from coercion.)

¹²¹ Within the requirements to benefit from the law, it establishes a minimum amount of approximately 1.5 million dollars (significant amount of financial resources) and a description of the project with its expected economic and social impact (another difference between FDI and other type of investments), which constituted the basis for approval or disapproval. Additionally, long-terms of stabilization guarantee permanency.

¹²² L. 963, julio 8, 2005, *DIARIO OFICIAL* [D.O.], art. 1 (Colom.)

¹²³ *Id.*

¹²⁴ Castaño, *supra* note 1, at 70.

above, as well as with the rationale of attracting FDI and local investments with similar characteristics.

With regards to Legal Stability Contracts, the law states:

*“[T]he Nation guarantees to investors that subscribe it, that if there is any adverse modification in certain rules specifically included in the contract, whose stability was identified in it as determinant for the investment, the right to keep the application of the rules during the term of the contract.”*¹²⁵

LSCs thus provide investors with the right to keep the application of any rule determinant for their investment¹²⁶ on the condition that they comply with two prerequisite conditions. First, the investment has to be more than 5000 Colombian Minimum Monthly Legal Wages,¹²⁷ which is equivalent to approximately USD \$1.5 million.¹²⁸ Second, the investor has to pay the government a premium equivalent to 1 percent of the investment made every year or 0.5 percent in the unproductive phases of the investment.¹²⁹

An investor meeting these requirements then has to present a submission to the Comité de Estabilidad Jurídica (Committee of Legal Stability),¹³⁰ which was specially created by the law and is composed of ministers and national authorities responsible for economic affairs.¹³¹ Within the next four months, the minister in charge of the sector in which the investment is going to be made must sign the contract or provide reasons not to approve the application.¹³²

In making this decision, the minister and the Committee must follow general criteria established in the instruments that created the law.¹³³ Most of these instruments do not establish clear criteria,¹³⁴ which gives the Committee wide negotiation power to guarantee – if

¹²⁵ L. 963, julio 8, 2005, DIARIO OFICIAL [D.O.] art. 1 (Colom.)

¹²⁶ Excluded legislation: labor, emergency tax regulation, indirect taxes (regional), prudential regulation of the financial sector and public services tariff regime. *See id.*, art. 11.

¹²⁷ L. 1111, diciembre 27, 2006, DIARIO OFICIAL [D.O.], art. 51 (Colom.) (replacing the wages standard with a fixed value that can be actualized periodically).

¹²⁸ *See* MINISTERIO DE COMERCIO, INDUSTRIA Y TURISMO, *supra* note 3, at §1.1.

¹²⁹ *See* L. 963, julio 8, 2005, *Diario Oficial* [D.O.] art. 5 (Colom.).

¹³⁰ *Id.*, art. 4 (b).

¹³¹ *Id.*

¹³² *See id.*, art. 4(f).

¹³³ Some of these documents are *Plan Nacional de Desarrollo* (a national development program for each presidential period), documentos CONPES (released by the highest State organ for the coordination of the economy of the country) and the law. *See* CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, *supra* note 8, at 1-2.

¹³⁴ *See* CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, *supra* note 8, at 3 (establishing that economic and social impacts were an important criterion for approving a submission, but did not mention how decisive these criterion would be).

applied correctly – an increase in investments and in their social impact.

Even though the Committee had the power to decide whether social commitments were binding obligations or not, obligations in LSCs were limited to the investment before the first contract was signed.¹³⁵ This ruling providing that LSCs are only binding in capital-related aspects was subsequently further reaffirmed.¹³⁶

The law was also the subject of constitutionality exams. The Colombian Constitutional Court considered the new law to be adjusted to the Constitution in cases concerning equality before the law,¹³⁷ separation of powers,¹³⁸ conflicts regarding the application of the law, and dispute resolution.¹³⁹

Despite these successes in court, the criteria to approve submissions have become more and more specific. For instance, the Committee prohibited the stabilization of certain taxes and deductions in 2009. It also established that only quantifiable obligations, both social and financial, were to be analyzed in submissions.¹⁴⁰ The Committee and other national economic authorities have introduced a variety of criteria since the law entered into force, mainly to prevent the signature of disproportional LSCs.¹⁴¹

¹³⁵ See Azuero, *supra* note 59, at 13; Juliana Castaño & Paola Galeano, *Los Contratos de Estabilidad Jurídica en Colombia: ¿Una Verdadera Herramienta Para la Protección de los Intereses del Inversionista Extranjero y Del Estado Colombiano?*, 2 EAFIT J. INT'L L. 68, 89 (2011), available at <http://www.eafit.edu.co/revistas/ejil/Documents/ejil-jan-jun-2011/Los-Contratos-de-Estabilidad-Juridica-en-Colombia.pdf>.

¹³⁶ L. 14, octubre 30, 2009, Comité de Estabilidad Jurídica.

¹³⁷ See generally Corte Constitucional [C.C.] [Constitutional Court], marzo 29, 2006, Sentencia C-242, Gaceta de la Corte Constitucional art. 12 (Colom.).

¹³⁸ See Corte Constitucional [C.C.] [Constitutional Court], 2006, Sentencia C-320, Gaceta de la Corte Constitucional at preamble (Colom.).

¹³⁹ See Corte Constitucional [C.C.] [Constitutional Court], Noviembre 22, 2006, Sentencia C-961, Gaceta de la Corte Constitucional (Colom.) (reaffirming that LSCs are governed by Colombian law).

¹⁴⁰ See L.13, septiembre 25, 2009, Gaceta de la Corte Constitucional [G.C.] § IV (Colom.).

¹⁴¹ Interview with anonymous consultant, Comm. of Legal Stability, (Feb. 2012). An expert consultant for the Committee who required anonymity, believes that it is necessary to have objective criteria to empower the Committee with the capacity to deny LSCs to projects that do not need it or that may not have a significant impact in development. He stresses the importance of applying the law specifically for what it was created: to attract investments that would not otherwise be executed. With vague criteria, he insists, the Committee would have to keep signing LSCs to most submissions, with direct negative effects on collection and commerce (equality).

On the other hand, some modifications were actually issued without the appropriate publicity. For example, Cesar Cermeño, Manager of the Litigation & Dispute Resolution Department of Deloitte in Colombia, stresses the negative impact of the legal instrument Acta No. 11 (September 7, 2009). Acta No. 11, which had binding effects on the Committee, established, *inter alia*, that only investments that represent more than 75 percent of the fixed assets of the investing enterprise were to benefit from a 20-year stabilization regardless of other criteria or the types of projects. Cermeño insists that the lack of publicity prevented the execution of important projects with proven positive social impact for which the term of stabilization was determinant.¹⁴²

The instrument has now been adjusted notwithstanding the discussions on criteria. Ley 963, for example, recently experienced two important modifications.¹⁴³ The National Development Program for 2010-2014,¹⁴⁴ which is a type of legislation that is issued in every presidential period,¹⁴⁵ introduced these modifications. The first change was in the criteria for new investments, which originally included all projects starting operations *after the law entered into force*.¹⁴⁶ Since reform became binding, new investments refer only to projects starting operations *after the contract is subscribed*.¹⁴⁷

This legal instrument also eliminated the static 0.5 percent and 1 percent prime standard by giving the Ministry of Finance and Public Debt (Hacienda y Crédito Público) the authority to issue a new methodology defining their amount, in view of the risk for the nation and taking into account each specific submission.¹⁴⁸

These modifications were made through a law with temporary effects that left the possibility of permanent incorporation uncertain.

¹⁴² One of Cermeño's clients was a national energy corporation with operations in different cities and with high fixed assets. One of its projects consisted in the installation of street lights in some of the poorest populations of the north coast. The submission, presented prior to the issuance of the cited Acta, was approved with one quarter of the stabilization term required, even though it complied with all other criteria and proved to have a direct positive impact in society and in the development of the region. See Interview with César Cermeño, Manager of Litigation & Dispute Resolution Dept., Deloitte - Colom. (Nov. 24, 2011).

¹⁴³ See L. 1111, art. 21 (indirectly reforming Ley 963 by modifying the Tax Regime's measurement from the traditional minimum monthly legal wages to a new concept known as unit of tributary value (UVT, for the Spanish *Unidad de Valor Tributario*).

¹⁴⁴ See L. 1450, junio 16, 2011, DIARIO OFICIAL [D.O.] art. 1 (Colom.).

¹⁴⁵ See CONSTITUCION POLITICA DE COLOMBIA [C.P.] art. 339-342; see also L. 152, julio 15, 1994, DIARIO OFICIAL [D.O.] arts. 13, 14, 25 (Colom.).

¹⁴⁶ See L. 963, julio 8, 2005, DIARIO OFICIAL [D.O.] art. 3 (Colom.).

¹⁴⁷ See L. 1450, art. 49.

¹⁴⁸ *Id.*, art. 48.

Their orientation, however, makes it reasonable to infer that Juan Manuel Santos' current government is not in favor of incentives. Whether a consequence of a turn in the policies toward FDI or a change in the Committee's agenda and methodology for analyzing submissions, the truth is that the number of approved contracts has decreased and submissions have been suppressed since the end of 2009.¹⁴⁹ Up to May, 2011, 160 submissions were pending and some accusations for uneven competition practices were presented to the competent authorities.¹⁵⁰

The impact of the introduced reforms is not conclusive however, as only one contract was signed in 2011. Additionally, the reprisal of submissions, some of which have been pending for more than one year, shows the Committee's inefficiency and how reprisal deteriorates the investment environment.

In light of the above, the following analysis will emphasize the Committee's activity in particular. The intent of my analysis is to identify explanations to possible flaws of the law or its application.

VI. IMPACT ANALYSIS: HAVE LSCS MET EXPECTATIONS? *PROS AND CONS OF THE LAW AND ITS APPLICATION*

I analyzed the 64 Legal Stability Contracts that were in force at the end of 2010. The first was EJ-01 of 2006, which was subscribed between the Ministry of Commerce, Industry, and Tourism, and the corporation Alpina Productos Alimenticios S.A. on January 24, 2006. The last studied LSC was EJ-16 of 2010, which was subscribed between the Ministry of Information Technologies and Communication, and the corporation Telmex Colombia S.A. on September 15, 2010. According to the last report published by the government, two additional contracts were signed at the end of 2010, and one contract was signed per year in 2011 and 2012.¹⁵¹

1. *General Data*

Since Law 963 of 2005 entered into force, an average of 25 LSCs have been signed each year, although the majority were subscribed in the 2008-2010 period.¹⁵² With respect to stabilization terms, the most common period (65 percent) was 20 years. Only approxi-

¹⁴⁹ See *O Todos en la Cama*. . ., DINERO.COM (May 11, 2011), <http://www.dinero.com/edicion-impresa/negocios/articulo/o-todos-cama.../118985>.

¹⁵⁰ *Id.*

¹⁵¹ See *Contratos de Estabilidad Jurídica-Firmados. Resumen de Contratos de Estabilidad Jurídica Firmados*, MINISTERIO DE COMERCIO, INDUSTRIA Y TURISMO (2013) <https://www.mincomercio.gov.co/minindustria/publicaciones.php?id=17145> These four agreements were only included in the statistics concerning contracts per year.

¹⁵² See *infra* Figure 1.

mately 3 percent of analyzed LSCs had stabilization terms of less than 10 years.¹⁵³

Investments were generally considerably larger than the minimums required by law. Only 12 percent of the studied contracts had amounts close to the minimum.¹⁵⁴ Contrary to press critiques that contend that the primary sector benefited most under the Law, the only relevant pattern with respect to economic activity is manufacturing and tourism (31.6 percent of analyzed LSCs).¹⁵⁵ Only 9 percent of investments were for the primary sector.¹⁵⁶

2. *Efficacy to Fulfill its Purposes*

As explained earlier, the particular context in which LSCs and most incentives for FDI in Colombia were implemented was due to the need for fresh financial resources and significant employment generation.¹⁵⁷ Since those constitute the ulterior purposes of the Law, I chose to analyze the Law's efficacy to meet its own expectations in those matters.

a. *Attraction of Investments*

There are two sets of findings with respect to attracting investments. The first concerns the direct role of the Law in increasing investments and the second looks at its contribution to an investment environment (investors' reliance).

There is evidence that the Law has had a successful impact on investments. As represented in Figure 2 (stability terms), most analyzed LSCs (79 percent) establish long terms of stability of 15 years or more.¹⁵⁸ This shows that Colombia has an advantage in competing for FDI since similar legislation in Latin America only allows stabilization for up to 10 years.¹⁵⁹ This is bolstered by the fact that these projects are planned for an extensive period and are thus more likely to reinvest. It is reasonable to infer that some investors have chosen Colombia instead of similar destinations considering these comparative advantages of the Law.

Additionally, more than half of the analyzed LSCs are for investments above COP \$50,000 million, which is around 10 times the minimum required by law.¹⁶⁰ Statistics on the number of LSCs with

¹⁵³ See *infra* Figure 2.

¹⁵⁴ See *infra* Figure 3.

¹⁵⁵ See *infra* Figure 4.

¹⁵⁶ See *id.*

¹⁵⁷ See *supra* pp. 255-60.

¹⁵⁸ See *infra* Figure 2.

¹⁵⁹ *Id.*

¹⁶⁰ See *infra* Figure 3.

foreign and domestic investments are not included given that there is no conclusive data on the participation of foreign capital in the projects entitled to stabilization. There is no available official record of the number of LSCs in which foreign investors participated and the contracts do not provide decisive information on the owners of the assets of the companies. An inference based on the information included in the contracts would not be precise enough considering that most foreign investors either merge or acquire Colombian companies in private contracts. In any case, it is consistent with the purpose of this text not to distinguish the two situations since, as expressed above, local investments that benefit from LSCs have FDI characteristics and comply with the purposes of incentivizing FDI in that they attract investments with high positive social impact.

b. Contribution to an Investment Environment

I identified two deficiencies in the application of the Law that could harm the incentives' attractiveness and eventually the country's investment environment: inexplicable delays in the approval and evidence that the Committee lacks both cautiousness and general criteria to guarantee equality.

With respect to the former, the most alarming finding is that 59 percent of the analyzed LSCs spent more than six months in the approval process.¹⁶¹ Considering the Law stipulates that submissions must be answered within four months of presentation, this clearly damages the country's image as an investment destination.¹⁶²

Nonetheless, it is also true that most of the submissions that took more than a year to be approved are long-term LSCs and therefore are presumably more complex projects.¹⁶³ Generally, the longer the stability, the longer the time to approve the submission.¹⁶⁴ Investors may have some responsibility in this. Submissions have increasingly addressed all types of legislation and investors have sent extensive folders with complex information that have increased the amount of work for the Committee during the time the law has been in force.¹⁶⁵ The Committee thus sometimes has to consult experts in different areas, which demands more time than the four months stipulated by law.

With respect to the destination, only projects related to culture and health evidence a significantly shorter time for approval, though

¹⁶¹ See *infra* Figure 5.

¹⁶² See *id.*

¹⁶³ See *infra* Figure 6.

¹⁶⁴ *Id.*

¹⁶⁵ Interview with an expert consultant for the Committee (Feb. 2012).

this is not a conclusive finding in the sense that projects in the mentioned areas are also fewer.¹⁶⁶

Finally, even though there is no connection between the amount of capital invested and the time the Committee took to approve the application, it is at least curious that higher amounts are equivalent to shorter terms for approval.¹⁶⁷

Regarding the Committee's lack of caution, it is unclear why it signed LSCs with investments that were already executed at the moment of the signature. It is true that the Law is applicable to investments made after its entry into force, but the object of each LSC is to execute new investments, whether in new projects or in existing ones, but new executions nonetheless. Guaranteeing stability to already executed investments is like an empty glass of water: the investment was going to be executed with or without the LSC. The State is still providing benefits that imply a detriment in collection.

Now, although only 6 percent of the analyzed contracts concern executed investments,¹⁶⁸ it suggests that the Committee either did not notice or did not apply the law in accordance with its purposes. The lack of general criteria for an objective analysis of submissions is apparent in the results of the study: there is absolutely no clear connection between the amount invested and the years of stability granted.¹⁶⁹

c. Employment Generation and Social Commitments

Although the main purpose of the Law is to attract investment, employment generation requirements were thought to increase the positive social impact of investments, both local and foreign.¹⁷⁰ It was included in the Committee's own criteria to approve submissions,¹⁷¹ in the law,¹⁷² and in the technical¹⁷³ and legal¹⁷⁴ instruments that developed it.

Yet, immediate changes left the cited texts without any binding character. Following technical recommendations for allowing the Committee to decide whether the social commitments had a binding char-

¹⁶⁶ See *infra* Figure 7.

¹⁶⁷ See *infra* Figure 8.

¹⁶⁸ See *infra* Figure 9.

¹⁶⁹ See *infra* Figure 10.

¹⁷⁰ See CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, *supra* note 8, at 1.

¹⁷¹ See Ministerio de Comercio, Industria y Turismo, Res. 01, ¶ 7 (2010).

¹⁷² See L. 963, julio 8, 2005, DIARIO OFICIAL [D.O.] art. 4(a) (Colom.).

¹⁷³ See CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, *supra* note 8, at 1.

¹⁷⁴ See Decreto 2950, Agosto 29, 2005, arts. 3(h), 8(h) (Colom.).

acter in each case,¹⁷⁵ the president issued a decree eliminating the exigency of including social obligations, such as generating employment.¹⁷⁶ The result: obligations only for investment commitments.

This dramatic change not only reduced the Committee's negotiation capacity, but also eliminated an important mode of increasing investments' social impact. Therefore, 31 percent of studied LSCs do not have commitments in employment generation¹⁷⁷ and the existing ones are not considered binding obligations. Therefore, not complying with the LSCs does not entail contractual responsibility.

One could contend that, since none of the direct competitors (namely, Latin American countries) included such obligations in their legislation, it was reasonable to eliminate them to retain attractiveness for FDI. However, it is also true that none of the direct competitors allowed stabilization for 20 years, which is evidently more beneficial for investors. Additionally, the content and extent of social commitments was part of the negotiation power attributed to the Committee for it to use on a case-by-case basis to maximize the positive impact of investments in Colombia's development. The elimination of this requirement and the inclusion of new non-negotiable and capital-related pre-requisites prevented the execution of projects with proven incidence in the wealth of communities and development, in general.¹⁷⁸

3. *The Law's Main Problems and Its Causes*

It is important to stress that the results of my analysis provide evidence of deficiencies in Law 963 of 2005. Even though most are attributable to the Committee's misapplication of the Law, earlier reforms left no option for the establishment of social commitments as binding obligations. The latter clearly reduces eventual benefits for the State and increases its aptitude to attract FDI.

It is thus fair to conclude that Law 963 experienced earlier reforms, before it was applied, that oriented it to the attraction of capital in detriment of other interests. The following table summarizes key issues.

¹⁷⁵ CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, MODIFICACIÓN ACLARATORIA DEL DOCUMENTO CONPES 3366 "CONSIDERACIONES TÉCNICAS PARA LA EVALUACIÓN DE SOLICITUDES DE CELEBRACIÓN DE CONTRATOS DE ESTABILIDAD JURÍDICA" 2 (Documento Conpes, No. 3406, 2005).

¹⁷⁶ See L. 133, enero 23, 2006, DIARIO OFICIAL [D.O.] art. 1 (Colom.) (repealing article 8 of Decreto 2950 de 2005).

¹⁷⁷ See *infra* Figure 10.

¹⁷⁸ See Interview with César Cermeño, *supra* note 142.

TABLE 4. LAW 963 OF 2005'S MAIN PROBLEMS AND THEIR CAUSES

	Cause	Problem	Result
Employment and social concerns			
1	Deficient application of the Law.	Committee's lack of clarity on the applied criteria.	Long-term stabilization for low investments.
2	Elimination of binding character for social commitments. ¹⁷⁹	No employment generation obligations.	LSCs for investments with less positive social impact.
3	New non-negotiable and capital-related requirements. ¹⁸⁰	Impossible to sign LSCs for projects with high positive impact in development.	Fewer LSCs with high positive social impact.
Approval			
4	Committee's inefficiency.	Average time for approval exceeds what the Law contemplates.	59 percent of analyzed LSCs spent more than six months in the approval process. More than 160 repressed submissions.
Projects			
5	Applying the Law without considering its purposes.	Committee's self-limitation of its negotiation capacity.	LSCs for investments that were already executed at the moment of the signature.

VII. CONCLUSION

Colombia began the 21st century with major challenges in both economic and social aspects. The competition for the attraction of Foreign Direct Investment, as uneven as it is, required legal instruments specifically created to stimulate it. At the same time, the consequences of a complex and prolonged internal armed conflict in society, and of unstable tax legislation in business, urged for an increase in investments with a positive social impact.

In this context, LSCs appeared as a competitive tool to attract FDI and to increase the benefits of national investments. The results of my analysis suggest that the law that established them successfully met the expectations of increasing investments. I also found evidence that some LSCs concern investments that might have been executed without the incentive. Nevertheless, from the investment commitments established in the studied contracts it is reasonable to conclude that the law was appropriate.

Still, as promising as it might seem, it is the only remarkable result of my research. According to the findings exposed in the previous section, there are two preoccupant conclusions. The first is that

¹⁷⁹ See L. 133, art. 1.

¹⁸⁰ See Comité de Estabilidad Jurídica, Acta 11 (2009); Interview with César Cermeño *supra* note 142.

the Committee has been inefficient in the application of the law, which could explain the ascending number of applications repressed and of the related administrative and judicial actions. The other depressing result is that early reforms have denaturalized the incentive, limiting the possibilities to increase its impact in development.

Initiatives with a positive social impact are essential for Colombia today. According to UNCLAC, 45.5 percent of the Colombian population was poor and 16.5 percent of the population was extremely poor in 2009.¹⁸¹ These rates contrast with the country's consistent growth and with its renewed image as an investment destination. In the period between 2007-2010 the country ascended 40 positions in the world business environment ranking, reaching position 39, which means that it is the third most business-friendly country in Latin America, the first in reforms for FDI, and the first in the region (fifth in the world) that offers guarantees to foreign investors.¹⁸²

Along this train of thought, it is fairly reasonable to question the suitability of the reforms, since they have inclined the balance toward financial resources to the detriment of development objectives. The government has had the opportunity to reactivate employment generation obligations and, instead, has imposed new capital-related rules and requirements, some of which even limit the normative spectrum to stabilize. The findings presented above suggest that this is not a step forward in the attraction of the desired investments.

If the government is pretending to make further modifications, it should be for increasing the social impact: economic growth is stable and investment confidence is at its highest level. Then, if Colombia is finally an investment destination with *investors' reliance*, it should stop focusing on the capital and start focusing on society.

¹⁸¹ *Colombia Avanza en ODM, Pero Persisten Grandes Brechas Regionales*, NOTAS DE LA CEPAL, http://www.eclac.cl/notas/65/Subsedes_Colombia.html (last visited Mar. 4, 2013).

¹⁸² See WORLD BANK, *DOING BUSINESS* 156 (2011).

FIGURES

FIGURE 1: *Contracts Per Year*

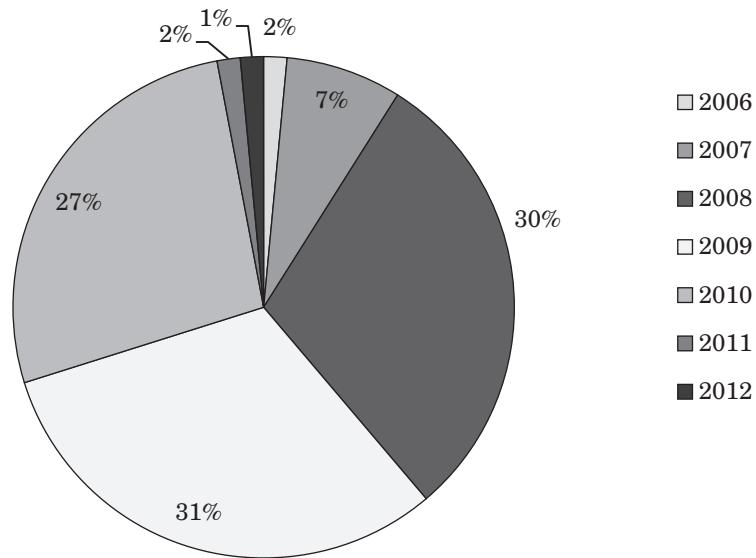


FIGURE 2: *Stability Terms*

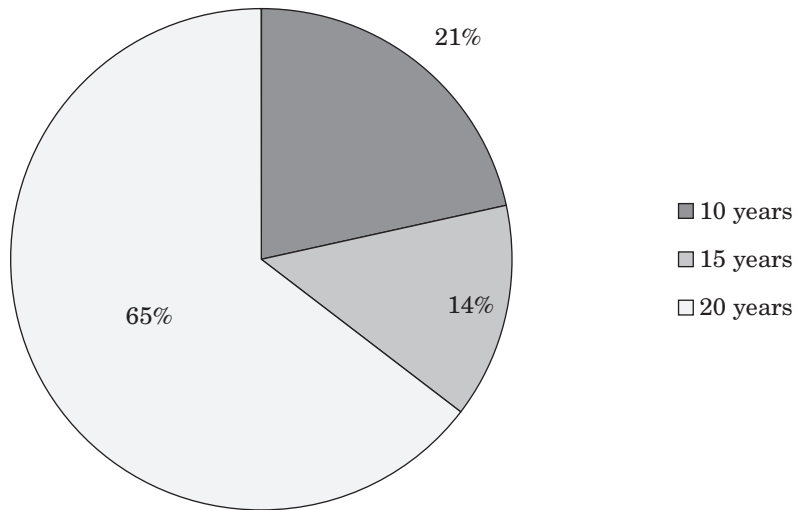


FIGURE 3: Investments per LSC

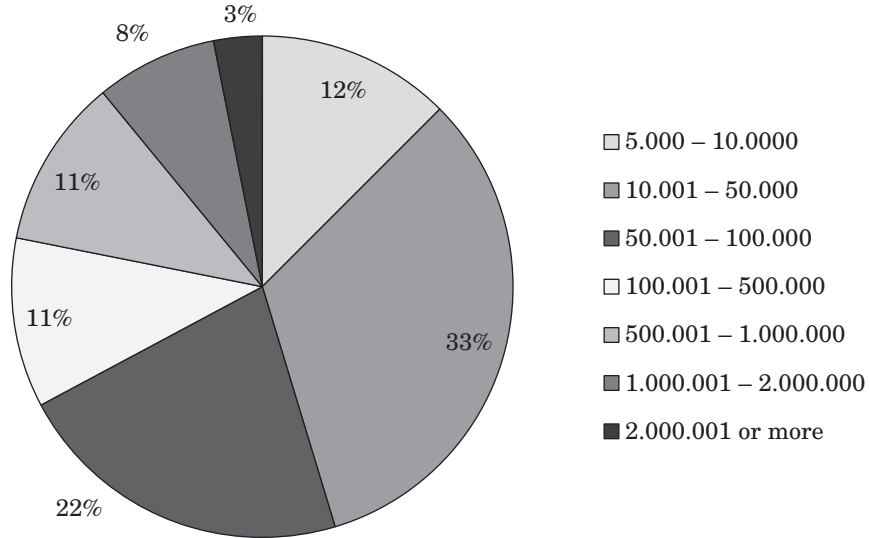


FIGURE 4: LSCs per Ministry

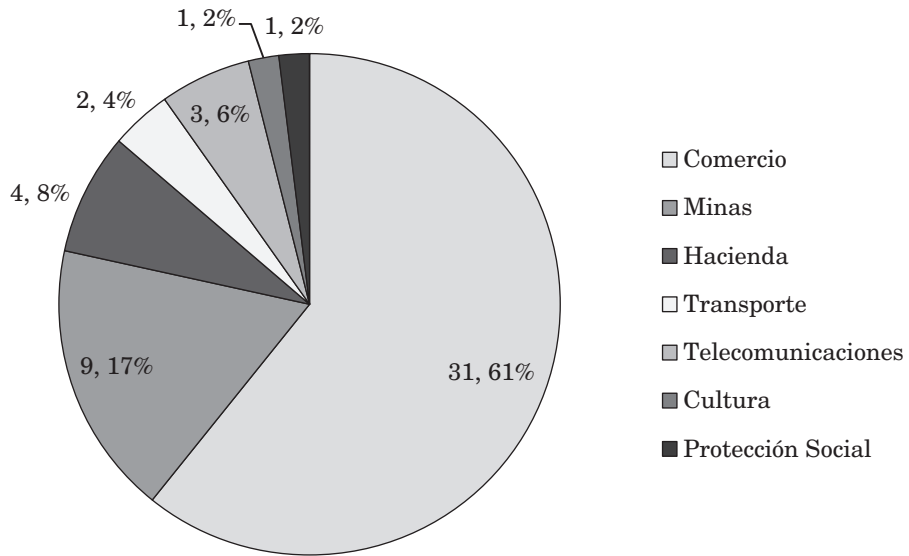


FIGURE 5: *Time for Approval*

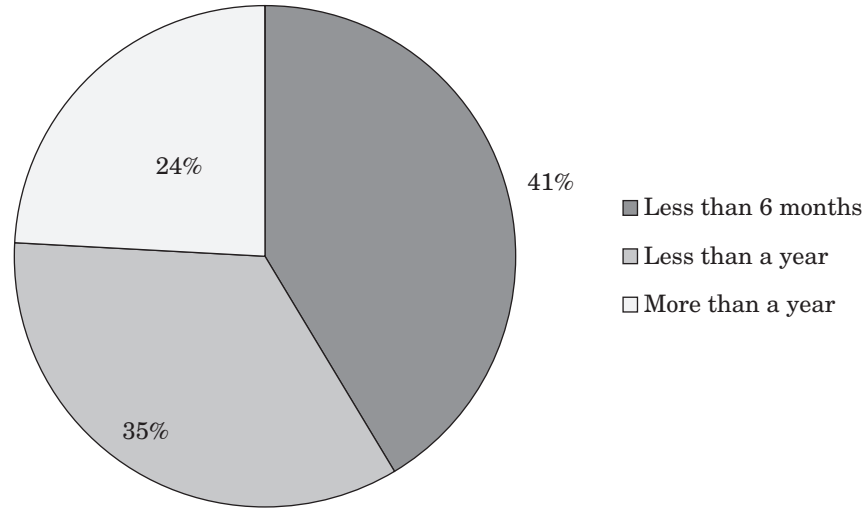


FIGURE 6: *Approval vs. Stability*

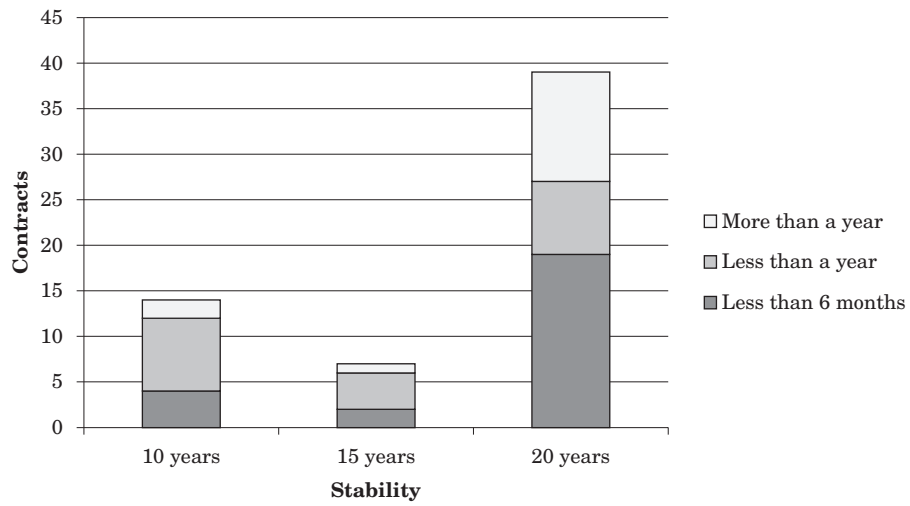


FIGURE 7: Approval vs. Ministry

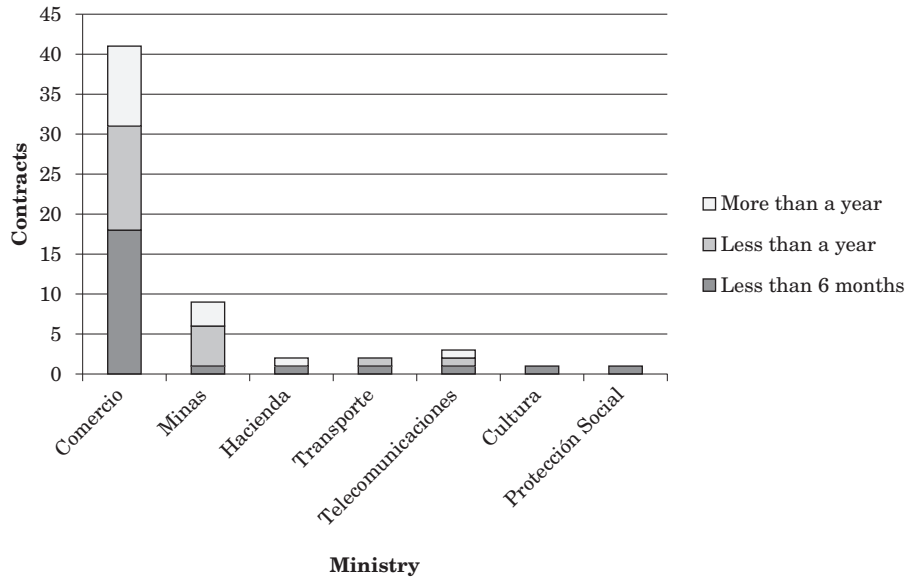


FIGURE 8: Approval vs. Investment

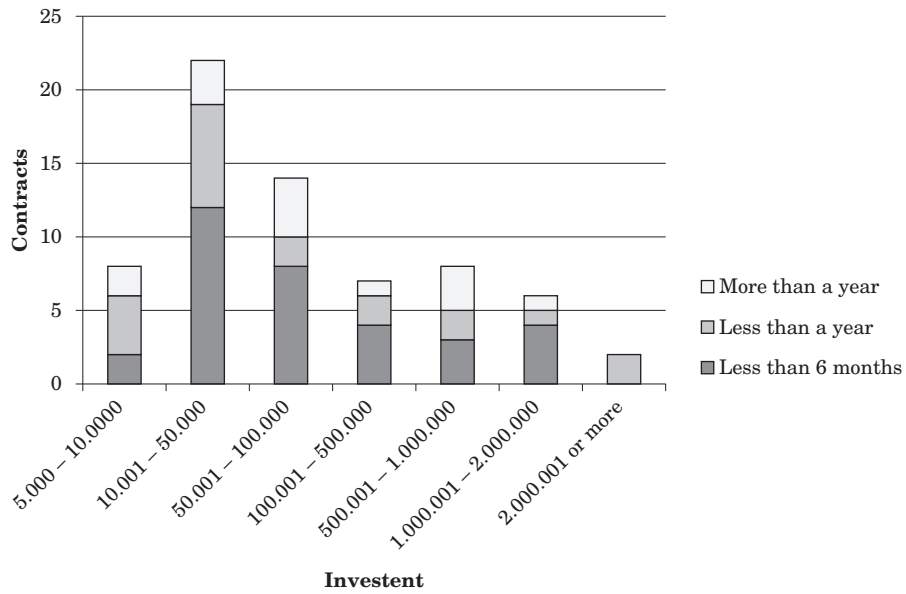


FIGURE 9: *Term to Execute Investments*

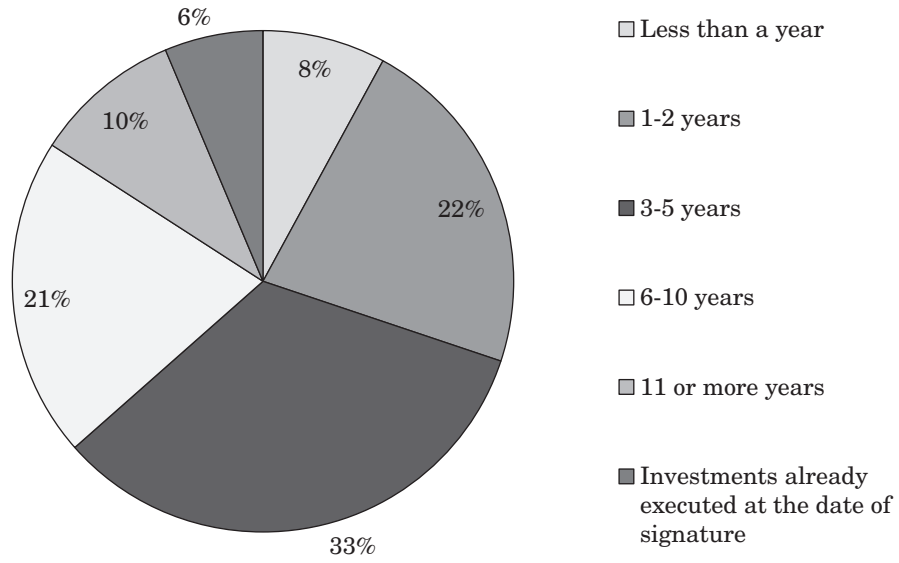


FIGURE 10: *Stability vs. Investment*

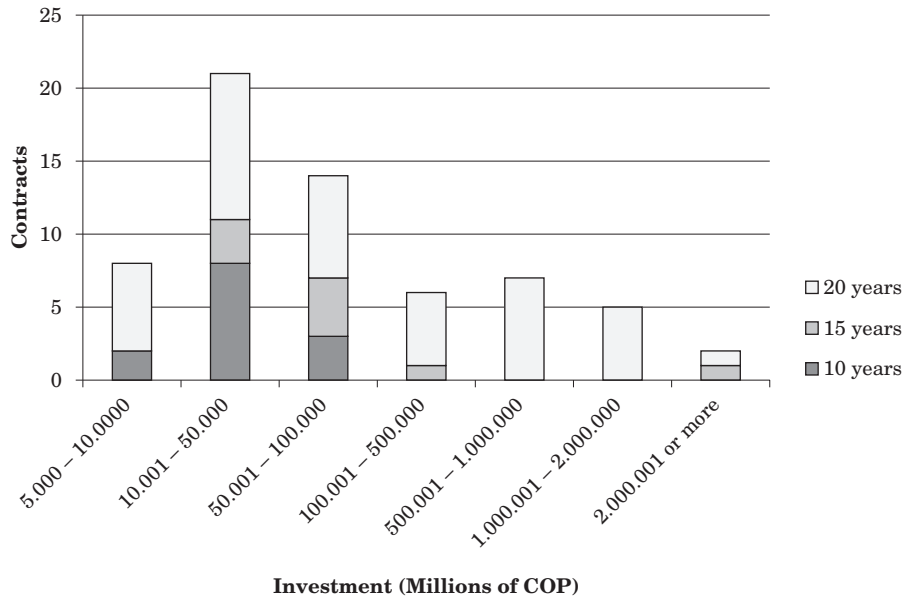
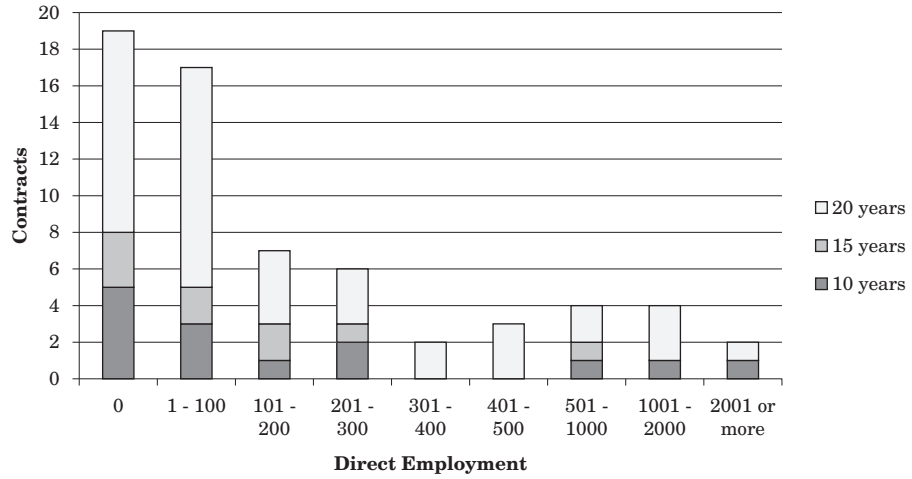


FIGURE 11: *Stability vs. Direct Employment*



**DEEPENING CONFIDENCE IN THE APPLICATION
OF CISG TO THE SALES AGREEMENTS
BETWEEN THE UNITED STATES AND
JAPANESE COMPANIES**

Yoshimochi Taniguchi

ABSTRACT

Parties to contracts between U.S. and Japanese companies usually agree to exclude the application of the United Nations Convention on Contracts for the International Sale of Goods ("CISG") from the sales agreement due to concerns about how the CISG will be interpreted and/or incompatibility with U.S. or Japanese law or both. In this paper, the author will suggest that the more countries amend their laws in accordance with CISG standards and the more national courts develop a unified interpretation of the CISG, the more the CISG will represent harmonized law, and as such, contracting parties should not exclude it.

This paper begins with the trend concerning the application of the CISG to sales agreements between U.S. and Japanese companies, and the backgrounds and reasons for such a trend. In the second part, the author introduces some laws that either are or will be amended to be in accordance with CISG standards. The author also introduces some uniform laws that are already in effect and that can resolve some problems arising from the application of the CISG. In the third part, the author introduces and analyzes some cases in which the courts made decisions referring to decisions made in other countries concerning the CISG, which in turn has led to the development of a unified interpretation of the CISG among many countries. Finally, the author concludes that the CISG will represent harmonized law in the future, which will ultimately give both contracting parties more substantive benefits, and contracting parties therefore should not exclude it.

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I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (“CISG”) is an international treaty that defines the formation of contracts and the obligations of sellers and buyers. It will be applied to sales contracts between parties from countries that ratified it unless they agree to exclude it from such sales contracts. Both the United States and Japan ratified this treaty, which means that if both U.S. and Japanese companies do not agree with the exclusion of the CISG, it will be automatically applied to the sales contracts made between them.

This topic was chosen because the author had many opportunities to review sales contracts between U.S. and Japanese companies while working in Japan. The author noticed that in most contracts, the CISG was excluded due to concerns about how the CISG would be interpreted and/or incompatibility with U.S. or Japanese law or both. So, in examining this topic, the author would like to ascertain whether it is beneficial for both U.S. and Japanese parties to exclude the CISG.

In this paper the author will suggest that the more countries amend their laws in accordance with CISG standards and the more national courts develop a unified interpretation of the CISG, the more the CISG will represent harmonized law. For this reason, contracting parties should not exclude it.

This paper begins with the trend concerning the application of the CISG to sales agreements between U.S. and Japanese companies, and the backgrounds of and the reasons for such a trend. In the second part, the author introduces some uniform laws that are already in effect as well as some U.S. and Japanese laws that either are or will be amended to be in accordance with CISG standards. These laws can resolve some problems arising from the application of the CISG. In the third part, the author introduces and analyzes some cases in which the courts made decisions referring to decisions made in other countries concerning the CISG, which in turn has led to the development of a consistent interpretation of the CISG among many countries. Finally, the author concludes that the CISG will represent harmonized law in the future, which will ultimately give both contracting parties more substantive benefits, and contracting parties should not exclude it.

A. *What is the CISG?*

1. *Introduction to the CISG*

The CISG is an international treaty.¹ The United Nations Commission on International Trade Law prepared a draft of the CISG,

¹ United Nations Convention on Contracts for the International Sale of Goods, Mar. 2, 1987, 1489 U.N.T.S. 3 [hereinafter CISG].

which was adopted at the conference on April 10, 1980 and opened for signature on April 11, 1980.² Under the preamble of the CISG, its purpose is to encourage the development of international trade on the basis of equality and mutual benefit, which is an important element in promoting friendly relations among states.³ The CISG addresses the adoption of uniform rules that govern contracts for the international sale of goods and takes into account that the removal of legal barriers related to different social, economic, and legal systems would contribute to and promote the development of international trade.⁴

According to Article 1 of the CISG, the treaty applies to contracts for the sale of goods between parties whose places of business are in different states when the states are Contracting States or when the rules of private international law lead to the application of the law of a Contracting State.⁵

According to Article 6 of the CISG,⁶ which is based on the premise accepted by most legal systems that the parties to a sales transaction are at liberty to choose the law applicable to their contract,⁷ the parties may exclude the application of the CISG.⁸ To exclude the application of the CISG, clear language indicating that both contracting parties intend to opt out of the CISG is necessary. This is because an affirmative opt-out requirement, which means express language that both parties do not wish to apply the CISG to the contract, promotes uniformity and observance of good faith in international trade, two principles that guide interpretation of the CISG.⁹

² William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 *BUFF. L. REV.* 213, 217-218 (2011).

³ CISG, *supra* note 1, at pmbl.

⁴ *Id.*

⁵ *Id.* art. 1.

⁶ *Id.* art. 6.

⁷ United Nations Commission on International Trade Law, Vienna, May 23-June 17, 1977, *Report of Committee of the Whole Relating to the Draft Convention on the International Sale of Goods*, U.N. Doc A/32/17, Annex 1 (1977), available at <http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/vol8-p11-70-e.pdf> (last visited Feb. 22, 2013).

⁸ CISG, *supra* note 1, art. 6.

⁹ *Id.* art. 6, 7(1); *see, e.g.*, *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003) (saying that if the parties decide to exclude the CISG, it should have been expressly excluded by language stating that it did not apply and also stating what law shall govern the contract, because an affirmative opt-out requirement promoted uniformity and observance of good faith in international trade (art. 7(1))); *see also Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142 (N.D. Cal. 2001) (saying that if both parties are "Contracting Countries" under article 1 of the CISG and there is no agreement concerning governing law under contracts of sale of goods, the CISG can be applied to such con-

2. *Ratification of the CISG by the United States and Japan*

In the United States, the Senate ratified the CISG in 1986.¹⁰ The CISG entered into force on January 1, 1988, in accordance with Article 99, Section 1 of the CISG, after ten countries, including the United States, had deposited with the United Nations their respective instruments of ratification of the CISG.¹¹ In contrast, the Government of Japan didn't accede to the CISG until July 1, 2008. The Government of Japan deposited the instrument of accession to the CISG at the United Nations Headquarters in New York and the CISG entered into force in Japan on August 1, 2009.¹² Considering these accessions, both the United States and Japan are already Contracting States as defined in Article 1 of the CISG, and as such the treaty automatically applies to contracts for the sale of goods made between U.S. and Japanese companies.

B. *Present Trends of Either Application or Exclusion of the CISG Between U.S. and Japanese Parties*

1. *Exclusion of the CISG*

a. *The Present Trend in the United States*

Concerning the United States, the present trend seems to be the exclusion of the CISG from sales agreements.¹³ The Martin F. Koehler and Guo Yujun survey on practical operations of practicing attorneys in the United States, Germany, and China concerning the CISG was sent to attorneys in private practice and in-house counsel in the United States and Germany, both directly and via various discus-

tracts because there is no clear language indicating that both contracting parties intend to opt out of the CISG.).

¹⁰ William P. Johnson, *supra* note 2, at 218. (citing Dep't of State Pub. Notice 1004, 52 Fed. Reg. 6262 (Mar. 2, 1987); UNITED NATIONS TREATY COLLECTION, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, CHAPTER X: INTERNATIONAL TRADE AND DEVELOPMENT, UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Apr. 11, 1980) (last updated Jan. 11, 2010).

¹¹ William P. Johnson, *supra* note 2, at 218.

¹² *Deposit of Instrument of Accession to the United Nations Convention on Contracts for the International Sale of Goods*, Ministry of Foreign Affairs in Japan. (July 2, 2008), http://www.mofa.go.jp/announce/announce/2008/7/1181058_1030.html.

¹³ Tetsuo Morishita, CISG no Kakkoku ni okeru riyouno jyokyo [The Usage Situation of CISG in Each Country] 1375 JURISTO 12, 15-16 (2009) (citing Martin F. Koehler & Guo Yujun, *The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems an International Comparison of Three Surveys on the Exclusion of the CISG's Application Conducted in the United States, Germany and China*, 20 PACE INT'L L. REV. 45, 46 (2008)).

sion forums or by e-mail.¹⁴ In China, in addition to mailings to attorneys in private practice and in-house counsel, the survey was also sent to people's courts and arbitration commissions by post or e-mail.¹⁵ In the United States alone it is likely that more than 3,000 practitioners were addressed and only about 50 questionnaires were returned, which could be seen as an early indication of the poor acceptance of the CISG.¹⁶ Of the responses received, 29.2 percent of the practicing attorneys in the United States had contact with the CISG in their day-to-day work, and the majority of the U.S. practitioners (58.2 percent) knew of the CISG only from hearsay (29.2 percent), from their studies (16.7 percent), from literature (10.4 percent), or from their colleagues (2.1 percent).¹⁷ Additionally, 70.8 percent of U.S. practicing attorneys excluded the CISG principally and preponderantly.¹⁸

A second survey was conducted by Peter L. Fitzgerald.¹⁹ This survey was conducted entirely online, using the Zoomerang online survey hosting service, although the initial "welcome" page that provided entry to the actual survey was hosted on the Stetson University College of Law website.²⁰ Each participant was asked to respond to between 20 and 38 questions, depending upon their responses. There were ten basic questions asked of all participants. These were followed by questions specifically directed at practitioners, jurists, and legal academics.²¹ A total of 236 individuals responded to the survey, with 66 percent of the responses coming from practitioners, 7 percent from jurists, and 27 percent from legal academics. The majority of the responses (68 percent) came from the five target jurisdictions of California, Florida, Hawaii, Montana, and New York. However, 22 percent of the practitioners or academics who responded were located in other U.S. jurisdictions, and 10 percent came from foreign jurisdictions. Altogether, responses were received from 22 states, the District of Columbia, and 15 foreign countries or regions.²² According to the results

¹⁴ Martin F. Koehler & Guo Yujun, *The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems an International Comparison of Three Surveys on the Exclusion of the CISG's Application Conducted in the United States, Germany and China*, 20 PACE INT'L L. REV. 45, 46 (2008).

¹⁵ *Id.* at 46.

¹⁶ *Id.* at 46-47.

¹⁷ *Id.* at 47.

¹⁸ *Id.* at 48.

¹⁹ Peter L. Fitzgerald, *The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the Unidroit Principles of International*, 27 J.L. & COMM. 1 (2008).

²⁰ *Id.* at 4-5.

²¹ *Id.* at 5.

²² Fitzgerald, *supra* note 19, at 6.

of this survey, only 30 percent of U.S. practitioners had familiarity with the CISG.²³ Additionally, when drafting international commercial contracts, 55 percent of U.S. practitioners who said they were familiar with the CISG specifically choose to opt out of its coverage, while 24 percent specifically opt in to the CISG in whole or in part.²⁴ However, 21 percent do not address the Convention at all in their agreements. These data are consistent with other studies that found a comparable, or even higher, tendency for U.S. practitioners to opt out of the CISG in whole or in part.²⁵

b. The Present Trend in Japan

Even before August 1, 2009, when the CISG went into effect in Japan, some Japanese lawyers and large Japanese companies tended to exclude the CISG from sales agreements between such Japanese companies and foreign parties who were Contracting States, as defined in Article 1(1)(a) of the CISG, even if such Japanese companies had their subsidiaries or branches in such counter parties' countries.²⁶ No specific data is available regarding whether such trends continued after 2009. Anecdotal evidence from the author's experience, however, suggests the same trend as in the United States. The author checked all of the sales contracts that were made between U.S. companies and one large Japanese chemical company after August 1, 2009, when the CISG went into effect in Japan. In a majority of the contracts reviewed, the parties excluded the CISG.

2. Obvious Reasons for Excluding the CISG in Agreements

There are some obvious reasons for the trend of exclusion of the CISG. One of them is that generally, the CISG is not very widely known among U.S. practicing attorneys. According to the survey conducted by Martin F. Koehler and Guo Yujun, 54.2 percent of the practicing attorneys in the United States answered that they excluded the CISG because the CISG was generally not very widely known.²⁷ Additionally, according to the survey conducted by Peter L. Fitzgerald, 44 percent of U.S. practitioners are not familiar with the CISG.²⁸

²³ *Id.* at 7.

²⁴ *Id.* at 14.

²⁵ *Id.*

²⁶ Tusneyoshi Tanaka & Adam Newhouse, *Nihonhou to beikokuhou no kanten karano Uiinbaibaijyouyaku (CISG); globalization heno tool [The CISG from the Standpoint of Japanese Law and U.S. Law]* 338 RITSUMEIKAN HOUGAKU 2084, 2089 (2011), http://r-cube.ritsumei.ac.jp/bitstream/10367/3256/1/J2011_4tanakaadam.pdf.

²⁷ Koehler & Yujun, *supra* note 14, at 49.

²⁸ Fitzgerald, *supra* note 19, at 41.

The second reason is that there is legal uncertainty of the CISG. The CISG does not have a long history of interpretation in cases, and additionally, the interpretation itself differs from country to country. One result of the surveys showed that the second most chosen answer by U.S. practicing attorneys to the question as to why they excluded the CISG was that there is still “insufficient case-law to date related to the CISG.”²⁹

This reason also seems to be applicable to Japan. In Japan, there has been no court case which shows that any Japanese court has interpreted a provision of the CISG. Additionally, the language itself, Japanese or English, is different between Japanese law and the CISG. So, for example, even if a Japanese court interprets a provision of the CISG, citing cases which were decided in other countries, a different interpretation may arise based on the differences in the language itself.³⁰

Furthermore, the third reason is that there are some differences between U.S. law and the CISG which are applicable to sales contracts of goods, and also between Japanese law and the CISG. Four specific differences will be introduced in the following section.

a. Differences between U.S. Law and the CISG

Each state has laws concerning sales of goods, which are enacted based on the Uniform Commercial Code (UCC). The UCC is a uniform law that governs commercial transactions, including sales of goods, secured transactions, and negotiable instruments.³¹ The UCC has been adopted in some form by every state except Louisiana and the District of Columbia.³² There are four significant differences between the CISG and the UCC. The first is the “statute of frauds” or oral contracts.³³ Article 11 of the CISG says that making a sales contract does not require any writing or any other evidence form.³⁴ On the other hand, UCC Article 2, Section 2-201 says that a contract for the sales of goods for the price of \$500 or more is not enforceable unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by such parties.³⁵ So, under the CISG, we can make an oral sales contract of goods even if

²⁹ Koehler & Yujun, *supra* note 14, at 49.

³⁰ Morishita, *supra* note 13, at 19.

³¹ BLACK'S LAW DICTIONARY 1168 (9th ed. 2009).

³² *Id.* at 1668.

³³ Tom McNamara, *U.N. Sale of Goods Convention: Finally Coming of Age?*, COLO. LAW. Feb. 2003, at 11, 11.

³⁴ CISG, *supra* note 1, art. 11.

³⁵ U.C.C. § 2-201 (1999).

the price of such goods is over \$500. However, under the UCC, such oral sales contracts cannot be enforceable.

The second difference between the CISG and the UCC is the “parol evidence rule.” Under UCC Article 2, Section 2-201, oral testimony of witnesses concerning the terms of a contract and the intent of the parties that contradicts or varies from the terms of a written contract is generally inadmissible as evidence.³⁶ On the other hand, there is no similar “parole evidence rule” provision in the CISG.

The third difference between the CISG and the UCC is “Disclaimers of Warranties.”³⁷ UCC Article 2, Section 2-316 says that an effective disclaimer of the implied warranty of merchantability must mention “merchantability” and must be in conspicuous writing, and that an effective disclaimer of an implied warranty of fitness must be in writing and conspicuous.³⁸ On the other hand, there is no provision in the CISG which states clearly the “Disclaimers of Warranties” as it appears in UCC Article 2, Section 2-316.³⁹

Furthermore, the CISG is a statute. When lawyers have to handle a legal issue related to the CISG, they tend to make an interpretation based on the CISG itself. If they do so, the method to handle the legal issue under the CISG seems to be totally different from that under common law because the common law is derived from judicial decisions, rather than from statutes or constitutions.⁴⁰ So, to handle such a legal issue, it seems that lawyers tend to analyze and search for judicial decisions whose facts are similar to their own at the very beginning of the legal process. It is not surprising, therefore, that U.S. attorneys would be particularly concerned about the lack of cases interpreting and developing the jurisprudence of the CISG.

b. Differences Between Japanese Law and the CISG

Japanese commercial transactions are generally governed by the Japanese Civil Code⁴¹ and the Japanese Commercial Code.⁴² Just as there are some differences between the CISG and the UCC, there are some differences between the CISG and the Japanese Civil Code, and between the CISG and the Japanese Commercial Code.⁴³ The first difference is “Time of Formation of Contract between Persons at a

³⁶ McNamara, *supra* note 33, at 16; U.C.C. § 2-201.

³⁷ McNamara, *supra* note 33, at 18.

³⁸ *Id.*; U.C.C. § 2-316 (1999).

³⁹ U.C.C. § 2-316 (1999).

⁴⁰ BLACK'S LAW DICTIONARY, *supra* note 31, at 133.

⁴¹ MINPŌ [MINPŌ] [CIV. C.] (Japan).

⁴² SHŌHŌ [SHŌHŌ] [COMM. C.] (Japan).

⁴³ YASUTOMO SUGIURA, TAKASHI KUBOTA, UINBAIBALJYOYAKUNO JITSUMUKAISETSU [THE EXPLANATION TO THE PRACTICAL USAGE OF CISG] 9-10 (2d ed. 2011) (Japan).

Distance,” which is defined in Article 526(1) of the Japanese Civil Code.⁴⁴ Article 18(2) of the CISG says “the acceptance of an offer becomes effective at the moment that the indication of an assent reaches the offeror.”⁴⁵ On the other hand, according to Article 526(1) of the Japanese Civil Code, “a contract between persons at a distance shall be formed upon dispatch of the notice of acceptance.”⁴⁶ So principally under the CISG, the time when a contract is formed is when the indication of an assent reaches the offeror. Under the Japanese Civil Code, however, the time when a contract is formed is when the indication of an assent is dispatched.

The second difference between the CISG and the Japanese Civil Code is a seller’s warranty against hidden defects in goods, which is defined in Article 526 of the Japanese Commercial Code. Article 35(1) of the CISG states that “the seller must deliver goods which are of the quality, quantity and description required by the contract and which are contained or packaged in the manner required by the contract.”⁴⁷ On the other hand, Article 415 of the Japanese Civil Code states that “if an obligor fails to perform consistent with the purpose of its obligation, the obligee shall be entitled to demand damages arising from such failure,” which is construed to require the delivery of goods which are of the quality, quantity and description required by the seller in the contract.⁴⁸

Additionally, Article 526 of the Japanese Commercial Code, which is a special provision of Articles 566 and 570 of the Japanese Civil Code⁴⁹ that applies to a transaction which takes place among merchants, says that if the buyer detects hidden defects of goods and dispatches the notice of such detection to the seller in six months, such buyer can claim the termination of such a contract, requiring either the deduction of the price of such goods or damages.⁵⁰ This seller’s obligation applies even if there is no contract concerning the quality and description of such goods.

Furthermore, whether there are “hidden defects of goods” or not is decided based on the requirement of the quality which such goods usually have. For example, take the purchase of a ball point pen where the pen fails to write. Such a pen, which may meet the requirement of quality and description under the contract, has hidden defects because the pen lacks a quality which such a pen usually has, specifi-

⁴⁴ MINPÔ, *supra* note 41, art. 526, para.1.

⁴⁵ CISG, *supra* note 1, art. 18 (2).

⁴⁶ MINPÔ, *supra* note 41, art. 526, para.1.

⁴⁷ CISG, *supra* note 1, art. 35 (1).

⁴⁸ MINPÔ, *supra* note 41, art. 415.

⁴⁹ MINPÔ, *supra* note 41, art. 566, 570.

⁵⁰ SHÔHÔ, *supra* note 42, art. 526.

cally, that it will function. So, under the CISG, there is one concept concerning warranties of quality, quantity, and description of the goods that are based on the contract. Japanese law, however, has not only the warranty of the goods based on a contract, but also one which is based on the concept of “hidden defects of the goods” that arises without relation to a contract.⁵¹

The third difference between the CISG and the Japanese Civil Code is the time of forecast to determine the scope of damages. Article 74 of the CISG says that the damages for a breach of contract may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract.⁵² On the other hand, Article 416(2) of the Japanese Civil Code states that “the obligee may also demand compensation for damages which arise from any special circumstances if the party did foresee, or should have foreseen, such circumstances.”⁵³ This can be construed, however, as stating that the time when such forecast should be made is one when the obligor causes a default. So, the time of the forecast to determine the scope of damages under the CISG is the conclusion of the contract. Under the Japanese Civil Code, however, the time of the forecast is the time at which the obligor causes a default, which postdates the conclusion of the contract.

The fourth difference between the CISG and the Japanese Civil Code is the revocation of offers. Article 16(1) of the CISG states that “until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.”⁵⁴ On the other hand, Article 521(1) of the Japanese Civil Code states that “an offer which specifies a period for acceptance may not be revoked,” and Article 524 of the Japanese Civil Code states that “an offer made to a person at a distance without specifying a period for acceptance may not be revoked until the lapse of a reasonable period for the offeror to receive a notice of acceptance.”⁵⁵ So, under the CISG the offer can be revoked, but under the Japanese Civil Code, it is irrevocable.

II. POSSIBLE UNIFICATION THROUGH NATIONAL LAWS AND “SOFT LAW” COLLABORATION

As mentioned in Part I, there are some factors that induce the exclusion of the CISG from sales agreements between U.S. and Japanese companies. There are some additional circumstances from a legal

⁵¹ SHŌHŌ, *supra* note 42, art. 526.

⁵² CISG, *supra* note 1, art. 74.

⁵³ MINPŌ, *supra* note 41, art. 416, para. 2.

⁵⁴ CISG, *supra* note 1, art. 16 (1).

⁵⁵ MINPŌ, *supra* note 41, art. 521, 524.

point of view, however, which seem to remove or mitigate the factors which induce such exclusion.

A. Existence of ‘Soft’ International Law Between US and Japanese Parties.

There are some frequently used international rules in sales agreements between U.S. and Japanese companies. These rules support the argument that although these parties seem reluctant to follow hard international law like the CISG, in practice there is in fact unification by resorting to another ‘global’ standard. Therefore, maybe the problem of exclusion of the CISG is not such a big problem in reality.⁵⁶ An analysis of these international rules will follow.

1. The Uniform Customs and Practice for Documentary Credits

The first international rule is the Uniform Customs and Practice for Documentary Credits (“UCP”), which is a set of rules on the issuance and use of letters of credit, first published in 1933 and revised in 1951, 1962, 1974, 1983, 1993, and 2007, and whose latest version is publication no. 600 known as “UCP 600.”⁵⁷ It is standardized by the International Chamber of Commerce (“ICC”),⁵⁸ which was founded in 1919 by the private sectors in Belgium, Britain, France, Italy, and the United States, and has become a world business organization with thousands of member companies and associations in approximately 120 countries.⁵⁹ Its aim is to promote international trade, service, investment, and a market economy system, as well as to foster the economic growth of developed and developing countries.⁶⁰

A “letter of credit” is an instrument under which the issuer, at a customer’s request, agrees to honor a draft or other demand for payment made by a party, as long as the draft or demand complies with specified conditions, and regardless of whether any underlying agreement between the customer and the beneficiary is satisfied.⁶¹ One of the examples of issuance and use of a letter of credit is the following: an issuer located in the United States, which is usually the buyer’s

⁵⁶ See *infra*. pp. 291-92.

⁵⁷ DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES AND MATERIALS 235 (Aspen Publishers 2d. ed. 2010).

⁵⁸ *Id.* at 235.

⁵⁹ *A Word from our Secretary General*, INT’L CHAMBER OF COMMERCE <http://www.iccwbo.org/id93/index.html> (last visited January 30, 2013).

⁶⁰ *Constitution of the International Chamber of Commerce*, INT’L CHAMBER OF COMMERCE (June, 2012), [http://www.iccwbo.org/Data/Documents/About-ICC/ICC-Constitution-\(English\)-June-2012/](http://www.iccwbo.org/Data/Documents/About-ICC/ICC-Constitution-(English)-June-2012/).

⁶¹ BLACK’S LAW DICTIONARY, *supra* note 31, at 987-88.

bank, at the U.S. buyer's request, issues a letter of credit. After the seller in Japan is notified of the issuance of the letter of credit by the issuer, it delivers the goods to the carrier. The carrier loads the goods and issues a bill of lading to the seller. The seller presents the bill of lading, a commercial invoice, and a certificate of issuance to the Japanese seller's bank, which acts as a confirming bank. The seller's bank examines the bill of lading and other documents to determine whether they conform to the letter of credit. The seller's bank then decides whether the documents are conforming and if so, makes payment to the seller.⁶² These procedures related to the issuance and use of a letter of credit are regulated by the UCP.

A letter of credit is frequently used in international transactions because it reduces the risk to the seller if the buyer does not pay. While reviewing international sales contracts, the author sometimes saw provisions concerning a letter of credit as follows:

At least thirty (30) days prior to the date of shipment of the Products under this Agreement, the Purchaser shall open an irrevocable and confirmed letter of credit, through a prime bank satisfactory to the Seller, which letter of credit shall be in a form and upon terms satisfactory to the Seller and shall be in favor of the Seller and shall be payable in United States Dollars.⁶³

Furthermore, in some circumstances, the UCP may govern the sales transaction without express agreement between the buyer and seller by well-known custom and usage.⁶⁴ For now, the UCP thus fulfills a unifying function similar to the purpose of the CISG.

2. *Incoterms® Rules or International Commercial Terms*

The second rule is the ICC's International Commercial terms, or the Incoterms rules. The ICC first published these rules along with the UCP 600 in 1921, and the latest versions of them became effective on January 1, 2011.⁶⁵ Contracts for the international sale of goods have integrated these rules worldwide, providing guidance to those who engage in international trade.

⁶² CHOW & SCHOENBAUM, *supra* note 57, at 64-65.

⁶³ TAKAO YAMAMOTO, EIBUN BJINESU KEIYAKUSHO DALJITEN [A DICTIONARY FOR STANDARD INTERNATIONAL BUSINESS CONTRACTS] 251 (Nihonkeizaishinbunsha 1st ed. 2006).

⁶⁴ Henry D. Gabriel, *Choice of Law, Contract Terms and Uniform Law in Practice*, Congress to Celebrate the Fortieth Annual Session of UNCITRAL, Vienna, July 9-12, 2007, <http://www.uncitral.org/pdf/english/congress/Gabriel-rev.pdf>.

⁶⁵ *From 1936 to Today: The Incoterms® Rules*, INT'L CHAMBER OF COMMERCE, available at http://www.iccwbo.org/incoterms_history/ (last visited February 19, 2013).

The Incoterms rules apply to sales contracts relating to the delivery of tangible goods.⁶⁶ They clarify which party, the buyer or seller, has to perform some necessary tasks for the delivery of goods under a sales contract. For example, they determine which party bears the risk of loss to the goods and which party bears the costs relating to such goods.⁶⁷ Under the rules for Cost, Insurance and Freight (“CIF”), the seller must bear all risk of loss to the goods, until such time as they pass the ship’s rail at the port of shipment.⁶⁸ The seller must also obtain, at his expense, cargo insurance as provided in the contract.⁶⁹

The Incoterms rules are also frequently used in international sales contracts. One is likely to see provisions concerning Incoterms in such contracts. For example:

“Delivery of the Products shall be made at San Francisco Port, California, on or before 31st of December, 20XX, on F.O.B. San Francisco Port basis. The trade term “F.O.B.” shall be interpreted in accordance with INCOTERMS 2000.”⁷⁰

Furthermore, in certain circumstances, the Incoterms rules may govern sales transactions without express agreement between the parties according to well-known custom and usage.⁷¹ So for now, the Incoterms rules, like the UCP, fulfill the unifying function embodied in the CISG.

Considering the above, in terms of the rules that are applied to sales transactions between U.S. and Japanese companies, the CISG might be as similarly applied to them as the UCP and the Incoterms rules are applied to those transactions. As the CISG becomes more familiar to U.S. and Japanese lawyers, it is possible that its provisions will become common in many sales contracts between U.S. and Japanese companies, much like a letter of credit and the Incoterms rules.

⁶⁶ CHOW & SCHOENBAUM, *supra* note 57, at 68.

⁶⁷ *Id.* at 69.

⁶⁸ INCOTERMS 2000: ICC OFFICIAL RULES FOR THE INTERPRETATION OF TRADE TERMS (2000), CIF COST, INSURANCE AND FREIGHT (. . . named port of destination) A.5, available at http://www.cardel.ru/pdf/incoterms_eng.pdf (last visited Feb. 21, 2013).

⁶⁹ *Id.* at CIF COST INSURANCE AND FREIGHT (. . . named port of destination) A.3.

⁷⁰ YAMAMOTO, *supra* note 63, at 246.

⁷¹ Gabriel, *supra* note 64, at 4.

B. Amending the U.S. and Japanese Laws in Accordance with the CISG Provisions

Unification and alignment with the CISG standards can be achieved through amending national laws, such as has occurred in the United States and is being proposed in Japan. Some provisions of the UCC are, in effect, identical with the CISG provisions. There is an effort to amend the Japanese Civil Code to be in accordance with the CISG provisions. This implies that parties are becoming more comfortable with the CISG, ergo the problem of excluding the CISG is not such a big problem, at least in these provisions. In the next section, the author will introduce some sections of the U.S. Code that are in accordance with the CISG, as well as the contents of proposed amendments to the Japanese Civil Code, before analyzing the impact of both for U.S. and Japanese legal practitioners.

1. Existence of Some Provisions of U.S. State Law that Are in Accordance with the CISG Provisions

According to a leading CISG scholar, the functions of the UCC and the CISG are substantially the same:

Both were designed to reduce the misunderstandings and controversies that can arise when one law governs the seller and a different law [governs] the buyer. They do the job in different areas: The UCC is designed to avoid the modest differences among the domestic laws of our fifty states, while the CISG is designed to overcome differences among the laws of the countries of the world.⁷²

What follows are three illustrative similarities between the UCC and the CISG.

The first UCC provision is one entitled “Variation of Agreement” under Article 2, Section 1-302. UCC § 1-302(a) states that “except as otherwise provided in subsection (b) or elsewhere in the UCC, the effect of provisions of the UCC may be varied by agreement.”⁷³ Article 6 of the CISG allows parties to “exclude the application of th[e] Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.”⁷⁴

Second, the UCC’s “Implied Warranty: Merchantability; Usage of Trade” is substantially the same as the CISG’s Article 35(2). Section 2-314(2)(c) of the UCC requires goods to be “fit for the ordinary pur-

⁷² McNamara, *supra* note 33, at 14 (citing John Honnold, *The Sales Convention: From Idea to Practice*, 17 J. L. & COMM. 181 (1998)).

⁷³ U.C.C. § 1-302 (2012).

⁷⁴ CISG, *supra* note 1, art. 6.

pose for which such goods are used.”⁷⁵ Such requirement is implied in the contract, so long as the seller is a merchant that deals in goods of that kind.⁷⁶ Mirroring the structure and content of this section, Article 35(2) of the CISG provides that unless the contract states otherwise, “goods do not conform with the contract unless they . . . [a]re fit for the purposes for which goods of the same description would ordinarily be used.”⁷⁷

The third UCC provision in accord with the CISG is one concerning “Buyer’s Remedies in General: Buyer’s Security Interest in Rejected Goods” under UCC Article 2, Section 2-711. UCC Article 2, Section 2-711 states that “where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, . . ., the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid (a) “cover” and have damages. . .; or (b) recover damages for non-delivery. . .”⁷⁸ On the other hand, Article 46 of the CISG states that “(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and. . . (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair.”⁷⁹

The author is unaware of any state in the United States that has amended or plans to amend any provisions of its state law based on the UCC in accordance with the CISG, including the provisions concerning the statute of frauds, the parol evidence rule, and disclaimers of warranties. So, the similarity of the provisions is merely coincidental and they likely have little impact on U.S. legal practitioners.

2. *Proposed Amendments to Japanese Law that Would be in Accordance with Provisions of the CISG*

In Japan, there is a plan to amend the Japanese Civil Code. The Ministry of Justice has proposed the amendments publicly on its website.⁸⁰ The first proposed amendment concerns “Time of Formation of Contract between Persons at a Distance” as defined in Article

⁷⁵ U.C.C. § 2-314(2)(c).

⁷⁶ U.C.C. § 2-314 (2012).

⁷⁷ CISG, *supra* note 1, art. 35. See *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 898 (7th Cir. 2005).

⁷⁸ U.C.C. § 2-711 (2012).

⁷⁹ CISG, *supra* note 1,, art. 46.

⁸⁰ MINPÔ (saiken kankei) no kaisei ni kansuru chukantekina rontenseiri [The Tentative Issues Concerning the Amendment of MINPÔ in the Area of Claims], (Ministry of Justice in Japan) (June 3, 2011), <http://www.moj.go.jp/content/000074989.pdf> [hereinafter Tentative Issues].

526(1) of the Japanese Civil Code. The existing Article 526(1) of the Japanese Civil Code states that “a contract between persons at a distance shall be formed upon dispatch of the notice of acceptance.”⁸¹ The amendment proposal for this article, however, modifies that to read that a contract between persons at a distance shall be formed at the moment that the indication of an assent reaches the offeror.⁸² The amended language essentially mirrors CISG Article 18(2), which reads, “[T]he acceptance of an offer becomes effective at the moment that the indication of an assent reaches the offeror.”⁸³

The second proposed amendment of the Japanese law concerns “Seller’s Warranty against (Hidden) Defects” as defined in Article 526 of the Japanese Commercial Code, which is a special provision of Article 566 and 570 of the Japanese Civil Code,⁸⁴ applying to transactions that take place among merchants. The existing Article 526 of the Japanese Commercial Code states that “if the buyer detects the hidden defects of the goods and dispatches the notice of such detection to the seller in six months, such buyer can claim the termination of such contract, deducting the price of such goods or damages.”⁸⁵ The proposed amendment to Articles 566 and 570, however, states that the legal nature of “the (hidden) defects of the goods” is part of the seller’s obligation under the contract. This means that the contract requires the seller to deliver goods that are of the quality, quantity and description described in the contract.⁸⁶ That language seems similar to Article 35(1) of the CISG, which states that “the seller must deliver goods which are of the quality, quantity and description required by the contract and which are contained or packaged in the manner required by the contract.”⁸⁷

The third proposed amendment of the Japanese Civil Code concerns “Scope of Damages” as defined in Article 416(2). The existing Article 416(2) reads, “the obligee may also demand the compensation for damages which arise from any special circumstances if the party did foresee, or should have foreseen, such circumstances.”⁸⁸ This can be construed, however, as stating that such foresight should occur when the obligor causes a default. The proposed amendment to Article 416(2) of the Japanese Civil Code instead states that such forecast should be made when the conclusion of the contract occurs.⁸⁹ The

⁸¹ MINPŌ, *supra* note 41, art. 526, para.1.

⁸² Tentative Issues, *supra* note 80, at 81.

⁸³ CISG, *supra* note 1, art. 18 (2).

⁸⁴ MINPŌ, *supra* note 41, art. 566, 570.

⁸⁵ SHŌHŌ [SHŌHŌ] [COMM. C.] art. 526 (Japan).

⁸⁶ Tentative Issues, *supra* note 80, at 118-119.

⁸⁷ CISG, *supra* note 1, at art. 35 (1).

⁸⁸ MINPŌ, *supra* note 41, art. 416, para. 2.

⁸⁹ Tentative Issues, *supra* note 80, at 9.

amended language seems similar to Article 74 of the CISG, which says that the damages for a breach of contract may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract.⁹⁰ Thus, if these proposed amendments to the Japanese Civil Code do pass, it appears that the number of differences between the CISG and the Japanese Civil Code will dramatically decrease.

III. BUILDING CONFIDENCE IN THE CISG THROUGH JUDICIAL INTERPRETATION

Courts in the United States have interpreted some articles of the CISG in accordance with different interpretations followed in other countries. This practice has led to a unity in the interpretation of the CISG. Three examples of this unity of interpretation can be seen in *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*,⁹¹ *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*,⁹² and *Macromex Srl. v. Globex International Inc.*⁹³

A. *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*

The first example is *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*⁹⁴ Chicago Prime Packers, Inc. (“Chicago Prime”), which was a seller of pork ribs and a Colorado meat wholesaler, filed a lawsuit against Northam Food Trading Co. (“Northam Food”), a partnership formed under the laws of Ontario, Canada, which was a buyer of such pork ribs from Chicago Prime. Chicago Prime alleged that Northam Food breached a sales contract by refusing to pay for a shipment of pork ribs that was condemned as spoiled by the United States Department of Agriculture (USDA) after it was delivered to an American retail customer. One of the issues in this case is the interpretation of Article 38(1) of the CISG because the contract did not contain an inspection provision.⁹⁵ To construe Article 38(1) of the CISG, the court relied on a case from the Netherlands and found “decisions under the

⁹⁰ CISG, *supra* note 1, at art. 74.

⁹¹ See generally *Chicago Prime Packers v. Northam Food Trading Co.*, 408 F.3d 894, 894 (7th Cir. 2005).

⁹² See generally *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*, 53 F. App'x 173, 173 (2d Cir. 2002).

⁹³ See generally *Macromex Srl. v. Globex International Inc.*, AM. ARB. ASSOC., Case No. 50181T 0036406, (23 October 2007).

⁹⁴ *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702 (N.D. Ill. 2004) *aff'd*, 408 F.3d 894 (7th Cir. 2005).

⁹⁵ *Id.*

CISG indicate that the buyer bears the burden of proving that the goods were inspected within a reasonable time.”⁹⁶

As a result of this case, the court achieved a unified interpretation of Article 38(1) of the CISG.⁹⁷ The unified interpretation of cases seems to mitigate any issues that arise from differences between the CISG and the UCC, and this unification may lead to a higher rate of inclusion of the CISG because Article 38(1) of the CISG⁹⁸ is different from similar articles of the UCC. Article 38(1) of the CISG says that the examination of the goods by the buyer is an obligation.⁹⁹ Section 2-513(1) of the UCC, on the other hand, says that to inspect them is the buyer’s right.¹⁰⁰

B. *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*

The second example is *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*.¹⁰¹ In this case, St. Paul Guardian Insurance Company and Travelers Property Casualty Insurance Company brought the lawsuit as subrogees of Shared Imaging, Inc., to recover the money they paid to Shared Imaging for damage to a mobile magnetic resonance imaging system (“MRI”) purchased by Shared Imaging from Neuromed Medical Systems & Support GmbH (“Neuromed”). One of the issues in this case was whether the CISG is applied to the sales contract for the MRI between Shared Imaging, Inc. and Neuromed, which provided that German law would be the applicable law. The court here referred to Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988–1994*, in reaching its conclusion.¹⁰²

Additionally, the court interpreted the governing law provisions “country-A law is applicable law” based on a case in country-A, not based on one in the United States. So, for example, if the legal

⁹⁶ *Chicago Prime Packers, Inc.*, 320 F. Supp. 2d at 712 (citing *Fallini Stefano & Co. s.n.c. v. Foodic BV*, No. 900336, Arrondissementsrechtbank Roermond, Netherlands (Dec. 19, 1991), UNILEX 1991).

⁹⁷ CISG, *supra* note 1, art. 38.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ U.C.C. § 2-512 (1999).

¹⁰¹ *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*, 00 CIV. 9344(SHS), 2002 WL 465312 (S.D.N.Y. Mar. 26, 2002) *aff’d*, *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GMBH*, 53 F. App’x 173 (2d Cir. 2002).

¹⁰² *St. Paul Guardian Ins. Co.*, 2002 WL 465312 (citing OLG Koblenz 17 September 1993; OLG Köln 22 February 1994), available at <http://www.cisg.law.pace.edu/cisg/biblio/karollus.html> (“[P]arties, as here, designate a choice of law clause in their contract—selecting the law of a Contracting State without expressly excluding application of the CISG—German courts uphold application of the Convention as the law of the designated Contracting state.”).

practitioners face the interpretation of the provisions “country-B law is applicable law” and country-B is a “Contracting State” in Article 1(1)(a) of the CISG,¹⁰³ they should first search for cases which have been decided in country-B concerning similar provisions. This makes it easier for such legal practitioners to determine interpretations of similar provisions decided by courts. Furthermore, this leads to legal certainty of the CISG.

C. *Macromex Srl. v. Globex International Inc.*

The third example is *Macromex Srl. v. Globex International Inc.*¹⁰⁴ In this case, Macromex Srl. (“Buyer”), which was a Romanian company and buyer of chicken leg quarters (“Products”), sought damages for undelivered Products under the contracts (“Contracts”) against Globex International (“Seller”), which was an American company engaged in the export of food products to multiple countries globally, including in Eastern Europe, and the seller of the Products to the Buyer. The Contracts expressly stated the shipments dates of the Products. The evidence at the hearing, however, showed that some flexibility of such shipment dates was allowed in the normal course of dealing within the industry, as well as by communications between Buyer and Seller. In this decision, for the purpose of considering whether the Contracts were modified by the agreement among the parties, the arbitrator construed Articles 11 and 29 of the CISG by referring to a Belgian case.¹⁰⁵

Through this decision, the arbitral body achieved a unified interpretation of Article 11 of the CISG,¹⁰⁶ referring to a case decided in another country. The accumulation of unified interpreted decisions, even by arbitral bodies, seems to lessen the issues that arise from differences between the CISG and the UCC, and this unification may lead to a higher rate of inclusion of the CISG because Article 11 of the CISG¹⁰⁷ is different from similar articles of the UCC. For example, article 11 of the CISG says that making a sales contract does not require any writing or any other evidence.¹⁰⁸ UCC Article 2, Section 2-

¹⁰³ CISG, *supra* note 1, art. 1.

¹⁰⁴ *Macromex Srl. v. Globex International Inc.*, Case No. 5018IT 0036406, Interim Award (Int’l Centre for Dispute Resolution of the Am. Arbitration Ass’n 2007), <http://cisgw3.law.pace.edu/cases/071023a5.html>.

¹⁰⁵ *Macromex Srl. v. Globex International Inc.*, Case No. 5018IT 0036406, Interim Award (Int’l Centre for Dispute Resolution of the Am. Arbitration Ass’n 2007) (citing *NV A.R. v. NV I. (Design of radio phone case)*, Case No. 2001/AR/0180, (Hof van Beroep [Appellate Court] Gent 2002), <http://cisgw3.law.pace.edu/cases/020515b1.html>).

¹⁰⁶ CISG, *supra* note 1, art. 11.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

201, however, says that a contract for the sale of goods for the price of \$500 or more is not enforceable unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by such parties.¹⁰⁹

IV. CONCLUSION

Considering “Possible Unification Through National Laws and ‘Soft Law’ Collaboration,” it is possible that as the differences between the CISG and domestic law, especially those differences between the CISG and Japanese law, gradually decrease, Japanese legal practitioners will become more familiar with the CISG. Additionally, there are already common international rules that are applied to international sales contracts between U.S. and Japanese parties, namely the UCP and the Incoterms rules. It may be possible then that the CISG will become harmonized law in the field of international sales like the previously mentioned rules.

Considering “Building Confidence in CISG through Judicial Interpretation,” it is expected that cases or decisions that interpret some articles of the CISG in accordance with their interpretations in other countries will gradually increase in both the United States and Japan. Such cases and decisions may include those interpreting the provisions of the CISG differently from those of the UCC or the Japanese Civil Code, those allowing legal practitioners in both the United States and Japan to interpret the articles of the CISG with more confidence, and those ultimately leading to legal certainty in the CISG among U.S. and Japanese parties.

Additionally, the CISG seems to ultimately give both U.S. and Japanese parties more substantive benefits. As you may know, there are many differences between U.S. and Japanese parties when making a sales contract. For example, the differences include the sizes of the firms, and in turn, their financial and bargaining powers in the transaction.

These factors affect the contractual negotiations between the two parties with results varying on a case-by-case basis. For example, if a Japanese distributor sells products that can be produced by only a few companies in the world and the buyer is a U.S. company, the distributor may have bargaining power even if it is smaller than the U.S. buyer, and may decide the governing law provisions as it wishes. If the distributor sells products that can be produced by many companies in the world, however, and is smaller than the buyer, the distributor does not have much bargaining power in the transaction and the buyer may decide the governing law provisions. In this situation, the buyer

¹⁰⁹ U.C.C. § 2-201 (1999).

gets the power not only to decide commercial conditions, but also to reduce legal risks more than the distributor. If the CISG is applied to this transaction, this application, at least, seems to give both parties equal legal risks. For example, if some issues arise in an international sales contract between U.S. and Japanese parties and the governing law provisions to this contract include the CISG, to resolve such issues both parties must make equal efforts to examine both the interpretations and cases of the CISG.

If the associated legal fees are too high, the parties may choose to resolve such issues directly without the assistance of lawyers, courts, or arbitration systems, which seems to be favorable to small and medium-sized enterprises.¹¹⁰ According to the Small and Medium Enterprise Agency in Japan, 99.2 percent of all companies in Japan are small and medium-sized enterprises.¹¹¹ On the other hand, according to the United States International Trade Commission, small and medium-sized enterprises form a large part of firms and account for roughly half of the gross domestic product generated by nonagricultural sectors in the United States.¹¹² So, under these circumstances, certain changes in conduct that are beneficial to small and medium-sized enterprises would lead to advantages for both U.S. and Japanese economies. The author believes that the benefits would be numerous. One such change includes a reduction of legal costs as U.S. and Japanese legal practitioners increase their adoptions of the CISG into their sales contracts.

In conclusion, U.S. and Japanese parties should not exclude the CISG from sales agreements. To achieve this, the author believes that legal practitioners both in the United States and Japan should familiarize themselves more with the CISG and include the application of the CISG to their sales contracts as soon as possible. In the meantime, the author recommends that small and medium-sized enterprises, managed without the assistance of lawyers, use sales contract templates that include governing law provisions that do not exclude the application of the CISG to their sales contracts.

¹¹⁰ Kazuhiko Kokusho, *Wagakunidenō CISG no jūyū: Doitsu Amerika wo sankōni* [Acceptance CISG in Japan Reference to that of Germany and the United States] 38 no.6 *KOKUSAI SHŌJI HŌMU* 758 (2010) (citing Henry D. Gabriel, *Choice of law, Contract Terms and Uniform Law in Practice*, Congress to Celebrate the fortieth annual session of UNCITRAL, Vienna, 9-12 July 2007).

¹¹¹ *FAQ: Chushokigyo hakusho nit suite* [FAQ: Concerning White Paper on Small and Medium Enterprises in Japan], THE SMALL AND MEDIUM ENTERPRISE AGENCY IN JAPAN, <http://www.chusho.meti.go.jp/faq/faq26.html> (last visited May 26, 2012).

¹¹² *Small and Medium-Sized Enterprises: Overview of Participation in U.S. Exports*, UNITED STATES INTERNATIONAL TRADE COMMISSION (January 2010), <http://www.usitc.gov/publications/332/pub4125.pdf>.

COMMENT: BACK TO THE BAD OLD DAYS: PRESIDENT PUTIN'S HOLD ON FREE SPEECH IN THE RUSSIAN FEDERATION

Rebecca Favret

*"The KGB chief, their number one saint /
Will escort protesters off to jail."¹*

EXECUTIVE SUMMARY

This paper addresses new laws promulgated in Russia that restrict freedom of speech. Each implicitly reflects the Kremlin's hostility toward political dissidence in the aftermath of serious protests following President Putin's reelection and elections to the legislature. Disturbed by the outcry, which took place in cities across Russia but also infiltrated the Internet, the Russian legislature passed strict laws censoring Internet speech, prohibiting behavior and speech deemed "extremist," and curbing the size and type of public gatherings.

The new legislation is examined through the lens of some of the Kremlin's most infamous and recent targets: namely, the Internet blacklist and the Pussy Riot scandal. It is critical to note that these instances are only a fraction of the free speech violations that are now legal in the Russian Federation. These incidents—and the potential for similar and more serious results under the new laws—are of grave importance. For many Western critics and Russian citizens, the laws confirm their worst fears about Putin's autocratic leanings: that with the stifling of free speech will come a complete unraveling of Russian democracy. The effect is a grim future for the former Soviet Union eerily reminiscent of the past.

I. INTRODUCTION

It is a long-standing principle that freedom of speech is at the core of a functioning democracy. For purposes of democratic legitimacy, free speech is a necessity more critical than suffrage. A

¹ Lyrics from a Pussy Riot song, referring to Russian President Vladimir Putin's hostile approach to political dissenters. In her closing statements immediately preceding her conviction, band member Nadezhda Tolokonnikova noted the prophetic nature of the lyrics. See Adam Taylor, *Here's What Russian Punk Band Pussy Riot Said at the Conclusion of Their Controversial Blasphemy Trial*, BUSINESS INSIDER (Aug. 10, 2012, 11:29 AM), <http://www.businessinsider.com/pussy-riot-trial-nadezhda-tolokonnikovas-closing-statement-2012-8#ixzz23RAu7eW7>.

speaker's freedom to express his or her viewpoint implicitly carries with it the right of potential audiences to hear and access that viewpoint. Access to information, in a political context or otherwise, is a crucial component of autonomy. Without it, decision-making is significantly hindered. Despite the existence of a popular vote, if voters are unable to independently make decisions because of a lack of information, democracy inevitably erodes.

The importance of free speech is the foundation for Western concerns over recent legislation in Russia curtailing the right to free expression. Amid contentions that he rigged the recent Duma (parliament) elections, President Putin has asserted even more political control by pushing numerous laws through the legislature that inhibit free speech. This paper focuses on three of them: the anti-extremism law, the Act for Information, and the amendments to the Law on Rallies. Each serves to clamp down on political dissidence in one form or another, either through personal actions, Internet speech, or activism and protests.

II. RUSSIAN POLITICAL CULTURE UNDER PRESIDENT PUTIN

Vladimir Putin has held political prominence in Russia since the dawn of the twenty-first century.² The former KGB agent-turned Prime Minister is currently in his third six-year term as president.³ But his control runs even deeper than the already constitutionally superior executive branch.⁴ In 2003, he formed his own political party, United Russia, to serve as his proxy in the legislature, known as the Duma.⁵ After the 2011 elections, members of the United Russia party comprised 70 percent of the seats in the legislature.⁶ The results were

² Then-Prime Minister Putin succeeded Boris Yeltsin as President of the Russian Federation in May 2000. He served two four-year terms as President and then stepped aside, assuming the role of Prime Minister, because the Russian Constitution prohibits three consecutive presidential terms. Dmitry Medvedev assumed the presidency, with the understanding that he would step down so Putin could run once Medvedev's term expired. See, e.g., Ellen Barry, *Putin Once More Moves to Assume Russia's Top Job*, N.Y. TIMES, Sept. 25, 2011, at A1.

³ *World's Most Powerful People: Vladimir Putin*, FORBES, <http://www.forbes.com/profile/vladimir-putin/> (last visited Jan. 12, 2013).

⁴ See Gordon L. Bowen, *Russian Legislative and Electoral Systems*, MARY BALDWIN COLLEGE, <http://www.mbc.edu/faculty/gbowen/duma.htm> (last visited Jan. 11, 2013).

⁵ *Id.* Note that the United Russia Party was originally called One Russia. *Id.*

⁶ Kathy Lally, *Vladimir Putin's United Russia Party Wins Regional Elections*, WASHINGTON POST, Oct. 15, 2012, http://articles.washingtonpost.com/2012-10-15/world/35500413_1_regional-elections-election-results-political-technologies. The result of the legislative elections was the subject of considerable protest through-

so overwhelming in part because, since 2004, when Putin and the Duma passed legislation prohibiting non-party members from seeking election, only candidates from approved parties have been permitted to run for election.⁷ Additionally, amid allegations of fraud, only 25 percent of Russians turned out to vote in the 2011 elections with the majority abstaining in protest.⁸

In light of the allegedly corrupt electoral process, the correlation between freedom of expression and democracy has become tangle in Russia. While the Russian Constitution guarantees freedom of speech,⁹ the government either directly or indirectly controls every national television network.¹⁰ At least 19 journalists have been murdered after publicly opposing President Putin, and the half-hearted investigations into their deaths have yet to yield a conviction.¹¹ Well-known dissidents have been jailed on trumped-up charges.¹²

With his combination of intimidation tactics and ability to effectively handpick the nation's legislature, Putin is able to further control opposition to his leadership. Just in the months following the most recent legislative election, Putin has pushed through numerous laws that stifle free speech and the media in an effort to stamp out criticism.¹³ Opponents of the President have been swiftly silenced—either through prosecution and imprisonment under the new laws¹⁴ or

out Russia, discussed *infra*. For a discussion of Putin's relationship with the United Russia Party in the legislature as "electoral authoritarianism," see Sean Roberts, *Dominant-Power Politics and 'Virtual' Hegemony: The Role of United Russia in the Putin Period (2010)* (Ph.D dissertation, University of Birmingham) (on file with University of Birmingham).

⁷ Bowen, *supra* note 4.

⁸ Lally, *supra* note 6.

⁹ KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 29 (Russ.), available at <http://www.constitution.ru/en/10003000-01.htm> ("Everyone shall have the right to freedom of thought and speech. The propaganda or agitation instigating social, racial, national, or religious hatred and strife shall not be allowed.").

¹⁰ *Freedom in the World 2012: Russia*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-world/2012/russia-0> (last visited Jan. 11, 2013).

¹¹ *Id.*

¹² *Id.*

¹³ See, e.g., Amendments to Federal Law on Protecting Children from Information Harmful to Their Health and Development, FEDERAL'NYI ZAKON [FZ] [Federal Law] 2012, No. 139 (requiring that websites with information deemed harmful to children be blacklisted); Federal Law on Combating Extremist Activity, FEDERAL'NYI ZAKON [FZ] [Federal Law] 2002, No. 114, available at <http://www.legislationline.org/documents/id/4368>.

¹⁴ See, e.g., FREE PUSSY RIOT, <http://freepussyriot.org/about> (last visited Jan. 2, 2013); see generally James Brooke, *Analysis: Political Winter Descends over Russia*, VOICE OF AMERICA, Oct. 23, 2012, <http://www.voanews.com/content/analysisis->

through extra-legal tactics, including the mysterious disappearances and blatant assassinations of vocal dissidents.¹⁵ Silencing critics in Russia is nothing new,¹⁶ but the government has seemingly renewed its crusade against opposition through legislation that stifles free speech.¹⁷

The government's uneasiness regarding political speech comes on the heels of a massive uprising following the 2012 election, which was tainted by allegations of fraud, and extended up through the eve of Putin's inauguration.¹⁸ Protests raged in over 50 cities, marking the first widespread anti-Putin demonstration since he first took office in 2000.¹⁹ In December, the For Fair Elections rally drew a crowd of 30,000, demanding that the Duma elections be recalled.²⁰ Virtually,

political-winter-descends-on-russia/1531876.html ("President Putin has methodically reduced civic space in Russia by advocating new laws on treason, blasphemy, libel, Internet censorship and curbs on public protest.").

¹⁵ See, e.g., *Journalists Killed in Russia*, COMMITTEE FOR THE PROTECTION OF JOURNALISTS, <http://cpj.org/killed/europe/russia/> (last visited Jan. 10, 2013). In 2010, the Committee for the Protection of Journalists listed Russia as the fourth-most dangerous nation in the world for journalists. *The Five Most Dangerous Countries for Journalists*, CHRISTIAN SCI. MONITOR, Nov. 8, 2012, <http://www.csmonitor.com/World/Global-Issues/2010/1108/The-five-most-dangerous-countries-for-journalists/Russia>; *Two More Critics of Vladimir Putin Take Bullets in the Head*, WASHINGTON POST, Jan. 20, 2009 (The aptly titled article discusses the assassinations of a human rights lawyer, Stanislav Markelov, and an opposition journalist, Anastasia Baburova, days after they held a press conference condemning Putin's leadership.).

¹⁶ See generally *Partial Justice: An Inquiry Into the Deaths of Journalists in Russia, 1993-2009* (John Crowfoot, ed., 2009), available at http://www.ifex.org/russia/2009/06/23/ifj_partial_justice_report.pdf (reporting that over 300 journalists were killed in Russia between 1993 and 2009, either during the performance of professional duties such as being caught in the crossfire while reporting during war times, or assassinated for political reasons, or were reported missing and never found).

¹⁷ See, e.g., Amendments to Federal Law on Protecting Children from Information Harmful to Their Health and Development, *supra* note 13 (requiring that websites with information deemed harmful to children be blacklisted); Federal Law on Combating Extremist Activity of the Russian Federation, *supra* note 13.

¹⁸ Zack Whittaker, *Russia's Internet Blacklist Looms in Freedom Crackdown*, CNET NEWS (July 6, 2012), http://news.cnet.com/8301-13578_3-57466592-38/russias-internet-blacklist-looms-in-freedom-crackdown/.

¹⁹ *Id.* Over 7,000 people participated in an election protest in St. Petersburg, and 4,000 rallied in Novosibirsk, despite the temperature being -20 degrees Celsius. Miriam Elder, *Russians Come Out in Force To Protest Against Alleged Electoral Fraud*, OBSERVER, Dec. 10, 2011, <http://www.guardian.co.uk/world/2011/dec/10/russia-protests-election-vladimir-putin>.

²⁰ See generally *Russia's Opposition Protests Chronology*, RUSSIAN LEGAL INFORMATION AGENCY, Sept. 14, 2012, <http://rapsinews.com/publications/20120914/2646>

thousands of Russians protested Putin's third presidential election, creating blogs and websites demanding that votes be recounted and alleging that the election was rigged.²¹ Prominent blogger Alexei Navalny, who has since been jailed,²² took his anti-corruption crusade to new levels after Putin's re-election when he launched the Good Machine of Truth (GMT).²³ The project condemns Putin's United Russia political party and aims to educate Russians about government corruption.²⁴ After opening the site, Navalny became the target of an implausible embezzlement investigation that most view as an attempt to silence his infamous criticism of Putin.²⁵

Fully illustrating the context in which these new laws are being implemented is additional legislation, recently adopted, that reflects the Putin regime's anti-democratic principles. In November 2012, a law went into effect requiring all foreign non-commercial organizations and non-governmental organizations to register with the government as "foreign agents."²⁶ Registration subjects foreign agents to substantial surveillance and financial audits by the government.²⁷ Moreover, the Duma newly reversed legislation that had, just seven

76534.html (including a chronology of the entire series of opposition protests from December 2011 to September 2012).

²¹ Whittaker, *supra* note 18.

²² Navalny was arrested in 2012 on what most believe to be fabricated embezzlement charges. This is the third allegation of embezzlement leveled against Navalny; all three investigations came in the wake of a protest organized by Navalny or anti-government Internet campaign such as the Good Machine of Truth. See, e.g., Ellen Barry, *Russia Charges Anticorruption Activist in Plan To Steal Timber*, July 31, 2012, N.Y. TIMES, available at http://www.nytimes.com/2012/08/01/world/europe/aleksei-navalny-charged-with-embezzlement.html?_r=0; Max Seddon, *Alexei Navalny, Russia Opposition Leader, Accused of Financial Corruption*, Dec. 14, 2012, HUFFINGTON POST, available at http://www.huffingtonpost.com/2012/12/14/alexei-navalny-fraud_n_2300393.html (last visited Jan. 9, 2013).

²³ *Profile: Russian Blogger Alexei Navalny*, BBC NEWS, <http://www.bbc.co.uk/news/world-europe-16057045> (last visited Jan. 12, 2013).

²⁴ *Dobraya Mashina Pravdi (Good Machine of Truth)*, MASHINA.ORG (last visited Jan. 12, 2013) (translated by the author).

²⁵ Max Seddon, *Alexei Navalny, Russia Opposition Leader, Accused of Financial Corruption*, HUFFINGTON POST, Dec. 14, 2012, http://www.huffingtonpost.com/2012/12/14/alexei-navalny-fraud_n_2300393.html.

²⁶ Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organizations Performing the Function of Foreign Agents. See also NCO Law Monitor: Russia, INFORMATION CENTER FOR NOT-FOR-PROFIT LAW, <http://www.icnl.org/research/monitor/russia.pdf> (last visited Dec. 19, 2012).

²⁷ INFORMATION CENTER FOR NOT-FOR-PROFIT LAW, *supra* note 26.

months prior, made defamation an administrative offense.²⁸ Now, defamation is back in the Criminal Code.²⁹ UN High Commissioner for Human Rights, Navi Pillay, said of the re-criminalization of defamation:

“There is a lot of concern that making defamation a criminal offense will stifle all criticism of Government authorities and limit the ability of individuals to address issues of transparency, corruption, and abuse of power. I urge the Government of the Russian Federation to avoid taking further steps backward to a more restrictive era, and to make strenuous efforts to limit the detrimental effects of the laws and amendments already passed over the last few weeks.”³⁰

Anti-Western sentiment was further espoused in Putin’s September 2012 termination of Russia’s partnership with USAID, signaling the end of collaboration between the two nations in helping develop the Russian Federation in the post-Soviet era.³¹ Most recently, an emphatic anti-Western enactment by the Duma sparked an international outrage when it formally outlawed U.S. adoptions of Russian orphans.³²

²⁸ *Russia’s New Laws Could Have Serious Negative Impact on Human Rights – U.N. Official*, U.N. NEWS CENTRE, July 18, 2012, <http://www.un.org/apps/news/story.asp?NewsID=42497#.ULeZCWA1Yb0> (“In just two months, we have seen a worrying shift in the legislative environment governing the enjoyment of freedoms of assembly, association, speech and information in the Russian Federation. [. . .] At least four new provisions have been made that will have a detrimental effect on human rights in this country.”).

²⁹ *Id.*

³⁰ *Id.*

³¹ David M. Herszenhorn, *With Aid Cutoff, Kremlin Recalibrates*, N.Y. TIMES, Sept. 22, 2012, http://www.nytimes.com/2012/09/23/world/europe/as-kremlin-ends-us-aid-critics-see-bid-to-quell-dissent.html?_r=0.

³² See On Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation, informally Dima Yakovlev Act, Dec. 26, 2012, 272-FZ (unofficially translated by RT.com); See, e.g., Madison Park, *Russia’s Lower House Approves Bill To Ban U.S. Adoption*, CNN, Dec. 27, 2012, <http://www.cnn.com/2012/12/21/world/europe/russia-us-adoption-ban/index.html>; *Duma Retaliates Against U.S. With Adoption Ban, NGO Restrictions, Blacklist*, RUSSIAN LEGAL INFORMATION AGENCY, Dec. 21, 2012 (explaining that the adoption ban was a retaliatory gesture by Russia after the United States signed the Magnitsky Act, imposing sanctions against Russians who have been involved in human rights violations).

III. CURTAILING SPEECH

A. *Laws Against Extremism and the Pussy Riot Scandal*

A federal law “on combating extremist activity” was adopted in 2002 and broadly prohibits the dissemination of “extremist” information through personal activities, media, the Internet, or mass gatherings.³³ In addition to stirring up racial or religious discord, obstruction of justice, and promoting terrorism, the first activity on the list of prohibited “extremist” activities is “forcible change of the foundations of the constitutional system and violation of the integrity of the Russian Federation.”³⁴ This provision has the potential to be construed liberally enough to disallow all civil activism, critical language, or government protest—if the activity or language is not already prohibited by other new laws, as discussed in Parts B and C, *infra*.

A first casualty of the anti-extremism laws gained global notoriety in February 2012. Members of an anonymous, feminist punk rock band, Pussy Riot, staged a political protest during a Moscow church service.³⁵ The performance was an act of protest against President Putin’s increasingly authoritative rule and the growing role of the Russian Orthodox Church in the political regime.³⁶ It lasted forty-one seconds.³⁷ Despite its brevity, the unwelcome concert became the subject of a criminal investigation after a video of the song appeared on YouTube, amassing over 600,000 views in the first day.³⁸ The song’s opposition to President Putin (“Virgin Mary, Mother of God, put Putin away/ Put Putin away, put Putin away!”) was deemed an act of religious hatred by Kirill I, the Patriarch of the Russian Orthodox Church, and the women were charged under the law against extremism.³⁹

The three artists, who are no longer anonymous but are known throughout the world: Maria Alyokhina, Yekaterina Samutsevich, and Nadezhda Tolokonnikova, were arrested on criminal charges of

³³ Federal Law on Counteraction of Extremist Activities, July 25, 2002, No. 114-FZ (unofficially translated by the Council of Europe).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* The Church has seen increased influence over the federal government since the 1990s and is highly visible in Russian secular life. For a discussion, see Amy Liedy, *The Orthodox Church in Russian Politics*, WILSON CENTER KENNAN INSTITUTE, <http://www.wilsoncenter.org/publication/the-orthodox-church-and-russian-politics> (last visited Jan. 21, 2013).

³⁷ See Take Action for Pussy Riot, AMNESTY INTERNATIONAL, http://takeaction.amnestyusa.org/c.60JCLQPAJiJUG/b.8465995/K.6DQD/Pussy_Riot_writeathon/siteapps/advocacy/ActionItem.aspx (last visited Jan. 2, 2013).

³⁸ Free Pussy Riot, *supra* note 14.

³⁹ *Id.*

hooliganism.⁴⁰ Samutsevich's sentence was suspended when the Court learned that she had merely been outside of the church during the demonstration, but Alyokhina and Tolkonnikova were given two-year sentences in two of the most notoriously inhumane Siberian labor camps, hundreds of miles from their homes and children in Moscow.⁴¹

Concededly, Pussy Riot's actions were designed to incite political change, and their actions did violate the anti-extremism law.⁴² Samutsevich did not attempt to hide the band's political aims, commenting to a reporter, "Our art is meant to make the entire world laugh at Putin, so that not a single self-respecting leader would agree to sit down at the same table with him."⁴³

The issue, then, is not simply whether Pussy Riot violated the anti-extremism law in attempting to incite political change; they blatantly did. The contention instead posed by human rights activists is that the law does not clearly define extremism and, in effect, the law itself is a violation of human rights.⁴⁴ The Center for Information Analysis, a Russian nonprofit organization, monitors government misuses of counter-extremism legislation and has condemned the application of the statute to the Pussy Riot protest.⁴⁵ The law under which

⁴⁰ See, e.g., *id.*

⁴¹ See, e.g., *id.* Their right to freedom of speech was not Pussy Riot's only constitutional guarantee violated. Leading up to their trial, the women were illegally placed under 24-hour video surveillance after the Pussy Riot scandal was labeled of "special importance" by the prosecution team. See also *Masha and Nadya To Serve Sentences in Russia's 'Harshes Prisons' in Perm and Mordovia*, FREE PUSSY RIOT (Oct. 24, 2012), <http://www.freepussyriot.org/news/masha-and-nadya-serve-sentences-russias-harshes-prisons-perm-and-mordovia> (Perm and Mordovia host multiple prison camps, most of which reportedly represent the Soviet-era gulag, or forced labor, system); *Maria Alekhina Transferred to Solitary Cell in Berezniki Prison Because She Received Threats of Physical Harm*, FREE PUSSY RIOT (Nov. 22, 2012), <http://www.freepussyriot.org/news/maria-alekhina-day-transferred-solitary-cell-berezniki-prison-because-she-received-threats-phys>.

⁴² See Federal Law on Combating Extremism of the Russian Federation, No. 114-FZ, July 25, 2002 (unofficially translated by the Council of Europe).

⁴³ Anna Nemstova, *Pussy Riot's Yekaterina Samutsevich Speaks Out*, DAILY BEST, Dec. 2, 2012, <http://freepussyriot.org/articles>.

⁴⁴ See, e.g., Christopher Plummer, *Protests Condemn Pussy Riot Verdict, Call for Russia's Awakening*, HUMAN RIGHTS FIRST, Aug. 21, 2012, <http://www.humanrightsfirst.org/2012/08/21/protests-condemn-pussy-riot-verdict-call-for-russias-awakening/>; see generally *We Will Not Be Silent: Free Pussy Riot*, AMNESTY INTERNATIONAL, Sept. 18, 2012, <http://www.amnestyusa.org/get-involved/take-action-now>.

⁴⁵ SOVA: CENTER FOR INFORMATION AND ANALYSIS, <http://www.sova-center.ru/en/about-us/> (last visited Nov. 19, 2012); Alexander Verkhovsky, *Inappropriate Enforcement of Anti-Extremist Legislation in Russia in 2011*, SOVA: CENTER FOR INFORMATION AND ANALYSIS, Apr. 27, 2012, <http://www.sova-center.ru/en/misuse/>

Pussy Riot was convicted raises concerns about the ability of Russians to display any oppositional conduct.⁴⁶

The anti-extremism statute is not restricted to Pussy Riot's punk performance or amateur criticism of Putin. The legislation has been instrumental in stamping out even official political speech of party opponents. Leading up to the 2007 and 2011 parliamentary election seasons, the legislation was instrumental in halting distribution of informational campaign materials.⁴⁷ Eventually, the concerns with the seized brochures and newspapers would be deemed "unfounded," in most cases under the anti-extremism statute, but not until voting had ended and their purpose had obviously and conveniently been nullified.⁴⁸ Similarly, commercials on behalf of the Just Russia party were removed from circulation after the election commission concluded that the commercials were "inciting social discord."⁴⁹

B. Internet Censorship in Russia

The government's efforts to combat extremism also have implications for Internet speech. In November 2012, the legislature enacted a new censorship law aimed at extremist web content.⁵⁰ The Act for Information authorizes government officials to blacklist websites displaying information deemed harmful to children.⁵¹ Websites warrant-

reports-analyses/2012/04/d24302/; Natalia Yudina, *Recommendations for the OSCE Dublin Conference on Internet Freedom*, SOVA: CENTER FOR INFORMATION AND ANALYSIS, JUNE 20, 2012, available at <http://www.sova-center.ru/en/misuse/reports-analyses/2012/06/d25708/> (identifying "interrelation of countermeasures to hate speech on the Internet and defense of freedom of expression on the Internet" as an area that the Institute deemed "especially problematic.").

⁴⁶ Note that Pussy Riot's performance would have also been outlawed under the amendments to the Law on Rallies, which imposes strict regulations on permits for public gatherings and outlaws numerous types of behavior during rallies, including wearing masks, which the members of Pussy Riot always sport to preserve their signature anonymity. See *Main Amendments to Laws on Rallies*, RUSSIAN LEGAL INFORMATION AGENCY, http://rapsinews.com/legislation_mm/20120613/263437356.html (last visited Jan. 10, 2013).

⁴⁷ See generally SOVA: CENTER FOR INFORMATION AND ANALYSIS, <http://www.sova-center.ru/en/> (last visited Nov. 19, 2012); Alexander Verkhovsky, *supra* note 45.

⁴⁸ SOVA, *supra* note 48.

⁴⁹ *Id.*

⁵⁰ *Russia Internet Blacklist Law Takes Effect*, BBC NEWS TECH., 31 Oct. 2012, <http://www.bbc.co.uk/news/technology-20096274> (last updated March 3, 2013, 8:06PM); Claire Bigg, *Russia's Internet 'Blacklist' Law Sparks Free-Speech Fears*, RADIO FREE EUROPE RADIO LIBERTY, <http://www.rferl.org/content/russia-internet-blacklist-free-speech/24758022.html> (last visited Dec. 18, 2012).

⁵¹ *Russia Internet Blacklist Law Takes Effect*, *supra* note 50.

ing censorship include those promoting child pornography, violence, or substance abuse.⁵²

While the law's official purpose is to protect children from inappropriate material, the legislation can be read broadly enough to prohibit much more. Not surprisingly, a Moscow court in November ordered that any websites circulating videos of Pussy Riot's performance be shut down pursuant to the anti-extremism law, as the video was deemed a dangerous call to arms for Kremlin protestors across Russia.⁵³

No court order is necessary for authorities to remove a harmful site from the web.⁵⁴ The blacklist is managed by Roskomnadzor, the federal service for telecom, information technology, and mass communication supervision.⁵⁵ The watchdog service fields complaints from citizens, who are encouraged to submit screenshots of offensive material.⁵⁶ Within twenty-four hours of the Act for Information's legalization, Roskomnadzor received over 5,000 complaints.⁵⁷ Although many of those complaints were rejected,⁵⁸ over 180 websites have been shut down since the law's enactment.⁵⁹ The blacklist in its entirety is not public, but curious citizens can search a government-regulated registry to see if a particular website has been blocked.⁶⁰

Human rights organizations and journalist advocacy groups, as well as the Russian search engine Yandex, the social media website Mail.Ru, and Wikipedia's Russian language affiliate, have all expressed concern over the government's new role in monitoring Internet speech.⁶¹

⁵² *Id.*

⁵³ *Russian Court Tries To Ban All Online Videos of Pussy Riot*, BBC NEWS, Nov. 29, 2012, <http://www.theatlanticwire.com/global/2012/11/russian-court-tries-ban-all-online-videos-pussy-riot/59433/>.

⁵⁴ See Olga Khazan, *Russia's Secret New Internet Blacklist*, WASH. POST, Nov. 9, 2012, <http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/09/russia-secret-new-internet-blacklist/>.

⁵⁵ See Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications, ROSKOMNADZOR, <http://www.rsoc.ru/eng/> (last visited Jan. 12, 2013).

⁵⁶ See Khazan, *supra* note 54.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Federal Service for Supervision of Communications, Information Technology and Mass Communication, *supra* note 55.

⁶¹ See *Russia Internet Blacklist Law Takes Effect*, *supra* note 50; see also Dara Kerr, *Wikipedia Blackout in Russia to Protest Censorship*, CNET NEWS, July 9, 2012, http://news.cnet.com/8301-1023_3-57469107-93/wikipedia-blackout-in-russia-to-protest-censorship/.

Russia's efforts to stamp out dissent online extend beyond its own borders, revealing the motives of the Russian government to suppress anti-government dialogue.⁶² In July 2012, Russia proposed an amendment to the United Nations' International Telecommunications Regulations Treaty that would have a similar impact as the Act for Information.⁶³ The amendment would restrict public access to websites designed for "interfering in the internal affairs or undermining the sovereignty, national security, territorial integrity and public safety of other states, or to divulge information of a sensitive nature."⁶⁴ Though the United Nations failed to pass the amendment,⁶⁵ the proposal suggests Russia's intolerance for government opposition.

Other former Soviet countries have followed in Russia's footsteps, enacting similar laws against political speech. Less visible than the Kremlin, smaller Eurasian countries have pushed free speech infringement further, perhaps forecasting the potential results of the Russian laws. Kazakhstan provides a recent example. Similar to the election protests in Russia, Kazakhstan has seen numerous labor strikes and terrorist acts over the past year and has subsequently been the site of considerable protest.⁶⁶ During the peak of the rioting, all telecommunication was cut off, and Twitter was blocked throughout the country.⁶⁷ Journalists were banned from going to observe the protests.⁶⁸ Ever since, Kazakhstan has clamped down on the media.⁶⁹ The nation's information minister, Darkhan Mynbai, announced in September 2012 that media coverage of "emergency situations," including natural disasters and terrorist acts, would be strictly censored.⁷⁰ The new policy's purported aim is to dispel rumors, but Mynbai's explanation suggests that, like Russia's Act for Information, the Kazakh regu-

⁶² Dara Kerr, *Amendments to U.N. Treaty Could Censor the Internet*, CNET NEWS, June 24, 2012, http://news.cnet.com/8301-1023_3-57459564-93/amendments-to-u.n-treaty-could-censor-the-internet/.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ The version of the Treaty that was accepted and signed by 140 countries at the December 2012 World Conference on International Communications authorized prohibition of spam only. Secretary General of the International Telecommunication Union, Dr. Hamoudoun Toure, stressed that the amendment was not "content-related." Naushad K. Cherrayil, *New U.N. Telecoms Treaty Signed in Dubai*, Dec. 14, 2012, GULF NEWS, <http://gulfnews.com/business/telecoms/new-un-telecoms-treaty-signed-in-dubai-1.1118727>.

⁶⁶ *Minister's Announcement Could Augur Drastic Increase in Censorship*, Reporters without Borders via INTERNEWS, Sept. 14, 2012, <http://en.rsf.org/kazakhstan-minister-s-announcement-could-14-09-2012,43382.html>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

lations will go further: “‘Questioning the veracity of [official] information or the spokesperson’s competence, criticizing the actions undertaken by authorities, and inciting citizens to act in one way or another’ will be forbidden ‘in all media – TV, print, and Internet.’”⁷¹

Belarus has outdone Russia with its Internet monitoring leading up to the nation’s 2012 elections.⁷² In August, a human rights watch organization, Viasna, reported that the Belarusian government had blocked news websites expressing viewpoints oppositional to President Aleksandr Lukashenko (who is known throughout the global community as “Europe’s Last Dictator”).⁷³ Authorities also censored electoral addresses on statewide television made by Lukashenko’s opposing party and omitted any “references to the plight of Belarus’s political prisoners or Belarus’s serious economic crisis.”⁷⁴ “Lukashenk[o]’s attitude towards the media is summed up by his statement that he ‘supports a free press as long as it is responsible and helps his presidency.’”⁷⁵

Similar to Lukashenko’s actions to censor media leading up to the 2012 elections, in the months prior to a 1996 referendum, the president prohibited his opponents from using the government-operated media but continued using it himself.⁷⁶ Prior to the 2001 presidential election, which Lukashenko won with a staggering 76 percent of the vote, government officials confiscated the publishing equipment of one independent newspaper and closed down two other independent printing houses.⁷⁷

Russia could do the same. Substantively, opposing parties’ political platforms are not far removed from Navalny’s Good Machine of Truth. Eventually, Russian speech laws could become as strict as other suffering democracies like Ecuador, which enacted a new media law outlawing articles “that ‘have a bearing, in favor of or against any

⁷¹ *Id.*

⁷² *Opposition Journalists and Cyber Dissidents Hounded in Run-Up to Election*, Reporters without Borders via INTERNEWS, Sept. 3, 2012, <http://en.rsf.org/belarus-opposition-journalists-and-cyber-03-09-2012,43321.html>.

⁷³ *Id.*; see also Eric R. Reed, *Descent into Authoritarianism: Barriers to Constitutional Rule in Belarus*, 28 HASTINGS INT’L & COMP. L. REV. 147, 151 (2004-2005); Andrej Dynko, *Belarus: Europe’s Last Dictatorship*, N.Y. TIMES, July 16, 2012, http://www.nytimes.com/2012/07/17/opinion/belarus-europes-last-dictatorship.html?_r=0 (noting Condoleezza Rice first coined the expression ‘Belarus as Europe’s last dictatorship’ in 2006).

⁷⁴ *Opposition Journalists and Cyber Dissidents Hounded in Run-Up to Election*, *supra* note 72.

⁷⁵ Reed, *supra* note 73 (citing RETT A. LUDWICKOWSKI, CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE 100, 101 (1996)).

⁷⁶ *Id.*

⁷⁷ *Id.*

candidate, proposal, option, electoral preference or political thesis.’”⁷⁸ Similarly, the Egyptian government removed every *Al-Dustour* newspaper from the stands when, following the country’s first presidential election, it ran an article criticizing the president’s political affiliation.⁷⁹

Even if political speeches themselves, like those blacked out in Belarus, are not deemed extremist by Russian authorities, it will be very difficult for Putin’s political opponents to generate a following without being able to communicate and disseminate information online.⁸⁰

C. *Laws Curbing Public Gatherings*

The issue is confounded by citizens’ inability to gather publicly under the newly amended Law on Rallies.⁸¹ New measures were enacted on the eve of a scheduled mass demonstration in June, imposing steep fines on those who either organize or participate in unapproved rallies, or whose rallies are allowed but violate strict new conditions on

⁷⁸ Frida Ghitis, *New ‘Democracies’ Failing if Speech Isn’t Free*, CNN, Aug. 22, 2012, <http://www.cnn.com/2012/08/22/opinion/ghitis-press-freedom/index.html>.

⁷⁹ *Id.* Every issue was removed from the newsstands when *Al-Dustour* newspaper published accusations against the Muslim Brotherhood (of which newly-elected President Morsy was a member) after the country’s first presidential election. *Id.* The newspaper’s editor, Islam Affi, and other journalists from the paper were charged with insulting the President. *Id.* The Egyptian legislature recently hand-picked fifty new newspaper editors; including Salah Abdel Maksoud, a member of the Muslim Brotherhood who Morsy selected as Information Minister. *Id.* But see *Egypt Bans Detention of Journalists, Islam Afifi, Editor of Opposition Paper Charged with Insulting President Morsi, Released After President Issues Decree*, GUARDIAN, Aug. 24, 2012, <http://www.guardian.co.uk/world/2012/aug/24/egypt-bans-detention-journalists> (noting even after President Morsy released Affi and issued a decree banning detention of journalists, Affi was still tried in September).

⁸⁰ With the potential to blacklist all of YouTube, the Russian censorship laws are reminiscent of Iran’s Internet policies. Like Russia, Iran is known for torturing and imprisoning journalists as well as blocking unflattering websites. Additionally, the Iranian government has vowed to stop using the Internet by the end of 2013 because it is “untrustworthy.” Samuel Blackstone, *Iran Plans To Stop Using the Internet by 2013*, BUS. INSIDER, Aug. 9, 2012, <http://www.businessinsider.com/iran-plans-to-stop-using-the-internet-by-2013-2012-8>. Iran’s goal to abandon the global Internet follow in the footsteps of North Korea and Cuba, which have both opted for a national intranet. *Id.*

⁸¹ *Main Amendments to Laws on Rallies*, *supra* note 46; see David M. Herszenhorn, *New Russian Law Assesses Heavy Fines on Protestors*, N.Y. TIMES, June 8, 2012, <http://www.nytimes.com/2012/06/09/world/europe/putin-signs-law-with-harsh-fines-for-protesters-in-russia.html>.

demonstration permits.⁸² The amended fines for violations—up to \$9,000 for individual participants, \$18,000 for organizers, and \$30,000 for groups or companies— are nearly triple those that existed prior to the amendments.⁸³ The heightened penalties are astronomical when considering that the average Russian’s annual income is \$8,500.⁸⁴ The risk of such a steep fine will likely scare members of the middle class from protesting at all.⁸⁵ In addition to the increase in fines for violators, the amended law prohibits anyone with prior convictions for dissidence from organizing demonstrations.⁸⁶ Incidentally, this provision would forbid Alexei Navalny from leading any more rallies and would ban the members of Pussy Riot from organizing demonstrations.

The Law on Rallies gives government officials considerable leverage to suppress the “antigovernment street protests” that erupted and have been brewing since the presidential and Duma elections.⁸⁷ The mere threat of sanctions has already proven effective in preventing protests.⁸⁸ Sergei Mitrokhin, the leader of a liberal opposition party, responded to the law as an overarching “ban on rallies and political actions.”⁸⁹ He told a news agency, “Now, anyone can be punished with slave’s work or an astounding fine. I cannot call people to a rally knowing in advance that from there they may be sent to the galleys.”⁹⁰

Again, the amendments to the Law on Rallies could conceivably be interpreted to outlaw a wide array of public meetings. Now that extremist speech is banned from the Internet, how can Russians exchange opinions and information? The Law on Rallies has the potential to prohibit even the most non-threatening of information sessions or town hall meetings. Taken in concert with the Act for Information and anti-extremism laws, the new amendments, read broadly, have the power to restrict all political speech outside of the home.

⁸² See Herszenhorn, *supra* note 81.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See *Russia Protest Bill: Vladimir Putin Supports Controversial Anti-Protest Law*, HUFFINGTON POST, May 23, 2012, http://www.huffingtonpost.com/2012/05/23/russia-protest-bill-president-vladimir-putin_n_1538990.html.

⁸⁶ *Main Amendments to Laws on Rallies*, *supra* note 46; see also Herszenhorn, *supra* note 81 (“[A]ll evidence indicated that the law was forced through the State Duma by the presidential administration, [. . .] a grave mistake given the apparent trampling of constitutional rights. [. . .] ‘People who do not agree with the authorities turn out not to have full rights.’”).

⁸⁷ Herszenhorn, *supra* note 81.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

D. *Extra-Legal Methods of Stamping Out Dissident Speech*

It is important to point out that the new legislation is not the first time Russian officials have attempted to monitor speech.⁹¹ Nor is legislation the only means through which Putin and former leaders have controlled discourse.⁹² The most significant curtailment of free speech still occurs outside of the legislature, aided by widespread intimidation tactics.⁹³ Over the past few decades, the Russian government has strong-armed the media by making examples of unwelcome outspokenness.⁹⁴

For example, Mikhail Khodorkovsky has been in a Siberian prison since challenging then-Prime Minister Putin in 2003.⁹⁵ Khodorkovsky was the owner of a prominent oil company and the richest man in Russia when he accused Putin of being corrupt.⁹⁶ Considered Putin's "biggest political liability," Khorkovsky was imprisoned and convicted in two ludicrous show trials.⁹⁷ Much like the Pussy Riot trials, where the defendants awaited their verdict in cages, the publicity and harshness of Khorkovsky's treatment sent a stern message to other potential dissidents.⁹⁸

More than prosecution, the assassination of journalists has also effectively silenced much anti-Kremlin sentiment in the media. Fifty-four journalists have been murdered in Russia since 1992.⁹⁹ Almost 40 percent of the slain writers covered war.¹⁰⁰ One-third covered government corruption, another one-third covered politics, and one-quarter of the journalists who were killed wrote on crime.¹⁰¹

The most notable journalist assassinated was Anna Politkovskaya, who was gunned down in 2006 in broad daylight before her final novel, *A Russian Diary: A Journalist's Final Account of a Country*

⁹¹ See, e.g., Masha Gessen, *The Wrath of Putin*, VANITY FAIR, Apr. 2012, <http://www.vanityfair.com/politics/2012/04/vladimir-putin-mikhail-khodorkovsky-russia>; *Journalists Killed in Russia*, COMMITTEE FOR THE PROTECTION OF JOURNALISTS, *supra* note 15. In 2010, the Committee for the Protection of Journalists listed Russia as the fourth-most dangerous nation in the world for journalists.

⁹² *The Wrath of Putin*, *supra* note 91; *Journalists Killed in Russia*, *supra* note 15.

⁹³ *Journalists Killed in Russia*, *supra* note 15.

⁹⁴ *Id.*

⁹⁵ Masha Gessen, *supra* note 91.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See generally *id.* (describing the apparent lack of freedom and law in Russian society).

⁹⁹ *Journalists Killed in Russia*, *supra* note 15.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Moving Backward,¹⁰² was published, and after having recently completed *Putin's Russia: Life in a Failing Democracy*.¹⁰³ Investigators determined that the assassin had stalked the renowned journalist for five days but waited to kill her until October 7, Putin's birthday.¹⁰⁴ Though Politkovskaya's murder was never solved, the consensus among investigators is that the motive was to intimidate Russian journalists who might find themselves, like Politkovskaya, inclined to condemn President Putin.¹⁰⁵ The top investigator on the murder, Petros Garibyan, made his opinion about the killer's motive clear: "First and foremost, [the killer] sought a demonstrative and resonant act aimed at intimidating all of you—journalists—as well as society and the authorities."¹⁰⁶

Prophetically, Politkovskaya wrote in an article two years before her death:

"We are hurtling back into the Soviet abyss, into an information vacuum that spells death from our own ignorance. All we have left is the [I]nternet, where information is still freely available. For the rest, if you want to go on working as a journalist, it's total servility to Putin. Otherwise, it can be death, the bullet, poison, or trial—whatever our secret services, Putin's guard dogs, see fit."¹⁰⁷

Sadly, Russia's Act for Information now controls what Politkovskaya felt was the last hope for free speech.

IV. PROJECTING THE FUTURE OF RUSSIAN DEMOCRACY

Free speech is of focal importance for the health and longevity of a democracy. The anti-extremism law, Act for Information blacklist law, and amendments to the Law on Rallies systematically strip Russians of their ability to voice and, perhaps more importantly, hear opinions about their government. Unable to access information about the opposition movement, the Russian people will no longer have a stake in the government. Each of the recently enacted free speech laws is disconcerting on its own. Taken in sum, however, the laws signal a

¹⁰² ANNA POLITKOVSKAYA, *A RUSSIAN DIARY: A JOURNALIST'S FINAL ACCOUNT OF A COUNTRY MOVING BACKWARD* (2007).

¹⁰³ ANNA POLITKOVSKAYA, *PUTIN'S RUSSIA: LIFE IN A FAILING DEMOCRACY* (2004).

¹⁰⁴ Anna Kordunsky, *Russian Investigator Speaks about Anna Politkovskaya Killing*, N.Y. TIMES, Nov. 9, 2012, http://www.nytimes.com/2012/11/10/world/europe/russian-investigator-speaks-about-anna-politkovskaya-killing.html?_r=0.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Anna Politskovskaya, *Poisoned by Putin*, GUARDIAN, Sept. 9, 2004, <http://www.guardian.co.uk/world/2004/sep/09/russia.media>.

troubling and ominous retreat for the Russian Federation into a regime reminiscent of the Soviet era.

The aim, or at least a major practical consequence, of these practices seems to be self-regulation. Just as the numerous assassinations of journalists has intimidated many in the field into backing off of their criticism of Putin, the threat of steep financial penalties and imprisonment will scare many citizens into silence. Even those who are unafraid, like Navalny and Khordorkovsky, will eventually be arrested, prosecuted, and incarcerated. Once enough dissidents are jailed, there will be less need for enforcement and fewer occasions for oversight. Fortunately, the Pussy Riot scandal has brought attention to the potential for governmental abuse of the new legislation; however, because of Putin's systemic stronghold over the legislature and silencing of political discourse, short of a revolution, little can be done to oust him.¹⁰⁸

¹⁰⁸ See generally David Hearst, *Putin's Repressive Regime Has Frozen Russia's Heart*, Guardian, Dec. 21, 2012, <http://www.guardian.co.uk/commentisfree/2012/dec/21/putins-repressive-regime-frozen-russia-heart> (describing recent legislative action and suggesting that the only way to get rid of Putin is through "Russia's next perestroika").

