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**MASTERING A TWO-EDGED SWORD: LESSONS
FROM THE RULES AND LITIGATION ON
SAFEGUARDS IN THE WORLD TRADE
ORGANIZATION**

*Julien Chaisse, Debashis Chakraborty & Animesh Kumar**

INTRODUCTION

The Uruguay Round discussions of GATT and the subsequent agreement liberalizing trade beginning in the mid-nineties through the WTO framework led to a considerable decline in tariff barriers among the Member countries. However, several non-tariff barriers (“NTBs”) increased simultaneously with the decline of tariffs. These NTBs include environmental and technical standards, dumping of products, provision of actionable subsidies, and misuse of rules of origin. Incorporation of a strong framework of trade remedial measures is an integral part of the WTO architecture. This architecture will counter unfair trade practices like dumping and the unequal subsidizing of partner countries, as well as a sudden surge in imports

The smooth functioning of the trade remedial measures, namely, the WTO Anti-Dumping Agreement (“ADA”), the Agreement on Subsidies and Countervailing Measures (“ASCM”), and the Agreement on Safeguards (“ASG”) play a crucial role in ensuring freer trade.¹ Nevertheless, growing misuse of the trade remedial provisions themselves evolved as a major NTB over the years. From January

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¹ See Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT’L L. & COM. REG. 393, 406 (1994). See generally Agreement on Safeguards, Apr. 15, 1994, 1869 U.N.T.S. 154, available at http://www.wto.org/english/tratop_e/safeg_e/safeint.htm [hereinafter Safeguards Agreement].

1995 through August 2014, a total of 4,230 anti-dumping investigations were initiated, with 2,719 investigations resulting in an imposition of final measures. The corresponding figures for countervailing measures have been 302 and 177 respectively. The WTO-incompatibility of several trade remedial practices has been established, leading to the withdrawal of key restrictive instruments like *zeroing methodology* and *Byrd Amendment*.²

The third form of trade remedial measure, namely safeguard (“SG”) actions, has been applied on relatively fewer occasions than the Anti-Dumping (“AD”) and the countervailing measures (“CVM”) so far. From March 1995 through October 2014, 255 instances of safeguard initiations were reported, while 118 final measures were imposed over the same period. Despite lower numbers of occurrences *vis-a-vis* ADA and ASCM provisions, there is reason to believe that ASG provisions can also be considerably trade distorting, and often the actions of the importing countries have been questioned.³

Hartigan has noted that “the ASG was negotiated as a response to the increasing use of extra-legal measures, such as voluntary export restraints and orderly marketing agreements, to restrict imports among contracting parties of the GATT.”⁴ However, almost two decades since the inception of the WTO, it is widely viewed that “as a means of inducing countries to move away from VRAs or VRA-equivalent measures (antidumping), the Agreement on Safeguards has been an abject failure.”⁵

SG raises five major problems which we briefly review: SG can be affected by political and trade policy factors; SG actions within the regional trade agreements (“RTA”) are getting increasingly important; potential problems of the ASG framework have been noted from the legal perspective since its origin; the economic impact of SG; and the

² As a result, ensuring greater transparency in the operation of trade remedial measures has already been acknowledged as a major goal of the Doha Development Agenda. VIVIAN C. JONES, CONG. RESEARCH SERV., R40606, TRADE REMEDIES AND THE WTO RULES NEGOTIATIONS (2010). In particular, given the potential implications on livelihood of a considerably large number of people, negotiation for reducing fisheries subsidies has as an important agenda in recent period. See Debashis Chakraborty et al., *Doha Round Negotiations on Subsidy and Countervailing Measures: Potential Implications on Trade Flows in Fishery Sector*, 6 ASIAN J. WTO & INT’L HEALTH L. & POL’Y, 201, 201–34 (2011).

³ Chad P. Brown, *Why Are Safeguards Under The WTO So Unpopular?*, WORLD TRADE REV. 47, 47–51 (2002).

⁴ James Hartigan, *Making Sense of Safeguards*, 5 REV. INT’L ECON. 809, 818 (2011).

⁵ Dennis Kitt, Note, *What’s Wrong with Volunteering? The Futility of the WTO’s Ban on Voluntary Export Restraints*, 47 COLUM. J. TRANSNAT’L L. 359, 380 (2009).

potential problems for the newcomers eyeing entry in the importing country.

- Political factors: The possibility of political and trade policy-related motivations influencing SG actions has been widely reported in literature.⁶ The SG actions of both developed and developing countries have come under review so far.⁷
- Regional dimension: SG actions within the RTA framework have also become increasingly important in recent periods. As a number of RTAs have entered into force with the objective of providing deeper tariff cuts to the partner countries *vis-a-vis* the prevailing most favored nations (“MFN”) rate, protection of domestic industries in the involved parties emerge as a major area of concern.⁸ Several RTAs in the recent period incorporate SG provisions.⁹ On the other hand, the possible violation of MFN through SG provisions in RTAs is not uncommon either. For instance, the recent objection raised by the EU against Brazil’s imposition of fines on table wine deserves mention here. The EU argued that despite the lack of any sudden and sharp increase in imports and lack of serious injury, Brazil has introduced SG measures. Moreover, Brazil excluded the imports from MERCOSUR countries (where Brazil is a key member) from its SG investigation.¹⁰ A similar concern arose when the Argentine SG actions against footwear imports from third countries came under scanner based on the fact that there was no intra-regional SG mechanism imposed on MERCOSUR partners. The Dispute Settlement Body

⁶ See Lihu Chen & Yun Gu, *China’s Safeguard Measures Under the New WTO Framework*, 25 *FORDHAM INT’L L.J.* 1169-86 (2002).

⁷ See, e.g., Dukgeun Ahn, *Restructuring the WTO Safeguard System*, in *THE WTO TRADE REMEDY SYSTEM: EAST ASIAN PERSPECTIVES* 11, 11–31 (Cameron May ed., 2006) (discussing the manipulation and use of SGs in both developed and developing countries).

⁸ See PAUL KRUGER, WILLEMEN DENNER & JB CRONJE, *COMPARING SAFEGUARD MEASURES IN REGIONAL AND BILATERAL AGREEMENTS* 7 (Int’l Center for Trade and Sustainable Development 2009).

⁹ For instance, it has been reported that under the EC-CARIFORUM EPA more flexible SG triggers have been provided to the latter. In addition, CARIFORUM states are entitled to impose SG measures in the wake of a potential threat to infant industries (pro-development provision). See U.N. ECLAC, *The CARIFORUM-EU Economic Partnership Agreement (EPA): An Assessment of Issues Relating to Market Access, Safeguards and Implications for Regional Integration*, 9–10, U.N. Doc. LC/CAR/L.181 (Nov. 26, 2008).

¹⁰ See Committee on Safeguards, *Minutes of the Regular Meeting Held on 27 April 2012*, ¶ 13, G/GS/M/41 (July 16, 2012).

(“DSB”) ruling forced Argentina to dismantle those measures.¹¹ Bronckers noted, “As long as safeguards cover imports ‘from every source,’ the importing country can select its targets and discriminate.¹² Thus, the most efficient importers are not protected by this MFN rule.”¹³

- Legal factors: SG measures inherently accompany the processes of liberalization and *structural adjustment* that goes along with enhancing market access for imported products.¹⁴ Moreover, the instrument is politically necessary in order to undertake liberalization in the first place and to find the necessary majorities to do so at home. Members are thus entitled to *unilaterally* undertake restrictive measures, whenever trade liberalisations result in difficulties for domestic producers.¹⁵ For instance, the determination of “significant cause of material injury” is open to interpretation and hence may lead to protectionist policies. As a result, SG measures constantly run the risk of being abused, as domestic producers may seek excessive relief from policymakers by requesting that they take recourse to such measures. International trade law needs to strike a careful balance and define conditions for implementing SG measures in sufficiently precise terms. There exists vibrant literature on this aspect that is becoming increasingly important in the current context.
- Economic dimension: On the economic front, analysing the trade effects of SG measures over 1995-2000, Bown and McCulloch noted that safeguard actions both explicitly and im-

¹¹ Elías Baracat & Julio J. Nogués, *WTO Safeguards and Trade Liberalization Lessons from the Argentine Footwear Case* (World Bank Policy Research, Working Paper No. 3614, 2005).

¹² Marco Bronckers, *Nondiscrimination in the World Trade Organization Safeguards Agreement: A European Perspective*, in *LAW AND ECONOMICS OF CONTINGENT PROTECTION IN INTERNATIONAL TRADE* 367, 368 (Kyle W. Bagwell, George A. Bermann & Petros C. Mavroidis, eds., Cambridge Univ. Press 2010).

¹³ *Id.*

¹⁴ Robert Wolfe, *The Special Safeguard Fiasco in the WTO: The Perils of Inadequate Analysis and Negotiation* 6 (Feb. 10, 2009) (Unpublished Paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353909 (“At least three are relevant in this debate. The first is temporary protection against injurious imports based on an injury test. The second is encouragement to accept liberalization, if available only for products subject to a reduction commitment. The third is protection from volatility in the global market for all products.”).

¹⁵ Yong-Shik Lee, *Destabilization of the Discipline on Safeguards? Inherent Problems with the Continuing Application of Article XIX after the Settlement of the Agreement on Safeguards*, 35 *J. WORLD TRADE* 1235, 1235 (2001) (Neth.).

licitly lead to a departure from MFN principles.¹⁶ The analysis also notes that the economic impact of SG is a function of the form in which it is applied, and might discourage entry of new suppliers and non-RTA partner exports.¹⁷ Instances of procedural stringency have also been reported in the literature. For instance, Baldwin and Steagall analysed the US International Trade Commission (“ITC”) actions over 1980-1990 and noted that while calculating serious injury, the ITC applied a higher standard for SG *vis-a-vis* the same under AD and CVD cases.¹⁸ The optimality of SG as a trade policy tool has also been questioned. As Read observed, the benefits of the SG actions are much lower than the associated costs.¹⁹

- Problems for Newcomers: Finally, another major problem associated with SG actions is the potential problems for newcomers. SG measures result in quantitative restrictions in terms of tariff rate quotas, where licenses are often based on historical market shares in recent years.²⁰ For obvious reasons, this practice goes against the interest of countries who newly enter the market of the importing Member for the product facing SG actions.²¹

While the literature on SG actions is quite rich, the analysis on the related disputes, especially in terms of misuse of the ASG provisions, is a relatively less researched area. In this background, the present paper attempts to understand whether existing WTO SG provisions are vulnerable to potential misuse. The paper is arranged along the following lines. The WTO ASG provisions are discussed first, looking into the provisions susceptible to misuse. The actual violations of the SG provisions are analyzed next, followed by a policy conclusion identifying potential reform areas in the agreement.

¹⁶ Chad P. Bown & Rachel McCulloch, *The WTO Agreement on Safeguards: An Empirical Analysis of Discriminatory Impact*, in *EMPIRICAL METHODS IN INTERNATIONAL TRADE* 145, 147 (Michael G. Plummer ed., 2004).

¹⁷ *Id.* at 147, 164.

¹⁸ Robert E. Baldwin & Jeffrey W. Steagall, *An Analysis of ITC Decisions in Antidumping, Countervailing Duty and Safeguard Cases*, 130 *WELTWIRTSCHAFTLICHES ARCHIV* 290, 304 (1994) (Ger.).

¹⁹ Robert Read, *The Political Economy of Trade Protection: Determinants & Welfare Impact of the 2002 US Emergency Steel Safeguard Measures* 1 (Lancaster Univ. Mgmt. Sch. Working Paper No. 2005/013, 2005), available at <http://eprints.lancs.ac.uk/48759/1/Document.pdf>.

²⁰ Brown & McCulloch, *supra* note 16, at 145.

²¹ *Id.*

I. REGULATING SAFEGUARDS: WTO LAW AND PRINCIPLES

The WTO system comprises a number of different safeguard clauses in various agreements. The principal safeguard provision in the 1994 Global Agreement on Tariffs and Trade (“GATT”) is Article XIX, supplemented by the Agreement on Safeguards which came into force at the conclusion of the Uruguay Round. Moreover, certain other agreements also contain special safeguard clauses: Article 5 of the Agreement on Agriculture (“AoA”), Article 6 of the ATC (transitional safeguard mechanism) and Article X of the GATS (the criteria of which were left to future negotiations).

A. *GATT 1994 and the Agreement on Safeguards*

In general, the following requirements must be met for the adoption of a SG measure on the import of goods pursuant to Article XIX of the GATT 1994: there has to be an upward surge of imports of the product in question.²² This increase must be caused by developments that were not foreseen by the country applying the SG measure at the time when the relevant obligation, including tariff concessions, was incurred. Finally, the increase in imports must cause or threaten to cause “serious injury” to a domestic industry producing a “like” or “directly competitive” product.²³

In a very early dispute under the GATT 1947, the contracting parties were called upon to review a U.S. safeguard measure against imports of hats from Czechoslovakia. They examined the measure’s consistency with Article XIX of the GATT and concluded that the stipulated conditions were fulfilled.²⁴

Since the coming into force of the WTO and the adoption of the ASG, commentators dispute whether the requirement of unforeseen developments—as mentioned in Article XIX of the GATT 1994—still applies, as this criterion is omitted in this agreement.²⁵ Commentators

²² See Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Dec. 14, 1999) [hereinafter *Argentina—Safeguard Measures*] (clarifying the relationship between Article XIX of the GATT 1994 and the Agreement on Safeguards). Again, it found these rules to apply concurrently and avoided finding conflicting norms. *Id.*

²³ See *id.* (detailing the legal regime of safeguards under the GATT 1994); see also J. Chaisse, D. Chakraborty, and J. Mukherjee, *Deconstructing Service and Investment Negotiating Stance*, J. WORLD INV. & TRADE 44–78 (2013).

²⁴ See GATT Contracting Parties, *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, CP/106US (Mar. 27, 1951) at 4, 17 (regarding the requirement of the existence of unforeseen developments).

²⁵ See, e.g., Tilottama Raychaudhuri, *The Unforeseen Developments Clause in Safeguards under the WTO: Confusions in Compliance*, 11 ESTEY CENTRE J. INT’L

state that the drafters deliberately replaced the criterion with other additional requirements under the agreement.²⁶ In *Argentina – Safeguard Measures on Imports of Footwear*, the Appellate Body settled the issue by applying its doctrine of effective interpretation.²⁷ It established that, despite the omission in the agreement, the existence of unforeseen developments nevertheless forms a relevant criterion in a SG investigation.²⁸

Safeguard measures adopted by national authorities so far have been subject to substantial review in various panel and Appellate Body reports. The following report examined the different requirements for adopting safeguard measures. The Appellate Body, in *US – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat*,²⁹ assessed the requirement of a “threat of serious injury to domestic producers” as follows: a safeguard measure is imposed on a specific “product,” namely, the imported product.³⁰ The measure may only be imposed if that specific product (“such product”) is having the stated effects upon the “domestic industry that produces like or directly com-

LAW & TRADE POL’Y 302, 311 (2010) (“[d]ebate that persists is whether the increase in imports themselves has to be unforeseen, or should the said increase be able to be attributed due to unforeseen developments.”); JEANNE J. GRIMMETT, CONG. RESEARCH SERV., R40844, CHINESE TIRE IMPORTS: SECTION 421 SAFEGUARDS AND THE WORLD TRADE ORGANIZATION (WTO) 3 (2011) (“Although the Agreement on Safeguards does not contain language requiring the existence of ‘unforeseen developments,’ the WTO Appellate Body has determined that the requirement continues to apply.”).

²⁶ See, e.g., Alan O. Sykes, *The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute*, 7 J. INT’L ECON. L. 523, 523–24 (2004). See also Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections—General exceptions clause as a forced perspective*, AM. J. L. & MED. 332–61 (2013).

²⁷ U.N. ECLAC, *supra* note 9, at 9–10.

²⁸ *Argentina—Safeguard Measures*, *supra* note 22, at ¶88 (noting that “the Panel states that the *express omission* of the criterion of unforeseen developments” in Article XIX:1(a) from the *Agreement on Safeguards* “must, in our view, have meaning. On the contrary, in our view, if they had intended to *expressly omit* this clause, the Uruguay Round negotiators would and could have said so in the *Agreement on Safeguards*. They did not”).

²⁹ Appellate Body Report, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, ¶ 86, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001); accord Henrik Horn & Petros Mavroidis, *US – Lamb United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia: What Should Be Required of a Safeguard Investigation*, 2 WORLD TRADE REV. 395, 395–430 (2003) (Eng.) (commenting on this dispute over imported lamb meat).

³⁰ *Agreement on Safeguards*, *supra* note 1, at art. 2.1.

*petitive products.*³¹ . The conditions in Article 2.1, therefore, relate in several important respects to *specific products*. In particular, according to Article 2.1, the legal basis for imposing a safeguard measure exists *only* when imports of a specific product have prejudicial effects on domestic producers of products that are “like or directly competitive” with that imported product.³² In our view, it would be a clear departure from the text of Article 2.1 if a SG measure could be imposed because of the prejudicial effects that an imported product has on domestic producers of products that are not “like or directly competitive products” in relation to the imported product.

The problems inherent in the ASG have caused Hartigan to conclude that “[s]tandards and requirements in the ASG that are technically complex, such as non-attribution, and subjective, such as serious injury and an unforeseen increase in imports, will not be effective in disciplining the invocation of SG actions to protect import competing constituents.”³³

B. *Special Safeguard Clauses*

Both the Agreement on Textiles and Clothing (“ATC”) and the AoA contain special safeguard clauses. The former permits members to apply specific transitional safeguard measures while the latter provides for an elaborate and permanent, price-based SG mechanism for products specifically listed in the members’ schedules.³⁴ Both are different and mutually exclusive in relation to the general SG clause of Article XIX of the GATT 1994 and the Safeguards Agreement.³⁵

Article 6 of the ATC governs a special safeguard clause for the disciplines under that agreement. The ATC, however, expired after ten years at the end of 2004.³⁶ The application of the SG clause has given rise to a number of dispute settlement cases.³⁷ Article 5 of the AoA provides for two complicated price-based SG mechanisms.³⁸ Both rely

³¹ *Id.* at art. 4.1(c)(a) 131 (emphasis added).

³² *Id.* at art 2.1.

³³ Hartigan, *supra* note 4, at 810. See generally Julien Chaisse and Puneeth Nagaraj, *Changing Lanes—Trade, Investment and Intellectual Property Rights* 37 HASTINGS INT’L & COMP. L. REV. 223 (2014).

³⁴ Agreement on Textiles and Clothing, Jan. 1, 1995, GATT.

³⁵ *Id.*

³⁶ See generally Agreement on Safeguards, *supra* note 1, at art. 19.

³⁷ See generally Panel Report, *United States—Restrictions on Imports of Cotton and Man-Made Fiber*, WT/DS24/R (Feb. 25, 1997) (listing the peculiarities of the safeguard clause).

³⁸ Agreement on Agriculture art. 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 (1994).

on trigger mechanisms and surcharge tariffs, either based on increased imports or based on declining prices.³⁹

C. Safeguards and Trade in Services

The General Agreement on Trade in Services (“GATS”) does not contain a safeguard mechanism in comparison to that of the “GATT 1994” or the special safeguard clauses.⁴⁰ The matter could not be resolved during the Uruguay Round negotiations.⁴¹ Article X of GATT explicitly provides that there shall be multilateral negotiations on the question of emergency SG measures based on the principle of non-discrimination.⁴² Traditional safeguard concepts applied to trade in goods can only, to a certain extent, be analogised to trade in services. Border measures such as tariffs and quantitative restrictions are not generally available in trade of services.⁴³

II. MAPPING THE USE OF SAFEGUARD PROVISIONS

In order to understand the Safeguard imposing behaviour of the major countries during the Jan. 1, 1995 to Oct. 30, 2014 period, we have conducted an analysis of the data obtained from WTO Safeguard Gateway.⁴⁴ We first review the global trends in SG practice (3.1.), then the geographical distribution (3.2), and finally the sectoral analysis (3.3).

³⁹ See Harry de Gorter, Merlinda D. Ingco & Laura Ignacio, *Market Access: Economics and the Effects of Policy Instruments*, in AGRICULTURE AND THE WTO: CREATING A TRADING SYSTEM FOR DEVELOPMENT 63, 76 (Merlinda D. Ingco & John D. Nash eds., 2004).

⁴⁰ General Agreement on Tariffs and Trade, art. 10, Apr. 15, 1994, 1869 U.N.T.S. 154 (1994).

⁴¹ See generally General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1167 (1994) [hereinafter GATS] (negotiating the General Agreement on Trade in Services during the Uruguay Round).

⁴² GATT, art. 10, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

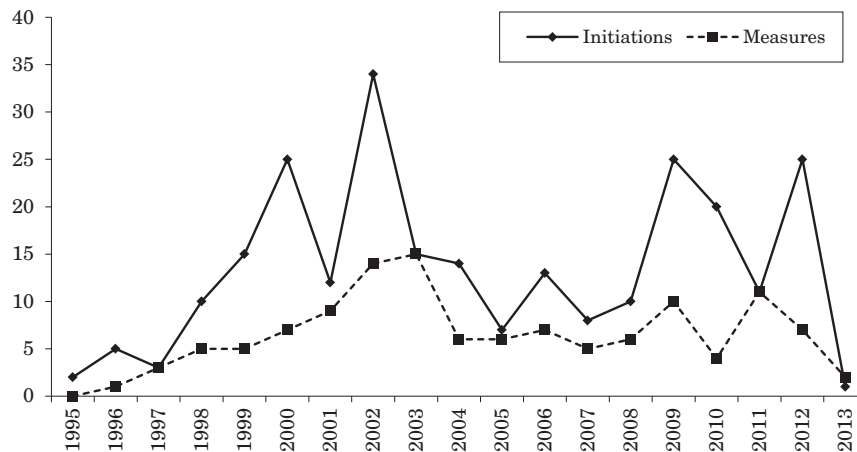
⁴³ See generally Note by the Secretariat, *Issues for Future Discussions on Emergency Safeguards*, ¶ 5, S/WPGR/W.27/Rev.1 499 (May 7, 1999).

⁴⁴ See Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT’L ECON. L. 153, 158, 170 (2007) (devolving the methodology from which the analysis in this section is derived); see also Julien Chaisse and Mitsuo Matsushita, *Maintaining the WTO’s Supremacy in the International Trade Order – A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. INT. ECON. L. 1, 9–36 (2013).

A. Safeguards Activism: Global Trends

Figure 1 reveals the number of global SG initiations and measures fluctuated between 1995 and 2014. The number of SG initiations increased steadily from 1997 to 2000, peaking with thirty-four initiations reported in 2002. Since then, however, there has been a decline, with only seven reported cases of initiations during 2005. On the other hand, in the post-recession period, in line with AD and CVM measures, the number of SG actions has increased considerably, and during 2009, a total of twenty-five initiations were reported.⁴⁵

Figure 1: Safeguard actions initiated from 1995 to 2013, worldwide



Source: Constructed by the authors from WTO Safeguards database

The trend of “safeguard-activism” continued in 2010 as well, with twenty initiations reported and twenty-four reported in 2012. SG measures have also followed a similar pattern, with fourteen and fifteen measures reported during 2002 and 2003 respectively.⁴⁶ The numbers declined in the following years in line with the downward trend in initiations, but increased to ten and eleven during 2009 and 2011 respectively.⁴⁷

⁴⁵ See World Trade Organization, *Safeguard Measures by Reporting Member*, available at http://www.wto.org/english/tratop_e/safeg_e/SG-Measures_By_Reporting_Member.pdf (last updated Apr. 30, 2014).

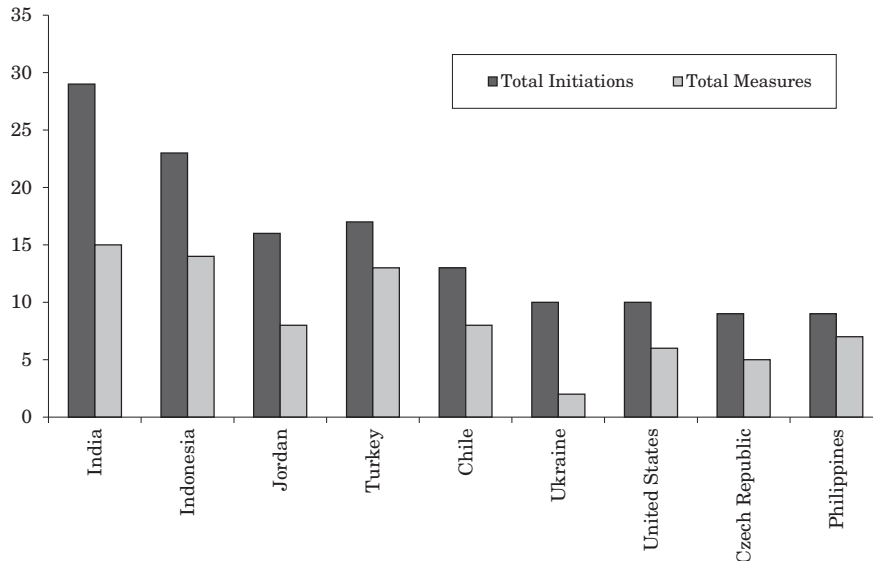
⁴⁶ See World Trade Organization, *Safeguard Initiations by Reporting Member*, available at http://www.wto.org/english/tratop_e/safeg_e/SG-Initiations_By_Reporting_Member.pdf (last updated Oct. 30, 2014).

⁴⁷ See *id.*

B. Geographical Analysis: SG as a Developing Country Phenomenon

Interestingly, unlike AD and CVM, SG measures have been used more frequently by the developing countries. **Figure 2** attempts to identify the major countries involved in SG actions.

Figure 2: Major Players undertaking Safeguard Actions (1995 to 2014)



Source: Constructed by the authors from WTO Safeguards database

Although mainly the developing countries are taking recourse to this policy tool, developed countries occasionally have also adopted this route. India tops the SG actions list with twenty-nine initiations, which accounts for 11.37% of the total initiated cases.⁴⁸ Indonesia, Turkey and Jordan come next in the list, by accounting for 9.02%, 6.67% and 6.27% of the total initiated cases each, followed by Chile (5.10%), the US (3.92%) and Ukraine (3.92%).⁴⁹

Regarding SG measures, India is at the top with 11.86% of the total measures, Indonesia and Turkey are also at the forefront with 11.02% each.⁵⁰ Jordan, the Philippines, and Chile come next, collectively accounting for 5.93% of the total SG measures to date.⁵¹ Several least developed countries (“LDCs”) and transition economies have also taken recourse to SG measure at times. For instance, the Czech Re-

⁴⁸ See World Trade Organization, Safeguard Initiations by Reporting Member, available at http://www.wto.org/english/tratop/_safeg_e/SG-Initiations_By_Reporting_Member.pdf (Apr. 30, 2014).

⁴⁹ See *id.*

⁵⁰ *Id.*

⁵¹ *Id.*

public (nine initiations), Bulgaria (six initiations), Morocco (six initiations) and Poland (five initiations) deserve special mention.⁵² As a whole, if the SG initiations from Australia, Canada, the EU, Japan and the US are taken aside, the actions by remaining developing countries and LDCs account for 91.76% of the total number of cases, and the corresponding figure for the top ten user countries stands at 58.86%. In other words, unlike the case of CVM duties,⁵³ SG actions are mainly a developing country phenomenon. It has been noted in the literature that the adoption of SG as a trade remedial instrument is much lower in the EU as compared to AD and CVM.⁵⁴ However, developed countries have taken recourse to this policy at times.⁵⁵

Lissel explains the phenomenon by acknowledging that the “lack of injury test and the lack of compensation makes application easier since developing countries often lack the capacity and means allowing them to compensate.”⁵⁶ However, the same provision may seriously constrain their market access when developed countries adopt SG measures. For instance, the twenty-one-month steel safeguard in the US in 2001 and the associated trade effects deserve mention.⁵⁷

The inclination of developing countries towards using SG actions can be explained by the fact that the importing country, which takes recourse to SG provisions (additional duties or quotas), needs to compensate the affected country by allowing it to retaliate accordingly. However, as per Article 8.3 of the WTO ASG, no retaliation is to be

⁵² *Id*; see also Julien Chaisse, Debashis Chakraborty & Biswajit Nag, *The Three-Pronged Strategy of India's Preferential Trade Policy: A Contribution to the Study of Modern Economic Treaties*, 26 CONN. J. INT'L L. 415. See generally, Julien Chaisse, *Deconstructing Services and Investment Negotiations – A Case Study of India at WTO GATS and Investment Fora*, 14 J. WORLD INV. & TRADE 1, 44–78 (2013).

⁵³ See generally Debashis Chakraborty et al., *supra* note 2, at 222 (noting that while Canada, the EU and the US account for 73.47% of all SCM initiations, China, India, South Korea, Indonesia and Thailand account as target for 50.20% of these initiated cases and concluding that the low cost economies of Asia are emerging as the major targets of SCM activism in developed countries).

⁵⁴ See Edwin Vermulst & Brian Gatta, *Concurrent Trade Defense Investigations in the EU, the EU's New Anti-Subsidy Practice Against China, and the Future of Both*, 11 WORLD TRADE REV. 527, 530–31 (2012).

⁵⁵ See Edwin Vermulst et al., RECENT EC SAFEGUARDS' POLICY: “KILL THEM ALL AND LET GOD SORT THEM OUT?” at 1–3, <http://www.vvgb-law.com/wp-content/uploads/2013/02/Vermulst-Recent> (last visited Sept. 17, 2013).

⁵⁶ Elenor Lissel, *Regional Safeguard Measures: An Incentive to Sign Regional Trade Agreements Without Taking Into Consideration the Special Needs for Developing Countries*, 23 (Sept. 2011) (unpublished dissertation, Lund University paper collection).

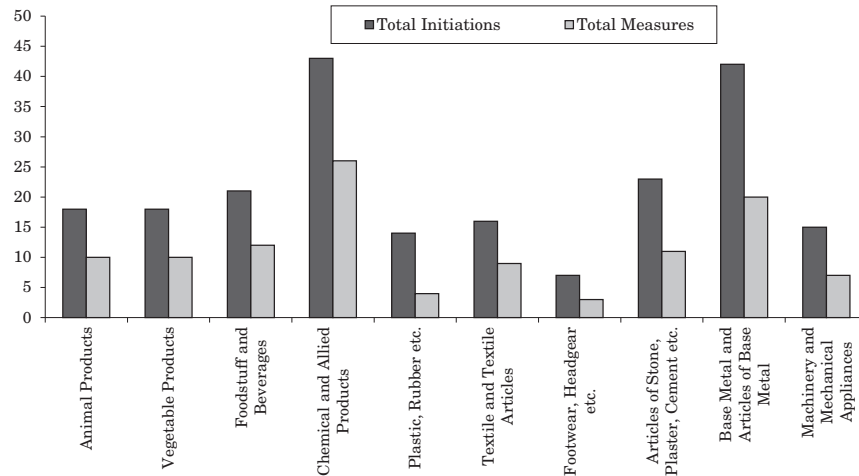
⁵⁷ Ritu Lodha, *US Steel Safeguard Dispute: Forged Protection Brought to Light*, CUTS Trade Law Brief No. 3 (2005) (describing the steel safeguard and its effects).

applied for three years since the implementation of the SG measure. This provides a crucial protection to the developing countries, and in particular, to their local firms.⁵⁸

C. *Sectoral Analysis: Primary Sector, Low-Tech or High-Tech Products?*

Figure 3 shows the distribution of the major sectors that are affected by the SG actions.

Figure 3: Major Sectors affected by Safeguard Actions (1995 to 2014)



Source: Constructed by the authors from WTO Safeguards database

It is observed that chemical and allied products suffer most from SG initiations (16.86% of the total cases), followed by the base metals and articles of base metal (16.47%), articles of stone, plaster, cement etc. (9.02%), foodstuffs and beverages (8.24%), animal products (7.06%), vegetable products (7.06%), textile and textile articles (6.27%), and machinery and mechanical appliances (5.88%). Final measures have been imposed more frequently on chemical and allied products (22.03% of the total cases), base metals and articles of base metal (16.95%), articles of stone, plaster, cement etc. (9.32%), animal products (8.47%) and vegetable products (8.47%) respectively.

A closer analysis of the SG actions by the major user countries (i.e., India, Jordan, Turkey and Chile) at the HS sectional level are reported in **Table 1**.

⁵⁸ Kitt, *supra* note 5, at 372.

Table 1: Major Players undertaking Safeguard Actions (1995 to 2014) (Sector)

HS Section	Description	Safeguard Actions				Safeguard Measures			
		India	Jordan	Turkey	Chile	India	Jordan	Turkey	Chile
I	Live Animals; Animal Products	0	0	0	3	0	0	0	2
II	Vegetable Products	1	0	0	3	1	0	0	2
III	Animal or Vegetable Fats and Oils and Their Cleavage Products; Prepared Edible Fats; Animal or Vegetable Waxes	1	0	0	1	0	0	0	0
IV	Prepared Foodstuffs; Beverages, Spirits and Vinegar; Tobacco and Manufactured Tobacco Substitutes	0	3	0	1	0	2	0	1
V	Mineral Products	0	2	1	0	0	0	1	0
VI	Products of the Chemical or Allied Industries	18	1	3	0	12	1	2	0
VII	Plastics and Articles Thereof; Rubber and Articles Thereof	2	0	1	1	1	0	1	0
VIII	Raw Hides and Skins, Leather, Furskins and Articles Thereof; Saddlerly and Harness; Travel Goods, Handbags and Similar Containers; Articles of Animal Gut (Other than Silk-Worm Gut)	0	0	1	0	0	0	1	0
IX	Wood and Articles of Wood; Wood Charcoal; Cork and Articles of Cork; Manufactures of Straw, of Esparto or of Other Plaiting Materials; Basketware and Wickerwork	2	0	0	0	0	0	0	0
X	Pulp Of Wood or of Other Fibrous Cellulosic Material; Recovered (Waste and Scrap) Paper or Paperboard; Paper and Paperboard and Articles Thereof	2	0	0	0	0	0	0	0

XI	Textiles and Textile Articles	1	0	1	1	0	0	0	1	1	0	1	1
XII	Footwear, Headgear, Umbrellas, Sun Umbrellas, Walking-Sticks, Seat-Sticks, Whips, Riding-Crops and Parts Thereof; Prepared Feathers and Articles Made Therewith; Artificial Flowers; Articles of Human Hair	0	1	1	0	0	0	1	1	0	1	1	0
XIII	Articles of Stone, Plaster, Cement, Asbestos, Mica or Similar Materials; Ceramic Products; Glass and Glassware	0	4	2	0	0	0	2	0	0	0	0	0
XV	Base Metals and Articles of Base Metal	2	3	0	2	0	0	0	0	0	0	0	1
XVI	Machinery and Mechanical Appliances; Electrical Equipment; Parts Thereof; Sound Recorders and Reproducers, Television Image and Sound Recorders and Reproducers, and Parts and Accessories of Such Articles	0	2	3	0	0	0	1	3	0	1	3	0
XVII	Vehicles, Aircraft, Vessels and Associated Transport Equipment	0	0	1	0	0	0	0	1	0	0	1	0
XVIII	Optical, Photographic, Cinematographic, Measuring, Checking, Precision, Medical or Surgical Instruments and Apparatus; Clocks and Watches; Musical Instruments; Parts and Accessories Thereof	0	0	3	0	0	0	0	3	0	0	2	0
XX	Miscellaneous Manufactured Articles	0	0	0	1	0	0	0	0	1	0	0	0
	Total	29	16	17	13	14	7	13	7	13	7	13	7

Source: Constructed by the authors from WTO Safeguards database up to Oct. 2014

No clear sectoral trend, however, emerges from the SG actions analysis, which implies that country-specific domestic compulsions perhaps play a greater role in this context. For instance, in case of India, it is observed that nearly 62.07% of the SG investigations and 85.71% of the measures are being imposed on chemical products. On the other hand, Jordan's SG initiations have mainly been carried on prepared foodstuff and articles of stone. Turkey has imposed several SG actions on machinery and precision equipment, while Chile has imposed a number of such measures on live animals and vegetable products. On the other hand, looking at the data for developed countries, it is observed that in the US, 50% of the SG measures have been imposed on articles of base metals, and animal products and vegetable products have faced one SG measure each. In the EU, one SG measure has been imposed for animal products, prepared foodstuff, and base metals each. In other words, the SG actions by major developed and developing countries have affected both primary sector imports as well as the same from low-tech and high-tech products.

III. UNDERSTANDING THE USE AND MISUSE OF SAFEGUARDS: ANALYSIS OF WTO SCM DISPUTES

The current section attempts to analyse the disputes lodged at WTO's forum on SG-related concerns, and later reviews the litigants in these disputes.

A. *Quantitative Analysis of WTO Litigation on SCM*

It is observed from the WTO dispute gateway that a total of forty-three cases have been lodged between 1995 and 2014 on this provision.⁵⁹ The data shows that several SG provisions have been misused on quite a few occasions, both by developed and developing countries. The SG actions by developing countries have increased considerably over the last decade, in line with the decline in their tariff barriers.⁶⁰ The US has been the respondent in almost 34.88% of the SG-related disputes, though a number of these disputes were focusing on a similar problem. For instance, although DS 259 (complaint by Brazil), DS 258 (complaint by New Zealand), DS 254 (complaint by Norway), DS 253 (complaint by Switzerland), DS 252 (complaint by China), DS 251 (complaint by South Korea), DS 249 (complaint by Japan), DS 248 (complaint by EC) are considered different cases here, they were focusing on the same issue: an increase in duties on imports of iron and steel products in the US. The WTO panel and appellate

⁵⁹ See World Trade Organization, *Dispute Settlement: Subsidies and Countervailing Measures*, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A20.

⁶⁰ *Id.*

body noted that the serious injury provision and other clauses were violated by the US actions.⁶¹ Subsequently, DS 274 (complaint by Taiwan) also focused on US SG actions imposed on iron and steel products.⁶² DS 202 (complaint by South Korea), lodged in the later period on line pipe products, led to the finding that the US failed to establish a causal link between the increased imports and the serious injury, and also failed to provide an adequate opportunity for prior consultations with interested parties, among other measures.⁶³

United States SG actions in the area of primary products have also been successfully challenged by partners at times. For instance, DS 178 (complaint by Australia), DS 177 (complaint by New Zealand), involving *Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb*, and DS 166 (complaint by EC), focusing on *Safeguard Measure on Imports of Wheat Gluten*, deserves mention here.⁶⁴ The dispute settlement bodies in these cases indicated WTO-incompatibility of US investigation procedure and SG duty determination, among other findings.⁶⁵

In line with the US experience, a clustering of disputes on similar issues has been noticed in cases of developing countries as well, given the nature of SG action involving imports “irrespective of its source.”⁶⁶ For instance, Argentina has faced several disputes on the SG front to date. Three of these disputes are based on the *Footwear*

⁶¹ See Panel Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS259/R (July 11, 2003); Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R (Nov. 10, 2003).

⁶² Request for the Establishment of a Panel by Taiwan, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS274 (Nov. 1 2002), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds274_e.htm.

⁶³ See Panel Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R (Oct. 29, 2001); Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (Feb. 15, 2002).

⁶⁴ Request for the Establishment of a Panel by Australia, *United States—Safeguard Measure on Imports of Fresh, Chilled, or Frozen Lamb from Australia*, WT/DS178 (Nov. 21, 2001) available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds178_e.htm; Request for the Establishment of a Panel by European Community, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166 (Jan. 19 2001), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds166_e.htm.

⁶⁵ *United States—Safeguard Measure on Imports of Fresh, Chilled, or Frozen Lamb from Australia*, *supra* note 64; *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, *supra* note 64.

⁶⁶ See Safeguards Agreement, *supra* note 1, at art. 2.2.

Imports—DS 164 (complaint by USA), DS 123 (complaint by Indonesia), and DS 121 (complaint by EC). In the case of DS 121, the DSB noted that the provisional SG measure in the form of specific duties was not consistent with WTO provisions.⁶⁷ DS 238 (complaint by Chile) focuses on *Safeguard Measures on Preserved Peaches*.⁶⁸ The DSB verdict in this case indicated unsatisfactory performance by the competent authorities while determining the extent of serious injury.⁶⁹ Recently, four disputes have been lodged against Argentina—DS 446 (complaint by Mexico), DS 445 (complaint by Japan), DS 444 (complaint by US), and DS 438 (complaint by EU), all of which are targeted at *Measures Affecting the Importation of Goods*.⁷⁰

A similar clustering effect is noted in the case of another Latin American country, Chile, as well. For instance, DS 356 and DS 351 (Argentina is complainant in both cases) concerns *Safeguard Measures on Certain Milk Products*; DS 278 (complaint by Chile) looks into *Definitive Safeguard Measure on Imports of Fructose*, while DS 230 and DS 228 (Columbia is complainant in both cases) concerns *Safeguard actions on Sugar*. DS 220 (complaint by Guatemala)⁷¹ and DS 207 (complaint by Argentina), on the other hand, relate to the *Price Band System in Chile* and its *Safeguard Measures Relating to Certain Agricultural Products*.⁷² Responding to the complaint in DS 207, the DSB indicated violation of several relevant WTO provisions by Chile. DS 418 (complaint by El Salvador), DS 417 (complaint by Honduras), DS 416 (complaint by Guatemala) and DS 415 (complaint by Costa Rica),

⁶⁷ Panel Report, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121 (Feb. 11, 2000), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds121_e.htm.

⁶⁸ See Panel Report, *Argentina—Definitive Safeguard Measure on Imports of Preserved Peaches*, WT/DS238 (Apr. 15, 2003), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds238_e.htm.

⁶⁹ *Id.*

⁷⁰ Panel Report, *Argentina—Measures Affecting the Importation of Goods*, WT/DS446 (Aug. 24, 2012), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds446_e.htm; Panel Report, *Argentina—Measures Affecting the Importation of Goods*, WT/DS445 (Sept. 26, 2014), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds445_e.htm; Panel Report, *Argentina—Measures Affecting the Importation of Goods*, WT/DS444 (Sept. 26, 2014), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds444_e.htm; *Id.*

⁷¹ Panel Report, *Chile—Definitive Safeguard Measures on Certain Milk Products*, WT/DS356 (Aug. 1, 2008); Panel Report, *Chile—Definitive Safeguard Measure on Imports of Fructose*, WT/DS278 (Dec. 20, 2002); Dispute Settlement, *Chile—Safeguard Measures and Modification of Schedules Regarding Sugar*, WT/DS356 (April 17, 2001).

⁷² Request for Consultations by Argentina, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/1 (Oct. 12, 2000).

on the other hand, are lodged against the *Safeguard Duties on Imports of Polypropylene Bags and Tubular Fabric* by the Dominican Republic.⁷³ The WTO-incompatibility of the Dominican Republic's actions has been noted by the WTO dispute settlement panel in their verdict.⁷⁴ The clustering of disputes is an indicator of the level of conviction complainant countries have over the validity of their claim on one hand and the violations of WTO provisions on the other.

B. DSB Complaints on Safeguard Related Disputes

Table 2 is constructed by adopting the framework developed in Chaisse and Chakraborty for understanding the dynamics of the SG-related complaints lodged at the DSB.⁷⁵ It is observed that although the number of SG disputes declined after 2002, the incidence of the same has increased in 2010 and 2012.

⁷³ Request for Consultations by El Salvador, *Dominican Republic—Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS418/7 (Oct. 19, 2010), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds418_e.htm.

⁷⁴ Report of the Panel, *Dominican Republic—Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R-WT/DS416/R-WT/DS417/R-WT/DS418/R (Jan. 31, 2012) available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx.

⁷⁵ See Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules through Negotiations and Sanction: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT'L L. 153 (2007).

Table 2: Analysis of DSB Complaints on Safeguard related Disputes⁷⁶

Global Scenario								
Year	A	B	C	D	E	F	G	Total
1997	1	-	-	-	1	-	-	2
1998	1	-	-	1	-	-	-	2
1999	3	-	-	-	1	-	-	4
2000	2	-	-	-	1	-	-	3
2001	1	-	4	1	-	1	-	7
2002	8	-	2	-	1	-	-	11
2003	-	-	1	-	-	-	-	1
2005	-	-	1	-	-	-	1	2
2006	-	-	-	2	-	-	-	2
2010	4	-	-	-	-	-	-	4
2012	-	-	5	-	-	-	-	5
Total	20	0	13	4	4	1	1	43
Disputes with US as Respondent								
Year	A	B	C	D	E	F	G	Total
1997	-	-	-	-	1	-	-	1
1999	3	-	-	-	-	-	-	3
2000	1	-	-	-	1	-	-	2
2002	8	-	1	-	-	-	-	9
Total	12	0	1	0	2	0	0	15

Source: Constructed by the authors from WTO Safeguard-related disputes

Following their methodology, the SG complaints lodged at the DSB are placed under seven different categories, from a complainant's perspective. The first two columns represent victory and defeat in a particular case. Victory by a complainant is defined as determination of WTO-inconsistency in the respondent's alleged policy at the panel level, which remains unchanged even if the appellate body later reverses certain legal interpretations of the verdict, since the existence of a WTO-incompatible policy has been established. However, rejection of the complainant's claims, initially at panel stage and subsequently at the appellate body level, is defined as defeat. The cases classified under the third column encompass several possibilities, namely cases at consultation stage, disputes currently for consideration at the appellate body stage, cases where panel verdict is expected within a specified time or cases which have never been officially closed. The fourth column signifies the scenario where the complainant and the respondent jointly request DSB for suspension of proceeding after panel for-

⁷⁶ A – Victory for complainant; B – Defeat for complainant; C – Continuing/result expected soon/case with Appellate Body/not officially closed; D – Request to suspend panel proceeding; E – Panel not formed/formed but not composed; F – Amicably settled; G – Discontinuation of the alleged measure by the respondent

mation. This clearly indicates traces of flexibility in the respondent country to negotiate the alleged measures in force.

The fifth column shows the cases where no panel had been formed, potentially implying mutual discussion, probably leading the respondent to guarantee the desired market access for the complainant to resolve the dispute. However, two other possibilities cannot be ruled out in this case. First, a complaint might have been raised for harassing the respondent as a trade policy instrument and second, a complainant might have lacked the necessary technical expertise to support the claim, and decided to opt out before formation of the panel. The sixth column notes the cases where a mutually agreeable solution has been notified to the DSB. In the last column, the cases where the alleged measure was promptly discontinued after the initial notification at DSB are placed. The last column on one hand indicates the existence of a WTO-incompatible measure in force, and highlights the effectiveness of the dispute settlement mechanism on the other.

The top and the bottom panels of **Table 2** represent the global SG dispute scenario and the same for the US respectively. The US scenario is reported separately because the country has faced the most complaints for violating its obligations from partner countries. It is observed from the top panel that among the forty-three cases lodged at the WTO on SG provisions during the period under consideration, on twenty occasions (46.51% of the cases), the WTO-incompatibility of the alleged measure was proven.⁷⁷ Interestingly, not proven on a single occasion was a safeguard-related complaint rejected.⁷⁸ On four occasions (9.30% of the cases), the parties did not persist in the dispute by requesting to suspend panel proceedings, as a result of which these cases are still not officially closed. Only in four cases was the initial complaint not actively pursued, resulting in the formation/composition of no panel. Amicable settlement between parties⁷⁹ and discontinua-

⁷⁷ The comparable figure for CVM related cases stands at 36.14%. Debashis Chakraborty et al., *supra* note 2, at 208. This indicates greater intensity in potential abuse of the SG provisions, despite lesser number of initiations vis-à-vis SCM provisions.

⁷⁸ This is again in sharp contrast with the experience under ADA and ASCM related cases, where the respondent has won a number of times. For instance, in DS 221 involving *Section 129(c)(1) of the Uruguay Round Agreements Act*, the dispute settlement body noted that Canada has failed to establish that section US actions were inconsistent with Articles VI:2, VI:3 and VI:6(a) of the GATT 1994, Articles 1, 9.3, 11.1 and 18.1 and 18.4 of the ADA, and Articles 10, 19.4, 21.1, 32.1 and 32.5 of the ASCM among other provisions. Panel Report, *United States—Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R (July 15, 2002).

⁷⁹ Notification of Mutually Agreed Solution, *Slovakia—Safeguard Measure on Imports of Sugar*, WT/DS235/2 (Jan. 16, 2002).

tion of the alleged measure by respondent⁸⁰ have each been observed once.

It is observed from the bottom panel that the US has lost twelve out of the fifteen cases (80%) faced as respondent, signifying strong justification behind the claims lodged by their trade partners. On two occasions, no panel was formed.⁸¹ Notably, no case involving the US has been amicably settled, nor have any requests for suspending the panel proceedings ever been submitted to the WTO. This denotes the intensity of the conflict between the US and their partners on Safeguard grounds. However, since 2003, no new SG cases have been lodged against the US. This is quite different *vis-a-vis* ADA and ASCM scenarios, where the misuse of those provisions by the US has been alleged regularly by other WTO member countries, notably the developing countries.⁸²

Among major developing countries, the SG disputes lodged against Chile (eight disputes) and Argentina (eight disputes) deserve special mention. In case of both countries, the SG measures in question were proven WTO-incompatible at times.

IV. EXPLORING THE MISUSE OF SAFEGUARDS: WHICH ARTICLES OF THE SAFEGUARD AGREEMENT ARE SUSCEPTIBLE TO MISUSE?

The overall trend analysis based on SG-related complaints lodged in DSB in the preceding section is supplemented in the following with an article-level micro analysis. With this objective, each individual safeguard-related dispute is analysed with respect to the alleged violations under particular provisions in the WTO ASG.

A. Allegations of WTO Violations

The article-level data on alleged/conclusively proven violations from individual disputes on SG provisions has been obtained by accessing the cases reported at the Safeguard Gateway among WTO web-

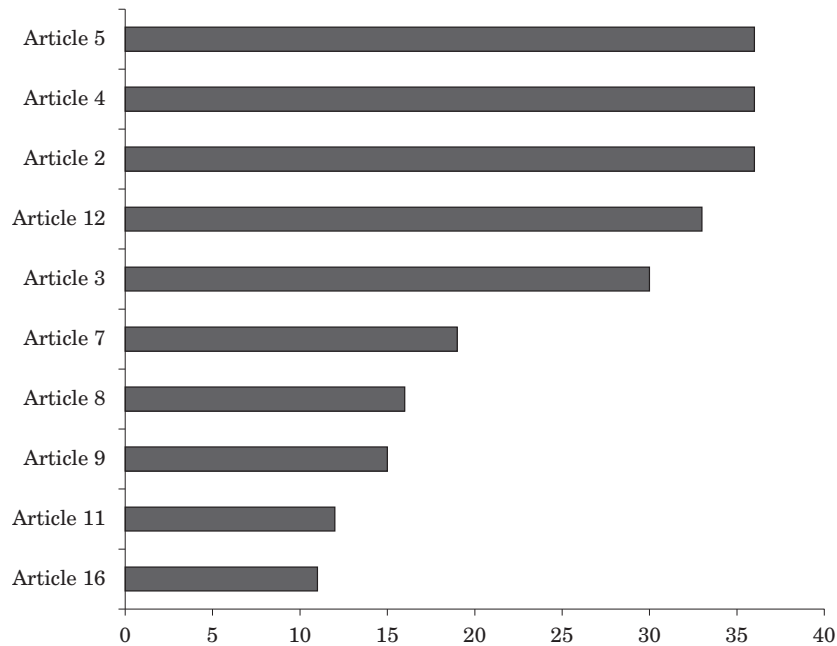
⁸⁰ Communication from Chile, *European Communities—Definitive Safeguard Measure on Salmon*, WT/DS326/4 (May 17, 2005).

⁸¹ See generally Request for the Establishment of a Panel by the European Communities, *United States—Definitive Safeguard Measures on Imports of Steel Wire Rod Circular Welded Quality Line Pipe*, WT/DS214/4 (Aug. 10, 2001) (requesting a panel that was never formed); Request for Consultations by Columbia, *United States—Safeguard Measures Against Imports of Broom Corn Brooms*, WT/DS781/1 (May 1, 1997).

⁸² See generally Debashis Chakraborty et al., *supra* note 2, at 208 (stating that the articles of the SCM agreement are susceptible to misuse).

resources.⁸³ The alleged violations, as revealed from the complaints, are reported in **Figure 4**.

Figure 4: Alleged violation of WTO Safeguard Provisions at DSB (by Article)



Source: Constructed by authors from WTO Safeguard related disputes

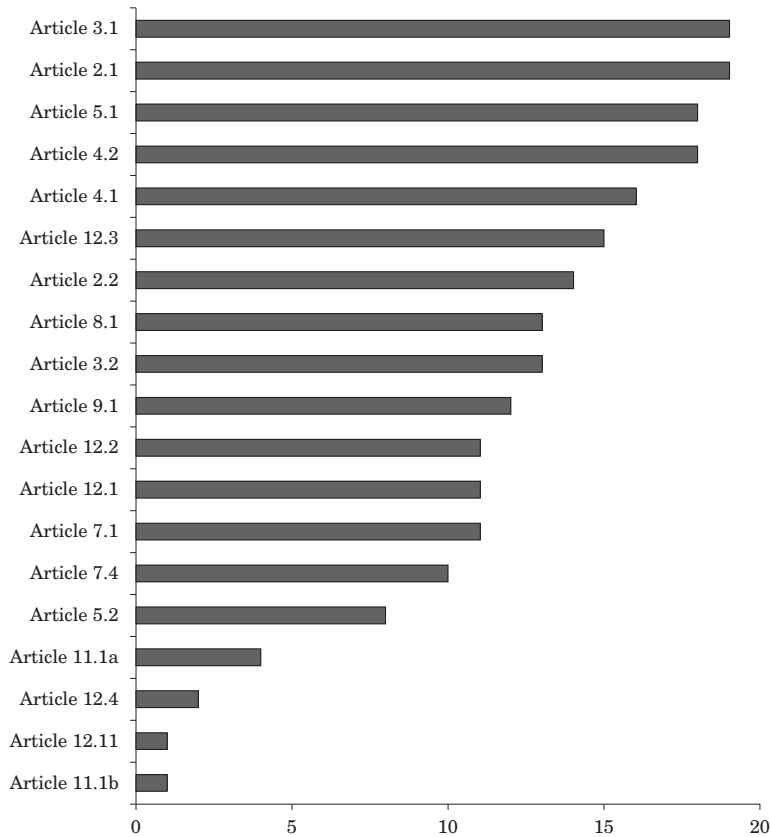
It is observed from the figure that Article 2 (conditions), Article 4 (determination of serious injury or threat thereof) and Article 5 (application of safeguard measures) of the Safeguard agreement have allegedly been violated the most (14.81% of the total alleged violations each). The other provisions allegedly being violated include Article 12 (notification and consultation) and Article 3 (investigation), which account for 13.58% and 12.35% of the total number of alleged violations respectively. Article 7 (duration and review of safeguard measures), Article 8 (level of concessions and other obligations), and Article 9 (provisions relating to developing country members) come next with alleged violations in 7.82%, 6.58%, and 6.17% of the cases respectively. Article 11 (prohibition and elimination of certain measures) and Article 6 (provisional safeguard measures) witnessed violations in 4.53% of the cases each.

⁸³ *Safeguard Measures*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (last visited Nov. 19, 2014).

B. Allegations of WTO Violations at Sub-Article Level

Figure 5 attempts to understand the alleged safeguard violations at the sub-article level, by analyzing the WTO disputes.

Figure 5: Alleged violation of WTO Safeguard Provisions at DSB (by Sub-Article)



Source: Constructed by authors from WTO Safeguard related disputes

It is observed from **Figure 5** that major SG violations take place under Article 2.1 (condition for imposing safeguard measures), Article 3.1 (opportunity to exporters to respond and publication of the findings), Article 5.1 (application of safeguard measure only to the necessary extent), Article 4.2 (evaluation of all relevant factors during investigation), Article 4.1 (definition of serious injury and threat of serious injury), Article 12.3 (opportunity for consultations before applying or extending safeguard measures), Article 2.2 (application of safeguard measure on imports irrespective of its source), Article 8.1 (adequate means of trade compensation), Article 3.2 (confidentiality of information), Article 9.1 (provisions relating to application of safe-

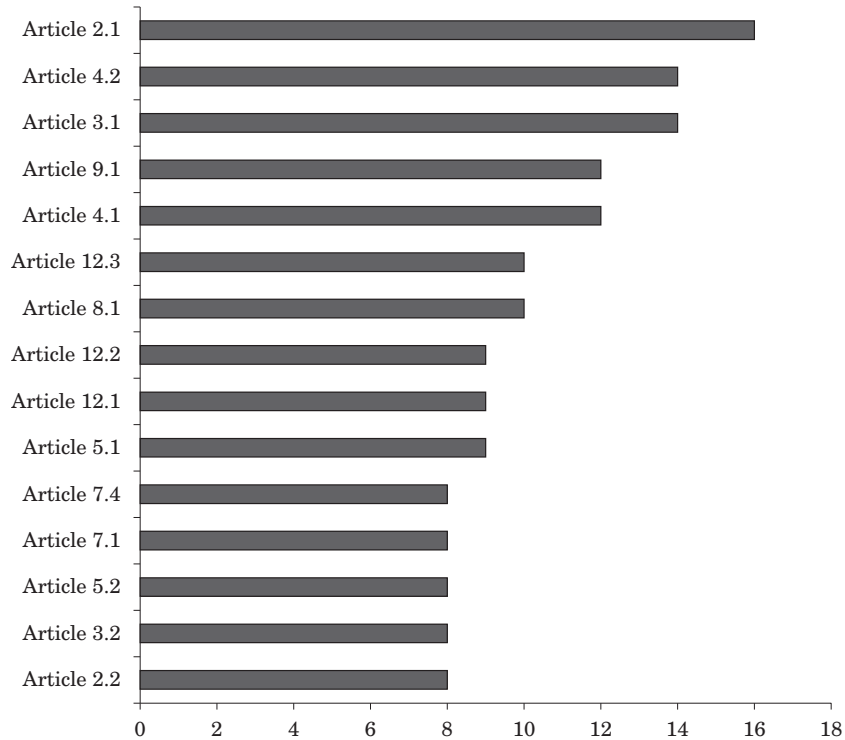
guard measures on developing country imports), Article 12.2 (notification of evidence to Committee on Safeguards), Article 12.1 (safeguard notifications), Article 7.1 (application of safeguard measure only for the necessary period), Article 7.4 (progressive liberalization of applied measure and mid-term review provisions), and Article 5.2 (allocation of quota while implementing the safeguard measure).

C. Lesson from Litigation: Actual Violations of ASG

It is clearly observed from the analysis that almost all the major provisions in the WTO Agreement on Safeguards have been allegedly violated in both developed and developing countries. In order to identify the provisions more prone to violation, the above-mentioned methodology is applied now to the completed cases (i.e., where the verdict of the dispute settlement panel/appellate body has been released). In the current context, only cases reported under columns A of **Table 2** are included for the analysis.⁸⁴ The findings are summarized in **Figure 6**.

⁸⁴ Here the cases involve the ones where panel rulings or the appellate body verdicts (if the defeated party challenged the panel ruling) have been made. On the DSB role in the WTO system, see generally Julien Chaisse & Mitsuo Matsushita, *Maintaining the WTO's Supremacy in the International Trade Order – A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. INT'L ECON. L. 9 (2013).

Figure 6: Actual violations of WTO Safeguard Provisions – DSB rulings



Source: Constructed by authors from WTO Safeguard related disputes

It is observed from Figure 6 that actual violations have taken place most frequently (sixteen times) under Article 2.1 (condition for imposing safeguard measures), which accounts for 10.32% of the total number of violations. The actions of WTO Members have been proven to be WTO-incompatible under Article 3.1 (opportunity to exporters to respond and publication of the findings) and Article 4.2 (evaluation of all relevant factors during investigation) fourteen times each. The alleged violation against both Article 9.1 (provisions relating to non-application of safeguard measures on developing country imports) and Article 4.1 (definition of ‘serious injury’ and ‘threat of serious injury’) has been confirmed by WTO DSB twelve times. Article 8.1 (adequate means of trade compensation) and Article 12.3 (opportunity for consultations before applying or extending safeguard measures) has been proved WTO-incompatible ten times each. Article 5.1 (serious prejudice), Article 12.1 and Article 12.2 (application of Article VI of GATT 1994) have been misused nine times each, while Article 3.2 (confidentiality of information), Article 5.2 (allocation of quota while implementing the safeguard measure), Article 7.1 (application of safeguard measure only for the necessary period), and Article 7.4 (progressive

liberalization of applied measure and mid-term review provisions) has been proven WTO-incompatible eight times each. Like the case of initiations, clearly actual violations have also taken place under each and every major provision of the ASG.

The WTO cases demonstrate that in practice the reason behind seldom applying the provisions on serious prejudice probably lie in its vague legal text. There are still legal elements which are arguable and need further clarification. There is also no clear threshold for subsidies which causes “serious prejudice.” For example, phrases such as “significant” without any clarification and threshold makes these provisions open to interpretation and misuse. But the actual challenge lies in fixing certain determinants to find serious prejudice because every case on this aspect is unique and each dispute will have different threshold and determinants to find serious prejudice.

The discussion so far explains why the WTO members, before initiating the “serious prejudice” case, should always bear in mind the possible difficulties and obstacles they can face and only after consideration of all pros and cons should they bring the dispute before the WTO DSB. Moreover, it is apparent that today only developed countries can take advantage of the present legal text on serious prejudice because they can potentially abuse the fact of difficulty for the complainant to demonstrate “serious prejudice” (especially for developing countries) and thus can adopt subsidies which could have adverse consequences for international trade. The replacement of the phrase “serious prejudice” to “simple prejudice” would be one of the solutions to this problem. This replacement would simplify the process of proof of the adverse effect caused by subsidies to international trade. In this case, the developing countries will gain from such reformation and the result will be the reduction of adverse subsidies and therefore harmonization of international trade.

Thus, there is still room for further development of the concept in order to make the application of serious prejudice provisions easier for the complainant party and to avoid abuse by developed WTO members due to the inability of developing countries to initiate a case.

CONCLUSION

The GDP and trade growth rate suffered across the countries in 2011, thanks to the compounding effects of Arab spring and Greece’s economic crisis, among other factors.⁸⁵ The recession effect contributed

⁸⁵ See World Bank, *Global Economic Prospects: Uncertainties and Vulnerabilities* 1–30 (Jan. 2012), available at http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1322593305595/82871391326374900917/GEP_January_2012a_FullReport_FINAL.pdf (providing a general overview of economic activity and prospects for the future around the globe).

in continued economic crisis in several developing countries during late 2011 and early 2012. The rising SG-activism from 2010 onwards can be explained in light of those developments. In 2011, Indonesia justified the upward movement in its safeguard notifications on the basis of growing “awareness” of their domestic industry about the contingency measures and their importance in protecting them from the “negative effects of trade liberalization.”⁸⁶

The ability of the governments to effectively determine whether SG intervention is a necessary tool or not for reaping the free trade advantages holds a crucial position.⁸⁷ Over the period, however, the emergence of SG actions as a major contingency measure with potential trade-restrictive usage has been an area of concern. As noted earlier, the usage has increased mostly in developing countries (e.g., India, Indonesia, Chile, Ukraine) in the wake of import tariff decline. The products targeted under the SG actions include both low-tech light manufacturing products (e.g. woven fabrics of cotton, ceramic tableware, footwear) as well as consumer products (e.g. motorcycles, electrical appliances).⁸⁸ The saving grace is that SG actions are less discriminatory in nature than the AD actions, and are hence less problematic from the exporter’s view.⁸⁹

Meanwhile, new cases have been brought, and sometimes with innovations in terms of grounds for the claims. In April 2012, some WTO members asked the Safeguards Committee to find whether or not the SCM procedural requirements have been complied with in connection with the safeguard measures taken by Turkey on cotton yarn.⁹⁰ This is the first time Article 13.1(b) SCM has been invoked by members.⁹¹ This provision provides that one of the functions of the

⁸⁶ See Press Release, World Trade Org., Indonesia, Ukraine Lead Safeguard Notifications to the WTO (May 2, 2011), http://www.wto.org/english/news_e/news11_e/safe_02may11_e.htm.

⁸⁷ See J. Michael Finger, *GATT Experience with Safeguards: Making Economic and Political Sense out of the Possibilities that the GATT Allows to Restrict Imports* (World Bank Policy Research Working Paper Series 2000, 1998) (providing suggested guidelines for a safeguard process that emphasizes an import restriction’s impact on the domestic economy).

⁸⁸ Committee on Safeguards, *Report (2011) of the Committee on Safeguards to the Council for Trade in Goods*, G/L/972 (Nov. 1, 2011).

⁸⁹ See Kitt, *supra* note 5, at 372–75.

⁹⁰ See Request for Consultations by India, *Turkey—Safeguard Measures on Imports of Cotton Yarn (Other Than Sewing Thread)*, WT/DS428/1, G/L/979, G/SG/D41/1 (Feb. 15, 2012) (detailing India’s request that the Safeguards Committee investigate Turkey’s compliance with safeguard measures related to its cotton yarn imports).

⁹¹ In the review of 13 safeguard investigations reported to the Committee, the following concerns were raised: On India’s safeguard measure on N1, 3-

Safeguards Committee is “to find, upon the request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods.”⁹²

One major point of contention under the Doha Round negotiations regarding the Agreement on Agriculture has been devising a Special Safeguard Mechanism (“SSM”) both in terms of price and volume triggers, which would be acceptable to both developed and developing member countries.⁹³ Developing countries are strongly inclined in favour of the SSM option given the ease of its operation,⁹⁴ but the proposals on this front, as outlined in the December 2008 draft,⁹⁵ have so far witnessed a very strong opposition between developed and developing nations. As a result, the formal introduction of this provision in trade policies in the coming future may also usher in increasing disputes on the newly adopted measures. In October 2012, the Friends of Safeguards Procedures (“FSP”) (a WTO grouping made of Australia, Canada, the European Union, Japan, Korea, New Zealand, Norway, Chinese Taipei, Singapore, and the United States) expressed concern about “procedural, transparency, and due process issues” related to safeguard investigations.⁹⁶ The FSP especially cited the following “examples of where there appears to be an emerging and serious disregard of multilateral rules”: imposition of provisional safeguard measures without clear evidence; lack of rationale and consistency in the data examined during the investigation; “suspension” of previously

dimethylbutyl-N Phenyl paraphenylenediamine, the US complained that India had never acknowledged its request for consultations while the European Union expressed concern that the measure had replaced an anti-dumping measure. On Thailand’s measure on glass block, the EU complained that the Thai measure was on top of an existing anti-dumping measure. On Turkey’s measure on polyethylene terephthalate, India raised doubt as to whether threat of serious injury existed. On Ukraine’s safeguard measure on motor cars, the EU and Japan raised doubt as to whether there was surge of imports. The EU noted that Indonesia had reported four safeguard actions, and urged Indonesia to exercise utmost caution in using safeguards.

⁹² Agreement on Safeguards, *supra* note 1, at art. 13(1)(b).

⁹³ Robert E. Baldwin, *Resolving the Conflict Leading to the Collapse of the Doha Round*, VOXEU (Sept. 25, 2008) <http://www.voxeu.org/article/how-resolve-doha-stalemate-better-agricultural-safeguard-trigger>.

⁹⁴ See generally Jason H. Grant & Karl D. Meilke, *The WTO Special Safeguard Mechanism: A Case Study of Wheat 2–6, 16–18* (Canadian Agricultural Trade Policy Research Network, Working Paper No. 2, CATPRN) (describing SSMs and their effectiveness).

⁹⁵ *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev. 4 (Dec. 6, 2008).

⁹⁶ *Friends of Safeguards, Urge More Transparency and Investigations*, WTO.ORG (Oct. 22, 2012) http://www.wto.org/english/news_e/news12_e/safe_22oct12_e.htm.

imposed safeguard measures; untimely notifications to the Committee; and unwarranted safeguard investigations.⁹⁷

The present discussion clearly indicates that unlike other trade remedy issues, SG matters are not squarely addressed in the Doha Development Agenda.⁹⁸ While the result of the SG disputes reveal that the alleged measures in most of the cases have been proven WTO-incompatible, the cases have often been dragged for a long time, usually in excess of two years.⁹⁹ The safeguards regulation is a sensitive issue *par excellence* which makes it a stumbling block in Doha negotiations. But, the WTO jurisprudence can also be criticized,¹⁰⁰ as the ineffectiveness of a normal WTO dispute settlement procedure to address unjustifiable SG measures is blatant.¹⁰¹

Given the problems associated with the SG mechanism, this may lead to a new wave of protectionism demonstrating how difficult it is to control the use of a two-edged sword as a safeguard. We can only emphasize the limited prospects for reforms, but obvious emergency exists for liberal trade order. The present analysis shows an increase in the number of SG initiations. Only a few SG of doubtful validity were brought to the review of the DSB. Such a trend demonstrates the non-respect of SG-related principles and the shift to litigation, thereby shifting the burden on DSB, which by definition will take necessary time to analyze temporary measures. The ASG framework has not been able to respond to the corresponding challenges and there is a need to address the following issues as a priority: applying an “Unforeseen Development” requirement; causality requirement; parallelism doctrine; and legal requirement of structural adjustment. Moving towards this step will ensure the initial goals of GATT, which are to allow for a safety valve to members entitling them to undertake restrictive measures. SG is politically necessary in order to undertake liberalisation and to find the necessary majorities to do so at home.

⁹⁷ Committee on Safeguards, *Systemic Concerns with Certain Safeguard Proceedings*, ¶ 1, G/SG/W/226, (Oct. 5, 2012).

⁹⁸ Dukgeun Ahn, *Restructuring the WTO Safeguard System*, in *THE WTO TRADE REMEDY SYSTEM: EAST ASIAN PERSPECTIVES* 11, 24 (Mitsuo Matsushita, Dukgeun Ahn, & Tain-Jy Chen eds., Cameron May Publishers, 2006).

⁹⁹ *See id.* at 12–14, 27–28.

¹⁰⁰ *See generally* Alan O. Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence* 30 (Chicago: John M. Olin Law and Economics Working Paper, 2d Series, No. 187, 2003).

¹⁰¹ Ahn, *supra* note 6, at 15.

CHINESE FOREIGN DIRECT INVESTMENT INTO AFRICA IN THE CONTEXT OF BRICS AND SINO-AFRICAN BILATERAL INVESTMENT TREATIES

Catherine Elkemann & Oliver C. Ruppel***

China is now the second largest economy in the world after the United States of America¹ and is deemed to be the most influential member of the group of leading emerging economies, the so called BRICS partnership consisting of Brazil, the Russian Federation, India, China and South Africa. According to the latest World Investment Report published by the United Nations Conference on Trade and Development (“UNCTAD”), China is also the second largest recipient of inward foreign direct investment (“IFDI”) and the third in terms of outward foreign direct investment (“OFDI”).² In this context, Africa is emerging as an important destination for China’s FDI outflows.³ Through an interdisciplinary approach, this article seeks to further our understanding of the economic, political and, more importantly, the legal framework that underlies these current developments. The article first of all provides an overview of China’s current Africa policy with regards to investment. Also, the role of BRICS is scrutinized in this context. In its main part, the article then refers to the international law governing

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¹ Taking into account the countries’ nominal GDP and respective shares of global nominal GDP. See UN Statistics Division, *National Accounts Main Aggregates Database*, <http://unstats.un.org/unsd/snaama/dnllist.asp> (last updated Dec. 2013).

² United Nations Conference on Trade & Dev., *World Investment Report 2013*, at xiv, xv (2013), available at http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

³ United Nations Conference on Trade & Dev., *Asian Foreign Direct Investment in Africa 56* (2007), available at http://unctad.org/en/Docs/iteia20071_en.pdf (2007); UNITED NATIONS CONFERENCE ON TRADE & DEV., *GLOBAL INVESTMENT TRENDS MONITOR* (2013), available at http://unctad.org/en/PublicationsLibrary/webdiaeia2013d6_en.pdf.

FDI. A special emphasis is put on bilateral investment treaties that have been concluded between China and Africa. Finally, this article evaluates the political and legal framework of the Sino-African investment relations, taking into account various aspects ranging from environmental concerns to human rights aspects, labour issues, and economic development. Again, the bilateral investment treaties are analysed in more detail.

INTRODUCTION

While commercial relations between China and Africa have been in existence for quite some time, it is the scale and pace of China's trade and investment flows that is particular about the current Chinese commercial activities in Africa.⁴ In addition, recently, the BRICS partnership consisting of Brazil, the Russian Federation, India, China and South Africa became of special importance for the Sino-African relationship. In fact, trade between the BRICS countries and the African continent has been rising constantly, doubling since 2007 to \$340 billion USD in 2012, and is projected to reach \$500 billion USD in 2015.⁵ To put in context, this means that the BRICS countries (accounting for a combined 24%) surpassed the U.S. (17%) as Africa's second biggest trading partner, falling only behind the European Union ("E.U."), which remains Africa's largest trading partner with 34% of the total exports.⁶ BRICS countries in general are forming an increasingly influential network with a growing impact on international political and economic governance. The cooperation of BRICS members with one another and with African nations thus provides an enormous potential for development in the future.

Traditionally, China was seen as a host country for direct foreign investment, rather than being the source of it.⁷ But recently, Chinese OFDI rose significantly in absolute terms, but also relative to FDI.⁸ Starting with an outward FDI flow of \$2.5 billion USD in 2002,

⁴ Harry G. Broadman, *Chinese-African Trade and Investment: The Vanguard of South-South Commerce in the Twenty-first Century* 87, in *CHINA INTO AFRICA* (2008) (Robert I. Rotberg ed.).

⁵ United Nations Econ. Conference for Afr., *Africa-BRICS Cooperation*, at iii, available at http://www.uneca.org/sites/default/files/publications/africa-brics_cooperation_eng.pdf.

⁶ *Id.* at 10.

⁷ See Axel Berger, *China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making*, *AM. SOC'Y INT'L L.* 5 (2008), available at <http://www.diegdi.de/publikationen/mitarbeiter-sonstige/article/chinas-new-bilateral-investment-treaty-programme-substance-rational-and-implications-for-international-investment-law-making-1/>.

⁸ Axel Berger, *Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China Following the Global Trend Towards Comprehensive Agree-*

there was a massive increase to \$21.1 billion USD in 2006, with a steady growth almost edging up to \$85 billion USD in 2012,⁹ making China the largest OFDI investor among developing countries.¹⁰ In 2012, China's OFDI stock in Africa reached \$21.23 billion USD.¹¹ Looking at the FDI flows from 2009 to 2012, "China's direct investment in Africa increases from \$1.44 billion to \$2.52 billion," which represents an annual growth rate of 20.5%.¹² This makes Africa the fourth most important destination of Chinese OFDI after Asia (Hong Kong), Latin America, and the Caribbean (the British Virgin Islands and the Cayman Islands),¹³ leaving behind North America and Europe.¹⁴ South Africa is the largest recipient of Chinese OFDI in Africa, followed by Sudan, Nigeria, and Zambia.¹⁵ In 2012, China's OFDI stock in South Africa alone reached \$4.6 billion USD.¹⁶ However, most investment flows to Africa still come from Africa's traditional foreign investors like the United States, Japan, and Europe.¹⁷

Africa as a place of investment still remains one of the least developed regions in the world. Therefore, potential investors have to be prepared to deal with such obstacles as underdeveloped market institutions, a shortage of skilled workers, constraints on business competition, and weak governance, which is even more aggravated by the

ments? (German Dev. Inst., Discussion Paper No. 7, 2013), available at <http://www.die-gdi.de/discussion-paper/article/investment-rules-in-chinese-preferential-trade-and-investment-agreements-is-china-following-the-global-trend-towards-comprehensive-agreement>.

⁹ United Nations Conference on Trade & Dev., *FDI Statistics*, <http://unctad-stat.unctad.org/ReportFolders/reportFolders.aspx> (last visited Feb. 28, 2014).

¹⁰ Wang Duanyong, *China's Overseas Foreign Direct Investment Risk: 2008–2009* (S. Afr. Inst. of Int'l Aff., Occasional Paper No. 73, 2011), available at http://www.saiia.org.za/images/stories/pubs/occasional_papers/saia_sop_73_duanyong_2011_0125.pdf.

¹¹ *China-Africa Economic and Trade Cooperation*, INFO. OFFICE OF THE STATE COUNCIL, CHINA (Sept. 2013), <http://allafrica.com/stories/201309250592.html>.

¹² *Id.*

¹³ MINISTRY OF COMMERCE, CHINA, 2010 STATISTICAL BULLETIN OF CHINA'S OUTWARD FOREIGN DIRECT INVESTMENT 82–85 (2010), available at <http://images.mof.com.gov.cn/hzs/accessory/201109/1316069658609.pdf>.

¹⁴ Claude Sumata & Théophile Dzaka-Kikouta, *The Determinant of China's Foreign Direct Investment in Central Africa*, *African East-Asian Affairs*, THE CHINA MONITOR, June 2013, at 20, 21.

¹⁵ MINISTRY OF COMMERCE, CHINA, *supra* note 13; *Asian Foreign Direct Investment in Africa*, *supra* note 3, at 8.

¹⁶ *World Investment Report 2013*, *supra* note 2, at 40.

¹⁷ SANNE VAN DER LUGT ET AL., ASSESSING CHINA'S ROLE IN FOREIGN DIRECT INVESTMENT IN SOUTHERN AFRICA 9 (2011), available at <http://www.ccs.org.za/wp-content/uploads/2011/03/Final-report-CCS-March-2011-CCS.pdf>.

geographical fragmentation and the poorly developed infrastructure.¹⁸ In the worst case, investors even have to be prepared to deal with such things as severe environmental degradation, social disruptions, violence, and civil wars.¹⁹ However, contrary to Africa's relatively weak economic performance, it is endowed with one of the world's highest concentrations of natural resources, including oil, diamonds, chromium, cobalt, ores, and so forth,²⁰ making it an attractive business partner for China. This becomes especially apparent in the oil market. As China's demand for oil, for example, is constantly rising at an enormous growth rate,²¹ it actively seeks to reduce its vulnerability to the international oil market by encouraging investments in the African oil sector; a sector often overlooked by western competitors.²² Thus, the search for natural resources is deemed as the main motivation for OFDI.²³ Closely linked to that is the fact that many African countries have implemented a set of measures as part of the Economic Recovery Programmes ("ERP") from the 1980s onwards, including among others, trade liberalisation, exchange rate liberalisation (devaluation), fiscal and monetary reforms, public enterprise reforms and de-regulation of investments, labour, and prices.²⁴ In this context, Chinese manufacturers and entrepreneurs are becoming increasingly aware of the potential that the untapped African consumer market offers.²⁵ The African population, currently making up roughly one billion people, is estimated to significantly grow over the coming decades.²⁶ This positive demographic outlook offers vast opportunities for Chinese businesses, not only because their products are usually affordable, even for those living on less than the global poverty benchmark of \$1 USD.²⁷ In addition, Africa's trade pacts with the U.S. and the E.U., the African Growth and Opportunity Act ("AGO"), and the Economic Partnership

¹⁸ HARRY G. BROADMAN, AFRICA'S SILK ROAD 6 (2007); Broadman, *supra* note 4, at 92.

¹⁹ Alexis Habiyaremye, *Chinafrique, Africom, and African Natural Resources: A Modern Scramble for Africa*, 12 WHITEHEAD J. DIPL. & INT'L REL. 79 (2012).

²⁰ *Id.*

²¹ China is now the world's second biggest consumer of petroleum products after the United States. See Ian Taylor, *China's Oil Diplomacy in Africa*, 82 J. INT'L AFF. 938, 943 (2006).

²² Wenran Jiang, *Fuelling the Dragon: Natural Resources and China's Development*, THE CHINA Q., Sept. 2009, at 602–03.

²³ Broadman, *supra* note 4, at 88; Jiang, *supra* note 22, at 602; Sumata & Dzaka-Kikouta, *supra* note 14, at 18; Taylor, *supra* note 21, at 938.

²⁴ Peter Kragelund, *Knocking on a Wide Open Door: Chinese Investment in Africa*, 122 REV. AFR. POL. ECON. 479, 489 (2009).

²⁵ IAN TAYLOR, INTERNATIONAL RELATION OF SUB-SAHARAN AFRICA 71 (2010).

²⁶ *World Investment Report 2013*, *supra* note 2, at 42.

²⁷ Sanusha Naidu & Daisy Mbazima, *China-Africa Relations: A New Impulse in a Changing Continental Landscape*, 40 FUTURES 748, 755 (2008).

Agreement (“EPA”) fostered interest in Africa as an investment place, as they offer Chinese firms the possibility to export goods at concessional rates to the U.S. and the E.U. markets.²⁸ Lately, African countries have been able to attract FDI flows in such diverse sectors such as the financial, telecom, electricity, retail trade, light manufacturing (apparel, footwear), and the transportation equipment sector.²⁹

I. LEGAL FRAMEWORK OF CHINESE FDI IN AFRICA

A. *Definition of Foreign Direct Investment*

This article relies on the standardised definition of FDI as agreed upon by the members of the Organization for Economic Cooperation and Development (“OECD”) Development Assistance Committee, the OECD Benchmark Definition:

Foreign direct investment (FDI) is a category of investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy (*direct investor*) with an enterprise (*direct investment enterprise*) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. The direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship.³⁰

The definition is not only of importance for members of the OECD itself, but is recognized by other major international institutions dealing with trade and investment.³¹ Usually the following components of FDI can be identified: equity capital, reinvested earnings, and other capital (mainly intra-company loans).³² Equity capital means “equity in branches, all shares in subsidiaries and associates,

²⁸ *Id.*

²⁹ *World Investment Report 2013*, *supra* note 2, at xvi.

³⁰ ORG. FOR ECON. COOPERATION & DEV., *OECD Benchmark Definition of Foreign Direct Investment* 234 (2008) (alterations in original), available at <http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>.

³¹ See, e.g., INT’L MONETARY FUND, *BALANCE OF PAYMENTS MANUAL: FIFTH EDITION* 86 (1993), available at <http://www.imf.org/external/pubs/ft/bopman/bopman.pdf>; *Foreign Direct Investment (FDI)*, United Nations Conf. on Trade & Dev., [http://unctad.org/en/Pages/DIAE/Foreign-Direct-Investment-\(FDI\).aspx](http://unctad.org/en/Pages/DIAE/Foreign-Direct-Investment-(FDI).aspx) (last visited July 20, 2014).

³² INT’L MONETARY FUND, *supra* note 31, at 87; ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 30, at 36; *Foreign Direct Investment*, *supra* note 31; Press Re-

and other capital contributions.”³³ Notably, this also includes the “greenfield investments” and M&A transactions. Reinvested earnings on the other hand usually comprise “the direct investor’s share of earnings not distributed as dividends by subsidiaries or associates and earnings of branches not remitted to the direct investor.”³⁴ And finally, other direct investment capital includes “the borrowing and lending of funds—including debt securities and suppliers’ credits—between direct investors and subsidiaries, branches and associates.”³⁵ In this context, subsidiaries are enterprises in which the investor has control of more than 50% of the voting power, while associates constitute enterprises in which the investor has control of at least 10%, but less than 50% of the voting power.³⁶ These basic forms of relationships can be extended through indirect ownerships (a series of subsidiaries or associated enterprises) or through joint ventures (“a contractual agreement between two or more parties for the purpose of executing a business undertaking, in which the parties agree to share in the profits and losses of the enterprise as well as the capital formation and contribution of operating inputs or costs”³⁷).³⁸

FDI has to be distinguished from portfolio investments. Portfolio investments refer to investments which do not necessarily represent a long-term interest.³⁹ Direct investment relationships, by their very nature, demand for long-term, steady financing, so that FDI in contrast to portfolio investments always triggers management or control of the company. Also, FDI as a private investment is usually opposed to public funding or foreign aid. While FDI seeks to generate monetary returns, foreign aid is provided by official agencies (mainly nations) and is administered with the promotion of the economic development and welfare of the developing countries as its main objective.⁴⁰ Nevertheless, in practice a distinction is often difficult. For example, in China’s case, much of the FDI is generated through alternative ways of financing as well as by the state-owned enterprises (“SOEs”).⁴¹

lease, World Trade Organization, *Trade and Foreign Direct Investment*, http://www.wto.org/english/news_e/pres96_e/pr057_e.htm (last visited July 20, 2014).

³³ INT’L MONETARY FUND, *supra* note 31, at 87.

³⁴ *Id.* at 87, 88.

³⁵ *Id.* at 88.

³⁶ ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 30, at 55.

³⁷ *Id.* at 237.

³⁸ *Id.* at 55.

³⁹ MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW OF FOREIGN DIRECT INVESTMENT* 7–8 (2004).

⁴⁰ See Official Development Assistance, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/dac/stats/officialdevelopmentassistancedefinitionandcoverage.htm> (last visited Feb. 26, 2014).

⁴¹ VAN DER LUGT ET AL., *supra* note 17, at 18.

In the Chinese context ODA therefore is often linked with private investments and trade (see below).⁴²

Reasons for foreign direct investment are manifold: While some companies use FDI to produce the same or similar goods abroad to access new markets (horizontal FDI), other companies try to take advantage of the host countries' business environment (vertical FDI).⁴³ This can be due to gains resulting from outsourcing labour intensive production to low wage countries or in order to have access to certain raw materials, information, or technology.⁴⁴ Other reasons for companies to invest abroad include the need to minimize or diversify risks, integrating operations of a multi-stage production process, the aim of protecting or making use of non-transferable knowledge, as well as protecting and capitalizing on reputation, avoiding tariffs and quotas, and finally exchange rate consideration.⁴⁵ Thus, attracting FDI is at the top of the agenda for most developing countries. In addition to capital, it will create new jobs, bring new technology, marketing techniques, and management skills.⁴⁶

B. China's Current Investment Policy Towards Africa

The rapid growth of the Chinese OFDI started with the adoption of the "Going Global" strategy ("Zou-chu-qu") that was first announced in 1998 and embedded in the Tenth Five-Year Plan on National Economy and Social Development in 2001, and included in every plan thereafter.⁴⁷ The "Going Global" strategy (sometimes also referred to as the "Go Out" policy) is basically a long-term, innovation-oriented development plan, in the context of which the government promulgated a series of regulations and circulars in order to facilitate and encourage OFDI.⁴⁸ Recognizing outward investment as necessary for the growth of Chinese economy, Chinese policymakers encouraged and supported key firms by offering a number of incentives and benefits including tax rebates, investment insurances, direct and indirect subsidies, and most importantly, low interest loans or export credits from financial sources that the Chinese government controls such as state banks.⁴⁹ Especially through its Export-Import Bank ("EXIM

⁴² Barry van Wky, *Resources for Infrastructure: China's Role in Africa's New Business Landscape*, THE CHINA ANALYST, Sept. 2011, at 1.

⁴³ IMAD A. MOOSA, FOREIGN DIRECT INVESTMENT – THEORY, EVIDENCE AND PRACTICE 4 (2000).

⁴⁴ *Id.*

⁴⁵ *Id.* at 268–69.

⁴⁶ Broadman, *supra* note 18, at 152.

⁴⁷ Berger, *supra* note 7, at 6.

⁴⁸ Ping Deng, *Investing for Strategic Resources and its Rationale: The Case of Outward FDI from Chinese Companies*, 50 BUS. HORIZON 72 (2007).

⁴⁹ *Id.* at 72, 73; Kragelund, *supra* note 24, at 485.

Bank”), China is increasingly making use of a deal structure that is known as the “Angola mode,” “resources for infrastructure” or “package deals”⁵⁰ combining foreign aid and economic development.⁵¹ Typically, a beneficiary country receives a loan for the development of infrastructure, including electricity generation, telecom expansion, railway construction, and water catchments, while the repayment of the loan is done in terms of natural resources.⁵² Both the contracts for the infrastructure project, as well as the rights for extracting natural resources are generally awarded to Chinese companies.⁵³

In the Outward Investment Sector Direction Policy & 2006 Catalogue of Industries for Guiding Outward Investment issued among others by the National Development and Reform Commission (“NDRC”), the Ministry of Commerce (“MOFCOM”), and the Ministry of Foreign Affairs (“MFA”), special emphasis has been given to the following projects:

- (1) Projects that can acquire resources or raw materials for which there is a domestic shortage and an urgent need for the national economic development;
- (2) Projects that can promote the export of domestic products, equipment, and technologies with competitive advantages, as well as the export of labour service;
- (3) Projects that can significantly improve China’s capacity in technology, research, and development, and can utilize global cutting-edge technologies, advanced management expertise, and professionals.⁵⁴

Next to these three priority areas, other official policy documents name a fourth area relating to mergers and acquisitions that enhance the international competitiveness of Chinese enterprises and accelerate their entry into foreign markets.⁵⁵

⁵⁰ See generally Vivien Foster et. al, *Building Bridges: China’s Growing Roles as Infrastructure Financier for Sub-Saharan Africa*, (World Bank Public-Private Infrastructure Advisory Facility, Trend and Policy Options No. 5, 2009); Hannah Edinger & Jansson Johanna, *China’s ‘Angola Model’ comes to the DRC*, CHINA MONITOR, no. 34, Oct. 2008, at 4, available at [http://www.ccs.org.za/downloads/monitors/China%20Monitor%20October%202008%20\(4\).pdf](http://www.ccs.org.za/downloads/monitors/China%20Monitor%20October%202008%20(4).pdf).

⁵¹ Wky, *supra* note 42, at 1.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Nat’l Dev. & Reform Comm’n, China, *Outward Investment Sector Direction Policy & 2006 Catalogue of Industries or Guiding Outward Investment in Chinese Outward Investment*, in CHINESE OUTWARD INVESTMENT: AN EMERGENCY POLICY FRAMEWORK 67, 67 (Nathalie Bernasconi-Osterwalder et al eds., 2012).

⁵⁵ See, e.g., Nat’l Dev. & Reform Comm’n, China, *Circular About the Relative Issues on Offering More Financing Support to Key Overseas-invested Projects*, in CHI-

In order to invest abroad, Chinese companies must first go through an administrative procedure of examination and approval from the MOFCOM, the NDRC, China Customs, and the State Administration of Foreign Exchange (“SAFE”) at various levels.⁵⁶ This procedure is mainly regulated in the 2009 Measures for Overseas Investment Management, which the MOFCOM issued (annulling the 2004 Provisions on the Examination and Approval of Investment to Run Enterprises Abroad). Depending on the category of the projects (resource exploitation project or non-resource exploitation) and on the size of the project, the approval can be either granted by the central or the provincial government.⁵⁷

Through the Forum on China-Africa Cooperation (“FOCAC”), China is furthermore stressing the element of cooperation with the African continent regarding their mutual investment relations. The first forum was held in October 2000 in Beijing and has ever since taken place in a three-year interval, with the latest ministerial conference taking place in July 2012 in Beijing, China. The results of the FOCAC meetings are outlined in the Action Plans which set out the general principles of Sino-African development, trade, and investment. In their latest Action Plan, the partners committed themselves to continue to encourage mutual investment and to push forward negotiations and implementations of bilateral agreements on promoting and protecting investments.⁵⁸

C. BRICS’s Current Investment Policy towards Africa⁵⁹

The African relationship with BRICS is far more complex, internally divergent, and perhaps precarious than it may seem. The im-

NESE OUTWARD INVESTMENT: AN EMERGING POLICY PROJECTS 52, 53 (Nathalie Bernasconi-Osterwalder et al eds., 2012).

⁵⁶ OXFAM H.K., UNDERSTANDING CHINA’S OVERSEAS FOREIGN DIRECT INVESTMENT 7 (2012), available at <http://www.oxfam.org.cn/uploads/soft/20130428/1367136257.pdf>; Wang & Wang, *Chinese Manufacturing Firm’s Overseas Direct Investment*, in RISING CHINA: GLOBAL CHALLENGES AND OPPORTUNITIES 99, 102 (Jane Golley & Lig-ang Song eds., 2011).

⁵⁷ United Nations Conference on Trade & Dev., *Asian Foreign Direct Investment in Africa*, *supra* note 3, at 54.

⁵⁸ *The Fifth Ministerial Conference of the Forum on China-Africa Cooperation Beijing Action Plan (2012–2015)*, FORUM ON CHINA-AF. COOPERATION, <http://www.focac.org/eng/zxxx/t954620.htm>.

⁵⁹ This section (with further references) is largely based on Oliver C. Ruppel & Katharina Ruppel-Schlichting, *The BRICS Partnership: Development and Climate Change Policy from an African Perspective*, in CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE: POLICY, DIPLOMACY AND GOVERNANCE IN A CHANGING ENVIRONMENT 549–69 (Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting eds., 2013).

part of the BRICS countries on Africa can only be correctly understood if it is seen as part of a wider shift in the international balance of power, both politically and economically. BRICS is emerging as an intergovernmental network somewhat comparable to, for instance, the Group of 20 (“G20”). It functions on agenda-setting, consensus-building, policy coordination, and as a platform for knowledge production and information exchange. So far, BRICS consists of five states with no founding document (formal charter or treaty). This means that there is actually no formal structure, voting procedure, or central secretariat. Moreover, BRICS so far fails to provide for any mechanism to come up with legally binding decisions, nor does it have a dispute settlement procedure in place. However, the BRICS leaders have issued several joint statements and declarations. Of particular importance are the official documents that have resulted from the BRIC and BRICS summits, namely:

- 2009 Joint Statement, Yekaterinburg, Russia
- 2010 Joint Statement, Brasília, Brazil
- 2011 Sanya Declaration, Sanya, China
- 2012 Delhi Declaration, New Delhi, India,
- 2013 eThekweni Declaration, Durban, South Africa, and
- 2014 Fortaleza Declaration, Brazil

Several other official documents have been produced by the Summits and on the BRICS ministerial level, such as the 2011 BRICS Agriculture Ministers Declaration or the 2011 BRICS Finance Ministers Communiqué. Yet, BRICS does not constitute an international organisation in the strict sense of public international law and it is yet to be seen whether it will develop as such in the future. BRICS is neither an international organisation nor a trade bloc in terms of a regional (or preferential) economic community. It refers to itself as a “partnership,” which comprises a non-hierarchical governance structure in which relations among actors are repeated and enduring, but where no one has the power to arbitrate and resolve disputes among the members. With regards to investment policy, the Contact Group on Economic and Trade Issues (“CGETI”) is intended to become a platform for BRICS. It shall aim to foster trade cooperation and encourage investment links between BRICS countries with an emphasis on sharing policy practices on trade and investment.

The Fifth BRICS Summit on 27 March 2013 in Durban, which was hosted by South Africa’s President Jacob Zuma, took place under the working title “BRICS and Africa: Partnership for Development, Integration and Industrialisation.”⁶⁰ In their final summit declaration,

⁶⁰ Fifth BRICS Summit, *eThekweni Declaration*, (Mar.27, 2013), <http://www.brics5.co.za/about-brics/summit-declaration/fifth-summit/>.

the leaders of the BRICS provided for a retreat together with African leaders after the summit, under the theme, “Unlocking Africa’s potential: BRICS and Africa Cooperation on Infrastructure.”⁶¹ The retreat was an opportunity for BRICS and African leaders to discuss how to strengthen cooperation between the BRICS countries and the African Continent.⁶² Furthermore, BRICS leaders confirmed their support for African countries in their industrialisation process through stimulating foreign direct investment, knowledge exchange, capacity building, and diversification of imports from Africa within the framework of the New Partnership for Africa’s Development (“NEPAD”).⁶³ It was acknowledged that infrastructure development was of special importance for the African continent, so that BRICS will now actively “seek to stimulate infrastructure investment on the basis of mutual benefit to support industrial development, job-creation, skills development, food and nutrition security and poverty eradication and sustainable development in Africa.”⁶⁴ Although China is just one of five members of the BRICS community, this cooperation also helps to intensify trade and investment links between China and Africa.

D. Other Relevant Legislation

In the first place, each national state has the power to regulate FDI and to provide domestic incentive schemes in order to attract FDI. These measures include among others tax incentives, economic processing zones, investment promotion agencies, and investment climate assessments next to a general good-policy framework.⁶⁵ However, international investment flows are also regulated by arrangements that are multilateral or regional in nature.

1. Multilateral Investment Agreements

A multilateral investment agreement (“MIA”) regulating all substantive aspects of FDI (comparable to the Global Agreement on Tariffs and Trade (“GATT”) regarding trade) was discussed intensively during the previous decades, but was in fact never concluded due to strong opposition by many developing states (namely India and Brazil) and the anti-globalisation movement.⁶⁶ So far, only the procedural aspects of international investment law are codified in a multilateral

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 5.

⁶⁴ *Id.*

⁶⁵ BROADMAN, *supra* note 18, at 153.

⁶⁶ Anders Aslund, *The World Needs a Multilateral Investment Agreement* 5 (Peterson Inst. for Int’l Econ., Paper No. PB13-01, 2013), available at <http://www.piie.com/publications/pb/pb13-1.pdf>.

agreement—the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”), which regulates a voluntary dispute resolution system for states and investors.⁶⁷ Under the ICSID Convention, the International Centre for Settlement of Investment Disputes was established to “provide facilities for conciliation and arbitration of investment disputes between Contracting States.”⁶⁸ Currently the ICSID Convention has been signed and ratified by 158 states.⁶⁹ Furthermore, the WTO deals with many aspects relating to FDI. According to paragraph twenty-six of the Sanya Declaration, BRICS is generally committed to supporting a strong, open, rules-based multilateral trading system embodied in the WTO. While the Agreement on Trade-Related Investment Measures (“TRIMs”) is by far the most comprehensive agreement, certain aspects of FDI are also regulated in the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) and the General Agreement on Trade in Services (“GATS”), as well as the WTO Agreement on Subsidies and the multilateral Government Procurement Agreement.

2. Investment Law on the African Continent

Turning to the African continent, the African Union (“A.U.”), which was established on the 26th of May 2001 in Addis Ababa as an African continental union, and which consists of fifty-four African states,⁷⁰ does not have a specific strategy document focusing on investments.⁷¹ But, within the framework of the A.U., the New Partnership for Africa’s Development (“NEPAD”) was created, which is an economic development program that aims to provide an overarching vision and policy framework for accelerating economic co-operation and integration among African countries.⁷² In its Framework Document, NEPAD specifically recognises the importance of increasing investments to Africa as an essential component for a sustainable long-term approach to fulfil the International Development Goals, particularly the goal of reducing the proportion of Africans living in poverty by one

⁶⁷ Monika C. E. Heymann, *International Law and the Settlement of Investment Disputes Relating to China*, 1 J. INT’L ECON. L., 507, 509 (2008).

⁶⁸ International Centre for Settlement of Investment Disputes art. 1, April 2006.

⁶⁹ *Id.*

⁷⁰ *Organization of African Unity (OAU)/ African Union (AU)*, DEP. OF INT’L REL. & COOPERATION S. AFR., <http://www.dfa.gov.za/foreign/Multilateral/africa/oau.htm> (last visited July 19, 2014).

⁷¹ Department of Trade and Industry, *Bilateral Investment Treaty Policy Framework Review*, available at <http://db3sqepoi5n3s.cloudfront.net/files/docs/090626trade-bi-lateralpolicy.pdf> (last visited Feb. 26, 2014).

⁷² *About*, NEW PARTNERSHIP FOR AFR.’S DEV., <http://www.nepad.org/about> (last visited July 19, 2014).

half.⁷³ The NEPAD document prioritises specific areas and envisages certain actions that are deemed to be important to attract investments. Thus, the NEPAD process has mainly an enabling function contributing to the creation of a positive investment climate on the African continent as a whole. Finally, most African regional communities⁷⁴ developed regional investment promotion measures. These measures (regional investment policies or treaties, regional investment promotion agencies, and investment forums)⁷⁵ aim to promote market-friendly policies and regional integration, which can ultimately lead to improvements in the productivity of investments.⁷⁶ For example, renewable energy certificates (“RECs”) can coordinate national infrastructure plans within a regional framework or can create continental energy markets, which contributes to a positive investment climate.⁷⁷

3. Bilateral Investment Treaties

Nevertheless, the main instruments governing FDI flows remain bilateral investment treaties (BITs) and double taxation treaties (“DTT”). Over the last few decades the world has seen an increasing

⁷³ New P’ship for Afr.’s Dev., NEPAD Framework Document 37 (2001), available at <http://www.nepad.org/nepad/knowledge/doc/1767/nepad-framework-document>.

⁷⁴ In the Abuja Treaty (which established the African Economic Community) regional economic communities are seen as the “building blocks” or the basis for the African integration. Currently there are eight of these RECs recognised by the AU: The Arab Maghreb Union (UMA), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel-Saharan States (CEN-SAD), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD) and finally the Southern African Development Community (SADC). Cf. Oliver C. Ruppel, *Regional Economic Communities and Human Rights in East and Southern Africa*, in HUMAN RIGHTS IN AFRICA 275-318 (Anton Boesl & Joseph Diescho eds., 2007).

⁷⁵ See Meeting of the Committee of Experts of the Sixth Joint Annual Meetings of the ECA Conference of African Ministers of Finance, Planning and Economic Development and AU Conference of Ministers of Economy and Finance, Abidjan, Côte d’Ivoire, Mar. 21–24, 2013, *Assessment of Progress on Regional Integration in Africa*, E/ECA/COE/32/3, U.N. Doc. E/ECA/COE/32/3 (Mar. 8, 2013), available at http://www.uneca.org/sites/default/files/document_files/assessment-of-progress-on-regional-integration_en_0.pdf; Protocol of Finance and Investment, Annex 1, Aug. 18, 2006, available at <http://www.sadc.int/documents-publications/show/1009> (entered into force Apr. 14, 2010)

⁷⁶ *China and Regional Integration as Drivers of Structural Transformation in Africa*, S. AFR. FOREIGN POL’Y INACTIVATE, <http://www.safpi.org/news/article/2013/china-and-regional-integration-drivers-structural-transformation-africa> (last visited July 22, 2014).

⁷⁷ *Id.*

proliferation of BITs and DDTs, indicating a growing competition for FDI.⁷⁸ While DTTs provide foreign investors with tax-issue security, stability, and hinder double taxation of corporate incomes, BITs encourage and facilitate investment flows through liberalisation and protection of foreign investment.⁷⁹ They are defined as agreements that

protect investments by investors of one state in the territory of another state by articulating substantive rules governing the host state's treatment of the investment and by establishing dispute resolution mechanism applicable to alleged violations of those rules.⁸⁰

Presently, BITs show a “considerable uniformity,”⁸¹ with some constituting principles regarding the substantive and procedural protection of foreign investment. Salacuse identifies in total nine topics that are covered by almost all international investment treaties:

(1) [D]efinitions and scope of application; (2) investment promotion and conditions for the entry of foreign investments and investors; (3) general standards for the treatment of foreign investors and investments; (4) monetary transfers; (5) expropriation and dispossession; (6) operational and other conditions; (7) losses from armed conflict or internal disorder; (8) treaty exceptions, modifications, and terminations; and (9) dispute settlement.⁸²

With regards to standards of treatment, one can distinguish between absolute and relative standards of treatment. While the latter defines the required treatment to be granted to investment by reference to the treatment accorded to other investments, absolute standards are non-contingent.⁸³ Relative standards of treatment include the “national treatment” and the “most-favoured-nation” principle.⁸⁴ In their typical versions, the national treatment clause demands that foreign investors should not be treated worse than domestic investors,⁸⁵ while the most-favoured nation principle means that privileges provided to one foreign investor must be provided to all.⁸⁶ Absolute

⁷⁸ Kragelund, *supra* note 24, at 8.

⁷⁹ *Id.*

⁸⁰ Kenneth J. Vandavelde, *The Economic of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469 (2000).

⁸¹ Berger, *supra* note 7, at 4.

⁸² Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J., 427, 432 (2010).

⁸³ OECD, *International Investment Law: A Changing Landscape* 74, (2005).

⁸⁴ *Id.*

⁸⁵ Rudolf Dolzer, Symp. *Making The Most of International Investment Agreements: A Common Agenda National Treatment: New Developments* (Dec. 12, 2005).

⁸⁶ Broadman, *supra* note 23, at 8.

standards of treatment that are utilised in BITs usually include the international minimum standard of treatment, the “fair and equitable standard of treatment” (“FET standard”) and “full protection and security.”⁸⁷

4. Sino-African BITs

In general it can be observed that the number of Chinese BITs has been constantly rising as the Chinese economy has become more powerful.⁸⁸ China only started concluding BITs in 1982 (when the first BIT was signed with Sweden) and mainly focused on developed, capital-exporting countries as contracting partners in the first few years.⁸⁹ The main goal of its investment policy in the early years was to promote IFDI, rather than protect OFDI.⁹⁰ However, as of June 2013, China had concluded 131 BITs and is thus ranked second after Germany in terms of the total number of BITs concluded worldwide.⁹¹ On the African continent China has concluded over 30 BITs as of 2013.⁹²

When analysing the Chinese BITs concluded with the African countries, one of the remarkable features of the Sino-African BITs is the fact that they do not follow the normal BIT pattern—that they are concluded between a capital-exporting developed state and a developing state keen to attract capital, but between two developing countries. This category of BIT is generally known as the South-South BIT.⁹³ However, the Sino-African BITs contain all standard provisions found in global BIT practice, like a preamble stating the intentions of the contracting parties, definitions of investment and investors, as well as

⁸⁷ SORNARAJAH, *supra* note 39, at 233.

⁸⁸ UNITED NATIONS CONFERENCE ON TRADE & DEV., GLOBAL INVESTMENT TRENDS MONITOR, *supra* note 3, at 54–56.

⁸⁹ Wenhua Shan & Nora Gallagher, *China* 132, in COMMENTARY ON SELECTED MODEL INVESTMENT TREATIES (Chester Brown ed., 2013).

⁹⁰ *Id.*

⁹¹ United Nations Conference on Trade & Dev, *Full List of Bilateral Investment Agreements Concluded, 1 June 2013*, http://unctad.org/Sections/dite_pcbb/docs/bits_china.pdf.

⁹² With Algeria, Benin, Botswana, Cape Verde, Chad, Congo, Cote d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, Ghana, Guinea, Kenya, Madagascar, Mali, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Sierra Leone, South Africa, Sudan, Seychelles, Tunisia, Uganda, Zambia and Zimbabwe. *See id.*

⁹³ *See, e.g.*, MALIK MAHNAZ, IV ANNUAL FORUM FOR DEVELOPING COUNTRY INV. NEGOTIATORS BACKGROUND PAPERS NEW DELHI, OCT. 27–29, 2010, SOUTH-SOUTH BILATERAL INVESTMENT TREATIES: THE SAME OLD STORY? (2010), available at http://www.iisd.org/pdf/2011/dci_2010_south_bits.pdf; United Nations Conference on Trade & Dev., *South-South Investment Agreements Proliferating*, INT'L INVESTMENT AGREEMENTS MONITOR, no. 5, 2005, available at <http://bit.escwa.org.lb/CM-SPages/GetFile.aspx?nodeguid=2e36f350-c502-43a2-8afb-cf2b5215fe46>.

certain subjective and procedural investment protection provisions. The main reason for this is certainly that the dynamic of the comparatively more developed southern countries versus the lesser-developed southern treaty partner mirrors that of the north-south dynamic.⁹⁴

In general, all Sino-African BITs adopted the admission model. This means that the treaty provides investment protection only after the admission of the FDI project.⁹⁵ The admission model is opposed to the pre-establishment model (the screening power of the state is already restricted in the pre-establishment phase) that has been applied by the U.S., Canada, and Japan in their BIT practices.⁹⁶ When considering Chinese investment policies, one always has to bear in mind that China started as a capital-importing state and was therefore rather inclined to protect its sovereign right to regulate foreign investment.⁹⁷ Ever since the volume of its OFDI increased rapidly, China began to adopt a more liberal approach by trying to increase the legal protection of its own investment.⁹⁸ This also has an influence on Sino-African investment practice.

One of the most important goals of a BIT is obviously to promote investments. Thus, every BIT usually contains a provision that specifically reiterates this goal. However, most Sino-African BITs tend to leave the control and protection of the admission to the discretion of the host country (*in accordance with its laws and regulations*),⁹⁹ showing that there is still some reluctance to liberalize existing investment regimes. In the following subparagraphs, the treaties usually go into more detail and call for assistance and the provision of facilities for obtaining visa and work permits, as well as other necessary permits,¹⁰⁰ licence agreements, and contracts for technical, commercial, or administrative assistance. These provisions are of special importance within the Sino-African context because one of the greatest impediments to trade and investment on the African continent are the non-tariff barriers (“NTB”), like delays of customs clearance procedures, complex documentation requirements, and unpredictable procedures at the border.¹⁰¹ Especially measures that relate to entry and establishment, like bans on foreign investment in certain sectors,

⁹⁴ Mahnaz, *supra* note 93, at 3.

⁹⁵ Berger, *supra* note 7, at 4.

⁹⁶ *Id.*

⁹⁷ Congyan Cai, *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice*, 7 J. WORLD INV. & TRADE 621, 626 (2006).

⁹⁸ Berger, *supra* note 7, at 1.

⁹⁹ See, e.g., China- South Africa BIT (1997) art. 2 (1).

¹⁰⁰ See, e.g., China- South Africa BIT (1997) art. 2 (2).

¹⁰¹ Karin Hasse, *Non-Tariff Barrier Choke African Trade*, 8 J. GOOD GOVERNANCE AFR. 5 (2013), available at <http://gga.org/publications/africa-in-fact-february-2013-trade>.

screening, and approval requirements; measures that deal with ownership and control, like compulsory joint ventures, transfer of technology, or managerial know-how; and finally, operational measures, like performance requirements, operational permits or licences, or local content restrictions can become impediments to international investments.¹⁰² At least to some extent the Sino-African BITs can serve as a remedy to non-tariff barriers as they provide for assistance for obtaining necessary permits, licence agreements, and contracts for technical, commercial, or administrative assistance.¹⁰³ Also, the general commitment to encourage FDI flows can be seen as an incentive to abolish certain NTBs.

With regards to absolute standards of treatment, all Sino-African BITs include a provision reiterating the principle of fair and equitable treatment.¹⁰⁴ But notably these provisions do not contain any reference to the international minimum standard of treatment¹⁰⁵ or full protection and security.¹⁰⁶ With regards to the relative standards of treatment, China rarely included the standard of national treatment in its BIT practice before 1998. Berger argues that the main reason for this was the aim to protect “infant industries and especially state-owned enterprises from foreign companies’ competition.”¹⁰⁷ Most Chinese BITs offered the standard of most-favoured-nation treatment only.¹⁰⁸ But with the changing circumstances, China now being a capi-

¹⁰² MICHAEL V. GESTRIN, A Stocktaking of Investment-Related Barriers in Africa 3 (OECD-Africa Round-table), available at <http://www.oecd.org/daf/inv/investmentfordevelopment/21040978.pdf>.

¹⁰³ Bilateral Investment Agreement, China-S. Afr., art. 2, ¶3, Dec. 30, 1997.

¹⁰⁴ See e.g., Bilateral Investment Treaty, Benin-China, art. 3, ¶1, Feb. 18, 2004, available at http://www.aseanbriefing.com/userfiles/resources-pdfs/China/BIT/Asia_BIT_Benin_China.pdf; Agreement on Promotion and Protection of Investment, China-Bots., art. 3, June 12, 2000, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/500>; Agreement on the Promotion Protection of Investments, China-Cote d’Ivoire, art. 3 (1), Sep. 30, 2002, available at <http://www.asianlii.org/cn/legis/cen/laws/abtgotprocatgotrocdotpapoi1477/>; Agreement on the Reciprocal Promotion Protection of Investments, China-Uganda, art. 3, May 27, 2004, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/790>.

¹⁰⁵ An exception is a China-Seychelles Bilateral Investment Treaty signed in 2007. See Berger, *supra* note 8, at 10 (explaining that China traditionally rejected customary international law as a Western concept).

¹⁰⁶ Again exceptions apply. See e.g., Bilateral Investment Treaty Agreement, China-Madag., art. 5 (1), Nov. 21, 2005, available at http://www.aseanbriefing.com/userfiles/resources-pdfs/China/BIT/Asia_BIT_Madagascar_China.pdf.

¹⁰⁷ Berger, *supra* note 7, at 8.

¹⁰⁸ See e.g., Agreement Concerning the Enforcement and Reciprocal Protection of Investment, China-Ghana, art. 3, Oct. 12, 1989, available at <http://tfs.mofcom.gov.cn/aarticle/h/aw/201002/20100206778950.html>; China-South Africa BIT, art.

tal-exporting country, it also gradually gave up its reservations. In most Sino-African BITs a provision granting nation treatment is now included but accompanied by the phrase “without prejudices to its laws and regulation,” thereby restricting it to a best effort clause.¹⁰⁹ National treatment is thus not granted unless the host countries’ laws and regulations grant foreign investors treatment not less favourable than that accorded to domestic investors. Other Sino-African BITs include a paragraph allowing for national treatment,¹¹⁰ but in a separate protocol China reserves the right to maintain laws and regulations towards foreign investors that are incompatible with national treatment.¹¹¹ Only the BIT with the Seychelles in fact grants full national treatment without any further restrictions.¹¹²

In line with its changing attitude towards national treatment, China only recently started to grant unrestricted access to international arbitration.¹¹³ When China became a Contracting State of the ICSID Convention in 1993,¹¹⁴ it continued to conclude BITs without making explicit reference to ICSID arbitration.¹¹⁵ Nowadays such a provision can be found in most Sino-African BITs. There is no requirement to exhaust local remedies first and the submission of the dispute to the arbitral tribunal is not dependent on the consent of both parties. The only restriction that still exists is the refusal to grant the right to transnational arbitration once the investor has chosen to access the host country’s domestic judiciary and the requirement to conduct an administrative review procedure. This raised the question “whether the newly concluded Chinese BITs containing an ICSID clause may have effects on earlier BITs without such a clause through the application of the most-favoured-nation clause.”¹¹⁶ Case law on the question of the application of the most-favoured-nation clause to procedural rights is contradictory: While in the *Maffezini* case a tribunal applied

3 (3), which remarkably only provides for national treatment by the Republic of South Africa. So while Chinese authorities are still allowed to discriminate South African investors, Chinese investors can rely on national treatment provisions.

¹⁰⁹ Berger, *supra* note 8, at 12.

¹¹⁰ China-Uganda BIT, *supra* note 106, art. 3, ¶ 2; China-Cote d’Ivoire, *supra* note 105, art. 3, ¶ 2.

¹¹¹ Berger, *supra* note 8, at 9.

¹¹² Bilateral Investment Agreement, China-Seychelles, art.3, ¶ 2, Oct. 2, 2007, available at <http://investmentpolicyhub.unctad.org/IIA/country/188/treaty/966>.

¹¹³ Berger, *supra* note 8, at 10.

¹¹⁴ INT’L CENTER FOR SETTLEMENT OF INVESTMENT DISP. [ICSID], *List of Contracting States and Other Signatories of the Convention*, ICSID (Apr. 11, 2014), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Contractingstates&ReqFrom=Main>.

¹¹⁵ China-South Africa BIT, *supra* note 103.

¹¹⁶ Heymann, *supra* note 67, at 519.

the most-favoured-nation clause to dispute resolution provisions (in fact to a procedural waiting period),¹¹⁷ more recent case law explicitly rejected this line of thought with regards to invoking ICSID jurisdiction.¹¹⁸ Only recently in 2007 did a Chinese company log the first arbitration request,¹¹⁹ and it was not before 2011 that the first claim was filed against China under the ICSID Convention.¹²⁰

Finally, China is well aware of the unstable region it deals with and is especially aware of the fact that its outward FDI can face considerable political risks. Sub-Saharan Africa is one of the regions that has experienced a rising trend of conflicts during the past couple of decades.¹²¹ While some of these civil wars are a result of the ethnic and religious diversity, some of the main factors contributing to the instability of the continent are “the high levels of poverty, failed political institutions and economic dependence on natural resources.”¹²² Investors coming to the African continent, of course, have to be prepared for this and this is especially true for China who has been heavily engaged in many African conflict areas as well as post-war countries like Sierra Leone, Angola, or the Sudan.¹²³ To safeguard its FDI, some BITs with African countries therefore include a provision providing for national treatment (and not only the regular most-favoured-nation treatment) in the case of war and civil strife.¹²⁴

¹¹⁷ *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (Jan. 25, 2000).

¹¹⁸ *Plasma Consortium Ltd. v. Bulg.*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005).

¹¹⁹ *Victor Pey Casado & President Allende Foundation v. Republic of Chile*, Pending Case, ICSID Case No. ARB/98/2, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last visited Feb. 26, 2014).

¹²⁰ See ICSID, <https://icsid.worldbank.org/ICSID/FrontServlet> (last visited Feb. 28, 2014).

¹²¹ According to a study conducted by Elbadawi & Sambanis “over the last 40 years nearly 20 African countries (or about 40% of Sub-Saharan Africa) have experienced at least one period of civil war. See Ibrahim Elbadawi & Nicholas Sambanis, *Why Are There So Many Civil Wars in Africa?*, 9 J. AFR. ECON. 244 (2000).

¹²² *Id.* at 244, 254.

¹²³ Daniel Large, *China’s Involvement in Armed Conflict and Post-War Reconstruction in Africa: Sudan in Comparative Context*, in OIL DEVELOPMENT IN AFRICA: LESSONS FOR SUDAN AFTER THE COMPREHENSION PEACE AGREEMENT 62 (L. Patey ed. 2000).

¹²⁴ China-Bots. BIT (2000) art. 3 (2).

II. EVALUATION OF CHINESE INVESTMENT POLICIES TOWARDS AFRICA

A. *General Evaluation of the Investments*

Especially large Chinese infrastructure projects like the building of dams, hospitals, government offices, stadiums, and streets throughout Africa are at the forefront of public attention.¹²⁵ But, apart from these very obvious accomplishments of Chinese engagement on the continent, the Chinese demand stimulated raw material prices increasing the income of many African countries and promoting African industries.¹²⁶ African countries gained more choices for business partners and export markets, turning away from the dominion and dependence from the West.¹²⁷ This is especially true because the ordinary customer profits from cheap Chinese goods, which are affordable for large parts of the population and thus help to develop the consumer sector across the continent.¹²⁸ African governments appreciate that Chinese engagement comes with no “strings attached,” meaning that China does not want to impose certain values on its African partners as do many Western-dominated international financial institutions with their foreign aid and debt relief programmes.¹²⁹ In this regard, the China-Africa Development Fund is becoming an appealing alternative to traditional sources of funding.¹³⁰ However, there is also a downside to the Chinese presence on the African continent. In fact, it did not bring good to the continent in terms of environmental concerns, human rights, and economic development.

First of all, the strong reliance upon raw materials like oil and the resulting dependency on export revenues from the extracting sector is highly problematic (the so called “resource curse”).¹³¹ Natural resource investments are often very capital-intensive with standardized processes only creating modest spill-overs on local labour and technologies.¹³² It must be feared that governments refrain from initialising necessary political and economic reforms like investment in human capital and infrastructure, institutional reforms, structural di-

¹²⁵ Taylor, *supra* note 25, at 951.

¹²⁶ Li Anshan, *China's New Policy Toward Africa*, in CHINA INTO AFRICA: TRADE, AID, INFLUENCE 39 (Robert I. Rotberg ed. 2008).

¹²⁷ *Id.*

¹²⁸ Daniel Flynn, *Africa Investment, China Brings Goods and Roads, Now Africa Wants Jobs*, REUTERS, (July 21, 2013) <http://www.reuters.com/article/2013/07/21/africa-china-idUSL6N0FI3TE20130721> (last visited Feb. 28, 2014).

¹²⁹ Ana Christina Alves, *Making Sense of Chinese Oil Investment in Africa*, in CHINA'S RETURN TO AFRICA 84 (Chris Alden ed. 2008).

¹³⁰ Habiyaremye, *supra* note 19, at 90.

¹³¹ *Id.* at 82.

¹³² Miria A. Pigato, *The Foreign Direct Investment Environment in Africa 3*, available at www.worldbank.org/afr/wps/wp15.pdf (last visited Feb. 26, 2014).

versification, and technology accumulation, which are crucial for an employment-intensive and inclusive growth.¹³³ Other negative side effects of the over-reliance on the export of raw materials are the vulnerability to the vitality of the international commodity markets,¹³⁴ the possible misallocation of revenue incomes in governmental budgets, corruption practices, environmental degradation, and sometimes even violent conflicts.¹³⁵ While this problem is not a specific feature of the Sino-African trade, Chinese companies generally keep downstream and processing activities within China, only importing pure raw materials,¹³⁶ as labour market efficiency is currently still higher in China than in Africa.¹³⁷ Ultimately, this means “the jobs and wealth from processing the natural resources are created elsewhere.”¹³⁸ And even on the worksites in Africa where they could employ local workers, Chinese enterprises tend to employ Chinese workers.¹³⁹

All of this contributes to the general perception that the Sino-African investment relations might not be sustainable in the long run.¹⁴⁰ The Chinese government and many enterprises are well aware of these resentments and work on changing this perception.¹⁴¹ The African partners on the other hand ultimately have to initialise the necessary political and economic reforms to be able to attract investments in areas other than in the natural resource sector. Currently, African countries should look for opportunities to make the existing investment relationships more beneficial for the local economies. They could, for example, demand that investors have to meet certain criteria, that they use domestic inputs such as labour and supplies, that they transfer technology, or train local workers.¹⁴² Also, governments should seek options to keep down-stream activities in the country after the

¹³³ Deutsche Bank Research, *China's Commodity Hunger: Implications for Africa and Latin America* 12, http://www.dbresearch.com/PROD/DBR_INTERNET_DE-PROD/PROD0000000000199956.pdf (last visited Feb. 28, 2014).

¹³⁴ Taylor, *supra* note 25, at 951.

¹³⁵ Habiyaemye, *supra* note 19, at 84.

¹³⁶ Deutsche Bank Research, *supra* note 133, at 12.

¹³⁷ Frans Crul, *China and South Africa on Their Way to Sustainable Trade Relations* 10 (Tralac Working Paper 2013).

¹³⁸ Flynn, *supra* note 128.

¹³⁹ Crul, *supra* note 137, at 8.

¹⁴⁰ *Id.* at 2.

¹⁴¹ Tongkeh Joseph Fowale, *Third World Order vs. New World Order*, POLITICALARTICLES.NET, <http://www.politicalarticles.net/blog/2008/04/27/third-world-order-vs-new-world-order-sino-african-economic-cooperation-challenges-to-globalisation/> (last visited Feb. 28, 2014).

¹⁴² DEPARTMENT OF TRADE AND INDUSTRY (South Africa), *Bilateral Investment Treaty Policy Framework Review* 48, <http://db3sqepoi5n3s.cloudfront.net/files/docs/090626trade-bi-lateralpolicy.pdf> (accessed Feb. 28, 2014) [hereinafter DTI].

initial investment is made. Only then will the Sino-African partnership become sustainable in the long run.

Second, especially with regards to labour rights, Chinese companies faced much criticism in recent years. Chinese employers were accused of “tense labour relations, hostile attitudes towards trade unions, various violations of workers’ rights, poor working conditions and several instances of discrimination and unfair treatment.”¹⁴³ Furthermore, they were heavily criticized for their policies concerning minimum wage as well as flooding the African market with low quality goods.¹⁴⁴ With regards to working conditions, Chinese investors are supposed to ignore certain safety and health regulation,¹⁴⁵ underpay workers, and break promises with regards to wage increases.¹⁴⁶ Primarily it is of course the responsibility of the local governments to make sure that Chinese companies comply with international and local labour laws and regulations. Most African countries enacted quite detailed and strict labour legislations,¹⁴⁷ ranging from regulations on general conditions of employment, which deal with ordinary hours of work as well as leave and termination of employment, and more specific legislation (e.g. South Africa’s Amended Occupational Health and Safety Act (No. 85 of 1993) and South Africa’s Employment Equity Act (No. 55 of 1998)).

On an international level, the International Labour Organization, as the main international body responsible for promoting social justice and internationally recognized labour rights,¹⁴⁸ formulated certain international labour standards.¹⁴⁹ Topics that are covered by the 189 ILO Conventions are for example the Freedom of Association and Protection of the Right to Organise Convention (No. 87 of 1948), the Occupational Safety and Health Convention (No. 155 of 1981), the Safety and Health in Mines Convention (No. 176 of 1995), and the

¹⁴³ African Labour Research Network, *Chinese Investments in Africa: Opportunity or Threat for Workers* 32–38, http://www.worldlabour.org/chi/files/u1/China-Africa_Booklet_2009.pdf (last visited Feb. 02, 2014).

¹⁴⁴ Habiyaemye, *supra* note 19, at 88.

¹⁴⁵ Nick Kotch, *Zambia Seizes Chinese Mine Over Safety*, available at <http://www.bdlive.co.za/business/mining/2013/02/21/zambia-seizes-chinese-mine-over-safety> (last visited Feb. 28, 2014).

¹⁴⁶ Horand Knaup, *Chinas Rolle in Afrika: Ansturm der gierigen Helfer*, available at <http://www.spiegel.de/politik/ausland/chinas-rolle-in-afrika-ansturm-der-gierigen-helfer-a-728609.html> (last visited Feb. 28, 2014).

¹⁴⁷ South African Labour Law legislations are available at the website of the Department of Labour, see <http://www.labour.gov.za/DOL/legislation> (last visited Feb. 26, 2014); see Amended Basic Conditions of Employment Act (No. 75 of 1997).

¹⁴⁸ INT’L LAB. ORG. (ILO), *Mission and Objectives*, <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang—en/index.htm> (last visited Feb. 28, 2014).

¹⁴⁹ *Id.*

Minimum Wage Fixing Convention (No. 131 of 1970).¹⁵⁰ Often, other international or regional institutions adopted the standards contained in these conventions in their own labour law provisions. Thus, it is crucial to enable the responsible government agencies to rigorously enforce (international and local) labour standards in order to ensure the improvement of working conditions. Also, it is important that African governments in this regard do not give in, but instead defend labour rights against Chinese investors not fearing the withdrawal of investment revenues from the country.¹⁵¹

Third, the fact that Chinese economic relations are based on the concept of a no-strings policy or policy of non-interference is highly problematic with regards to human rights and democracy.¹⁵² Especially China's engagement in Zimbabwe and Darfur has been largely criticized.¹⁵³ The main accusation is that China, in order to gain access to raw materials, supports corrupt, authoritarian regimes at the expense of human rights.¹⁵⁴ As put in a Human Rights Report regarding the situation in the Sudan, "China provided financial and military support to the Sudanese government even as it was engaged in massive ethnic cleansing in Darfur."¹⁵⁵ Indirectly, China's activities interfere with rights that are codified in documents such as the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child.¹⁵⁶ In an African context, the African (Banjul) Charter on Human and Peoples' Rights is also important to mention. Rights that are affected are "the right to life, liberty and security of person,"¹⁵⁷ the

¹⁵⁰ INT'L LAB. ORG. (ILO) *Ratification by Convention*, <http://www.ilo.org/dyn/normlex/en/f?p=1000:12001:0::NO> (last visited July 19, 2014).

¹⁵¹ See Kotch, *supra* note 145 (referring to the election campaign of Zambian president Michael Sata in 2011).

¹⁵² TAYLOR, *supra* note 25, at 952.

¹⁵³ AFRICAN LABOUR RESEARCH NETWORK, *supra* note 143, at 21.

¹⁵⁴ Li Anshan, *China and Africa: Policy and Challenges*, 3 CHINA SECURITY 69, 83 (2007).

¹⁵⁵ HUMAN RIGHTS WATCH, WORLD REPORT 25 (2006), available at <http://www.hrw.org/sites/default/files/reports/wr2006.pdf>.

¹⁵⁶ Statement Delivered by Michael W. Inlander on Behalf of United Nations Watch to the 11th Session of UN Working Group On Minorities: Sudan's Mass Displacement, Rape, and Killing of Black African Minority in Darfur Constitutes Gross Violation of UN Declaration on the Rights of Minorities (June 1, 2005), <http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1313923&ct=1747993>.

¹⁵⁷ See Universal Declaration of Human Rights art. 3, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); African Charter on Human and Peoples' Rights art. 4, *adopted* June 27, 1984, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force Oct. 21, 1986).

right to be free of “torture or cruel, inhumane or degrading punishment,”¹⁵⁸ and the “right to freedom of movement.”¹⁵⁹ Of course, it is important to acknowledge that China only enables a situation in which these human right violations are possible and cannot be made responsible for them in the first place. Also, it is important to notice that China’s position of non-interference, for example with regard to Zimbabwe, is in accord with that of the AU¹⁶⁰ and that lately, for example in Darfur, China assumed a more active role trying to mediate between the Sudanese government and other actors.¹⁶¹ However, being one of the largest investors in many unstable and crisis-ridden countries, the Chinese could have done more “to exercise their growing ability to be a persuasive and responsible stakeholder.”¹⁶²

Finally, Chinese investors are engaging in many projects on the African continent like hydropower dams, concessions for tropical hardwood, large rainforest plantations, roads, as well as large-scale mining, which poses a significant risk for the environment in Africa.¹⁶³ Against this background, Chinese companies have been accused of violating environmental rights of the local communities where they operate. The Niger Delta, for example, was once Nigeria’s richest area of biodiversity but now suffers from severe environmental degradation caused in part by frequent oil spills and dumping of industrial waste.¹⁶⁴ There are now many international agreements that acknowledge the right to a clean and healthy environment such as the Universal Declaration on Human Rights of 1948 (Art. 25), the United Nations Declaration on the Rights of Indigenous Peoples of 2007 (Art. 29), and the African Charter on Human and Peoples’ Rights (Art. 24). Noteworthy in the Chinese-African investment context are the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the 1992 Convention on Biodiversity, and the 1998 Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. For a long time China did not have envi-

¹⁵⁸ See Universal Declaration of Human Rights, *supra* note 157, art. 5; African Charter on Human and Peoples’ Rights, *supra* note 157, art. 5.

¹⁵⁹ See Universal Declaration of Human Rights, *supra* note 157, art. 13; African Charter on Human and Peoples’ Rights, *supra* note 157, art. 12.

¹⁶⁰ Anshan, *supra* note 154, at 75.

¹⁶¹ *Id.* at 76–77; see also Bates Gill & James Reilly, *The Tenuous Hold of China Inc. in Africa*, 30 THE WASH. Q., no. 3, 2007, at 37.

¹⁶² DEBORAH BRAUTIGAM, *THE DRAGON’S GIFT: THE REAL STORY CHINA IN AFRICA* 292 (2011).

¹⁶³ *Id.* at 299.

¹⁶⁴ Habiyaemye, *supra* note 19, at 80.

ronmental laws that specifically related to OFDI.¹⁶⁵ The first guidelines that specifically addressed environmental issues were guidelines concerning social and environmental impact assessments issued by China's EXIM Bank in 2008.¹⁶⁶ In March 2013, the MOFCOM and the Ministry of Environmental Protection (MEP), as a next step, jointly issued the Guidelines on Environmental Protection in Investment and Cooperation Overseas ("Guideline on Environmental Protection").¹⁶⁷ But with no sanctions for violations of the guidelines and without much civil society activism, it will be difficult to actually hold Chinese investors accountable.¹⁶⁸

B. Evaluation of the Sino-African BIT Practice

Lately, the effectiveness of BITs as a means to attract international investments has been called into question.¹⁶⁹ As statistics show, there are many investors and host states that totally refrain from the conclusion of BIT.¹⁷⁰ Thus, it is highly disputed whether BITs can serve as substitutes for good institutional quality and local property rights and thereby promote FDI inflows.¹⁷¹ However, China and its

¹⁶⁵ OXFAM H.K., *Understanding China's Overseas Foreign Direct Investment: A Mapping of Chinese Laws and Stakeholders* 26 (2012), available at <http://www.oxfam.org.cn/uploads/soft/20130428/1367136257.pdf>.

¹⁶⁶ BRAUTIGAM, *supra* note 162, at 303.

¹⁶⁷ *Guidelines on Environmental Protection in Investment and Cooperation Overseas*, MINISTRY OF COMMERCE CHINA, (Mar. 1, 2013, 7:28 PM), <http://english.mofcom.gov.cn/article/policyrelease/bbb/201303/20130300043226.shtml>.

¹⁶⁸ See BRAUTIGAM, *supra* note 162, at 301 (referring to China's State Forestry Administration and the Ministry of Commerce guidelines which Chinese logging companies are expected to use abroad).

¹⁶⁹ See Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite* 22 (The World Bank Policy Research Working Papers, 2003), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3121>; Berger, *supra* note 7, at 2.

¹⁷⁰ See Hallward-Driemeier, *supra* note 169, at 9 (stating that Japan, the second largest source for FDI by the turn of last century, had only concluded 4 BITs up to 2003. Likewise Brazil, which is one of the top receivers of FDI, has only signed a couple of investments agreements none of which entered into force).

¹⁷¹ See generally Matthias Busse et al., *FDI Promotion through Bilateral Investment Treaties* 24–25 (Kiel Inst. for the World Econ., Working Paper No. 1403, 2008); Hallward-Driemeier, *supra* note 169, at 22; Eric Neumayer & Laura Spess, *Do Bilateral Investments Treaties Increase Foreign Direct Investment to Developing Countries*, 33 *WORLD DEV.*, no. 10, Oct. 2005, at 27, available at http://eprints.lse.ac.uk/627/1/World_Dev_%28BITS%29.pdf; Susan Rose-Ackerman & Jennifer Tobin, *Foreign Direct Investment and Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties* 23 (Yale Law Sch. Ctr. for Law, Econ., & Pub. Policy, Research Paper No. 293, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=557121.

respective African partners committed themselves to continue to encourage mutual investment and to push forward negotiations and implementations of bilateral agreements on promoting and protecting investments.¹⁷² This commitment is strong proof for the factual acceptance of BITs as an instrument to foster mutual investment. Especially in the last decade there has been a massive rise in the number of BITs concluded with African countries,¹⁷³ showing that China and the African countries seem to believe that international law is an adequate protection for its investors in third-world countries.¹⁷⁴ Nevertheless, Sino-African BITs pose serious and not yet anticipated risks especially to the African continent.

First of all, most investment agreements focus primarily on protecting the interests of the foreign investor and do not take into account the interest of the international community or the host state with regards to the protections of such areas as human rights or the environment.¹⁷⁵ Sino-African BITs do not address human rights or environmental issues at all. Considering international BIT practice, this is in fact not unusual as there are only a few, newer investment treaties (see for example Art. 1114 (1) of the North American Free Trade Agreement or the China-Canada BIT of 2011) that contain special provisions addressing these issues. However, it would be possible to include special exception clauses to general treaty provisions or to make a reference to human rights concerns and environmental aspects in the preambles of the BITs.¹⁷⁶ Although a preamble does not impose enforceable rights on the contracting parties, it has to be taken into account when interpreting a treaty according to Article 31 of the Vienna Convention on the Law of Treaties. Going even one step further, it would be an option to impose direct obligations on the investors themselves, such as a requirement to comply with the investment laws of the host state when making and operating an investment or obligations in the post-operation stage (e.g. environmental cleanup).¹⁷⁷ However, so far only few BITs (like the COMESA Investment Agreement 2007, Art. 13) contain specific investor obligations.

¹⁷² FOCAC, *supra* note 58, at 4.2.2.

¹⁷³ See United Nations Conference on Trade & Dev., *Full List of Bilateral Investment Agreements Concluded, 1 June 2013*, http://unctad.org/Sections/dite_pcb/docs/bits_china.pdf (last visited July 19, 2014).

¹⁷⁴ Heymann, *supra* note 67, at 526.

¹⁷⁵ SORNARAJAH, *supra* note 39, at 259.

¹⁷⁶ See Dep't of Trade & Indus., S. Afr., *supra* note 142, at 49.

¹⁷⁷ DIV. ON INV. & ENTER., UNITED NATIONS CONFERENCE ON TRADE & DEV., *Investment Policy Framework for Sustainable Development* 39 (n.d.), available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf (last visited July 19, 2014).

Second, many African countries have enacted ethnic policies (land redistribution and other schemes) to support those parts of their population that have been disadvantaged due to racial reasons in the past.¹⁷⁸ These policies have a potential to conflict with the BITs in case they include national treatment standards that may require that the best national standards are also given to the foreign investors.¹⁷⁹ Obviously, these provisions that favour the disadvantaged of the community are not meant to fall under the scope of an investment treaty.¹⁸⁰ To avoid this problem, specific exception clauses should be included in all BITs.¹⁸¹ The national treatment standard can furthermore conflict with performance requirements, which are imposed upon an investor by the host state. Usually a host state in its sovereign power can demand that the investor has to meet certain criteria, for example that he use domestic inputs such as labour and supplies.¹⁸² According to the national treatment clause, host countries cannot give national investors any preferential treatments over foreign investors once they are established in the country and require specific corporate behaviour.¹⁸³ With regards to the Chinese practice of refraining from hiring local workers, here the BITs certainly act as a constraint on the government's regulatory freedom.

Third, an emerging principle of International Law, which is often employed in the international trade context, is the principle of special and differential treatment, meaning that developing countries profit from special rights (e.g. longer periods to phase in obligations and more lenient obligations).¹⁸⁴ Expressions of this principle can be found in many international agreements, but rarely in international investment agreements and accordingly not in Sino-African BITs, as bilateral agreements are usually based on "legal symmetry and reciprocity."¹⁸⁵ However, the principle could easily be included through development-focused exceptions from general commitments, a development-oriented interpretation of treaty obligations by arbitral tribunals, or through best endeavour commitments for developing

¹⁷⁸ See *Basic Guide to Affirmative Action*, DEP. OF LAB. S. AFR., <http://www.labour.gov.za/DOL/legislation/acts/basic-guides/basic-guide-to-affirmative-action> (Last visited July 19, 2014).

¹⁷⁹ SORNARAJAH, *supra* note 39, at 261.

¹⁸⁰ *Id.*

¹⁸¹ See DTI, *supra* note 142, at 37.

¹⁸² DTI, *supra* note 142, at 48.

¹⁸³ *Investment Policy Framework for Sustainable Development*, *supra* note 177, at 40.

¹⁸⁴ See Definition of the WTO, available at http://www.wto.org/english/thewto_e/glossary_e/s_d_e.htm (last visited Feb. 28, 2014).

¹⁸⁵ *Investment Policy Framework for Sustainable Development*, *supra* note 177, at 42.

countries.¹⁸⁶ Surely it would be a very progressive step for the Sino-African BITs practice to adopt the special and differential treatment standard, which is unlikely to happen before other key players in the international investment scene start incorporating it as well.

Fourth, with regards to expropriation, the Sino-African BITs use terms like expropriation or nationalisation that can be found in most standard BITs nowadays. But, what constitutes an expropriation remains unclear and no further definition can be found in any BIT. The same applies to the obligation of “fair and equitable” treatment, which can be found in basically all Sino-African BITs, but does not connote a clear set of legal orders and obligations.¹⁸⁷ Thus, to the extent that foreign investors perceive domestic policy changes to negatively affect their expectations, they might use these provisions to challenge government’s measure and claim for compensation.¹⁸⁸ It might be advisable for the African countries against this background to clarify the scope and meaning of the expropriation provisions as well as the fair and equitable treatment clause or to include exception and reservation clauses.¹⁸⁹

Finally, the dispute settlement clauses of BITs are highly controversial with regards to the potential risks they pose to the host state. Some argue that investors take advantage of these provisions to circumvent domestic legal systems in order to take their cases to more favourable international arbitration.¹⁹⁰ Here, many states fear that issues of public policy are not addressed as comprehensively and prudently as they should.¹⁹¹ As Chinese investment to the continent grows, also grows the potential for conflicts. Just recently Addax, a Chinese refiner owned by the Sinopec group, sought US \$330 million in damages from Gabon in the ICC International Court of Arbitration in Paris, triggering a counterclaim of the Gabon state for double that amount.¹⁹² The dispute mainly focused on the government’s allegations that Addax failed to pay customs duties and respect other laws,¹⁹³ while Addax blamed Gabon for not renewing its licence.¹⁹⁴

¹⁸⁶ *Id.*

¹⁸⁷ Christoph Schreuer, *Fair and Equitable Treatment (FET): Interactions with other Standards*, 4 *TRANSNAT’L DISP. MGMT.* 26 (2007).

¹⁸⁸ *Investment Policy Framework for Sustainable Development*, *supra* note 177, at 40.

¹⁸⁹ *Id.*

¹⁹⁰ DTI, *supra* note 142, at 45.

¹⁹¹ *Id.*

¹⁹² Emma Farge, *China’s Addax Locks in \$ 1 Billion Dispute with Gabon-Sources*, <http://www.reuters.com/article/2013/06/05/gabon-china-idUSL5N0E93DB20130605> (last visited Feb. 28, 2014).

¹⁹³ Flynn, *supra* note 128.

¹⁹⁴ Farge, *supra* note 192.

CONCLUSION

Notwithstanding all the criticism, China's engagement in Africa certainly contributes to Africa's economic development and can help to open up the continent and make business more competitive. The cooperation of BRICS members with African nations provides an enormous potential for development of the continent, especially as China attaches an ever-increasing importance to BRICS and its Africa relations. BRICS had a challenging 2013 and is expected to also have a challenging 2014. Critics state that the BRICS have hit a wall in which major emerging markets are suffering.¹⁹⁵ Nevertheless, in 2013 BRICS-Africa trade amounted to nearly \$350 billion, which is a significant amount for Africa in relation to its other trading blocs, constituting a 5% increase from 2012.¹⁹⁶

Chinese investments, in particular, have been growing tremendously during the last decade with the main focus on resource-rich countries like Sudan, Nigeria, and Zambia, as well as South Africa as the leading African economy. Not only is China interested in the raw materials that the African continent has to offer, but it also seeks to exploit Africa's potential as an emerging market with an immense consumer base.

However, it is not certain that Africa profits from Chinese investments. As shown above, the Chinese investments on the continent can also lead to negative side effects such as negative implications for human rights, labour law, and for the environment, as well as detriments for the local economies. From an economic perspective, the sustainability of Chinese investments is very questionable. Most Chinese investments still go into the natural resource sector with the result that many countries are becoming more and more dependent on these resources. If African countries want to make their investment relations with China more sustainable, it is essential that they attract investment in other areas as well. With regards to existing investment, African countries should place more emphasis on performance requirements, for example the participation of local workers in these investment projects, technology transfers, and training of local workers, and should also try to keep the labour-intensive down-stream activities in their respective home countries.

Regarding human rights violations, environmental abuse, and alleged labour law abuse, the onus is placed on the individual African countries. It is crucial that they build up capacities to monitor compli-

¹⁹⁵ Cf. Michael Schuman, *The BRICs Have Hit the Wall*, available at <http://business.time.com/2014/01/10/brics-in-trouble/> (last visited Feb. 20, 2014).

¹⁹⁶ Cf. Sapa, *BRICS Economies Not Crashing: Economist*, available at <http://www.sabc.co.za/news/a/a9c37e0042a6ffa1b579ff56d5ffbd92/Brics-economies-not-crashing: Economist-20142201> (last visited Jan. 20, 2014).

ance and to safeguard the enforcement of respective regulation. In this context it might be advantageous for the African countries to slowly get into a position where they can choose who they want to do business with in the future.

With regards to the Sino-African BIT practice, it might be advisable that the older BITs that were concluded at the turn of the century be revised and renegotiated. One recommendation might be to include more specific language that emphasises the fact that investment promotion and protection should not undermine other important values such as human rights, environmental concerns, and labour concerns, and that investments should always promote sustainable development. More clarification is also needed with regards to such provisions as those dealing with expropriation or fair and equitable treatment. There is still a lot of room for improvement especially with regards to recent developments in international investment treaty design (e.g. the inclusions of investors' obligations and the adoption of the principle of special and differential treatment). Bearing these recommendations in mind, Sino-African investments might become sustainable in the long-run and will be beneficial for China and the African continent at large.

**THE EXTRATERRITORIAL REACH OF
UNITED STATES SECURITIES ACTIONS AFTER
MORRISON V. NATIONAL AUSTRALIAN BANK**

*Nathan Lee**

INTRODUCTION

In the aftermath of Black Tuesday, the infamous Wall Street crash of 1929, Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934.¹ These two Acts sought to ensure legitimacy in the securities market by, among other things, regulating and preventing deceptive conduct in securities transactions.² As the business world expanded, technology improved, and the world became smaller (so to speak), many securities transactions took on a transnational character involving parties from around the globe.³ To ensure the legitimacy of these transactions and to protect the American public, courts expanded the scope of the antifraud provisions of the Securities Exchange Act to cover these transactions.⁴ Courts began to apply the Securities Acts to conduct that occurred extraterritorially, or outside the U.S.⁵ This extraterritorial application continued for over forty years⁶ until the Supreme Court abruptly put an end to that extraterritoriality in 2010.⁷

In *Morrison v. National Australian Bank*, the Supreme Court held that the presumption against the extraterritorial application of U.S. law prevented the Securities Exchange Act from being applied to

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¹ Rosemary J. Thomas, Note, *The Fraud-on-the-Market Theory: A "Basic"ally Good Idea Whose Time Has Arrive*, *Basic, Inc. v. Levinson*, 22 IND. L. REV. 1061, 1062-64 (1989).

² *Id.*

³ See Eric D. Peterson, *Transnational Securities Fraud Jurisdiction Under Section 10(b): The Case for a Flexible and Expansive Approach*, 47 WASH. & LEE L. REV. 637 (1990).

⁴ See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968), *overruled by Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247 (2010).

⁵ See Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1026 (2011).

⁶ See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247.

⁷ See *id.* at 273.

foreign conduct regardless of the effects within the United States.⁸ The presumption against extraterritoriality is a canon of statutory construction that presumes acts of Congress only apply domestically, unless Congress gives a clear indication that they should apply abroad.⁹ Despite this bar on the extraterritorial application of the Securities Acts, the Court's analysis and subsequent acts of Congress create the possibility that some antifraud provisions may still apply abroad. This article focuses on those provisions and under what circumstances they may apply extraterritorially.¹⁰

I. HISTORICAL DEVELOPMENT OF THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The presumption against extraterritoriality made its first appearance in 1818.¹¹ In *United States v. Palmer*, the U.S. government brought a criminal piracy charge against three foreigners for robbing a Spanish ship on the high seas.¹² The government argued that the piracy statute's broad terms—applying to “any person or persons”—meant that it applied against the defendants even though the crime took place on the high seas and involved a Spanish ship.¹³ Writing for the Court, Justice Marshall held that the statute did not apply to the foreign conduct because the legislature did not intend the statute to apply so broadly and “the intent of the legislature determine[s] the” scope of the statute.¹⁴

The Court soon showed its amicability to the extraterritorial application of U.S. law by applying the same statute against a U.S. citizen for piracy against a stateless vessel.¹⁵ Writing for the Court again, Justice Marshall distinguished *Palmer* on the grounds that the

⁸ See *id.* at 265. Other courts soon applied the presumption to the 1933 Securities Act as well. See, e.g., *In re Vivendi Universal S.A., Sec. Litig.*, 842 F. Supp. 2d 522, 529 (S.D.N.Y. 2012).

⁹ *Morrison*, 561 U.S. at 255.

¹⁰ This Article focuses only on the antifraud provisions of the Acts and not other provisions, such as ones that regulate filings or administrative functions. See, e.g., 15 U.S.C. § 77e (2012) (filing statements); 15 U.S.C. § 78(e) (selling unregistered securities); 15 U.S.C. § 78m (filing reports by issuers); 15 U.S.C. § 78o (registration of brokers and dealers).

¹¹ See *United States v. Palmer*, 16 U.S. 610, 611 (1818); see also Colangelo, *supra* note 5, at 1033.

¹² *Palmer*, 16 U.S. at 611.

¹³ *Id.* at 631.

¹⁴ *Id.* at 631–32; see also Colangelo, *supra* note 5, at 1061. Justice Marshall also rested the holding on international law limitations. See *Palmer*, 16 U.S. at 631–32. Since *Palmer*, international law has transformed to permit broader extraterritorial application of a nation's laws; Colangelo, *supra* note 5, at 1023–24.

¹⁵ *United States v. Klinton*, 18 U.S. 144, 151–52 (1920).

defendant was a U.S. citizen and the ship was a stateless vessel—compared to the Spanish vessel in *Palmer*.¹⁶ These two considerations led Justice Marshall to conclude that the defendant's conduct came squarely within Congress's intended reach of the statute.¹⁷

It was not until 1909 that the Supreme Court first applied the presumption against extraterritoriality outside the high seas context in *American Banana v. United Fruit*.¹⁸ There, the Court refused to apply the Sherman Act against a U.S. company that was operating abroad.¹⁹ Justice Holmes, writing for the Court, reasoned that the Court should construe the “statute as intended to be confined . . . to the territorial limits over which the lawmaker has general and legitimate power.”²⁰ This reasoning created a strict territorial approach to the presumption.²¹ However, the Court soon abandoned this approach.²²

In *United States v. Bowman*, the Court held that a statute criminalizing fraud against government-owned corporations applied to conduct in Brazil.²³ The Court distinguished *American Banana* on the grounds that it “was a civil case” and “the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated.”²⁴ Thus, the criminal nature of the case permitted the statute's extraterritorial application even though the result would have been different if it were a civil statute.²⁵

In 1991, the Supreme Court applied the presumption against extraterritoriality to Title VII of the Civil Rights Act.²⁶ The Court held that Congress's intent governed Title VII's extraterritorial scope.²⁷ To discern this intent, the Court focused on the text of the statute.²⁸ To apply extraterritorially, the Court held that Congress “need[ed] to

¹⁶ Colangelo, *supra* note 5, at 1064–65.

¹⁷ *See id.* at 1065.

¹⁸ *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356, 357 (1909).

¹⁹ *See id.* at 359.

²⁰ *Id.* at 357.

²¹ *See id.*

²² *See generally* *United States v. Bowman*, 260 U.S. 94, 103 (1922) (applying the U.S. Criminal Code extraterritorially to acts that defrauded the U.S. government).

²³ *See id.* at 102.

²⁴ *Id.* at 98.

²⁵ *See id.* at 98, 102–103.

²⁶ *Equal Emp't Opportunity Comm'n. v. Arabian Am. Oil Co.*, 499 U.S. 246, 246–47 (1991).

²⁷ *See id.* at 248.

²⁸ *See id.* at 248.

make a clear statement that [the] statute applies overseas.”²⁹ This “clear statement” rule, however, was discarded in *Morrison v. National Australian Bank*.³⁰ In applying the presumption to Section 10(b) of the 1934 Securities Exchange Act, the Court did not require a “clear statement” for extraterritoriality since “context can be consulted as well.”³¹ Instead, the Court required a “clear indication” that Congress intended the Act to apply extraterritorially.³²

In its latest articulation of the presumption, the Supreme Court held that the Alien Tort Statute (“ATS”) does not apply extraterritorially.³³ In determining the extraterritorial reach of the ATS, the Court examined both the text of the statute as well as the historical context surrounding its enactment.³⁴ Specifically, the Court focused on two historical events—the harassment of a French ambassador and seizure of slaves from a ship at port—to conclude that Congress did not intend the ATS to apply extraterritorially.³⁵

II. EXTRATERRITORIAL DEVELOPMENT OF SECURITIES LAWS

The 1933 and 1934 Securities Acts are generally silent in regards to their extraterritorial reach. Section 30 of the 1934 Act seems to prohibit its extraterritorial application while providing narrow exceptions.³⁶ Section 30(b) precludes the extraterritoriality of the Act stating that “[t]he provisions of this chapter or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States.”³⁷ Section 30(b) then provides a narrow exception by stating that the prohibition does not apply to regulations “the Commission may” enact to “prevent the evasion” of the Act.³⁸ Section 30(a) also provides an additional exception.³⁹ Section 30(a) explicitly permits extraterritorial application against brokers or dealers for transactions on foreign exchanges when the issuer is an U.S. company.⁴⁰ The exceptions in Sections 30(a) and 30(b) are fairly narrow in light of the general prohi-

²⁹ *See id.* at 258.

³⁰ *Morrison v. Nat’l Austl. Bank, Ltd.*, 561 U.S. 247, 265 (2010).

³¹ *Id.* (*Morrison* is addressed in-depth below. *See infra* Part II.B.)

³² *Id.* at 255.

³³ *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668 (2013).

³⁴ *See id.* at 1665–69.

³⁵ *See id.* at 1666–69.

³⁶ *See* 15 U.S.C. § 78dd(b) (2012).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 15 U.S.C. § 78dd(a) (2012).

⁴⁰ *Id.*

bition in Section 30(b). Yet, despite Section 30(b), courts began to apply the 1934 Act in an extraterritorial manner.⁴¹

A. Schoenbaum and Its Progeny

Section 10(b) of the 1934 Act⁴² and SEC rule 10b-5, which Congress promulgated under Section 10(b),⁴³ are the most frequently litigated securities laws.⁴⁴ The Second Circuit first applied Section 10(b) extraterritorially in *Schoenbaum v. Firstbrook*.⁴⁵ The court held that Section 10(b) applied extraterritorially despite the lack of affirmative language in the Act and despite “the specific language of Section 30(b).”⁴⁶ The importance of Section 10(b) and the effect that foreign transactions have on domestic investors led the court to hold that Section 10(b) and Rule 10b-5 apply extraterritorially.⁴⁷ Four years later, in *Leasco Data Processing Equipment v. Maxwell*, the Second Circuit expanded the extraterritorial reach of Section 10(b) to cover claims where deceptive conduct occurred in the U.S., even though the actual sale of securities took place abroad.⁴⁸ The court in *Leasco* held that when deceptive conduct occurred domestically, the presumption should not apply because the statute’s application is domestic not foreign since it is being used to regulate the domestic deceitful conduct.⁴⁹ The court reasoned that, even though the statute is silent on the issue, “if Congress had thought about the point,” it would have wanted Section 10(b) to apply in that case.⁵⁰

Subsequent courts used *Schoenbaum* and *Leasco* to formalize two tests that determined Section 10(b)’s extraterritorial reach.⁵¹ These two tests are (1) the “effects test”—“whether the wrongful conduct had a substantial effect in the United States or upon United States citizens” and (2) the “conduct test”—“whether the wrongful conduct occurred in the United States.”⁵² Other Circuits soon adopted

⁴¹ See *infra* Part III.A.

⁴² 15 U.S.C. § 78j (2012).

⁴³ 17 C.F.R. § 240.10b-5 (2009).

⁴⁴ See Robert Anderson IV, *Employee Incentives and the Federal Securities Laws*, 57 U. MIAMI L. REV. 1195, 1256–57 (2003) (quoting SEC v. Nat’l Sec., Inc., 393 U.S. 453, 465 (1969)).

⁴⁵ *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) *overruled by* *Morrison v. Nat’l Austl. Bank, Ltd.*, 561 U.S. 247 (2010).

⁴⁶ *Id.* at 206.

⁴⁷ *Id.*

⁴⁸ *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972) *overruled by* *Morrison v. Nat’l Austl. Bank, Ltd.*, 561 U.S. 247 (2010).

⁴⁹ See *id.* at 1334.

⁵⁰ *Id.* at 1337.

⁵¹ *Morrison*, 561 U.S. at 257.

⁵² See *S.E.C. v. Burger*, 322 F.3d 187, 192 (2d Cir. 2003).

these two tests⁵³ until almost every circuit used some form of the two tests and applied Section 10(b) extraterritorially.⁵⁴

B. *Morrison v. Australian National Bank*

Due to *Schoenbaum* and *Leasco*, before 2010, it was generally accepted that the Section 10(b) applied extraterritorially.⁵⁵ *Morrison* abruptly reversed this thinking and forty years of precedent. Writing for the Court, Justice Scalia criticized *Schoenbaum* and *Leasco*.⁵⁶ He rejected the Second Circuit's case-by-case analysis and held that the presumption applies "in all cases."⁵⁷ He then took it upon himself to determine, anew, whether the presumption precludes extraterritorial application of Section 10(b).⁵⁸ The Court held that there must be a "clear indication" showing Congress's affirmative intent that Section 10(b) applies extraterritorially.⁵⁹ While the Court noted that the context surrounding the Act's passage may be considered,⁶⁰ the Court relied heavily on the text of the 1934 Act in determining its inapplicability to extraterritorial conduct.⁶¹

1. Extraterritoriality of Section 10(b)

In determining the extraterritoriality of Section 10(b), the Court first looked to the text of the statute.⁶² The Court noted that the text was silent on the issue.⁶³ Section 10(b) refers to "interstate commerce," which is defined in Section 3 as "trade, commerce, transportation, or communication among the several States, or *between any foreign country*."⁶⁴ However, the Court believed that this "general reference to foreign commerce" was insufficient to provide a clear indication.⁶⁵ The Act's reference to "foreign countries" in Section 2, which sets out the Act's purpose,⁶⁶ was also too general to create a clear indi-

⁵³ See *Morrison*, 130 S. Ct. at 2880; see also *Kauthar SDN BHD v. Steinberg*, 149 F.3d 659, 667 (7th Cir. 1998); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 (D.C. Cir. 1987); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424–25 (9th Cir. 1983).

⁵⁴ *Morrison*, 561 U.S. at 274, n.2 (Stevens, J. concurring in judgment).

⁵⁵ See *id.* at 256.

⁵⁶ See *id.* at 261.

⁵⁷ See *id.*

⁵⁸ *Id.* at 262.

⁵⁹ See *id.* at 255.

⁶⁰ *Id.* at 265.

⁶¹ See *id.* at 275 (Stevens, J. concurring in the judgment).

⁶² See *id.* at 262.

⁶³ *Id.*

⁶⁴ See 15 U.S.C. § 78c(17) (2012) (emphasis added).

⁶⁵ See *Morrison*, 561 U.S. at 262–63.

⁶⁶ 15 U.S.C. § 78b(2) (2012).

cation of the legislative intent.⁶⁷ Bolstering its argument against extraterritoriality, the Court noted that Section 30(b) generally prohibited extraterritoriality while permitting two narrow exceptions.⁶⁸ This general prohibition with narrow exceptions indicates that the remainder of the Act—everything other than Section 30—does not apply extraterritorially.⁶⁹ Therefore, Section 10(b) not only lacks a clear indication of extraterritoriality, Section 30 indicates that it applies solely domestically.⁷⁰

2. Scope of the Act (Transactional Test)

Determining that Section 10(b) does not apply extraterritorially was not enough to settle the matter in *Morrison*. Some of the deceptive conduct occurred in Florida even though the securities were eventually purchased abroad.⁷¹ One party argued that because the conduct was domestic the presumption did not apply.⁷² Justice Scalia dismissed this argument by holding that “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”⁷³ He then formulated a new test for domesticity by looking to the “focus” of the Act.⁷⁴ The Court held that the “focus” of the Securities Exchange Act is the “purchase and sale” of securities.⁷⁵ If the purchase and sale of the security occurs in the U.S., the transaction is domestic, but if the sale takes place abroad, which happened in *Morrison*, the transaction is foreign even though there may be some domestic conduct.⁷⁶ This “focus” test has become known as the “transactional test.”⁷⁷

Under the transactional test, a court must first determine the focus of the statute.⁷⁸ The court will then determine where the conduct

⁶⁷ *Morrison*, 561 U.S. at 261.

⁶⁸ *Id.* at 263; see 15 U.S.C. § 78dd(b) (2012).

⁶⁹ See *Morrison*, 561 U.S. at 264–65

⁷⁰ See *id.*

⁷¹ See *id.* at 253

⁷² See *id.* at 265–66.

⁷³ See *id.* at 266 (emphasis in original).

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ Vladislava Soshkina, Note, *Beyond Morrison: The Effect of the “Presumption Against Extraterritoriality” and the Transactional Test on Foreign Tender Offers*, 54 WM. & MARY L. REV. 263, 277 (2012).

⁷⁸ See *Morrison*, 561 U.S. at 266; see also Marc I. Steinberg & Kelly Flanagan, *Transactional Dealings—Morrison Continues to Make Waves*, 46 INT’L LAW. 829, 845 (2012).

occurred that is at the focus of the statute.⁷⁹ The transaction is localized at the focus.⁸⁰ This localization of the entire transaction to a single point is similar to the “traditional approach to conflict of laws.”⁸¹ If the localized point occurred abroad, then the transaction is foreign and the presumption applies.⁸² But if the localized point occurred in the U.S., then the transaction is domestic and the presumption does not apply even though some of the conduct may have taken place abroad.⁸³

C. *Dodd-Frank*

In response to *Morrison*, Congress amended the Securities Acts with the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).⁸⁴ Dodd-Frank specifically permitted extraterritorial jurisdiction for fraud cases brought by the SEC.⁸⁵ The amendments sought to reverse *Morrison* by reinstating the conduct and effects tests for SEC actions.⁸⁶ They provide that:

The district courts of the United States . . . shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving:

- (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
- (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.⁸⁷

⁷⁹ See *Morrison*, 561 U.S. at 266; see also, Marc I. Steinberg & Kelly Flanagan, *supra* note 78, at 845.

⁸⁰ Colangelo, *supra* note 5, at 1080.

⁸¹ *Id.*

⁸² See Soshkina, *supra* note 77, at 284.

⁸³ See *id.*

⁸⁴ Eric C. Chaffee, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: A Failed Vision for Increasing Consumer Protection and Heightening Corporate Responsibility in International Financial Transaction*, 60 AM. U. L. REV. 1431, 1448 (2011); see 15 U.S.C. § 78 aa(b) (2012) (1934 Act); 15 U.S.C. § 77v(c) (1933 Act).

⁸⁵ 15 U.S.C. §§ 77v(c), 78aa(b) (2012).

⁸⁶ Steinberg & Flanagan, *supra* note 78, at 836–38.

⁸⁷ 15 U.S.C. § 78 aa (b) (2012). The amendment to the 1933 Act is identical to the 1934 Act, except that it only applies to actions brought under Section 17 (a) rather than all antifraud provisions. Compare 15 U.S.C. § 78aa(b) (“antifraud provisions”) with 15 U.S.C. § 77v(c) (“alleging violation of [Section 17(a)]”).

This language from Dodd-Frank is problematic because it concerns jurisdiction.⁸⁸ Before and after *Morrison*, courts had jurisdiction to hear extraterritorial cases involving securities laws.⁸⁹ *Morrison* held that Section 10(b) did not *apply* extraterritorially, not that the Court lacked *jurisdiction* to hear the case.⁹⁰ Thus, based solely on its language, the Dodd-Frank amendment is essentially meaningless and creates no change.⁹¹

Despite the inadequate language, the legislative history clearly shows Congress's intent to reverse *Morrison*.⁹² The contradiction between the text and the legislative history created confusion about whether Dodd-Frank is jurisdictional (thus mere surplusage) or substantive (applying SEC fraud actions extraterritorially).⁹³ Two courts noted in dicta that Dodd-Frank does remedy *Morrison*'s anti-extraterritorial holding for SEC fraud actions.⁹⁴ However, the only court to take the issue head-on discussed the tension between the text of the statute and the apparent legislative intent.⁹⁵ In the end, the court was unable to determine if Dodd-Frank was jurisdictional or substantive.⁹⁶ Thus, it is unclear whether Dodd-Frank has any substantive effect on the SEC's ability to bring fraud actions for extraterritorial violations.⁹⁷

III. EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAWS

Whether a private party or government entity brings an action may affect whether the action applies extraterritorially. If a private party brings an action, then the extraterritoriality analysis is unaffected by Dodd-Frank and by the underlying rationale for the presumption. Private actions are controlled by *Morrison*. However, suits by a government entity may be affected by Dodd-Frank and by the

⁸⁸ Richard Painter, Douglas Dunham, & Hellen Quackenbos, *When Courts and Congress Don't Say What They Mean: Initial Reactions to Morrison v. National Australian Bank and to the Extraterritorial Jurisdiction Provision of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1, 4 (2011).

⁸⁹ *Id.*

⁹⁰ See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010).

⁹¹ Painter, Dunham, & Quackenbos, *supra* note 88, at 4.

⁹² Steinberg & Flanagan, *supra* note 78, at 837.

⁹³ U.S. SEC v. Chi. Convention Ctr. L.L.C., 961 F. Supp. 2d 905, 916–17 (N.D. Ill. 2013) (failing to conclude whether Dodd-Frank Amendment is merely jurisdictional or substantive).

⁹⁴ See SEC v. Tourre, No. 10 Civ. 3229(KBF), 2013 WL 2407172, at *1 n.4 (S.D.N.Y. June 4, 2013); *In re Optimal U.S. Litig.*, 865 F. Supp. 2d 451, 456 n.28 (S.D.N.Y. 2012).

⁹⁵ See *Chi. Convention Ctr. L.L.C.*, 961 F. Supp. 2d 905 at 916–17.

⁹⁶ *Id.*

⁹⁷ Dodd-Frank will be discussed more in-depth later on. See *infra* Part III.B.2.

underlying rationale for the presumption. Therefore, private actions and government actions will be considered separately.

A. *Private Actions*

All private actions are subject to *Morrison*.⁹⁸ As the Court in *Morrison* held, every case under the securities statutes, other than under Section 30, is subject to the presumption against extraterritoriality.⁹⁹ Thus, the only question is whether the action is domestic or foreign. This inquiry will depend on the focus of the statute.¹⁰⁰ *Morrison* made the sweeping pronouncement “that the focus of the Exchange Act is . . . upon purchases and sales of securities in the United States” and that “the same focus on domestic transactions is evident in the Securities Act of 1933.”¹⁰¹ Yet, not every provision of the Securities Acts is focused on the purchase and sale of securities.¹⁰² Several courts ruled that different provisions within the Securities Acts have different focuses.¹⁰³ In *SEC v. Goldman Sachs & Co.*, the Southern District of New York ruled that the focus of Section 17(a) of the Securities Act is different than the focus of Section 10(b) of the Securities Exchange Act.¹⁰⁴ The court ruled that a transaction may be domestic for Section 17(a) purposes even though it is foreign for Section 10(b) purposes.¹⁰⁵ Therefore, each provision will be considered separately to determine its focus and what constitutes domestic conduct.

A final consideration that will affect all private actions is found in the last paragraph of *Kiobel*.¹⁰⁶ In *Kiobel*, the Court held that “claims [may sufficiently] touch and concern the territory of the United States . . . to displace the presumption against extraterritorial application.”¹⁰⁷ This language seems to indicate that the facts of a case may “touch and concern” U.S. territory to such an extent that the presumption will be overcome.¹⁰⁸ Several courts latched onto this language to hold that the facts in a particular case were sufficient to overcome the

⁹⁸ See, e.g., *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247 (2010).

⁹⁹ *Id.* at 265.

¹⁰⁰ *Id.* at 266–67.

¹⁰¹ *Id.*

¹⁰² See, e.g., 15 U.S.C. § 77q(a) (2012) (regulating both the “sale” and “offer” of a security).

¹⁰³ See *SEC v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147, 164 (S.D.N.Y. 2011) (finding that Section 17(a) of the 1933 Act is focused on both the offer and sale of securities while Section 10(b) is focused only on the sale).

¹⁰⁴ *Id.* at 164–65.

¹⁰⁵ See *id.* at 160, 165.

¹⁰⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

¹⁰⁷ *Id.*

¹⁰⁸ See *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d. 304, 323–24 (D. Mass. 2013).

presumption.¹⁰⁹ Other courts, however, hold that only an affirmative indication from Congress may overcome the presumption.¹¹⁰ Thus, the specific facts of a case have no bearing on whether the presumption is overcome.¹¹¹

So far, the “touch and concern” analysis has not been applied in the securities context. But, if *Kiobel*’s touch and concern language does permit the facts in a case to overcome the presumption, then private securities actions, which would normally be barred by *Morrison*, may survive despite the presumption’s application.¹¹² Therefore, in every case, regardless of the provision’s focus, a plaintiff may argue that the specific facts of the case sufficiently “touch and concern” U.S. territory to overcome the presumption.¹¹³

1. Section 10(b) of the 1934 Act¹¹⁴

Morrison explicitly bars the extraterritorial application of Section 10(b).¹¹⁵ If the sale of a security takes place abroad, even though deceptive conduct occurs in the U.S., Section 10(b) does not apply.¹¹⁶ The place of the actual sale controls whether the transaction is foreign or domestic.¹¹⁷ So, even if a security is listed on a U.S. exchange, if the actual sale takes place abroad—such as securities listed on multiple exchanges—then the transaction is foreign.¹¹⁸ Section 10(b) does not apply to foreign sales.¹¹⁹

Courts may technically apply Section 10(b) extraterritorially in certain cases. *Morrison*’s focus analysis localizes a transaction to a single point—the location of the sale.¹²⁰ In *Morrison*, some of the deceptive conduct occurred domestically while the sale occurred abroad.¹²¹ If the facts had been flipped—foreign deceptive conduct but domestic sale—then the transaction would have been localized at a domestic

¹⁰⁹ See, e.g., *id.*

¹¹⁰ See *Balintuno v. Daimler AG*, 727 F.3d 174, 191 (2d Cir. 2013).

¹¹¹ *Id.*

¹¹² See, e.g., *Lively*, 960 F. Supp. 2d at 323-24.

¹¹³ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

¹¹⁴ 15 U.S.C. § 78j(b) (2012).

¹¹⁵ See *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247, 267 (2010).

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See, e.g., *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 532 (S.D.N.Y. 2011); *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 472–73 (S.D.N.Y. 2010); *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011).

¹¹⁹ See, e.g., *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011).

¹²⁰ Colangelo, *supra* note 5, at 1080.

¹²¹ See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 252 (2010).

point and the presumption would not apply.¹²² According to *Morrison*, deceptive foreign conduct that results in a domestic sale is a domestic transaction.¹²³ Even though the deceptive conduct occurred abroad, U.S. law is applied under the fiction that the entire transaction occurred domestically.¹²⁴ Even though the transaction is classified as domestic, U.S. law is still regulating foreign conduct.¹²⁵ So, technically Section 10(b) can be applied extraterritorially even though the Court would classify its application as domestic.¹²⁶

2. Section 11 of the 1933 Act

Section 11 of the 1933 Act prohibits “untrue statement[s]” within a registration statement.¹²⁷ Even though *Morrison* focused on the 1934 Act, the Court held that the “same *focus on domestic transactions* is evident in the Securities Act of 1933.”¹²⁸ Thus, the same focus analysis is used for both Acts.¹²⁹ Section 11 only provides a cause of action to persons who acquired a security.¹³⁰ This acquisition requirement is similar to the sale or purchase requirement in Section 10(b) of the 1934 Act.¹³¹ So, the focus of Section 11 is on the acquisition, or purchase, of the security.¹³² Thus, its extraterritorial reach is the same as Section 10(b).¹³³ Section 11 applies extraterritorially in the same manner as Section 10(b)—when deceptive conduct (misleading statements or omissions) takes place abroad but the actual purchase occurs domestically.¹³⁴

¹²² See *id.* at 266–67.

¹²³ See *id.* at 266, 268; see also *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 69–70 (2d Cir. 2012) (holding that the transaction was domestic though some deceptive conduct occurred abroad).

¹²⁴ See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266–68 (2010).

¹²⁵ But see *id.* at 266, 269.

¹²⁶ But see *id.* at 267.

¹²⁷ 15 U.S.C. § 77k(a) (2012).

¹²⁸ *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247, 268 (2010) (emphasis added).

¹²⁹ See, e.g., *In re Smart Technologies, Inc. S’holder Litig.*, 295 F.R.D. 50, 55–56 (S.D.N.Y. Jan. 11, 2013); *In re Vivendi Universal, S.A., Sec. Litig.*, 842 F. Supp. 2d 522, 529 (S.D.N.Y. 2012).

¹³⁰ See 15 U.S.C. § 77k(a) (“any person acquiring such security . . . may, either at law or in equity, in any court of competent jurisdiction, sue.”).

¹³¹ See *In re Smart Technologies, Inc. S’holder Litig.*, 295 F.R.D. 50, 56–57 (S.D.N.Y. Jan. 11, 2013).

¹³² See *id.*

¹³³ See *id.* at 56.

¹³⁴ See *id.* at 56.

3. Section 12(a) of the 1933 Act

Section 12(a) of the 1933 Act creates two causes of action.¹³⁵ First, Section 12(a)(1) provides a cause of action against “any person who . . . offers or sells a security in violation of” Section 5 of the Act,¹³⁶ which requires certain securities to have a registration statement.¹³⁷ Second, Section 12(a)(2) provides a cause of action against “any person who . . . offers or sells a security” with a prospectus that contains a misleading statement or omission.¹³⁸ A cause of action under Section 12(a)(2) is similar to Section 11,¹³⁹ except that Section 12(a)(2) only applies to misstatements contained in a prospectus rather than the entire registration statement.¹⁴⁰

On its face, Section 12(a) provides causes of action against two classes of defendants: offerors and sellers.¹⁴¹ However, in *Pinter v. Dahl*, the Supreme Court narrowed the class of potential defendants to actual “sellers.”¹⁴² Section 12(a) states that an offeror or seller may be liable “to the person purchasing such security from him.”¹⁴³ The Court reasoned that since Section 12(a) only provides a cause of action to those who have purchased a security, only actual “seller[s]” of securities can be liable under Section 12(a).¹⁴⁴ So, like Section 10(b) of the 1934 Act, Section 12(a) is focused on the sale of the security.¹⁴⁵ Thus, Section 12(a) only applies if the sale is domestic.¹⁴⁶ Section 12(a), like

¹³⁵ See 15 U.S.C. § 77l(a) (2012).

¹³⁶ *Id.* § 77l(a)(1).

¹³⁷ See 15 U.S.C. § 77e (2012).

¹³⁸ 15 U.S.C. § 77l(a)(2).

¹³⁹ See *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 109 (2d Cir. 2011).

¹⁴⁰ See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 576–77 (1995).

¹⁴¹ See 15 U.S.C. § 77l(a) (2012).

¹⁴² See *Pinter v. Dahl*, 486 U.S. 622, 647 (1988).

¹⁴³ See 15 U.S.C. § 77l(a) (2012).

¹⁴⁴ See *Pinter*, 486 U.S. at 647.

¹⁴⁵ See *In re Smart Techs., Inc. S’holder Litig.*, No. 11 Civ. 7673(KBF), 295 F.R.D. 50, at 55–56 (S.D.N.Y. Jan. 11, 2013); *In re Vivendi Universal S.A., Sec. Litig.*, 842 F. Supp. 2d 522, 527–29 (S.D.N.Y. 2012). Some have argued that the focus of Section 12 may be on the offer or the sale—in accordance with the actual text of the Statute. See Richard A. Grossman, *The Trouble with Dicta: Morrison v. National Australian Bank and the Securities Act*, 41 SEC. REG. L.J. 1, 6–7 (2013). However, this analysis ignores *Pinter*, which narrowed the class of defendants to actual “sellers.” See *Pinter*, 486 U.S. at 647. Moreover, every court that has addressed the extraterritoriality of Section 12 has focused on the place of the sale. See *In re Vivendi Universal S.A., Sec. Litig.*, 842 F. Supp. 2d at 528–29.

¹⁴⁶ See *In re Smart Techs., Inc. S’holder Litig.*, No. 11 Civ. 7673(KBF), at 55–56 (S.D.N.Y. Jan. 11, 2013); *In re Vivendi Universal S.A., Sec. Litig.*, 842 F. Supp. 2d at 527–30.

Section 11, can apply extraterritorially to deceptive conduct abroad as long as the sale occurs domestically.

4. Section 9(f) of the 1934 Act

Section 9(f) provides a cause of action to persons who purchased or sold securities with unlawfully manipulated prices.¹⁴⁷ Specifically, a person who manipulates the price of a security through deceitful conduct;¹⁴⁸ affects the value of a put, call, straddle, or option in violation of SEC rules;¹⁴⁹ or endorses a put, call, straddle, or option in violation of SEC rules,¹⁵⁰ may be liable to anyone who purchased or sold a security and was injured by the manipulative conduct.¹⁵¹ Similar to Section 12(a) of the 1933 Act, Section 9(f) only provides a cause of action to a person who actually purchased or sold a security.¹⁵² Thus, the focus of Section 9(f) is the same as Section 12(a) of the 1933 Act—the purchase or sale of the security.¹⁵³ Section 9(f) applies only if the purchase or sale takes place domestically, but it can be used to regulate foreign deceptive conduct that results in a domestic sale.¹⁵⁴

5. Section 14(a) of the 1934 Act

Section 14(a) of the 1934 Act prohibits the solicitation of a proxy in a manner that violates the 1934 Act or SEC regulations.¹⁵⁵ The SEC promulgated Rule 14(a)(9) under its Section 14(a) authority.¹⁵⁶ Rule 14(a)(9) prohibits the use of “false or misleading statements” in the solicitation of a proxy statement.¹⁵⁷

So far, no court has construed the extraterritorial reach of Section 14(a). Under *Morrison*, the focus of Section 14(a) appears to be the actual voting, which is the subject of the proxy. In *Morrison*, to ascertain the focus of Section 10(b), the Court disregarded the deceptive conduct and fixated solely on the purpose of that conduct: the sale.¹⁵⁸ The Court looked to the end result of the transaction—the culmination

¹⁴⁷ See 15 U.S.C. § 78i(f) (2012).

¹⁴⁸ See *id.* § 78i(a).

¹⁴⁹ See *id.* § 78i(b).

¹⁵⁰ See *id.* § 78i(c).

¹⁵¹ *Id.* § 78i(f).

¹⁵² Compare *id.* § 77l(a) (“the person purchasing such security”) with *id.* § 78i(f) (“any person who shall purchase or sell any security”).

¹⁵³ See *supra* text accompanying notes 135–46.

¹⁵⁴ Its extraterritorial application is the same as Section 12(a) of the 1933 Act, which is to foreign deceptive conduct as long as the actual purchase or sale occurs domestically. See *supra* text accompanying notes 135–46.

¹⁵⁵ See 15 U.S.C. § 78n(a) (2012).

¹⁵⁶ See 17 C.F.R. § 240.14a-9 (2011).

¹⁵⁷ See *id.*

¹⁵⁸ See *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2883–84 (2010).

of the deceptive conduct.¹⁵⁹ This end result, the sale, was the focus of the statute.¹⁶⁰ In the same way, the end result of a proxy—its purpose—is the shareholder’s vote.¹⁶¹ Any misleading statement in the proxy culminates in affecting the vote. The focus of Section 14(a) is thus the vote.¹⁶²

Yet, regardless of the location of the vote, if the proxy concerns securities of a “foreign private issuer,” Section 14(a) does not apply.¹⁶³ SEC Rule 3a12-3 expressly exempts “foreign private issuer[s]” from Section 14(a) liability.¹⁶⁴ “[F]oreign private issuer[s]” are defined as “any private issuer” that has more than fifty percent of its outstanding voting shares held by foreign residents, or the majority of its “executive officers or directors” are not U.S. citizens or residents; less than fifty percent of its assets are not located in the U.S.; and its business is not “administered principally in the United States.”¹⁶⁵ If a company is a “foreign private issuer,” Section 14(a) does not apply.¹⁶⁶

Therefore, if a company is not a foreign private issuer, the place of the annual meeting, or where the actual voting occurs, determines if the transaction is foreign or domestic.¹⁶⁷ If the meeting and voting take place domestically, then Section 14(a) applies even if the solicitation of the proxy, recipients of the proxy, and making of the proxy occurred abroad. On the other hand, if the voting takes place abroad, then the presumption applies and the conduct is beyond Section 14(a)’s reach.¹⁶⁸

6. Section 16(b) of 1934 Act

Section 16(b) allows an issuer to recover an insider’s short-selling profits due to the purchase and sale of the issuer’s securities.¹⁶⁹ This is a strict liability statute that merely requires the issuer to show

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See Marlene Martin, Comment, *Can Shareholders “Bring the Sun” To Climate Change Disclosure?—Reflections on Shareholders’ Power To Fix Environmental Problems Through Proposals on Climate Change*, 14 WYO. L. REV. 289, 294–95 (2014).

¹⁶² See *Morrison*, 130 S. Ct. 6-6 at 2884.

¹⁶³ See 17 C.F.R. § 240.3a12-3 (2013).

¹⁶⁴ See *id.*

¹⁶⁵ 17 C.F.R. § 240.3b-4(c) (2008).

¹⁶⁶ 17 C.F.R. § 240.3a12-3(b) (2013).

¹⁶⁷ See *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2883–86 (2010).

¹⁶⁸ See *id.*

¹⁶⁹ See 15 U.S.C. § 78p(b) (2012); see also James D. Gordon III, *Acorns and Oaks: Implied Rights of Action Under the Securities Acts*, 10 STAN. J.L. BUS. & FIN. 62, 78 (2004) (explaining that while not an explicit antifraud provision, Section 16(b) was enacted to address insider trading); Alex Raskolnikov, *Irredeemably Ineffi-*

“that there was (1) a purchase and (2) a sale of securities (3) by an [insider] . . . (4) within a six-month period.”¹⁷⁰ Similar to Section 10(b), Section 16(b) is predicated on the purchase and sale of a security.¹⁷¹ Because the sale of the security creates the cause of action, the place of the sale determines if the action is domestic or foreign.¹⁷² Thus, Section 16(b) will only apply if the sale is domestic. Also, like Section 14(a), foreign private issuers are exempt from Section 16.¹⁷³ So, regardless of where the sale occurs, if the company is a foreign private issuer, Section 16(b) will not apply.¹⁷⁴

7. Section 18(a) of the 1934 Act

Section 18(a) of the 1934 Act provides a private right of action to a person who relied on a false or misleading statement that was filed with the SEC.¹⁷⁵ Section 18(a) allows a person who “purchased or sold a security at a price which was affected by” a false SEC filing to recover their losses.¹⁷⁶ Section 18(a) is “the most analogous express private right of action” to Section 10(b).¹⁷⁷ Since *Morrison*, no court has construed the extraterritorial reach Section 18(a), and its focus is unclear. Section 18(a) only provides a right of action to persons who “purchased or sold a security,”¹⁷⁸ making it similar to Sections 11 and 12(a) of the 1933 Act.¹⁷⁹ The focus of those Sections is on the sale of the securities.¹⁸⁰

Some scholars, however, believe that the focus of Section 18(a) is on the filing of the statements with the SEC and not on the sale.¹⁸¹ Because SEC filings occur domestically, if the focus is on the filing,

cient Acts: A Threat to Markets, Firms, and the Fisc, 102 GEO. L.J. 1133, 1173 (2014).

¹⁷⁰ *Gwozdzinsky v. Zell/Chilmark Fund, L.P.*, 156 F.3d 305, 308 (2d Cir. 1998).

¹⁷¹ 15 U.S.C. § 78p(b) (2012).

¹⁷² *See Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2884 (2010).

¹⁷³ *See* 17 C.F.R. 240.3a12-3(b) (2013).

¹⁷⁴ *See id.*

¹⁷⁵ 15 U.S.C. § 78r(a) (2012).

¹⁷⁶ *See id.*

¹⁷⁷ Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, 69 BUS. LAW. 307, 313 (2014).

¹⁷⁸ *See id.* at 340.

¹⁷⁹ *Compare id.*, with 15 U.S.C. § 77k(a) and 15 U.S.C. § 77l(a).

¹⁸⁰ *See In re Smart Techs., Inc. S’holder Litig.*, No. 11 Civ. 7673(KBF), 295 F.R.D. 50, 55–56 (S.D.N.Y. 2013); *see also In re Vivendi Universal S.A., Sec. Litig.*, 842 F. Supp. 2d 522, 529 (S.D.N.Y. 2012).

¹⁸¹ *See Steinberg & Flanagan, supra* note 77, at 852 n.204. *See also* Roger W. Kirby, *Access to United States Courts by Purchasers of Foreign Listed Securities in the Aftermath of Morrison v. National Australia Bank Ltd.*, 7 HASTINGS BUS. L.J. 223, 262 (2011).

Section 18(a) actions will always be domestic, and the presumption will never apply.¹⁸² This is especially useful for plaintiffs who purchase securities on a foreign exchange that are also listed on a domestic exchange.¹⁸³ Section 10(b) focuses on the location of the actual purchase, regardless of whether the security is listed on a domestic exchange.¹⁸⁴ For people who purchase foreign securities that are also listed on a domestic exchange, Section 18(a) may provide a cause of action in spite of Section 10(b)'s inapplicability.¹⁸⁵

Despite some scholars' belief that the focus of Section 18(a) is on the filing and not the purchase, *Morrison* seems to indicate that, like Section 10(b), the focus is on the sale. Section 10(b) requires deceptive conduct.¹⁸⁶ Section 10(b) regulates not only the purchase or sale of the securities, but also the deceptive conduct that affects the purchase or sale.¹⁸⁷ In *Morrison*, however, the Court ignored the predicate deceptive conduct in determining the focus of Section 10(b) by narrowing in on the end result that was the culmination of that deceptive conduct—the purchase or sale.¹⁸⁸ In the same way, Section 18(a) requires deceptive conduct through a misleading statement in an SEC filing.¹⁸⁹ Section 18(a) regulates not only the sale of the securities, but also the statements that go into the SEC filing.¹⁹⁰ The Supreme Court would likely interpret Section 18(a) in the same way as Section 10(b): by ignoring the predicate deceptive conduct (SEC filings) and zeroing-in on the end result of that conduct—the sale.¹⁹¹ Thus, the focus of Section 18(a) is likely the sale of the securities and not the SEC filing. So, Section 18(a) extraterritorial reach will be the same as Section 10(b). If a sale occurs domestically, Section 18(a) applies even if the filings were prepared abroad, but if a sale occurs abroad, the presumption bars Section 18(a) application.¹⁹²

¹⁸² See Kirby, *supra* note 181, at 262.

¹⁸³ See *id.* See also Steinberg & Flanagan, *supra* note 77, at 852 n.204.

¹⁸⁴ See *In re Vivendi Universal S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 532–33 (S.D.N.Y. 2011). See also *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 472–73 (S.D.N.Y. 2010); *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327, 335–36 (S.D.N.Y. 2011).

¹⁸⁵ See Kirby, *supra* note 181, at 262–63.

¹⁸⁶ See 15 U.S.C. § 78j(b) (2012).

¹⁸⁷ See *id.*

¹⁸⁸ See *Morrison v. Nat'l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2883–84 (2010).

¹⁸⁹ See 15 U.S.C. § 78r(a).

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² See *supra* text accompanying notes 120–23.

8. Section 29(b) of the 1934 Act

Section 29(b) allows contracts to be voided that are made in violation of the 1934 Act or in violation of SEC regulations.¹⁹³ “Section 29(b) itself does not define a substantive violation of the securities laws; rather, it is the vehicle through which private parties may rescind contracts that were made or performed in violation of other substantive provisions.”¹⁹⁴ Courts are split on whether a contract must violate the Act on its face or whether the contract may violate the Act in its performance to be voidable under Section 29(b).¹⁹⁵ Yet, regardless of how the violation occurs, courts agree that the contract must violate a different provision of the Act to be voided.¹⁹⁶

The question then is whether the focus of Section 29(b) is on the contract (i.e. the making of the contract) or on the violated provision. From a logistical standpoint, the focus of Section 29(b) should be on the actual violation—the other provisions of the Securities Exchange Act. If the focus is on the contract, such as the place where it was made, then parties could contract abroad to violate the securities laws in order to avoid Section 29(b)’s application. Parties could form a contract abroad that requires violating the Securities Exchange Act, and when a party pursues rescission under Section 29(b), the presumption precludes application since the focus occurred abroad. It only makes sense for the focus of Section 29(b) to be on the violated provision. So, whether courts apply Section 29(b) domestically depends on which provision is violated. If Section 10(b) is violated, the location of the sale will determine Section 29(b)’s application.¹⁹⁷ But, if Section 14(a) is violated, the location of the vote will determine the application of Section 29(b).¹⁹⁸

B. Criminal or SEC Actions

Unlike private actions, extraterritorial actions by the SEC or another government agency may have survived *Morrison*. Whether the SEC can maintain an action for extraterritorial conduct will depend on a court’s understanding of the presumption’s purpose and its interpretation of the Dodd-Frank amendments. Both the Supreme Court’s de-

¹⁹³ 15 U.S.C. § 78cc(b) (2012).

¹⁹⁴ *Berkeley Inv. Grp. v. Colkitt*, 455 F.3d 195, 205 (3d Cir. 2006) (citing *Nat’l Union Fire Ins. Co. v. Turtur*, 892 F.2d 199, 206 n.4 (2d Cir. 1989)).

¹⁹⁵ *Compare* *Drasner v. Thomson McKinnon Sec., Inc.*, 433 F. Supp. 485, 501–02 (S.D.N.Y. 1977) (concerning a violation of the Act on its face) *with* *Reg’l Prop., Inc. v. Fin. & Real Estate Consulting Co.*, 678 F.2d 552, 560 (5th Cir. 1982) (concerning a violation of the Act on its face or as performed).

¹⁹⁶ *See Colkitt*, 455 F.3d at 205.

¹⁹⁷ *See supra* text accompanying notes 120–23.

¹⁹⁸ *See supra* text accompanying notes 154–68.

cision in *United States v. Bowman*¹⁹⁹ and the Dodd-Frank amendments²⁰⁰ provide the potential for extraterritoriality. Furthermore, even if a court were to hold that *Bowman* and Dodd-Frank do not apply, government agencies can still bring securities actions for extraterritorial conduct in the same way as private litigants if the focus of the statute occurs domestically.

1. *United States v. Bowman*

In *Bowman*, the Supreme Court applied a criminal antifraud statute extraterritorially despite applying the presumption to a similar civil statute thirteen years earlier.²⁰¹ The Court differentiated the two statutes on the grounds that one was criminal and the other civil.²⁰² The Court reasoned that “the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated.”²⁰³ Many courts use this reasoning to apply a number of criminal statutes extraterritorially.²⁰⁴ Some courts interpret *Bowman* narrowly and hold that it only permits extraterritorial application to criminal conduct that is committed against the U.S. government.²⁰⁵ Other courts interpret *Bowman* more broadly and consider governmental interests, the nature of the offense, and policy considerations to determine extraterritoriality.²⁰⁶ Yet, the underlying rationale for the presumption leads to an even broader interpretation of *Bowman*.

¹⁹⁹ See *United States v. Bowman*, 260 U.S. 94 (1922).

²⁰⁰ 15 U.S.C. § 77v(c) (2012); 15 U.S.C. § 78aa(b).

²⁰¹ Compare *Bowman*, 260 U.S. at 102–03 with *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 514 (1909).

²⁰² *Bowman*, 260 U.S. at 98.

²⁰³ *Id.*

²⁰⁴ Zachary D. Clopton, *Bowman Lives: The Extraterritorial Application of U.S. Criminal Law After Morrison v. Nat’l Austl. Bank*, 67 N.Y.U. ANN. SURV. AM. L. 137, 165 (2011); see, e.g., *United States v. Layton*, 855 F.2d 1388, 1395 (9th Cir. 1988) overruled by *United States v. George*, 960 F.2d 97 (9th Cir. 1992) overruled recognized by *United States v. Pace*, 65 F. App’x 615, 617 (9th Cir. 2003).

²⁰⁵ See Clopton, *supra* note 204, at 165; see, e.g., *Layton*, 855 F.2d at 1395.

²⁰⁶ See Clopton, *supra* note 204, at 165; *Stegeman v. United States*, 425 F.2d 984, 986 (9th Cir. 1970) (government interests); *United States v. Belfast*, 611 F.3d 783, 811 (11th Cir. 2010) (discussing the nature of the offense); *United States v. Wright-Barker*, 784 F.2d 161, 167 (3d Cir. 1986) superseded by statute as recognized in *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) (discussing policy considerations).

Courts have not been consistent in stating the true rationale behind the presumption.²⁰⁷ Professor William Dodge has identified six potential rationales for the presumption.²⁰⁸ These rationales include: (1) “international law limitations on extraterritoriality;”²⁰⁹ (2) “consistency with domestic conflict-of-laws rules;”²¹⁰ (3) preventing “international discord” due to conflicting U.S. and foreign laws;²¹¹ (4) “the notion that Congress generally legislates with domestic concerns in mind;”²¹² (5) “separation-of-powers concerns;”²¹³ and (6) to “provide[] legislators with a clear background rule which allows them to predict the application of their statutes.”²¹⁴

Courts have soundly rejected the first two rationales since they were first articulated, and the sixth rationale does not hold much weight since the Supreme Court has not consistently applied the presumption in a manner that provides predictability.²¹⁵ Thus, the only remaining rationales are preventing international discord, Congress legislating with domestic concerns in mind, and separation-of-powers.²¹⁶ Of these three, if courts were to universally adopt the separation-of-powers rationale, then the presumption should not apply to actions brought by certain government agencies.

The separation-of-powers rationale is closely related to the prevention of international discord rationale, but it is more narrowed.²¹⁷ As Professor Curtis Bradley noted, “the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of the judiciary.”²¹⁸ The political branches—i.e. Legislative and Executive—are authorized to set foreign policy and may create international discord if they so

²⁰⁷ See Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 513–14 (1997).

²⁰⁸ See William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 112–13 (1998).

²⁰⁹ *Id.* at 112.

²¹⁰ *Id.*

²¹¹ See *id.* (citing Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

²¹² Dodge, *supra* note 208, at 112–13 (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)).

²¹³ *Id.* at 113.

²¹⁴ *Id.* at 90 (citing WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 277 (Harvard University Press 1994)).

²¹⁵ See Dodge, *supra* note 208, at 113, 122.

²¹⁶ See *id.* at 112–13.

²¹⁷ See *id.* at 120.

²¹⁸ Bradley, *supra* note 207, at 516.

please.²¹⁹ The Judiciary may not.²²⁰ Justice Roberts expressed this concern in *Kiobel*, where he wrote that the presumption “helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.”²²¹ Thus, while the political branches are free to create international discord and affect foreign relations, the presumption ensures that the Judicial Branch does not do the same.²²²

Government agencies, such as the SEC, are arms of the Executive branch,²²³ which is authorized to create international discord.²²⁴ Thus, the presumption should not apply to actions brought by government agencies such as the SEC or Department of Justice.²²⁵ Several courts have relied on this rationale and *Bowman* to hold that “[t]he presumption that ordinary acts of Congress do not apply extraterritorially . . . does not apply to criminal statutes.”²²⁶

Despite the separation-of-powers rationale and *Bowman*, the Second Circuit recently held that criminal actions for Section 10(b) violations were subject to the presumption against extraterritoriality.²²⁷ The court limited the holding in *Bowman* solely to cases in which the government defends its own rights, such as preventing fraud against itself.²²⁸ The Court relied on the text of *Bowman* and did not consider the underlying rationale behind the presumption.²²⁹ So, while the argument that the presumption does not apply to actions by government

²¹⁹ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 861 (1997).

²²⁰ See *id.*

²²¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); see also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (“[The] presumption has special force when . . . construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.”).

²²² See David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases After Morrison and Kiobel*, 45 LOY. U. CHI. L.J. 71, 89 (2013).

²²³ See Joan M. Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 FORDHAM J. CORP. & FIN. L. 225, 278–81 (2005) (noting that while an independent agency, the SEC is a part of the Executive Branch with some legislative oversight).

²²⁴ See Bradley & Goldsmith, *supra* note 219, at 861.

²²⁵ See Keenan & Shroff, *supra* note 222, at 90–91.

²²⁶ *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011); see *United States v. Siddiqui*, 699 F.3d 690, 700 (2d Cir. 2012) (“The ordinary presumption that laws do not apply extraterritorially has no application to criminal statutes.”).

²²⁷ See *United States v. Vilar*, 729 F.3d 62, 72 (2d Cir. 2013).

²²⁸ See *id.* at 73.

²²⁹ See *id.*

agencies is theoretically sound, it will likely fail due to courts' narrowing of *Bowman* and the refusal to consider the underlying purpose for the presumption.²³⁰

2. Dodd-Frank

Shortly after the Supreme Court decided *Morrison*, Congress passed the Dodd-Frank Act, which addresses the extraterritorial reach of antifraud securities actions brought by the SEC.²³¹ As noted above, Dodd-Frank only addresses the extraterritorial *jurisdiction* of SEC actions and not the actual *application* of the antifraud provisions.²³² This has created confusion as to whether Dodd-Frank effectuated any change after *Morrison* regarding the extraterritorial reach of SEC fraud actions.²³³ The only court to consider the issue could not determine whether Dodd-Frank had any effect, so it passed on the issue and decided the case on other grounds.²³⁴

Despite the uncertainty caused by the text of Dodd-Frank, the Supreme Court's analysis in *Kiobel* suggests that Dodd-Frank permits extraterritorial application for SEC fraud actions. In *Morrison*, the Court held that a "clear statement" in the text of the statute is not needed to overcome the presumption, but instead, "context can be consulted as well."²³⁵ In *Kiobel*, the Court indicated what context it is concerned with. The Court in *Kiobel* examined the historical circumstances surrounding the passage of the ATS to determine if it was intended to apply extraterritorially.²³⁶ The Court specifically focused on the "[t]wo notorious episodes involving violations of the law of

²³⁰ See *id.*; Clopton, *supra* note 204, at 165. *Vilar* was a criminal action brought by the Department of Justice, not an SEC action. See *Vilar*, 729 F.3d at 67. However, the courts' dismissal of the DOJ criminal action would apply with even more force against SEC actions. The SEC is an independent agency with less political oversight than purely executive agencies, such as the DOJ. See *United States v. Layton*, 855 F.2d 1388, 1395 (9th Cir. 1988) *overruled by* *United States v. George*, 960 F.2d 97 (9th Cir. 1992); *Heminway*, *supra* note 223, at 278–81. Thus, under the separation-of-powers rationale, there is a much stronger argument that the presumption does not apply to criminal actions by the DOJ, such as in *Vilar*, than actions by an independent agency, such as the SEC. See Keenan & Shroff, *supra* note 222, at 89–90. Therefore, the Second Circuit's application to a DOJ, criminal action indicates that it would almost certainly apply the presumption to SEC actions as well.

²³¹ Painter et al., *supra* note 88, at 2–3.

²³² See *supra* text accompanying notes 88–91.

²³³ Painter et al., *supra* note 88, at 25.

²³⁴ *U.S. S.E.C. v. Chi. Convention Ctr. L.L.C.*, 961 F. Supp. 2d 905, 916–18 (N.D. Ill. 2013).

²³⁵ *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010).

²³⁶ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666 (2013).

nations [that] occurred . . . shortly before passage of the ATS” to hold that Congress was concerned with domestic conduct when it passed the ATS.²³⁷ Because Congress passed the ATS in response to domestic incidents, the Court reasoned that Congress intended for the ATS to apply domestically.²³⁸

Congress passed Dodd-Frank shortly after *Morrison* was decided.²³⁹ The “incidents” that concerned Congress involved foreign conduct that violated the Securities Exchange Act.²⁴⁰ Under *Kiobel*’s historical context analysis, Dodd-Frank should be construed as permitting the extraterritorial application of U.S. securities laws for fraud actions brought by the SEC because Congress was addressing foreign conduct when it passed the Act.²⁴¹ The legislative history of Dodd-Frank further supports this view.

Congress drafted the Dodd-Frank amendments before the Court ultimately decided *Morrison*; however, “[m]any observers predicted that the Court in *Morrison* would bar” some of the extraterritoriality of Section 10(b) and “the SEC wanted Congress to be prepared.”²⁴² Several congressional debates that took place after the *Morrison* decision indicate that Congress intended for Dodd-Frank to reverse *Morrison*.²⁴³ Moreover, if courts treat Dodd-Frank as merely jurisdictional, it would be superfluous because it would essentially enact no change whatsoever since courts did not lack jurisdiction.²⁴⁴ The only interpretation that reconciles the congressional intent and gives effect to the provisions is one that construes Dodd-Frank as permitting the SEC to apply the antifraud provisions of the 1934 Act and Section 17(a) of the 1933 Act extraterritorially.²⁴⁵ Therefore, it is reasonable to assume that Dodd-Frank permits the SEC to bring extraterritorial fraud actions as long as the conduct or effects test is satisfied.²⁴⁶

²³⁷ *Id.*

²³⁸ *See id.* at 1666–67.

²³⁹ *See Painter et al., supra* note 88, at 2–3.

²⁴⁰ *See id.*

²⁴¹ *See Kiobel*, 133 S. Ct. at 1666–67.

²⁴² *Painter et al., supra* note 88, at 14.

²⁴³ *See U.S. S.E.C. v. Chi. Convention Ctr. L.L.C.*, 961 F. Supp. 2d 905, 914–15 (N.D. Ill. 2013).

²⁴⁴ *Id.* at 915; *see Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) (holding that statutory language should not be interpreted in way that causes provisions to be mere surplusage).

²⁴⁵ *See* 15 U.S.C. § 77v(c) (2012); 15 U.S.C. § 78a(b).

²⁴⁶ *See Painter et al., supra* note 88, at 24.

3. Focus Analysis

If neither *Bowman* nor Dodd-Frank applies extraterritoriality, then SEC actions will be subject to the *Morrison* focus analysis.²⁴⁷ Whether a cause of action can be maintained depends on the focus of the specific provision. For provisions that provide a private right of action and can be enforced by the SEC, such as Section 10(b),²⁴⁸ the focus is the same. Thus, the analysis for Sections 11 and 12 of the 1933 Act and Sections 9(f), 10(b), 14(a), 16(b), 18(a), and 29(b) of the 1934 Act will be the same as above.²⁴⁹ Section 17(a) of the 1933 Act is the main antifraud provision that does not provide a private right of action.²⁵⁰

Section 17(a) provides essentially the same cause of action as Section 10(b), except there is no scienter requirement.²⁵¹ An additional difference is that Section 17(a) applies to “any person” who “offer[s]” or sells a security, while Section 10(b) only applies to a “purchase or sale of” a security.²⁵² The “offer or sale” language of Section 17(a) is similar to Section 12(a),²⁵³ which only applies to sellers.²⁵⁴ Yet, unlike Section 12(a), Section 17(a) actions are not limited solely to someone who purchased a security.²⁵⁵ Thus, *Pinter v. Dahl*, which limited Section 12(a) to sellers, does not apply.²⁵⁶ The focus of Section 17(a) is therefore not only the sale of the securities, but also the offer.²⁵⁷

The Southern District of New York considered the focus of Section 17(a) in *SEC v. Goldman Sachs & Co.*²⁵⁸ The court noted that “Section 17(a), unlike Section 10(b), applies not only to the ‘sale’ but also to the ‘offer . . . of any securities.’”²⁵⁹ To determine what constitutes an offer, the court looked to the Act’s definition section.²⁶⁰ The

²⁴⁷ See *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2884 (2010).

²⁴⁸ See *Yates v. Mun. Mortg. & Equity, L.L.C.*, 744 F.3d 874, 884 (4th Cir. 2014) (discussing private actions); *SEC v. Pentagon Capital Mgmt.*, 725 F.3d 279, 280 (2d Cir. 2013) (discussing SEC actions).

²⁴⁹ See *supra* Section III.A.

²⁵⁰ *Touche Ros & Co. v. Redington*, 442 U.S. 560, 570 (1979) (holding no private right of action under Section 17).

²⁵¹ See 15 U.S.C. § 77q(a) (2012); see also *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999).

²⁵² Compare 15 U.S.C. § 77q(a) with 15 U.S.C. § 78j(b).

²⁵³ Compare 15 U.S.C. § 77q(a) with 15 U.S.C. § 77l(a).

²⁵⁴ See *Pinter v. Dahl*, 486 U.S. 622, 647 (1988).

²⁵⁵ Compare 15 U.S.C. § 77q(a) with 15 U.S.C. § 77l(a).

²⁵⁶ Cf. *Pinter*, 486 U.S. at 657.

²⁵⁷ See *SEC v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147, 164–65 (S.D.N.Y. 2011).

²⁵⁸ See *id.*

²⁵⁹ See *id.* at 164 (quoting 15 U.S.C. § 77q(a)) (emphasis in original).

²⁶⁰ *Id.*

Act defines “offer” as “every attempt or offer . . . or solicitation of an offer to buy, a security . . . for value.”²⁶¹ The court believed that this language focused on the person making the offer and not the recipient of the offer.²⁶² Thus, “[i]n order for an ‘offer’ to be domestic, a person or entity must (1) ‘attempt or offer[,]’ in the United States, ‘to dispose of securities . . . or (2) ‘solicit[,]’ in the United States, ‘an offer to buy’ securities.”²⁶³ In that case, the defendant made an offer via telephone from the U.S. to someone in Germany.²⁶⁴ Because the defendant made the offer in the U.S., in spite of the fact that the recipient was abroad, the court considered the conduct domestic and did not apply the presumption.²⁶⁵ Therefore, if either the sale occurs in the U.S. or an offer is made from the U.S., the focus of Section 17(a) is domestic, and the presumption does not apply.²⁶⁶ However, if the sale occurs and the offer is made abroad, the conduct is foreign, and the presumption bars Section 17(a) application.²⁶⁷

CONCLUSION

While *Morrison* sought to cut off the extraterritorial application of the Securities Exchange Act, the Court’s focus analysis left open the possibility of extraterritoriality. The focus analysis allows for U.S. laws to be applied to foreign conduct as long as the focus occurs domestically. Congress’s attempt to remedy *Morrison* in regards to SEC fraud actions resulted in the poorly-worded and ambiguous Dodd-Frank Act. Yet, with *Kiobel*’s context analysis and the legislative history behind Dodd-Frank, it is likely that the SEC is free to bring extraterritorial antifraud actions. So, while *Morrison* may have curtailed the extraterritorial application of U.S. securities laws, their extraterritoriality is still alive and well.

²⁶¹ 15 U.S.C. § 77b(a)(3) (2012).

²⁶² *Goldman Sachs & Co.*, 790 F. Supp. 2d at 165.

²⁶³ *Id.*

²⁶⁴ *Id.* at 164–65.

²⁶⁵ *Id.* at 165.

²⁶⁶ *See id.* at 164–65.

²⁶⁷ *See Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2884 (2010).

**THE SURPRISING ACQUITTALS IN THE *GOTOVINA*
AND *PERIŠIĆ* CASES: IS THE ICTY APPEALS
CHAMBER A TRIAL CHAMBER
IN SHEEP'S CLOTHING?**

*Mark A. Summers**

INTRODUCTION

Over a decade ago, not long after the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”)¹ had begun its work, one commentator opined that because of the three trial judge/five appellate judge structure of the tribunal, a three-judge majority of an Appeals Chamber could overturn a unanimous judgment by a Trial Chamber. Thus, there is “a risk . . . that three voices may prevail over five, where all the judges who have actually viewed the evidence are on the defeated side.”²

That happened in November 2012, when a three-judge majority ICTY Appeals Chamber overturned a unanimous Trial Chamber judgment.³ The lead defendant in the case was Ante Gotovina, a Croatian General and war hero, who led Operation Storm, which finally drove the Serbians out of Croatia after three years of occupation.⁴ This was the beginning of the end of the Yugoslav war.⁵ In Croatia, Gotovina’s conviction by the Trial Chamber in 2011 was met with scorn and cynicism. The wags commented that Gotovina, the Croatian word for “cash,” was the price of Croatia’s admission to the European Union.⁶

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¹ U.N. Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993).

² Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 *TEX. INT’L L.J.* 111, 115 (2002).

³ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012). Trial Chamber Judge Ćinić partially dissented from some of the majority’s findings but not from its judgment. Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

⁴ See *infra* Part IV.

⁵ See RICHARD HOLBROOKE, *TO END A WAR* 72–73 (1998).

⁶ As a Fulbright Scholar at the University of Zagreb in the spring of 2011, I have first-hand knowledge of these events. See Nick Carey, *Croatia Finds EU’s Entry*

Gotovina's surprise acquittal by the Appeals Chamber was celebrated in Croatia and decried in Serbia.⁷ It was praised by some commentators and panned by others.⁸ It is no surprise that some were shocked when, only three months later, another ICTY Appeals Chamber overturned the conviction of Momčilo Perišić, who had been the top general in the Serbian army during the war.⁹

One crucial similarity between the two cases is the focus of this article. In each case, the Appeals Chamber found that the Trial Chamber had insufficiently explained why it had come to a factual conclusion.¹⁰ This failure to provide a reasoned opinion was an error of law, which, both Appeals Chambers asserted, gave them the right to undertake a *de novo* review of the record without giving any deference to the findings of the Trial Chamber.¹¹ This maneuver permitted the Appeals Chambers to substitute their findings for those of the Trial Chambers without applying the standard of review normally applicable to errors of fact. A Trial Chamber's judgment is overturned only if no reasonable trier of fact could have come to same conclusion.¹² The Appeals Chambers' novel use of *de novo* review in cases where the error is the failure to provide a reasoned opinion based on a Trial Chamber's factual mistake is unsupported by the case law of either the ICTY or the International Criminal Tribunal for Rwanda ("ICTR"),¹³ and could have

Price Steep, WALL ST. J., Mar. 7, 2005, <http://online.wsj.com/news/articles/SB111015177847171707>.

⁷ Jens David Ohlin, *Why the Gotovina Appeals Judgment Matters*, EJIL: TALK! (Dec. 21, 2012), <http://www.ejiltalk.org/why-the-gotovina-appeals-judgment-matters/>.

⁸ Compare Gary D. Solis, *The Gotovina Acquittal: A Sound Appellate Course Correction*, 215 MIL. L. REV. 78 (2013), with Marko Milanovic, *The Gotovina Omnishambles*, EJIL: TALK! (Nov. 18, 2012), <http://www.ejiltalk.org/the-gotovina-omnishambles/>.

⁹ Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment (Int'l Crim. Trib. for the former Yugoslavia Feb. 28, 2013). Perišić's acquittal was celebrated in Serbia. Christopher Jenks, *Prosecutor v. Perišić, Case No. IT-04-81-A*, 107 Am. J. Int'l L. 622, 626 (2013). It was a bit less controversial, however, because the Perišić Trial Chamber had split 2-1 and the Appeals Chamber reversed 4-1, the majority including one of the dissenting judges in *Gotovina*. Marko Milanovic, *The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Mom-Čilo Perišić*, EJIL: TALK! (Mar. 11, 2013), <http://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/#more-7749>.

¹⁰ See *infra* Part VI.

¹¹ See *id.*

¹² Milanovic, *supra* note 8.

¹³ U.N. Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994).

future negative repercussions if the International Criminal Court (“ICC”) follows these cases.¹⁴

This article argues that the decisions in *Gotovina* and *Perišić* are wrong because *de novo* review is not the appropriate standard to apply when there is a failure to provide a reasoned opinion. First, Part II examines the origins of reasoned opinions in international criminal trials. Part III explains why reasoned opinions are necessary in international criminal trials. Part IV will identify the necessary elements of a reasoned opinion. Part V analyzes the ICTY and ICTR case law to ascertain the standards of review used in international criminal trials. Part VI dissects the portions of the *Gotovina* and *Perišić* Appeals Judgments dealing with the failure to provide reasoned opinions and the use of *de novo* review. Finally, Part VII offers my conclusions.

I. THE ORIGINS OF REASONED OPINIONS IN INTERNATIONAL CRIMINAL TRIALS: THE ADVERSARIAL AND INQUISITORIAL MODELS OF CRIMINAL PROCEDURE

Most of the world’s national criminal justice systems can be classified as either adversarial or inquisitorial. And while none of these national systems are entirely “pure,” there are certain salient features that characterize each of the models.¹⁵

A. *The Adversarial Model*

The adversarial systems are predicated upon opposing parties, equally armed, who are responsible for investigating the case and presenting it in court.¹⁶ The jury is composed of laypersons.¹⁷ The parties elicit facts in open court from witnesses who testify under oath and from documents and other physical evidence.¹⁸ The jury and, most of the time, the judge learn what they know about the case only when the evidence is presented in court.¹⁹ The judge plays the role of a “neutral” referee, administering complex rules of evidence, which determine what the jury may hear, instructing the jury as to the law applicable to the facts, and imposing the sentence following a guilty verdict.²⁰ The accused may or may not testify.²¹ If he chooses to tes-

¹⁴ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 83.

¹⁵ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 366 (2008). See Sean Doran et al., *Rethinking Aversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 13–14, 16 (1995).

¹⁶ CASSESE, *supra* note 15, at 356.

¹⁷ *Id.* at 357.

¹⁸ Doran et al., *supra* note 15, at 17–18.

¹⁹ CASSESE, *supra* note 15, at 361–62.

²⁰ *Id.* at 361, 363. See Doran et al., *supra* note 15, at 15–16.

tify, he is put under oath and treated as any other witness.²² If he chooses not to testify, the jury is instructed that it may not draw any adverse inferences from his failure to do so.²³ The verdict is tersely “enigmatic”—guilty or not guilty—unaccompanied by any statement of the reasons for or against.²⁴ Only the defendant may appeal a guilty verdict and an appellate court must assume that, in order for it to find guilt beyond a reasonable doubt, the jury found the facts most favorable to the prosecution’s case.²⁵ Appellate courts almost never hear additional evidence, and appellate review is ordinarily limited to correcting mistakes of law, except in those rare instances when no reasonable jury could have reached the same conclusion as the trial jury.²⁶

B. *The Inquisitorial Model*

In the inquisitorial systems, there is an investigating judge who is responsible for gathering the evidence. The judge investigates both sides of the case and can terminate weak cases prior to trial.²⁷ If the investigating judge determines that there is sufficient evidence of guilt, she sends the factual record (*dossier de la cause*) to the trial court.²⁸ The dossier itself is the evidence and the oral testimony in court is often merely an affirmation of the accuracy of the information contained in the dossier.²⁹ In some countries, the jury panel is a mixture of laypersons and professional judges.³⁰ The presiding judge is the dominant figure in the trial, aggressively questioning the witnesses who testify, including the defendant, who is not under oath.³¹ Because the judges are professionals, there are few rules of evidence.³² Consequently, the panel normally considers all the evidence (*liberté des preuves*)³³ and specifies that on which it relied in a written judgment, which is called a “reasoned opinion.”³⁴ The reasoned opinion explains why the court reached its conclusions both as to the facts and as to the

²¹ CASSESE, *supra* note 15, at 360.

²² *Id.*

²³ LAFAYE ET AL., Criminal Procedure § 24.5(b) (4th ed. 2004).

²⁴ Doran et al., *supra* note 15, at 18, 21.

²⁵ LAFAYE ET AL., *supra* note 23, §27.5(d).

²⁶ See *infra* note 88 discussing Jackson v. Virginia.

²⁷ CASSESE, *supra* note 15, at 356.

²⁸ *Id.*

²⁹ *Id.* at 358.

³⁰ *Id.*

³¹ *Id.* at 361–62.

³² Doran et al., *supra* note 15, at 19–20.

³³ CASSESE, *supra* note 15, at 363.

³⁴ *Id.* at 358.

law.³⁵ Appeals are trials *de novo*, with the appellate court conducting a thorough review of the record, substituting its judgment for that of the trial court, both as to the law and as to the facts.³⁶

C. *International Criminal Trials: A Blended Procedure*

When the first international criminal tribunal was established following Germany's defeat in World War II, the victorious allies represented both criminal procedure models. The United States and the United Kingdom followed the adversarial model while the French epitomized the inquisitorial model; this is because one of its most important features, the investigating judge, was instituted in the 1808 Napoleonic Code.³⁷ The Soviet Union, supported by France, wanted speedy trials followed by speedier executions, which would have had none of the features of a fair trial and would have provided no protection for the rights of the accused.³⁸

In the end, the adversarial system of oral evidence presented in open court by the parties largely prevailed.³⁹ The fact-finder, however, was a panel of professional judges whose judgment was rendered in a reasoned opinion.⁴⁰ The International Criminal Court has adopted, as have all the post-war *ad hoc* international criminal tribunals, that basic model.⁴¹ Consequently, the courtroom part of an international criminal trial would be familiar to any common law lawyer. Live witnesses, whom the parties call, are placed under oath and are subjected to both direct and cross-examination. Likewise, the parties present the documentary and physical evidence, which become part of the trial record when admitted by the court.

On the other hand, the decision-making process would not be so familiar. Once all the evidence is presented, the trial court retires to consider its verdict. Unlike a lay jury, which usually announces its verdict after hours or, at most, days of deliberation, the international jury renders its verdict months later in the form of a written opinion,

³⁵ CRYE, et al., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 387 (2008).

³⁶ CASSESE, *supra* note 15, at 364. Some countries limit the right of appeal to questions of law when the lower court decisions are reached by panels of professional judges because the "risk of erroneous conviction is lower." Fleming, *supra* note 2, at 114.

³⁷ CASSESE, *supra* note 15, at 357.

³⁸ See WHITNEY R. HARRIS, TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBURG, GERMANY, 1945-1946, at 16-17 (Southern Methodist Press ed., 1999).

³⁹ *Id.* at 11.

⁴⁰ Charter of the International Military Tribunal arts. 2, 26, Aug. 8, 1945, 82 U.N.T.S. 280.

⁴¹ CASSESE, *supra* note 15, at 369-70.

which is often hundreds, if not more than a thousand, pages long.⁴² This reasoned opinion resolves issues of fact and law and imposes a sentence.⁴³

The requirement for a reasoned judgment was included in the statute of the International Military Tribunal at Nuremberg, although there was no necessity for a written judgment because there was no appeal.⁴⁴ The Tribunal's judgment was more than 150 pages long and, while it did resolve the difficult legal questions the Tribunal faced, the bulk of it was devoted to the Tribunal's findings of fact and the bases upon which it had concluded that the defendants were either guilty or innocent.⁴⁵

The statutes of the post-war *ad hoc* international criminal tribunals and the ICC all contain provisions requiring a verdict in the form of a "reasoned opinion,"⁴⁶ and they all provide for appellate review.⁴⁷ A reasoned opinion is considered an essential element of a fair trial.⁴⁸

⁴² For example, in the *Gotovina* case, final arguments concluded on September 1, 2010, and the Trial Chamber Judgment was issued April 15, 2011. *Case Information Sheet: The Prosecutor v. Ante Gotovina, Ivan Čermak, & Mladen Markač*, INT'L TRIBUNAL FOR THE FORMER YUGOSLAVIA, available at http://www.icty.org/x/cases/gotovina/cis/en/cis_gotovina_al_en.pdf [hereinafter *Gotovina Information Sheet*]. The Trial Chamber's Judgment in *Gotovina* was nearly 1400 pages. *Prosecutor v. Gotovina, Čermak & Markač*, Case No. IT-06-90-T, Judgment (Int'l Crim. Trib. for the former Yugoslavia Apr. 15, 2011).

⁴³ See, e.g., *Prosecutor v. Gotovina, Čermak & Markač*, Case No. IT-06-90-T, Judgment.

⁴⁴ Charter of the International Military Tribunal, *supra* note 40, art. 26. The Charter does not mandate that the judgment be in writing, although, practically speaking, there was no other way to announce the verdict of the court and give the reasons for it. The lack of an appeal was one of the criticisms of both the Nuremberg and Tokyo Tribunals. See Fleming, *supra* note 2, at 111.

⁴⁵ International Military Tribunal (Nuremberg), Judgment (October 1, 1946), available at http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgment.pdf.

⁴⁶ U.N. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 23(2), U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; U.N. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 22(2), U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Rome Statute of the International Criminal Court, art. 74(5), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter ICC Statute].

⁴⁷ ICTY Statute, *supra* note 46, art. 25; ICTR Statute, *supra* note 46, art. 24; ICC Statute, *supra* note 46, art. 81.

⁴⁸ See, e.g., *Toriya v. Spain*, 303 Eur. Ct. H.R. (ser. A) ¶¶ 18-19 (1994).

II. THE NECESSITY FOR REASONED OPINIONS IN INTERNATIONAL CRIMINAL TRIALS

It is a fair question why a reasoned opinion is required when judges are fact-finders, but not when laypersons are the fact-finders. Intuitively, it would seem that it should be the other way around. But, as one appeals chamber of the ICTR observed:

When considering this case in the context of the Tribunal, it has to be borne in mind that here the trier of fact is not a jury, but a panel of professional judges. In the case of the jury, the one question that has to be answered is the question of guilty or not guilty, and the factual findings supporting this conclusion are neither spelled out nor can they be challenged by one of the parties. The instruction given to the jury concentrates on this 'ultimate issue' of the case. In this Tribunal, on the other hand, Trial Chambers cannot restrict themselves to the ultimate issue of guilty or not guilty; they have an obligation pursuant to Article 22(2) of the Statute, translated into Rule 88 (C) of the Rules, to give a reasoned opinion.⁴⁹

Aside from this legal obligation to render a reasoned opinion, there are a number of cogent reasons supporting the reasoned opinion requirement.

First, since appellate courts in the inquisitorial model have greater latitude to overturn the factual findings of a trial court, a reasoned judgment is necessary so that the defendant can exercise his right to appeal.⁵⁰ This is so because, unlike in the adversarial model where the jury may only consider the evidence the judge admits, in the inquisitorial model all or almost all of the evidence in the dossier is considered.⁵¹ Without a reasoned opinion, it would be impossible for an appellate court to tell what influenced the verdict and what did not.⁵²

⁴⁹ Prosecutor v. Ntagerura, Case No. ICTR-99-46-A, Judgment, ¶ 169 (Int'l. Crim. Trib. for Rwanda July 7, 2006).

⁵⁰ Nchamihigo v. Prosecutor, Case No. ICTR-2001-63-A, Judgment, ¶ 165 (Int'l Crim. Trib. for Rwanda Mar. 18, 2010).

⁵¹ Bernard H. Oxman, *International Criminal Procedure – Scope of ICTY Appellate Review – Eyewitness Credibility – Reasoned Opinion by Trial Judges – Adequacy of Factual Allegations in Indictment*, 96 AM. J. INT'L L. 439, 444 (2002) (observing that "international criminal tribunals employ a hybrid procedure: they allow cross-examination, as at common law, yet also admit evidence more freely, as at civil law").

⁵² *Cf. id.* at 444 ("[The] reasoned opinion . . . invites more rigorous appellate review."); see also Doran et al., *supra* note 15, at 49.

Second, scholars have studied the “Diplock” courts, which were instituted in Northern Ireland to deal with terrorist cases.⁵³ These courts follow common law procedures, except that the judge is both the fact-finder and the decision-maker.⁵⁴ In the cases that were studied, the researchers found that the Diplock judges tended to be more interventionist than their counterparts who presided over jury trials.⁵⁵ Unlike lay jurors, who are “passive” fact-finders, judges charged with making the ultimate determination in a case “often react to their duty by trying to bring the hearing into some order and coherence by following their own partial lines of inquiry, which may prevent the parties from having a sufficient opportunity to present their cases.”⁵⁶ To safeguard against this “adversarial deficit,” Diplock judges are required to issue reasoned opinions.⁵⁷

Finally, international criminal trials are extremely complex with the evidentiary phase of the trial lasting months and sometimes years.⁵⁸ In many of them, hundreds of witnesses testify, and thousands of exhibits are admitted into evidence.⁵⁹ The reasoned opinions are hundreds, and sometimes thousands, of pages long.⁶⁰ In such circumstances, appellate review of the trial record without a reasoned opinion would be a daunting task to say the least.

III. THE ELEMENTS OF A REASONED OPINION

There is extensive case law in both the ICTY and the ICTR regarding the essential elements that a reasoned opinion must contain.⁶¹ Trial chambers are required to make findings of fact for each essential element of a charged crime.⁶² But they are not required to

⁵³ Doran et al., *supra* note 15, at 11–13.

⁵⁴ *Id.* at 12.

⁵⁵ *See id.* at 28–29.

⁵⁶ *Id.*

⁵⁷ Oxman, *supra* note 51, at 444.

⁵⁸ For example, in the Gotovina trial, there were 303 trial days spanning the period from March 11, 2008 until September 1, 2010. Gotovina Information Sheet, *supra* note 42.

⁵⁹ *See id.*

⁶⁰ The Gotovina trial chamber judgment was nearly 1400 pages in length. *See supra* note 42 and accompanying text.

⁶¹ The ICTY and the ICTR share an appeals chamber and the chambers frequently cite each other’s opinions. *See* Gabrielle McIntyre, *The International Residual Mechanism and the Legacy of the International Criminal Tribunals of the Former Yugoslavia and Rwanda*, 3 *GO. J. INT’L L.* 3, 923, 928–29 n.8 (2011).

⁶² *Renzaho v. Prosecutor*, Case No. ITCR-97-31-A, Judgment, ¶ 320 (Int’l Crim. Trib. for Rwanda Apr. 1, 2011). But, even where no explicit factual findings are made, an appeals chamber may infer that “by finding that the crimes were established, the Trial Chamber implicitly found all the relevant factual findings re-

refer to every “witness testimony or every piece of evidence,” and “although certain evidence may not have been referred to . . . it may be reasonable to assume that the Trial Chamber took it into account.”⁶³ A trial chamber may not, however, disregard a piece of evidence that is “clearly relevant” to findings made by the trial chamber.⁶⁴ The failure to provide a reasoned opinion that meets this standard is treated as an error of law, even when that failure relates to a finding of fact.⁶⁵

Although there is a presumption that a trial chamber has “evaluated all the evidence presented to it,”⁶⁶ there are situations where an appeals chamber holds the trial chamber to a higher standard to provide a reasoned opinion.⁶⁷ One such circumstance is where the guilty verdict depends upon “identification evidence given by a witness under difficult circumstances.”⁶⁸ In that case, “the Trial Chamber must rigorously implement its duty to provide a ‘reasoned opinion.’”⁶⁹

Another situation where a trial chamber is required to make reasoned findings is when the evidence relating to one of the essential elements of the crime is circumstantial. In that instance the trial

quired to cover the elements of the crimes.” Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 384 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

⁶³ Nchamihigo v. Prosecutor, Case No. ICTR-2001-63-A, Judgment, ¶ 166 (Int’l Crim. Trib. for Rwanda Mar. 18, 2010).

⁶⁴ *Id.*; Zigiranyirazo v. Prosecutor, Case No. ICTR-01-73-A, Judgment, ¶ 45 (Int’l Crim. Trib. for Rwanda Nov. 16, 2009).

⁶⁵ Zigiranyirazo v. Prosecutor, Case No. ICTR-01-73-A, Judgment, ¶ 46 (holding *inter alia* that the Trial Chamber’s failure to address the feasibility of defendant’s traveling between two locations in the amount of time alleged by the prosecution was an error of law); see also Muvunyi v. Prosecutor, Case No. ICTR-2000-55A-A, Judgment, ¶¶ 144, 147–48 (Int’l Crim. Trib. for Rwanda Aug. 29, 2008) (finding that the Trial Chamber’s failure to address inconsistencies in witness testimony was an error of law).

⁶⁶ Prosecutor v. Kvočka, *et. al.*, Case No. IT-98-30/1-A, Judgment, ¶ 23 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005).

⁶⁷ *Id.* ¶ 24.

⁶⁸ Prosecutor v. Kupreškić, Case No. IT-95-16-A, Judgment, ¶ 39 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001). In assessing identification testimony, “‘little or no credence’ is given to the witness’s in-court identification.” Kalimanzira v. Prosecutor, Case No. ICTR-05-88-A, Judgment, ¶ 96 (Int’l Crim. Trib. for Rwanda Oct. 20, 2010) (quoting Kamuhanda v. Prosecutor, Case No. ICTR-95-54A-A, Judgment, ¶ 243 (Int’l Crim. Trib. for Rwanda Sept. 19, 2005)).

⁶⁹ Prosecutor v. Kupreškić, Case No. IT-95-16-A, Judgment, ¶ 39; see also Oxman, *supra* note 51, at 444 (opining that under the “difficult-circumstances doctrine” the trial chamber has an “enhanced duty” to “articulate adequate reasoning”).

chamber must explain how the findings it made were the “only reasonable inference that could be drawn from the evidence.”⁷⁰

A third instance when findings must be explicit is when there is conflicting testimony about a fact that is relevant to a finding of guilt. Then, the trial chamber must “provide sufficient reasons” for crediting the testimony of the witnesses it relied upon over that of the conflicting witnesses.⁷¹ Otherwise, the appeals chamber cannot “determin[e] whether the Trial Chamber assessed the entire evidence on this point exhaustively and properly.”⁷²

IV. STANDARDS OF REVIEW

Because additional evidence may be admitted on appeal⁷³ and the prosecutor may appeal from a judgment of acquittal,⁷⁴ there are additional standards of review in the *ad hoc* international criminal tribunals to deal with situations not confronted by common law courts. Because this article deals with appellate acquittals in cases where no additional evidence was admitted on appeal, it will limit itself to the standards of review applicable to errors of law, errors of fact, mixed errors of law and fact, and instances where the trial chamber has made no findings.

The ICTY and ICTR statutes contain identical provisions regarding appellate review of a trial chamber’s judgment.⁷⁵ Both provide that the appeals chamber can reverse the trial chamber when there is either a) “an error on a question of law invalidating the decision,” or b) “an error of fact which has occasioned a miscarriage of justice.”⁷⁶ Neither statute elaborates upon either “invalidating the decision” or “miscarriage of justice,” leaving these as matters for judicial interpre-

⁷⁰ *Renzaho v. Prosecutor*, Case No. ICTR-97-31-A, Judgment, ¶ 319 (Int’l Crim. Trib. for Rwanda Apr. 1, 2011).

⁷¹ *Muvunyi v. Prosecutor*, Case No. ICTR-2000-55A-A, Judgment, ¶ 147.

⁷² *Id.* ¶ 148.

⁷³ *See, e.g., Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, ¶ 24 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004) (defining additional standards of review in cases where there is an alleged error of fact and additional evidence has been admitted on appeal and cases where there is an alleged error in the legal standard plus an alleged error of fact and additional evidence has been admitted on appeal).

⁷⁴ *See, e.g., Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, Judgment, ¶ 9 (Int’l Crim. Trib. for the Former Yugoslavia May 9, 2007) (setting the standard of review for prosecution appeals).

⁷⁵ U.N. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 25. U.N. Doc. S/RES/827 (1993); U.N. Statute of the International Criminal Tribunal for Rwanda, art. 24, U.N. Doc. S/RES /955 (1994).

⁷⁶ *Id.*

tation. Similarly, the statutes do not define the applicable standards of review.⁷⁷

A. *Errors of Law*⁷⁸

Where the appeals chamber identifies an error of law, for example if the trial chamber has applied an incorrect legal standard, “the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.”⁷⁹ In doing so, not only is the legal error corrected, but also the appeals chamber satisfies itself whether, given the application of the correct legal standard, it is convinced beyond a reasonable doubt of the defendant’s guilt.⁸⁰

Indeed, with regard to pure errors of law, it may be a misnomer even to say that there is a standard of review because:

Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake.⁸¹

Logically then, the presence or absence of a reasoned opinion is irrelevant when the question is whether there was a pure error of law be-

⁷⁷ The tribunals’ rules of procedure and evidence are likewise silent on these questions. ICTY Rules of Procedure and Evidence, *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf. ICTR Rules of Procedure and Evidence, *available at* http://www.unict.org/Portals/0/English/Legal/Evidence/English/130410amended%206_26.pdf.

⁷⁸ Fleming, *supra* note 2, at 124:

A question of law, on the other hand, is a determination of the legal effect of the facts as found. The determination of a question of law involves two steps that are not distinguished in Article 25 [of the ICTY Statute], but are often identified in domestic jurisprudence. The first, which could be called a question of ‘pure law,’ is one where the court determines an abstract principle of general application that is independent of the facts of the case under consideration.

⁷⁹ Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgment, ¶ 14 (Int’l. Crim. Trib. for the Former Yugoslavia Nov. 12, 2009). *See, e.g.*, Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 41 (Int’l Crim. Trib. for the former Yugoslavia Feb. 28, 2013) (holding that the trial chamber’s ruling that “specific direction is not an element of the *actus reus* of aiding and abetting was an error of law”).

⁸⁰ Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgment, ¶ 14. These basic principles are repeated in every ICTY and ICTR appeals judgment in a section of the opinion entitled, “Standard of Review.”

⁸¹ Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment, ¶ 35 (Int’l. Crim. Trib. for the Former Yugoslavia July 21, 2000).

cause the appeals chamber will identify and correct the error no matter how much reasoning was supplied by the trial chamber making it.⁸² For example, in *Perišić*, the Appeals Chamber corrected the Trial Chamber's definition of the legal standard for aiding and abetting. In so doing, it stated:

The Appeals Chamber emphasises [sic] that the Trial Chamber's legal error was understandable given the particular phrasing of the *Mrkšić* and *Šljivančanin* Appeal Judgement. However, the Appeals Chamber's duty to correct legal errors remains unchanged. Accordingly, the Appeals Chamber will proceed to assess the evidence relating to Perišić's convictions for aiding and abetting *de novo* under the correct legal standard.⁸³

B. *Errors of Fact*⁸⁴

Errors of fact are less straightforward. The ICTY Appeals Chamber addressed this issue in its very first case when it stated that the standard of review for an error of fact is "unreasonableness, that is a conclusion which no reasonable person could have reached."⁸⁵ Since that decision, appeals chambers of both the ICTY and ICTR have consistently echoed this same standard.⁸⁶ In applying this standard, appeals chambers have stressed that "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence."⁸⁷

⁸² See Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶¶ 25–44.

⁸³ *Id.* ¶ 43.

⁸⁴ There is no reason for appellate courts to review questions of fact to achieve their purposes of assuring the "consistency of verdicts and the orderly development of law" because "[t]he decision that a certain body of evidence warrants or does not warrant a certain factual finding beyond a reasonable doubt cannot be of relevance to any other case." Fleming, *supra* note 2, at 135. Instead, appellate review of factual issues serves another purpose—"justice in the individual case." *Id.* at 136.

⁸⁵ Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 64 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). See Fleming, *supra* note 2 at 138 (noting that the Appeals Chamber in *Tadić* adopted the "common law standard").

⁸⁶ See, e.g., Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012); Kalimanzira v. Prosecutor, Case No. ICTR-05-88-A, Judgment, ¶ 9 (Int'l Crim. Trib. for Rwanda Oct. 20, 2010). An alternative formulation of the standard of review is that the trial chamber's finding must be "wholly erroneous." Prosecutor v. Galić, Case No. IT-98-29-A, Judgment, ¶ 9 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (quoting Prosecutor v. Kupreškić, Case No. IT-95-16-A, Judgment, ¶ 30 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001)).

⁸⁷ Prosecutor v. Kupreškić, Case No. IT-95-16-A, Judgment, ¶ 30.

ICTY and ICTR appeals chambers apply a rule of deference to the factual findings of the trial chambers. Thus, an appeals chamber “will not lightly disturb findings of fact by a Trial Chamber . . . [because] the Trial Chamber has the advantage of observing the witness testimony first-hand, and is, therefore, better positioned than this Chamber to assess the reliability and credibility of the evidence.”⁸⁸ Moreover, the appeals chambers have repeatedly explained that, unlike in the inquisitorial systems,⁸⁹ an appeal is not a trial *de novo*.⁹⁰ Finally, where a trial chamber has not made a finding of fact, “the party seeking to have the Appeals Chamber make that finding for itself must demonstrate that such a finding is the only reasonable conclusion available.”⁹¹

C. *Mixed Questions of Law and Fact*

Neither the ICTY nor the ICTR statute address mixed questions of law and fact—that is, where a court applies “an objective legal

⁸⁸ Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment, ¶ 37 (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000). This is almost identical to the approach taken in U.S. courts:

Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana*, 406 U.S., at 362, 92 S.Ct., at 1624–1625. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Jackson v. Virginia, 443 U.S. 307, 319 (1979).

⁸⁹ CASSESE, *supra* note 15, at 364.

⁹⁰ See, e.g., Prosecutor v. Furundžija, Judgment, ¶ 40 (“This Chamber does not operate as a second Trial Chamber”); *Musema v. Prosecutor*, Case No. ICTR-96-13-A, Judgment, ¶ 17 (Int’l. Crim. Trib. for Rwanda Nov. 16, 2001) (“The Appeals Chamber stresses, as it has done in the past, that an appeal is *not* an opportunity for a party to have a *de novo* review of their case.”); Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 21 n.15 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004) (“Furthermore, it is settled jurisprudence of the International Tribunal that it is the trier of fact who is best placed to assess the evidence in its entirety as well as the demeanour of a witness. The Appeals Chamber would act *ultra vires* when reviewing *proprio motu* the entire trial record.”). Accord Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgment, ¶ 14 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009).

⁹¹ Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, ¶ 48 (Int’l Crim. Trib. for the Former Yugoslavia May 30, 2001).

standard to the facts”⁹²—and there is scant case law addressing the issue. In *Prosecutor v. Strugar*, the defendant challenged the Trial Chamber’s finding that he should be held liable for crimes committed by those under his command because it had erroneously concluded that the facts established a superior-subordinate relationship.⁹³ Despite the defendant’s characterization of the issue as a question of law, the Appeals Chamber thought it was “a mixed error of law and fact” and, therefore, applied the deference standard applicable to errors of fact—“whether the conclusion reached by the Trial Chamber was one which no reasonable trier of fact could have reached.”⁹⁴ *Strugar* appears to be the only case squarely addressing this issue,⁹⁵ so it is fair to say that the Tribunals’ jurisprudence is underdeveloped.⁹⁶

Strugar also illustrates the point that a party’s characterization of the issue is not controlling.⁹⁷ In *Prosecutor v. Blagojević and*

⁹² *Ornelas v. United States*, 517 U.S. 690, 701 (1996) (Scalia, J. dissenting). One commentator has described this as “a question of ‘applied law,’ [which] is the concrete determination of the consequences of a specific set of facts under a specific principle of pure law.” Fleming, *supra* note 2, at 124.

⁹³ *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, ¶ 246 (Int’l Crim. Trib. for the Former Yugoslavia July 17, 2008).

⁹⁴ *Id.* ¶ 252.

⁹⁵ A search of the ICTR/ICTY Case Law Database using the search term “mixed errors (law and fact)” disclosed only the *Strugar* case as dealing squarely with that issue. As we shall see, however, the *Perišić* Appeals Chamber took the position that whether a superior-subordinate relationship had been established was a question of law because the Trial Chamber had failed to provide a reasoned opinion. *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgment, ¶ 95 (Int’l Crim. Trib. for the former Yugoslavia Feb. 28, 2013).

⁹⁶ This becomes apparent when one looks at the approach of the U.S. Supreme Court described by Justice Scalia in his dissenting opinion in *Ornelas*:

Merely labeling the issues ‘mixed questions,’ however, does not establish that they receive de novo review. While it is well settled that appellate courts ‘accep[t] findings of fact that are not ‘clearly erroneous’ but decid[e] questions of law de novo,’ there is no rigid rule with respect to mixed questions. We have said that ‘deferential review of mixed questions of law and fact is warranted when it appears that the district court is ‘better positioned’ than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine.’

Ornelas v. United States, 517 U.S. at 701 (citations omitted).

⁹⁷ See *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgment, ¶ 18 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009) (citing *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, ¶¶ 252, 269):

[W]here the Appeals Chamber finds that a ground of appeal, presented as relating to an alleged error of law, formulates no clear legal challenge but essentially challenges the Trial Cham-

Jokič, Jokič, who did not contest the legal standard utilized by the Trial Chamber, argued that the Chamber's conclusion that he had the *mens rea* required for aiding and abetting was a legal error because the facts were not sufficient to prove his knowledge beyond a reasonable doubt.⁹⁸ Rejecting Jokič's argument, the Appeals Chamber stated:

[A]lthough a Trial Chamber's factual findings are governed by the legal rule that facts essential to establishing the guilt of an accused have to be proven beyond reasonable doubt, this does not affect their nature as factual conclusions. A party arguing that a Trial Chamber based its factual conclusions on insufficient evidence therefore submits that the Trial Chamber committed an error in fact, not an error in law.⁹⁹

Based on *Strugar* and *Blagojevič and Jokič*, it is not easy to differentiate between a "pure" error of fact and a "mixed" error of law and fact. In both of these cases, the court applied the correct legal standard. In both cases, the appellants argued that the trial chamber's findings were not based upon sufficient evidence, and yet the appeals chambers characterized the issue differently. In the end perhaps it doesn't much matter, because the standard of review is the same—deference.

V. THE DECISIONS IN THE GOTOVINA AND PERIŠIĆ CASES

A. *Gotovina*

1. Background and Charges

Croatia declared its independence from Yugoslavia on June 25, 1991.¹⁰⁰ By the end of that year, the Yugoslav People's Army ("JNA")¹⁰¹ and "various Serb forces" occupied about one-third of Croatia.¹⁰² This occupation was concentrated in the Krajina region between Croatia and Bosnia-Herzegovina.¹⁰³ In December of 1991, the occupied

ber's factual findings in terms of its assessment of evidence, it will either analyse these allegations to determine the reasonableness of the impugned conclusions or refer to the relevant analysis under other grounds of appeal.

⁹⁸ Prosecutor v. Blagojevič & Jokič, Case No. IT-02-60-A, Judgment, ¶ 144 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007).

⁹⁹ *Id.* ¶ 145.

¹⁰⁰ Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Judgment, ¶ 2 (Int'l Crim. Trib. for the former Yugoslavia Apr. 15, 2011).

¹⁰¹ *Id.* ¶¶ 2, 7.

¹⁰² *Id.* ¶ 2.

¹⁰³ Historically, the Krajina was the military border between Croatia and Bosnia Herzegovina. NOEL MALCOLM, BOSNIA: A SHORT HISTORY 77 (1994). Ethnic Serbs

territory was declared the Republic of the Serbian Krajina (“RSK”) and it established its own government.¹⁰⁴ From then until 1995, Croatia engaged in a series of military operations with the goal of retaking the Krajina.¹⁰⁵ The culmination of this effort was Operation Storm, which began on August 2, 1995 and ended on August 5, 1995 with a Croatian declaration of victory.¹⁰⁶

According to the best estimate, in the wake of Operation Storm, 180,000 Croatian Serbs fled Croatia, going mostly to Bosnia-Herzegovina and the Federal Republic of Yugoslavia (“FRY”).¹⁰⁷ Elisabeth Rhen, the Special Rapporteur of the UN Commission on Human Rights, testified: “In the three years before the military operations of 1995, the proportion of Serbs in the Krajina had significantly increased,”¹⁰⁸ while after Operation Storm, “only 3,500 Serbs remain[ed] in the former Sector North and 2,000 Serbs remain[ed] in the former Sector South, representing a small percentage of the former Krajina Serb population.”¹⁰⁹

Ante Gotovina was the commander of the Split Military District (“MD”) of the Croatian Army (“HV”)¹¹⁰ and overall operational commander of Operation Storm in the southern Krajina region.¹¹¹ He was charged, along with Ivan Černak, the commander of the Knin Garrison,¹¹² and Mladen Markač, the Assistant Minister of the Interior,¹¹³ with being a member of a Joint Criminal Enterprise (“JCE”) whose purpose was to bring about the “permanent removal of the Serb population from the Krajina region by force, fear or threat of force, persecution, forced displacement, transfer and deportation, appropri-

had lived there peacefully with their non-Serb neighbors since World War II. MICHAEL P. SCHARF, *BALKAN JUSTICE* 129 (1997).

¹⁰⁴ Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Judgment, ¶ 2.

¹⁰⁵ Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Amended Joinder Indictment ¶ 25–27 (May 17, 2007), available at <http://www.icty.org/x/cases/gotovina/ind/en/got-amdjoind070517e.pdf>.

¹⁰⁶ *Id.* ¶ 27.

¹⁰⁷ Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Judgment, ¶ 1712.

¹⁰⁸ *Id.* ¶¶ 1711–12.

¹⁰⁹ *Id.* ¶ 1712.

¹¹⁰ *Id.* ¶ 7.

¹¹¹ *Id.* ¶ 4.

¹¹² *Id.* ¶ 5.

¹¹³ Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Judgment, ¶ 6. By virtue of his position, Markač was also the commander of the Special Police, who also participated in Operation Storm.

tion and destruction of property or other means.”¹¹⁴ The membership of the JCE also included some of the highest-ranking officials in the Croatian government, including its then president, Franjo Tuđman.¹¹⁵ According to the Appeals Chamber, the Trial Chamber found that Gotovina had significantly contributed to, and shared the objective of, the JCE by virtue of “ordering unlawful attacks against civilians and civilian objects in Knin, Benkovac, and Obrovac and by failing to make a serious effort to prevent or investigate crimes committed against Serb civilians in the Split MD.”¹¹⁶

Membership in a JCE is not itself a crime.¹¹⁷ It is a way of attributing liability to those who do not directly participate in the commission of a substantive offense.¹¹⁸ In this sense, it performs some of the same functions as conspiracy in U.S. law.¹¹⁹ There are three forms of JCE, only two of which (JCE I and JCE III) are relevant to this analysis.¹²⁰ JCE I imputes liability for substantive crimes based on the shared intent of the JCE members to achieve its common purpose.¹²¹ JCE III makes the members of a JCE liable for crimes outside its common purpose (deviant crimes) if those crimes are “a natural and foreseeable consequence of the implementation of the common

¹¹⁴ Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Amended Joinder Indictment ¶¶ 10, 12 (May 17, 2007), available at <http://www.icty.org/x/cases/gotovina/ind/en/got-amdjoind070517e.pdf>.

¹¹⁵ *Id.* ¶ 15. Tuđman was deceased at the time of the indictment. The alleged other members of the JCE, all of whom were deceased at the time of trial, were Gojko Šušak, the Minister of Defense, Janko Bobetka, the Chief of the Main Staff of the HV, and Zvonimir Červenko, who succeeded Bobetka. *Id.*

¹¹⁶ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 3 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

¹¹⁷ Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 118 (2005). Although there is substantial case law and academic debate about JCE, a brief overview of the doctrine is all that is necessary here. For a more thorough analysis, see Mark A. Summers, *The Problem of Risk in International Criminal Law*, WASH. U. GLOBAL STUD. L. REV. (2014).

¹¹⁸ Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 226-28 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

¹¹⁹ Danner & Martinez, *supra* note 117, at 140–41.

¹²⁰ Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 226-28; Gunel Guliyeva, *The Concept of Joint Criminal Enterprise and ICC Jurisdiction*, 5 EYES ON THE ICC 49, 53 (2008), available at <http://www.americanstudents.us/Pages%20from%20Guliyeva.pdf> (noting that JCE II involves the liability for crimes committed within the framework of an “organized criminal system” such as concentration or detention camps”).

¹²¹ Guliyeva, *supra* note 120, at 52–53.

purpose.”¹²² Via JCE I, the Trial Chamber convicted Gotovina of the crimes which were within the common purpose of the JCE.¹²³ He was also found guilty of deviant crimes under JCE III.¹²⁴

2. The 200-Meter Standard

The Appeals Chamber made it crystal clear that the ultimate validity of the Trial Chamber Judgment rested on its conclusion that Gotovina had ordered “unlawful” artillery attacks against civilian targets during Operation Storm.¹²⁵ Moreover, the Appeals Chamber found that the Trial Chamber’s conclusion that the attacks were unlawful was ineluctably linked to its “impact analysis” of the artillery strikes, which, in turn, was predicated on its finding that “with no exceptions . . . impact sites within 200 metres of such targets were evidence of a lawful attack, and impact sites beyond 200 metres from such targets were evidence of an indiscriminate attack.”¹²⁶ Indeed, the Trial Chamber’s reliance on the 200-Meter Standard was so pivotal that other evidence suggesting that there had been indiscriminate shelling of civilian objects “was indicative of an unlawful attack only in the context of the Trial Chamber’s application of the 200-Meter Standard.”¹²⁷ Thus, as it was portrayed by the Majority, the 200-Meter

¹²² *Id.* at 53 (citing Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 258 (Int’l Crim. Trib. for the Former Yugoslavia Sep. 1, 2004)).

¹²³ Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Judgment, ¶ 2619 (Int’l Crim. Trib. for the former Yugoslavia Apr. 15, 2011) (Crimes against humanity – Persecution (Count 1), Deportation (Count 2), and War crimes (wanton destruction)).

¹²⁴ *Id.* (Crimes against humanity, murder, inhumane acts (Counts 6 and 8, respectively); War Crimes, wanton destruction, murder, and cruel treatment (Counts 5, 7 and 9, respectively)).

¹²⁵ See, e.g., Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 24 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (stating that unlawful attacks were the “touchstone” of the Trial Chamber’s analysis concerning the existence of a JCE); *id.* ¶ 77 (observing that unlawful attacks were the “core indicator that the crime of deportation had taken place”); *id.* ¶ 92 (finding that unlawful attacks were “the primary means by which the forced departure of Serb civilians from the Krajina region was effected”); *id.* ¶ 96 (concluding that the unlawful attacks “constituted the core basis for finding that Serb civilians were *forcibly* displaced”).

¹²⁶ *Id.* ¶ 64. See also *id.* ¶ 25 (“Using the 200 Metre Standard as a yardstick, the Trial Chamber found that all impact sites located more than 200 metres from a target it deemed legitimate served as evidence of an unlawful artillery attack.”); *id.* ¶ 51 (“The Trial Chamber heavily relied on the 200 Metre Standard to underpin its Impact Analysis.”); and *id.* at ¶ 57 (“The Trial Chamber’s Impact Analysis never deviated from the 200 Metre Standard.”).

¹²⁷ *Id.* ¶ 65. See also *id.* ¶ 82 (“[T]he Trial Chamber assessed much of the other evidence on the record to be ambiguous and considered it indicative of unlawful

Standard was the lynchpin of the Trial Chamber's Judgment, so that if the 200-Meter Standard fell, then surely, so would Gotovina's conviction.

Yet, despite the fact that all five of the Appeals Chamber judges agreed that the Trial Chamber erred in adopting the 200-Meter Standard,¹²⁸ only three concluded that Gotovina's conviction should be reversed.¹²⁹ The Majority found that the Trial Chamber's mistake regarding the 200-Meter Standard was due to the lack of evidence in the record to support it and because the Trial Chamber failed adequately to explain its reasoning, *i.e.*, failed to provide a reasoned opinion.¹³⁰ Based on this, the Appeals Chamber undertook *de novo* review of the Trial Chamber judgment.¹³¹ In so doing, it swept aside not only the Trial Chamber's findings based on the 200-Meter Standard, but also all the other evidence of Gotovina's guilt.¹³²

3. Error of Fact, Error of Law or Something Else?

While the Appeals Chamber was quite clear that the Trial Chamber's error regarding the 200-Meter Standard was the fatal flaw in its judgment, it was much less clear regarding the nature of this error. At first it appeared that the Appeals Chamber regarded it as an error of fact when it said that when a Trial Chamber's approach leads to an "unreasonable assessment of the facts," an appeals chamber must consider "carefully whether the Trial Chamber did not commit an error of fact in its choice of the method of assessment or in its application thereof."¹³³ This seemed to perfectly describe the situation in

artillery attacks only when viewed through the prism of the Impact Analysis."); and *id.* ¶ 83 ("The Trial Chamber's reliance on the Impact Analysis was so significant that even considered in its totality, the remaining evidence does not definitively demonstrate that artillery attacks against the Four Towns were unlawful.").

¹²⁸ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Separate Opinion of Judge Theodor Meron, ¶ 2. (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

¹²⁹ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 158. Judges Meron, Robinson, and Güney concurred in the decision; Judges Agius and Pocar dissented.

¹³⁰ *Id.* ¶ 61.

¹³¹ *Id.* ¶ 64.

¹³² See Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 13 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (criticizing that the Majority's reliance on the Trial Chamber's error regarding the 200-meter standard because it then proceeded to "discard *all evidence on the record* with respect to the impact sites").

¹³³ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 50 (quoting Prosecutor v. Kayishema & Ruzidana, Case No. ICTR-95-1-A, Judgment, ¶ 119 (Int'l Crim. Trib. for Rwanda June 1, 2001)). The *Kayishema* and *Ruzidana* Ap-

Gotovina; *i.e.*, the trial court erred both in its choice of the 200-Meter Standard as its “method of assessment,” and it also erred in its application of that standard to the facts.¹³⁴ After identifying a factual error, the Appeals Chamber should have applied the “no reasonable trier of fact” standard of review to determine whether any reasonable trial chamber could have reached the same result¹³⁵ and, if not, whether the mistake caused a miscarriage of justice.¹³⁶

peals Chamber stated that if the Trial Chamber’s “approach in assessment of evidence . . . is reasonable, the [Appeals] Chamber is bound to respect it”; Prosecutor v. Kayishema & Ruzidana, Case No. ICTR-95-1-A, Judgment, ¶ 121. The *Gotovina* Appeals Chamber also cited Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 63 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000). In *Aleksovski*, the Trial Chamber found that witnesses had suffered without requiring any medical or scientific evidence to substantiate their testimony. The Appeals Chamber observed that it “has to give a margin of deference to the Trial Chamber’s evaluation of the evidence presented at trial” and that it may overturn that determination “only where the evidence could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous.”

¹³⁴ Though he called it an error of law, dissenting Judge Pocar described the Trial Chamber’s use of the 200-meter standard as an assessment tool:

Thus, in its assessment of the evidence, the Trial Chamber used the 200 Metre Standard as a presumption of legality—which was generous and to the benefit of Gotovina—to analyse in part the evidence of the shelling attacks and the artillery impacts. In my view, there is therefore no doubt that, while the error was allegedly founded on a factual basis, the establishment of the 200 Metre Standard and its use ultimately constitutes an error of law. The 200 Metre Standard was, as its name indicates, a standard or a legal tool that the Trial Chamber used in order to determine that Rajčić was not credible when he claimed that Gotovina’s attack order was understood as directing his subordinates only to target designated military objectives.

Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Fausto Pocar, ¶ 10 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2011). In fact, as I will argue, the best classification is a mixed error of law and fact as to which deference to the trial court’s findings is the appropriate standard of review. *See infra* Part VI.

¹³⁵ *See* Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 19 (reasoning that there was other evidence, apart from the 200-meter standard upon which a reasonable trier of fact could have relied to find that the artillery attacks were unlawful).

¹³⁶ Prosecutor v. Furundžija, Case No. IT-95-7/1-A, Judgment, ¶ 37 (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000) (“In putting forward this question [of fact] as a ground of appeal, the Appellant must discharge two burdens. He must show that the Trial Chamber did indeed commit the error, and, if it did, he must go on to show that the error resulted in a miscarriage of justice.”). (quoting Ser-

Thereafter, the Appeals Chamber proceeded to analyze the evidence that the Trial Chamber heard regarding the 200-Meter Standard,¹³⁷ concluding that “[t]he Trial Judgment contains no indication that any evidence considered by the Trial Chamber suggested a 200 metre margin of error.”¹³⁸ It also rejected the prosecution’s argument that the 200-Meter Standard was “a maximum possible range of error,” not because this was not a reasonable interpretation of the evidence, but rather because “the Trial Chamber did not justify the 200 Metre Standard on this basis.”¹³⁹ Even if that were so, given the Appeals Chamber’s approach to errors of fact discussed above, it should not have summarily dismissed the prosecution’s argument, since a Trial Chamber’s findings should stand if they are reasonable.¹⁴⁰

Instead, and although the Appeals Chamber had stated that there was “no indication of any evidence” supporting the 200-Meter Standard, the Appeals Chamber then described the problem as a failure by the Trial Chamber to “explain the specific basis on which it arrived at a 200 metre margin of error as a reasonable interpretation of the evidence on the record.”¹⁴¹ In the next paragraph, the Majority observed that “absent any specific reasoning as to the derivation of this margin of error, there is no obvious relationship between the evidence received and the 200 Metre Standard.”¹⁴² The Majority thus changed course from its original approach to the issue as one of factual error, making it explicit that there were in two errors in the Trial Chamber’s judgment:

[T]he Trial Chamber adopted a margin of error that was not linked to any evidence it received; this constituted an error on the part of the Trial Chamber. The Trial Chamber also provided no explanation as to the basis for the margin of error it adopted; this amounted to a failure to provide a reasoned opinion, another error.¹⁴³

Was the real issue that the 200-Meter Standard was not supported by the evidence, or that the Trial Chamber failed to explain why? And, if there really was no evidence that any reasonable trier of fact could have relied upon, how could such an explanation have been possible?

suhago v. Prosecutor, Case No. ICTR 98-39-A, Reasons for Judgment, ¶ 22 (Int’l Crim. Trib. for Rwanda Apr. 6, 2000)).

¹³⁷ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment ¶¶ 52–57 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

¹³⁸ *Id.* ¶ 58.

¹³⁹ *Id.* ¶ 59.

¹⁴⁰ See *supra* note 85 and accompanying text.

¹⁴¹ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 58.

¹⁴² *Id.* ¶ 59.

¹⁴³ *Id.* ¶ 61.

Notwithstanding these ambiguities,¹⁴⁴ the Majority confidently concluded that, given the error of law in failing to provide a reasoned opinion, it would “consider *de novo* the remaining evidence on the record to determine whether the conclusions of the Impact Analysis are still valid.”¹⁴⁵

4. *De Novo* Review

Gotovina appears to be the first case in which an ICTY Appeals Chamber has held that a *de novo* review of the record is appropriate when the legal error was a failure to provide a reasoned opinion.¹⁴⁶ Indeed, the ICTY cases are replete with assertions that an appeals chamber will not conduct a trial *de novo*.¹⁴⁷ One appeals chamber went so far as to say that “[t]he Appeals Chamber would act *ultra vires* when reviewing *proprio motu* the entire trial record.”¹⁴⁸ When it identifies an error of law because the Trial Chamber applied an incorrect legal standard:

The Appeals Chamber . . . will in principle only take into account evidence referred to by the Trial Chamber in the body of the judgment or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.¹⁴⁹

Some cases refer to this standard of review as *de novo* review, though it is clearly a less extensive review than trial *de novo* as it is limited to

¹⁴⁴ See Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 10 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (observing that the Majority should have “clearly explained” why the Trial Chamber’s error in “adopting a margin of error that was not linked to any evidence in the record” constituted the application of an incorrect legal standard (which would then permit it to proceed with a *de novo* review)).

¹⁴⁵ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 64.

¹⁴⁶ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 9. As Judge Agius observed, the failure to provide a reasoned opinion is “clearly not an error of law arising from the application of an incorrect legal standard.”

¹⁴⁷ See *supra* note 90.

¹⁴⁸ Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 21 n.15 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

¹⁴⁹ Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgment, ¶ 14 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009). Based on my research, *Gotovina* is the first ICTY case to omit the language cited in the text from the “Standard of Review” section of its opinion. *Perišić*, decided a few months later, was the other. Interestingly, the case decided in between those two cases contained the language. See Prosecutor v. Lukić & Lukić, Case No. IT-98-321/1-A, Judgment, ¶ 12 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012).

the evidence in the trial chamber judgment and in the record, only if the parties bring the latter to the appeals chamber's attention.¹⁵⁰ Nonetheless, an error in failing to provide a reasoned opinion does not justify even this more restricted form of *de novo* review.

The ICTR case cited by the majority provides, at best, ambiguous support for its holding that *de novo* review of the record is appropriate when there is a failure to provide a reasoned opinion.¹⁵¹ *Kalimanzira* involved the reliability of identifications made by two different witnesses. Regarding the first witness, BWK, the Appeals Chamber found that the Trial Chamber had not "explicitly explained why it had accepted BWK's identification evidence" and that its failure to do so was an error of law.¹⁵² It then "consider[ed] the relevant evidence," concluding that BWK's uncorroborated identification was "unsafe."¹⁵³ Ultimately, however, the Appeals Chamber did not reverse the appellant's conviction on this ground because the Trial Chamber's error "did not result in a miscarriage of justice."¹⁵⁴ Thus, despite its statement that the error was one of law, and because the miscarriage of justice standard applies only to errors of fact,¹⁵⁵ it is apparent that the *Kalimanzira* Appeals Chamber treated the failure to provide a reasoned opinion as a factual problem.

The *Kalimanzira* Appeals Chamber reached a similar conclusion with regard to the second identification witness, BDK, but, for reasons that are not apparent, applied a different standard of review when it concluded that it was not "convinced beyond a reasonable doubt" by the identification evidence and, therefore, that appellant's conviction was "unsafe."¹⁵⁶ While this more closely resembles the standard of review for errors of law,¹⁵⁷ it is important to note that there is heightened scrutiny of the obligation to provide a reasoned opinion in uncorroborated identification cases.¹⁵⁸ Moreover, the review undertaken in *Kalimanzira* must also be assessed in light of the oft-repeated position of the ICTY Appeals Chamber—that it will not engage in *de novo* review.¹⁵⁹ Thus, the case cited by the majority does not support

¹⁵⁰ See, e.g., Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶¶ 10-14.

¹⁵¹ *Kalimanzira v. Prosecutor*, Case No. ICTR-05-88-A, Judgment, ¶¶ 99-100, 199-200 (Int'l. Crim. Trib. for Rwanda Oct. 20, 2010).

¹⁵² *Id.* ¶ 99.

¹⁵³ *Id.* ¶ 100.

¹⁵⁴ *Id.* ¶ 126.

¹⁵⁵ See *supra* text accompanying note 76.

¹⁵⁶ *Id.* ¶ 201.

¹⁵⁷ See *supra* text accompanying note 80.

¹⁵⁸ See *supra* text accompanying note 69.

¹⁵⁹ See *supra* note 90.

its sweeping application of *de novo* review when the error of law is the failure to provide a reasoned opinion.

Moreover, if the failure to provide a reasoned opinion is an error of law, why did the majority neglect to use the standard of review applicable to such errors? As dissenting Judge Agius pointed out earlier in its judgment, the *Gotovina* majority parroted the correct standard of review when a Trial Chamber applies an incorrect legal standard.¹⁶⁰

[T]he Appeals Chamber will articulate the correct legal standard and review the relevant findings of the trial chamber accordingly. In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond a reasonable doubt as to the factual finding challenged by the appellant before that finding is confirmed on appeal.¹⁶¹

Several observations are apparent. First, the majority never even attempted to articulate a correct legal standard.¹⁶² Second, it is impossible to articulate a correct legal standard when dealing with an insufficiently reasoned opinion grounded on a factual error because the error is essentially one of fact, not law.¹⁶³ Finally, the majority's purported *de novo* review was a thinly disguised ruse for substituting its judgment for that of the Trial Chamber without following its own rules. By its own standards, the majority had only two choices: 1) substitute its findings of fact for those of a trial chamber only if no reasonable trier of fact could have reached the same conclusion and the result would be a miscarriage of justice;¹⁶⁴ or 2) identify an error of law, articulate the correct standard, and apply the correct standard to the facts in order to ascertain whether guilt has been proved beyond a reasonable doubt.¹⁶⁵ A third option—identify an error of fact, characterize it as an error of law, and conduct a *de novo* review, substituting the

¹⁶⁰ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶8 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

¹⁶¹ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

¹⁶² See Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 14.

¹⁶³ See *id.* ¶ 9.

¹⁶⁴ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 13.

¹⁶⁵ *Id.* ¶ 12.

Appeals Chamber's findings for those of the Trial Chamber—simply does not exist in the current jurisprudence of the Tribunal.¹⁶⁶

5. The House of Cards Collapses

With the 200-Meter Standard out of the way and along with it the Trial Chamber's findings regarding the unlawfulness of the attacks, the majority made swift work of the other arguments for affirming the conviction. It waved aside evidence that showed that the attacks were indiscriminate because some of the shells landed so far from any legitimate target that they could not be justified by any margin of error.¹⁶⁷ Likewise, it belittled other evidence of the unlawfulness of the attacks—including statements made by Gotovina during a meeting with Tuđman and others to plan Operation Storm (the Brioni Meeting) and Gotovina's order to attack the towns without specifying targets—because the evidence was ambiguous or somehow tainted by the original sin of the 200-Meter Standard.¹⁶⁸

It found that, without the unlawful artillery attacks, it could not “affirm the Trial Chamber's conclusion that the only reasonable interpretation of the circumstantial evidence on the record was that a JCE, aiming to permanently remove the Serb civilian population from the Krajina by force or threat of force, existed.”¹⁶⁹ The Appeals Chamber also rejected arguments that the artillery attacks that Gotovina had ordered proved that he had aided and abetted the deportation of the Serbs who fled the Krajina in their wake.¹⁷⁰ The majority's rejection of the aiding and abetting theory was principally grounded on its observation that the Trial Chamber “would not characterise civilian departures from towns and villages subject to lawful artillery attacks as deportation, nor could it find that those involved in launching lawful artillery attacks had the intent to forcibly displace civilians.”¹⁷¹

¹⁶⁶ Judge Agius characterized the Majority's approach as one which “fail[ed] to comport with any recognisable standard of review.” *Prosecutor v. Gotovina & Markač*, Case No. IT-06-90-A, Dissenting Opinion of Judge Agius, ¶ 14.

¹⁶⁷ *Prosecutor v. Gotovina & Markač*, Case No. IT-06-90-A, Judgment, ¶ 66.

¹⁶⁸ *See id.* ¶¶ 72–83.

¹⁶⁹ *Id.* ¶ 91.

¹⁷⁰ *Id.* ¶ 115.

¹⁷¹ *Id.* ¶ 114. This statement by the Majority was disingenuous for two reasons. First, the Trial Chamber was referring to the shelling of locations other than the Four Towns which were the focus of the trial. *See Prosecutor v. Gotovina, Čermak & Markač*, Case No. IT-06-90-T, Judgment, ¶¶ 1754–55 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011), available at http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol2.pdf; *see also Prosecutor v. Gotovina & Markač*, Case No. IT-06-90-A, Dissenting Opinion of Judge Fausto Pocar, ¶ 23 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2011) (pointing out that “paragraph 1755 of the Trial Judgment to which the Majority refers to support this claim is not

Finally, the majority dismissed the Trial Chamber's conclusion that Gotovina had made a substantial contribution to the JCE by failing to make a "serious effort" to ensure that reports of crimes against Serb civilians in the Krajina were followed up and future crimes were prevented.¹⁷² Without identifying any legal standard misapplied to the facts by the Trial Chamber, the Appeals Chamber reached the conclusion that evidence of the measures taken by Gotovina, coupled with the Trial Chamber's failure to address the testimony of a defense witness,¹⁷³ created a "reasonable doubt" as to Gotovina's guilt under this theory.¹⁷⁴

B. Perišić

Momčilo Perišić was the Chief of the Yugoslav Army ("VJ") General Staff from August 1993 until November 1995.¹⁷⁵ As such, he was the VJ's highest-ranking officer.¹⁷⁶ He was charged with various crimes¹⁷⁷ that had occurred in Sarajevo and Srebrenica based on his role "in facilitating the provision of military and logistical assistance from the VJ to the Army of the Republika Srpska ("VRS")."¹⁷⁸ The prosecution alleged that he was responsible for these crimes under two different theories—aiding and abetting and superior responsibility.¹⁷⁹

1. Aiding and Abetting

As to the former, the Appeals Chamber held that the Trial Chamber applied an incorrect legal standard for aiding and abetting.

linked to the Trial Chamber's findings on the departure of persons from the Four Towns on 4 and 5 August 1995 but rather concerns the departure of persons from other locations"). Second, the Trial Chamber did not conclude that the attacks on those other towns were "lawful." Rather, it found that "an unlawful attack on civilians or civilian objects in these towns was not the only reasonable interpretation of the evidence." *Prosecutor v. Gotovina, Čermak & Markač*, Case No. IT-06-90-T, Judgment, ¶ 1755.

¹⁷² *Prosecutor v. Gotovina & Markač*, Case No. IT-06-90-A, Judgment, ¶118.

¹⁷³ The witness, Anthony R. Jones, a retired U.S. Lieutenant General, "opined that Gotovina's actions were appropriate and sufficient." *Id.* ¶ 121.

¹⁷⁴ *Id.* ¶ 134.

¹⁷⁵ *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgment, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013), available at http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf.

¹⁷⁶ *Id.*

¹⁷⁷ The crimes included "murder, extermination, inhumane acts, attacks on civilians, and persecution as crimes against humanity and/or violations of the laws or customs of war." *Id.* ¶ 3.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*; U.N. Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 7(1), 7(3), U.N. Doc. S/RES/827 (1993).

Specifically, it found that the Trial Chamber had erred as a matter of law by “holding that specific direction is not an element of the *actus reus* of aiding and abetting.”¹⁸⁰ And, while this error was “understandable” because of the confusing language in some of the Tribunal’s cases, “the Appeals Chamber’s duty to correct legal errors remain[ed] unchanged.”¹⁸¹ Applying the correct legal standard, it then reviewed and assessed “*de novo* relevant evidence, taking into account, where appropriate, the Trial Chamber’s findings.”¹⁸² The result of this review and assessment was the Appeals Chamber’s conclusion that the evidence did not establish beyond a reasonable doubt that Perišić’s acts were specifically directed at aiding and abetting crimes committed by the VRS.¹⁸³ The first part of the *Perišić* Appeals Chamber judgment was thus a straightforward application of the standard of review for errors of law.

2. Superior Responsibility

The Appeals Chamber then turned to the second theory of individual responsibility—superior responsibility. There are three necessary elements for a conviction based on the theory of superior responsibility: “(i) the existence of superior-subordinate relationship; (ii) the superior’s failure to take the necessary and reasonable measures to prevent the criminal acts of his subordinates or punish them for those actions; (iii) . . . the superior knew or had reason to know that a criminal act was about to be committed or had been committed.”¹⁸⁴ The superior-subordinate relationship is established by proof that the superior had “the actual ability to exercise sufficient *control* over the subordinates so as to prevent them from committing crimes.”¹⁸⁵ Appellant challenged the Trial Chamber’s finding that Perišić exercised effective control over both the soldiers in the SVK and those in the VJ, who had been seconded to the SVK.¹⁸⁶ The Appeals Chamber determined that the Trial Chamber had insufficiently analyzed the evidence, which “can amount to a failure to provide a reasoned opinion . . . [and which] constitutes an error of law requiring *de novo* review of evidence by the Appeals Chamber.”¹⁸⁷

¹⁸⁰ Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 41.

¹⁸¹ *Id.* ¶ 43.

¹⁸² *Id.* ¶ 45.

¹⁸³ *Id.* ¶ 73.

¹⁸⁴ Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT’L. CRIM. JUST. 159, 161 (2007).

¹⁸⁵ *Id.* at 162.

¹⁸⁶ Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶¶ 80-82.

¹⁸⁷ *Id.* ¶ 92. It is interesting that Judge Agius, who so vociferously criticized the Majority’s use of *de novo* review in *Gotovina*, joined in the *Perišić* judgment, even though the *Perišić* Appeals Chamber followed the same approach.

3. *De Novo* Review

As it did in *Gotovina*, the Appeals Chamber cited *Kalimanzira* as support for its conclusion that *de novo* review was warranted. Additionally, it cited three other ICTR cases and one ICTY case but, curiously, it did not cite *Gotovina*. The three other ICTR cases cited by the *Perišić* Appeals Chamber do not strengthen the case for *de novo* review. Instead, they strongly suggest that the appropriate standard of review should be similar to that for errors of fact.

In *Zigiranyirazo*,¹⁸⁸ the Appeals Chamber found that the Trial Chamber failed to consider clearly relevant evidence suggesting that the defendant could not have been in two locations within the timeframe argued for by the prosecution.¹⁸⁹ Although the Trial Chamber erred in failing to provide a reasoned opinion and the Appeals Chamber categorized it as a error of law, it did not purport to conduct *de novo* review on that basis, nor did it identify the correct applicable legal standard, as it had done a few paragraphs earlier when it found that the Trial Chamber had reversed the burden of proof applicable to an alibi defense.¹⁹⁰ Instead, it accepted appellant's estimate of the travel time as "reasonable" based on the evidence on the record that the Trial Chamber had failed to consider.¹⁹¹

In *Muvunyi*,¹⁹² the Appeals Chamber found that the Trial Chamber erred in failing to explain why it relied on the testimony of witnesses YAI and CCP to convict appellant, even though their evidence was contradicted by the testimony of another witness.¹⁹³ In reaching its conclusion that there had been a failure to provide a reasoned opinion, the Appeals Chamber observed that it could not "conclude whether a reasonable trier of fact could have relied on the testimony of witnesses YAI and CCP to convict Muvunyi for this event."¹⁹⁴ This strongly suggests that the appropriate standard of review when there is a failure to provide a reasoned opinion based on a factual error is the same as that applicable to errors of fact. This conclusion is bolstered by the fact that the *Muvunyi* Appeals Chamber did not substitute its own factual findings for those of the Trial Chamber.

¹⁸⁸ *Zigiranyirazo v. Prosecutor*, Case No. ICTR-01-73-A, Judgment, (Int'l Crim. Trib. for Rwanda Nov. 16, 2009).

¹⁸⁹ *Id.* ¶¶ 44-46.

¹⁹⁰ *Id.* ¶ 43.

¹⁹¹ *Id.* ¶ 44. The Appeals Chamber noted that at the hearing the prosecution had essentially conceded the point. *Id.* ¶ 44 n.118.

¹⁹² *Muvunyi v. Prosecutor*, Case No. ICTR-2000-55 A-A, Judgment (Int'l Crim. Trib. for Rwanda Aug. 29, 2008).

¹⁹³ *Id.* ¶ 147.

¹⁹⁴ *Id.*

Rather, it took the exceptional step of remanding the case for a retrial on this issue.¹⁹⁵

In the *Simba* judgment,¹⁹⁶ also cited by the *Perišić* Appeals Chamber, the issue was essentially the same as in *Muvunyi*—the failure to provide a reasoned opinion explaining why the Trial Chamber had credited the testimony of a witness regarding the time the defendant arrived at a particular location.¹⁹⁷ Rather than stating that it intended to conduct a *de novo* review, the *Simba* Appeals Chamber said that it would “consider . . . whether and, if necessary, to what extent the Trial Chamber’s error affects its findings relating to the Appellant’s participation in the attacks at the Murambi Technical School and Kaduha Parish on 21 April 1994 within the time frame emerging from the relevant testimonies.”¹⁹⁸ After reviewing the evidence, the Appeals Chamber concluded that “a reasonable trier of fact could have found beyond a reasonable doubt” that appellant had been in the two locations on the relevant date, thus applying the standard of review applicable to errors of fact.¹⁹⁹

The final cited case, the ICTY’s appeals judgment in *Limaj*,²⁰⁰ likewise seems to weaken the support for *de novo* review and strengthen the case for applying the deference standard when there is no reasoned opinion based on an error of fact. The *Limaj* Appeals Chamber found no error based on the claim that the Trial Chamber had failed to cite in its judgment relevant evidence claimed to undercut the credibility of two prosecution witnesses because “the Trial Chamber reasonably accepted the honesty of their testimony.”²⁰¹ Therefore, “a reasonable trier of fact” could have found the witnesses credible.²⁰²

Limaj well illustrates the point that failing to provide a reasoned opinion does not genuinely convert an error of fact into one of law that alters the appropriate standard of review. While it did not do so, the Appeals Chamber could have characterized the Trial Cham-

¹⁹⁵ *Id.* ¶ 148. Because of the length and complexity of international criminal trials and the long periods of time defendants spend in jail prior to trial (Muvunyi had been in jail for eight years), the *ad hoc* tribunals are reluctant to order retrials. *Id.*

¹⁹⁶ *Simba v. Prosecutor*, Case No. ICTR-01-76-A, Judgment. (Int’l Crim. Trib. for Rwanda Nov. 27, 2007).

¹⁹⁷ *Id.* ¶ 142.

¹⁹⁸ *Id.* ¶ 143.

¹⁹⁹ It should be noted that the failure to provide a reasoned opinion was intertwined with other alleged errors of fact. *Id.* ¶ 144. But, the Appeals Chamber did not separate them when it made the statement quoted in the text.

²⁰⁰ *Prosecutor v. Limaj, et. al.*, Case No. IT-03-66-A, Judgment. (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007).

²⁰¹ *Id.* ¶ 88.

²⁰² *Id.*

ber's failure to address "clear and identical" discrepancies in the witnesses' stories²⁰³ as the failure to provide a reasoned opinion. But that does not change the fact that the essential nature of the appellate review is the same in both cases; that is, whether the trial chamber acted reasonably in reaching its conclusions.

In addition to the fact that its cited precedents do not support the *Perišić* Appeals Chamber's conclusion that *de novo* review was appropriate, its approach contradicts that taken by another ICTY Appeals Chamber that had faced the identical question. In *Strugar*,²⁰⁴ the appellant argued that the Trial Chamber erred when it found that a superior-subordinate relationship existed because he had the ability to prevent or punish the crimes that were committed and, therefore, that he had "effective control."²⁰⁵ The *Strugar* Appeals Chamber rejected the appellant's characterization of the issue as an alleged error of law, finding that "it is more accurately characterized as a mixed error of law and fact" to which it would apply the "no reasonable trier of fact" standard of review,²⁰⁶ the same standard applicable to pure questions of fact.²⁰⁷

Strugar is clearly the better-reasoned case. In neither *Strugar* nor *Perišić* did the Trial Chamber misapprehend the correct legal standard. Instead, in both cases the issue was whether the Trial Chamber had correctly applied the legal standard to the facts. While merely labeling the issue as a mixed question is not dispositive, a court should not treat the issue as one of law if the trial court is in a better position to decide the question and the result would not bring greater clarity to the law.²⁰⁸ That rationale clearly applies to both *Strugar* and *Perišić*. In neither case did the Appeals Chamber add to, or subtract from, the interpretation of the effective control necessary to establish the existence of a superior-subordinate relationship. On the other hand, both did involve ascertaining whether the trial chamber had correctly applied the well-established legal standard to the facts, an issue which should be decided by giving the trial chamber's findings due deference and reversing it only if no reasonable trier of fact could have reached the same conclusion.

²⁰³ *Id.* ¶ 87.

²⁰⁴ Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008).

²⁰⁵ *Id.* ¶¶ 247–48, 251.

²⁰⁶ *Id.* ¶ 252.

²⁰⁷ See Milanovic, *supra* note 8.

²⁰⁸ See *supra* note 96.

CONCLUSION

The reasoned opinion requirement originating in the civil law systems sits somewhat uncomfortably next to the deference standard for the review of a trial chamber's factual findings imported from the common law model.²⁰⁹ There is a strong argument, however, that both are necessary. The reasoned opinion is an essential element of a fair trial because complex international criminal cases take years to try and the verdicts are based on voluminous evidence. Without reasoned opinions, appellate review would simply be impossible. On the other hand, because the international criminal tribunals largely follow the common law procedure of presenting the trial evidence in open court, it is unarguably true that the trial judges are in a better position when it comes to determining the credibility of witnesses and the weight and persuasiveness of the evidence. Thus, deference seems to be the appropriate standard of review.

The vexing question is what standard of review is applicable when there is a failure to provide a reasoned opinion. It is unassailable that the failure to provide such an opinion is an error of law because all of the tribunals' statutes impose that obligation on trial chambers.²¹⁰ But, it is equally true that this error of law does not stem from the failure to apply the correct legal standard, which triggers a limited form of *de novo* review requiring articulation of the correct legal standard and application of it to the facts of the case. The failure to provide a reasoned opinion cannot result in this form of review because it is impossible to articulate a correct legal standard if there has been no mistake in that regard.

Moreover, *de novo* review of these errors does not serve the main purposes of appellate review, which are to insure consistency and develop the law:

The decision that a certain body of evidence warrants or does not warrant a certain factual finding beyond a reasonable doubt cannot be of relevance to any other case, where the quantity and type of evidence, as well as the demeanor and credibility of witnesses, will necessarily be different.²¹¹

In the *Gotovina* and *Perišić* decisions, the Appeals Chambers employed a *trompe l'oeil* to transform what was essentially an error of fact into an error of law, which freed them to substitute their findings for that of the Trial Chambers'. Consequently, these decisions have "lessen[ed] the ICTY historical record of the conflict in the former Yu-

²⁰⁹ See Fleming, *supra* note 2, at 138.

²¹⁰ See *supra* note 46.

²¹¹ Fleming, *supra* note 2, at 135.

goslavia” and “might result in a lack of predictability and confidence in the tribunal writ large.”²¹²

The most obvious way to correct the deficiencies in the reasoned opinions in these cases would have been to remand the cases to the trial chambers. Fearing additional delays in cases when defendants may have already been in jail for years and because of the finite existence of the *ad hoc* tribunals, appeals chambers have been reluctant to remand.²¹³ Such fears are overblown when the remand is to correct a reasoned opinion because there would be no need for additional evidence, and the specific areas requiring clarification would be identified.

Unlike the statutes of the *ad hoc* tribunals, the ICC Statute authorizes its Appeals Chamber to “remand a factual issue to the original Trial Chamber for it to report back accordingly.”²¹⁴ This method of curing deficiencies in a reasoned opinion would be rendered nugatory if the ICC follows the ICTY cases which characterize such errors as errors of law. Hopefully the ICC Appeals Chamber will see such errors for what they really are—errors of fact that have been insufficiently explained in the reasoned opinion—and use the power of remand rather than making its own findings of fact from its inferior position to assess the evidence based only on the cold record.

²¹² Jenks, *supra* note 9, at 626–27.

²¹³ Theodor Meron, *Hudson Lecture: Anatomy of an International Criminal Tribunal*, 100 AM. SOC'Y INT'L L. PROC. 279, 285 (March 29–April 1, 2006) (observing that the “the length of proceedings, combined with the tribunals’ need to complete their work, largely prevents their Appeals Chambers from using remand as a means of curing errors”).

²¹⁴ Rome Statute of the International Criminal Court, art. 83(2)(b), July 17, 1998, 2187 U.N.T.S. 3.

TOO MANY COOKS IN THE KITCHEN: BATTLING CORPORATE CORRUPTION IN BRAZIL AND THE PROBLEMS WITH A DECENTRALIZED ENFORCEMENT MODEL

*Michelle A. Winters**

INTRODUCTION

In June of 2013, over one million Brazilians in one hundred cities took to the streets in what have become the largest protests in Brazil in two decades.¹ Rallies began in early June when the Movimento Passe Livre (“MPL”), or Free Fare Movement, led a small demonstration demanding the reversal of a recent increase in public transport fares in the city of São Paulo from R\$3 to R\$3.20.² The MPL returned in larger numbers in the following days, and the police responded with increased brutality: beating up demonstrators and bystanders alike, throwing tear gas into classrooms on university campuses, and wounding several journalists.³

Over the next two weeks, the protests steadily gained supporters rallying over a number of decentralized issues including the need for more public services; disgust over police brutality; anger over the cost of the 2014 World Cup; gay rights; the legalization of drugs; the end of compulsory voting; abortion rights; and most especially, corruption.⁴ It is telling that these protests coincided with final verdicts in

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¹ *Brazil Unrest: ‘Million’ Join Protests in 100 Cities*, BBC NEWS (June 21, 2013, 12:17AM), <http://www.bbc.co.uk/news/world-latin-america-22992410>.

² *See Brazilian President Dilma Rousseff ‘Proud’ of Protests*, BBC NEWS (June 18, 2013, 8:15PM), <http://www.bbc.com/news/world-latin-america-22961874> (discussing the circumstances surrounding Brazil’s mass protests).

³ *See generally* Robert Mackey, *Protests Expand in Brazil, Fueled by Video of Police Brutality*, N.Y. TIMES (June 18, 2013), http://thelede.blogs.nytimes.com/2013/06/18/protests-expand-in-brazil-fueled-by-video-of-police-brutality/?_r=0; *More than 50 Journalists Hurt in Brazil Protests*, THE DAILY STAR (June 29, 2013), <http://www.dailystar.com.lb/News/International/2013/Jun-29/222002-more-than-50-journalists-hurt-in-brazil-protests.ashx#axzz2nwwyIDfA> (chronicling the violent actions taken by Brazilian police during the mass protests).

⁴ *See* Gary Duffy, *Brazil’s Leaders Caught Out by Mass Protests*, BBC NEWS (June 17, 2013), <http://www.bbc.com/news/world-latin-america-22947466> (listing the

Brazil's biggest political corruption trial in history, the *Mensalão* (Big Monthly Payment Scandal).⁵ Indeed, a large percentage of protestors declared that they were focused on “ending the perceived impunity and lack of accountability of political leaders.”⁶ Under fierce political pressure and facing historically low satisfaction ratings, in August of 2013, Brazil's President Dilma Rousseff signed law number 12.846/2013,⁷ popularly referred to as the Clean Company Law (*Lei da empresa limpa*) or Brazilian Anti-Corruption Act (“BACA”).⁸

wealth of causes that protestors cited as their reasons for attending nationwide demonstrations).

⁵ See Anderson Antunes, *The Cost of Corruption In Brazil Could Be Up To \$53 Billion Just This Year Alone*, FORBES (Nov. 28, 2013), <http://www.forbes.com/sites/andersonantunes/2013/11/28/the-cost-of-corruption-in-brazil-could-be-up-to-53-billion-just-this-year-alone/> (reporting that Brazil's Attorney General referred to the *Mensalão* as “the most daring and outrageous corruption scheme and embezzlement of public funds ever seen in Brazil”).

⁶ See John Lyons, Matthew Cowley & Paulo Trevisani, *Brazil Court Allows Corruption Case Appeals*, WALL ST. J. (Sept. 18, 2013), <http://online.wsj.com/news/articles/SB10001424127887323808204579083571863389380> (noting that the Brazilian Supreme Court's decision to hear appeals for twelve *Mensalão* defendants “could send shock waves through [the] country”). See also *Brazil Unrest*, *supra* note 1 (discussing the rallying cry of many of the protestors).

⁷ Decreto No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.) [hereinafter *Lei Anti-Corrupção*].

⁸ *Accord Senra Gabriel Pereira da Cunha, Lei Anticorrupção é Resposta aos Protestos*, CUNHAPEREIRA.ADV.BR (Aug. 20, 2013), <http://www.cunhapereira.adv.br/noticias/lei-anticorruptao-resposta-protestos/> (arguing that the passage of Brazil's new anti-corruption was a direct result of the protests in the summer of 2013). In fact, as a result of the public's disgust, other anti-corruption measures are being debated by the national legislature. The Senate recently approved the Draft Law 5.900/13, which makes corruption a heinous crime, and increased the minimum prison sentence from two to four years for persons guilty of this crime, in addition to adding travel restrictions that could seriously affect the ability of executives and companies to conduct their operations when facing trial for such crimes. The legislation, which still needs to be approved by the House of Representatives, would apply to public officials who taken advantage of their position to obtain benefits or divert public resources. See *A Lei Anticorrupção Empresarial Brasileira – Novos Riscos para Empresas que Operam no Brasil*, JONESDAY.COM, <http://www.jonesday.com/pt/a-lei-anticorruptao-empresarial-brasileira—novos-riscos-para-empresas-que-operam-no-brasil-08-16-2013/> (last visited Dec. 20, 2013) [hereinafter *Novos Riscos*].

I. A CULTURE OF CORRUPTION? THE *MENSALÃO* SCANDAL AND BRAZIL'S DECISION TO BECOME "TOUGH" ON CORRUPTION

Some have argued that corruption in Brazil is actually a product of Brazilian culture.⁹ *Jeitinho brasileiro* is a frequently used expression that refers to circumventing rules and social conventions using emotional resources, blackmail, family ties, promises, rewards, or money to obtain favors or to get an advantage.¹⁰ While *jeitinho brasileiro* typically manifests "innocently enough" in small transactions like cash payments to police officers in order to avoid speeding tickets, it can also manifest on a larger scale as corporate or political corruption.

A. *Corruption by the Numbers*

Brazil has long been party to the United Nations Convention against Corruption, the Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Anti-Bribery Convention"), and the Inter-American Convention against Corruption.¹¹ Yet, most observers would say that the country has to this point inadequately tackled bribery in international business because of a lack of enforcement.¹² Although the country ratified the OECD Anti-Bribery Convention, in the twelve years following ratification, officials have pursued only one case and two investigations.¹³ The true reality of corruption in Brazil is much more problematic than those three isolated cases. From 2003 to 2012, the federal auditor's office fired nearly 4000 employees from public service; most firings stemmed from allega-

⁹ E.g., Lucas Gabriel Marins, *Jeitinho Brasileiro Facilita Corrupção Dizem Especialistas*, GAZETA DO POVO (June 11, 2013), <http://www.gazetadopovo.com.br/economia/conteudo.phtml?id=1423013&tit=Jeitinho-brasileiro-facilita-corrupcao-dizem-especialistas> [hereinafter *Jeitinho brasileiro facilita*] (arguing that corruption is the result of a cultural phenomenon); Mark Vasconcellos, *Lei Anticorrupção Pode Frear Rerceirização no Brasil*, CONSULTOR JURIDICO (Feb. 7, 2014, 3:35PM), <http://www.conjur.com.br/2014-fev-07/leianticorrupcao-frear-terceirizacao-areas-lidam-governo> (noting that the culture of *jeitinho brasileiro* is hard to change).

¹⁰ STEPHANIE DENNISON & LISA SHAW, POPULAR CINEMA IN BRAZIL: 1930-2001, at 21-23 (2004); Robert M. Levine, *Jeitinho Land*, in BRAZILIAN LEGACIES 212, 212-14 (1997).

¹¹ See *United Nations Convention against Corruption Signature and Ratification Status as of 2 April 2014*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited July 26, 2014); *Brazil - OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/brazil-oecdanti-briberyconvention.htm> (last visited July 26, 2014).

¹² *Corruption by Country: Brazil*, TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/country#BRA> (last visited Dec. 21, 2013).

¹³ *Id.*

tions of corruption or dishonesty.¹⁴ According to a local media outlet, between 2008 and 2012, the number of individuals convicted for active and passive corruption increased by 133%.¹⁵ In 2013 alone, the federal police conducted 172 special operations to combat corruption, resulting in the arrests of 940 individuals.¹⁶ The monetary consequences of corruption are staggering: a March 2010 study conducted by the Federation of Industries of São Paulo found that each year Brazil loses 1.38% to 2.3% of its GDP (between \$26 billion and \$43 billion) to corruption.¹⁷ This study, however, does not consider the monies lost as a result of the decline in the country's ability to attract foreign investments.¹⁸

B. *The Mensalão Scandal and Political Corruption in Brazil*

Over the last six years, the *Mensalão* Scandal is the most representative example of corruption in Brazil.¹⁹ “*Mensalão*” refers to clandestine payments made by the Workers’ Party (*Partido Trabalhador* (“PT”)) to congressional allies in exchange for votes supporting its legislative agenda.²⁰ Originally discovered in 2005, “[t]he

¹⁴ *Id.*

¹⁵ Stella Dawson, *Brazil’s Corporate Bribery Law is a Step Forward but Faces Tough Scrutiny – OECD Official*, THOMSON REUTERS FOUNDATION (Nov. 22, 2013, 10:28PM), <http://www.trust.org/item/20131122222839-uqg1w/>.

¹⁶ Carlos Ayres, *How Brazil is Fighting Corruption*, FCPAMÉRICAS (Nov. 1, 2013), <http://fcpamericas.com/english/anti-money-laundering/brazil-fighting-corruption/#sthash.1R2WWu0G.dpuf>.

¹⁷ Frederick T. Stocker, *Anti-Corruption Compliance in Brazil—Addressing a Daunting Challenge*, MFRS ALLIANCE FOR PRODUCTIVITY AND INNOVATION 3 (March 2012), https://www.mapi.net/system/files/PA106_1.pdf. Brazil currently occupies 69th place in the corruption rankings by the Transparency & Anti-Corruption Initiatives of the United Nations. The organization estimates that corruption costs Brazil about R\$85 billion each year. See *Jeitinho brasileiro facilita*, *supra* note 9.

¹⁸ See generally Sidney Vianna, *Anti-corruption and Doing Business in Brazil*, ETHIC INTELLIGENCE (Jan. 10, 2012), <http://ethic-intelligence.com/experts/89-brazil-anti-corruption-trends> (arguing that corruption negatively impacts Brazil’s ability to attract foreign investments); *Jeitinho brasileiro facilita*, *supra* note 9 (arguing that to attract foreign investors and make the country more competitive, Brazil and specifically its corporations must show that they are honest).

¹⁹ See Antenor Madruga & Ana Maria Belotto, *Anti-Corruption Enforcement and Policies in Brazil: Changing Times Bring a Host of Development*, 4 DEBEVOISE & PLIMPTON FCPA UPDATE, no. 8, Mar. 2013, at 11, 13 (calling the ruling in the *Mensalão* case “the most emblematic law enforcement event in current Brazilian history”).

²⁰ See *O que foi o mensalão?*, MINISTÉRIO PÚBLICO FEDERAL (Aug. 9, 2012), <http://www.turminha.mpf.mp.br/honestidade/corruptao/mensalao/entenda-o-caso/o-que-foi-o-mensalao> (describing the scandal in a more simplified manner to educate Brazilian youths).

scandal was one of many that broke in quick succession, with others involving allegations that the state-run postal system accepted bribes for contracts and that the PT had been extorting money from illegal-betting rings in Rio de Janeiro.”²¹ The biggest name among the accused was José Dirceu, Chief of Staff under then-president Luiz Inácio “Lula” da Silva until he was forced to step down because of the scandal.²² *Mensaleiros*, as they are called, have been found guilty of crimes including bribery, money laundering, misuse of public funds, and conspiracy.²³

C. Corruption in the Private Sector

The presence of a wide range of regulatory agencies in Brazil ties corporate and political corruption together and can increase the likelihood that public officials will demand bribes.²⁴ Public procurement, and the bidding process associated with it, is one of the most commonly recognized arenas for corruption.²⁵ Nevertheless, Brazil’s extremely complex tax system is also prone to corruption.²⁶ Allegedly, tax authorities frequently request bribes “to relax assessments and inspections, to refrain from pursuing instances of alleged fraud, and for giving tax obligation reduction advice.”²⁷ The problem is so pervasive that Transparência Brasil reported in a 2003 study that more than half of Brazilian businesses received requests for bribes from tax authorities.²⁸ According to a 2009 survey, almost 70% of Brazilian business owners and top managers identify corruption as a major constraint in the corporate sector.²⁹

²¹ H.J., *What is Brazil’s “mensalão”?*, *ECONOMIST* (Nov. 18, 2013, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2013/11/economist-explains-14>. See generally *Petição* (Federal Complaint), *Ação Penal N° 470-DF*, available at http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/AP_470_Peticao_n_382072011.pdf [hereinafter *Federal Complaint*] (enumerating each of the defendants and the charges against them).

²² See Madruga & Belotto, *supra* note 19, at 11.

²³ See *Federal Complaint*, *supra* note 21, at 2. See generally *id.*; *Quadro de Reus (Table of Charges)*, MINISTÉRIO PÚBLICO FEDERAL, available at http://www.turminha.mpf.mp.br/quadro_de_reus.pdf (containing the federal charges against each individual *Mensaleiro*).

²⁴ *Corruption by Country: Brazil*, *supra* note 13.

²⁵ See Stocker, *supra* note 17, at 3 (discussing the most corrupt sectors of Brazilian business).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Brazil Data—World Bank Enterprise Survey of Business Managers*, WORLD BANK GROUP, <http://www.enterprisesurveys.org/Data/ExploreEconomies/2009/brazil>, (last visited July 28, 2014).

Previously, Brazilian anti-corruption laws imposed liability on individuals regardless of whether they acted on behalf of, or were induced by, corporations.³⁰ Corporations, however, faced no such criminal or civil liability.³¹ The measures in place were often seen as ineffective.³²

D. A Look at the Substantive Standards Behind BACA and Combating Corruption in Brazil

BACA took effect on January 29, 2014, 180 days after its publication in the Federal Official Gazette of Brazil (*Diário Oficial da União*).³³ The Act, drawing from foreign legislation like the United States' Foreign Corrupt Practices Act ("FCPA") and the United Kingdom's Anti-Bribery Act, will bring important and immediate consequences for businesses operating in Brazil.³⁴ The Act imposes civil and administrative liability for Brazilian companies for acts of domestic and international corruption.³⁵ Foreign corporations that operate in Brazil can also be held liable for acts of corruption committed in Brazil.³⁶ This new concept of corporate liability builds on the existing

³⁰ See Stocker, *supra* note 17, at 10 (stating that unlike common law jurisdictions, civil law systems generally do not apply criminal liability to legal as opposed to natural persons).

³¹ See *id.*

³² See Stocker, *supra* note 17, at 10, 11.

³³ Agência Brasil, *Lei Anticorrupção Empresarial entra em Vigor sem Decreto de Regulamentação*, CORREIO BRAZILENSE (Jan. 29, 2014), http://www.correio braziliense.com.br/app/noticia/politica/2014/01/29/interna_politica,410224/lei-anti-corruptcao-empresarial-entra-em-vigor-sem-decreto-de-regulamentacao.shtml.

³⁴ See generally Marcelo Figueiredo, *Impressões Preliminares sobre a Lei Anticorrupção*, GGN (Dec. 11, 2013), <http://jornalggn.com.br/noticia/impressoes-preliminares-sobre-a-lei-anticorrupcao> (giving initial impressions regarding the Anti-Corruption Act).

³⁵ Decreto No. 12,846, de 1 de Agosto de 2013, Código Civil [C.C.] (Brazilian Civil Code) de 02.08.2013 art. 2 [hereinafter Decreto No. 12,846] ("A corporate personhood shall be strictly liable, in the civil and administrative sectors, for harmful acts specified in this Act."); see also André Marques Gilberto, *Brazil's Anti-corruption "Clean Company Law" goes into Effect 1/24/14—Get Ready to Comply*, DLA PIPER.COM (Aug. 12, 2013), <http://www.dlapiper.com/brazil-anti-corruption-clean-company-law-goes-into-effect-1-24-14-get-ready-to-comply/> (describing the applicability of the Anti-Corruption Law).

³⁶ Decreto No. 12,846 art. 1 (Braz.) ("The provisions of this Act apply to . . . foreign corporations that have their headquarters, a branch office, or representation in Brazilian territory, . . . even temporarily."); see also Felipe Berer et al., *Brazilian FCPA-Equivalent Signed Into Law*, AKERMAN (Aug. 5, 2013), <http://www.akerman.com/documents/res.asp?id=1745> (discussing the widespread applicability of the Anti-Corruption Act).

criminal liability of individuals who bribe foreign and domestic public officials.³⁷

Prohibited acts: Article 5 of the Brazilian Anti-Corruption Act prohibits (i) promising, offering, or giving, directly or indirectly, an undue advantage to a public official or third person related to him or her; (ii) financing, funding, sponsoring, or in any way subsidizing the practice of illicit acts under the law; (iii) using an intermediary legal entity or individuals to conceal or disguise its real interests or the identity of the beneficiaries of the wrongdoings; and (iv) hindering the investigation or audit of a government agency, a public entity, or its agents.³⁸ The Act, however, covers more than just corruption. Significant parts of BACA's prohibited acts address illegal conduct related to public tenders and public contracting.³⁹ The prohibited conduct is deliberately broad and includes not only the "actual payment or provision of any undue advantage to any public official or third party, but also the acts of offering, promising, sponsoring, or otherwise supporting such activity."⁴⁰

Strict liability: Article 2 of the Act, in contrast with its U.S. equivalent, the FCPA, holds companies strictly liable for prohibited activities, meaning that the government need not show any intent on the part of the corporate actor.⁴¹ Prosecutors need only prove that an illegal act occurred and that it benefited the company.⁴²

Sanctions: The sanctions set forth in the Anti-Corruption Act include administrative sanctions (which a public administration can apply directly) and judicial sanctions (which judges apply).⁴³ Article 6

³⁷ Decreto No. 12,846 art. 3 § 1-2 (Braz.) ("Corporate liability does not preclude individual liability of the corporation's directors or officers or any natural person, accessory, or participant in the illegal activity."); see also *Novos Riscos, supra* note 8 (discussing that corporate liability is in addition to the existing criminal liability of individuals who bribe foreign public officials and Brazilian).

³⁸ Decreto No. 12,846 art. 5 (I)-(IV) (Braz.); see also Jonathan R. Barr, et al., *The FCPA on Steroids: Brazil Ups the Ante in Fighting Corporate Corruption*, BAKERLAW.COM (Aug. 12, 2013), <http://www.bakerlaw.com/alerts/the-fcpa-on-steroids-brazil-ups-the-ante-in-fighting-corporate-corruption-8-12-2013/> (enumerating the prohibited acts under the Anti-Corruption Act).

³⁹ See generally Decreto No. 12,846 art. 5 (IV)(a)-(g) (Braz.).

⁴⁰ Marcelo dos Santos Barradas Correia et al., *A Comparison of the New Brazilian Anticorruption Law, the FCPA, and the UK Bribery Act*, ASS'N OF CORPORATE COUNSEL, <http://www.acc.com/legalresources/quickcounsel/cnbalfuba.cfm> (last visited Nov. 14, 2013).

⁴¹ Decreto No. 12,846 art. 2 (Braz.); see also Barr, *supra* note 38 (comparing the text of the Anti-Corruption Act with its FCPA counterpart).

⁴² See Gilberto, *supra* note 35 (discussing the strict liability nature of the Act).

⁴³ See Decreto No. 12,846 arts. 6 & 19 (Braz.) (outlining the administrative and judicial sanctions contemplated under the Act).

of the Act outlines the administrative sanctions which are: a) fines in the amounts of 0.1% to 20% of the gross revenue of the legal entity; and b) publication of the condemnatory decision.⁴⁴ Judicial sanctions under Article 19 include: a) loss of assets, rights, or valuables directly or indirectly related to the wrongdoing; b) partial suspension or interdiction of activities; c) compulsory dissolution of the legal entity; and d) prohibition from receipt of incentives and public funding.⁴⁵ In all cases, the legal entities also have to pay reparations for damages caused.⁴⁶

Leniency agreements: In spite of its stiff penalties, Chapter 5 of BACA rewards self-disclosure and full cooperation with government investigations and proceedings. An agency may allow a company to enter into a leniency agreement, which may confer the following benefits: (i) up to a two-thirds reduction in fines; (ii) a waiver of debarment; and (iii) avoidance of government publication of its decision regarding the conduct.⁴⁷ Regardless of the conditions of the leniency agreement established by the governing agency, companies must provide full restitution for damages caused.⁴⁸

Enforcement: As discussed above, the law provides for civil and administrative penalties.⁴⁹ The Act specifically charges several governmental agencies, i.e. the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica*), the Ministry of

⁴⁴ Decreto No. 12,846 art. 6(I)-(II) (Braz.); see also Carlos Ayres, *How Brazil's New Anti-Bribery Law Compares to the FCPA—Part 1*, FCPAMÉRICAS (Aug. 6, 2013), <http://fcpamericas.com/english/brazil/how-brazils-new-anti-bribery-law-compares-to-the-fcpa-part-1/#sthash.9NiNcniO.dpuf>.

⁴⁵ See Decreto No. 12,846 art. 19 (Braz.).

⁴⁶ See *id.* art. 6 § 3°. President Rousseff vetoed some of the more favorable provisions approved by the Brazilian Congress, according to which: (i) administrative penalties would be limited to the total value of the contract object of the corruption offense; (ii) some sanctions were conditioned to proof of corrupt intention; (iii) the active participation of the public official to the act could serve as mitigating factor. See Rita Motta & Steven M. Bauer, *Brazilian Anti-Corruption Law: 7 Implications and Challenges for Companies Doing Business in Brazil*, LATHAM & WATKINS CLIENT ALERT COMMENTARY, Jan. 6, 2014 No. 1629, at 3 n.7; Andy Spalding, *Brazil's President Dilma Takes a Stand*, FCPA BLOG (Aug. 4, 2013, 8:32 PM), <http://www.fcpablog.com/blog/2013/8/4/brazils-president-dilma-takes-a-stand.html>.

⁴⁷ Decreto No. 12,846 art. 16 (Braz.); see Barr, *supra* note 38 (describing possible sanctions imposed on companies found in violation of the Act).

⁴⁸ Decreto No. 12,846 art. 16 § 3 (Braz.) (“The leniency agreement does not exempt the corporate entity from its obligation to make full reparation for the damage caused.”); see also Matteson Ellis, *The Problem with Leniency Agreements in Brazil*, FCPAMÉRICAS (Jan. 7, 2014), <http://fcpamericas.com/english/brazil/problem-leniency-agreements-brazil/> (discussing the fundamentals of leniency agreements under BACA).

⁴⁹ See *supra* note 34 and accompanying text.

Justice (*Ministério da Justiça*), and the Ministry of Finance (*Ministério da Fazenda*), with the power to prosecute violations and impose applicable administrative sanctions.⁵⁰ Additionally, the highest authorities in the executive, legislative, and judicial branches at the federal, state, and municipal levels may initiate the investigation or prosecution of alleged violators at the agencies' discretion or based on petitions filed with the government.⁵¹ These agencies will be authorized to grant clemency or give reductions of any penalties.⁵² The sheer number of agencies and government entities who may prosecute corporations will undoubtedly make for inconsistent applications of law, real challenges to cooperation between the agencies, and a lack of oversight, which might lead to further corruption. For now, the Act does not provide substantive standards for these bodies to comply with its regulations. This article explores the problems associated with Brazil's diffuse enforcement model and recommends both legislative and administrative changes that will improve efficiency and effectiveness.

II. DECENTRALIZED ENFORCEMENT: THE PRIMARY FAILURE OF BACA

As previously mentioned, one of the most problematic elements of the highly touted Brazilian Anti-Corruption Act is its delegation to essentially any entity of Brazil's public administration (at the federal, state, and municipal levels) of the power to investigate possible illegal acts.⁵³ While the Act specifically states that the Comptroller General (*Controladoria-Geral da União* ("CGU")) will investigate matters involving the executive federal power for acts committed against the Brazilian public administration, enforcement of BACA will be up to the highest authority of the executive, legislative, or judicial body affected by the conduct, and the Public Prosecutor's Office in cases of civil liability.⁵⁴ This means that hundreds of federal government agencies, including the Brazilian Institute of Environment and Renewable

⁵⁰ See Decreto No. 12,846 art. 29 (Braz.).

⁵¹ See *id.* art. 8 ("The initiation of administrative proceedings and prosecution of corporate entities for determination of liability rest with the head of each agency or entity of the Executive, Legislative and Judicial Branch.").

⁵² See Juan Carlos Varela et al., *Brazil: Brazil's New Anti-Corruption Law: What Every Multinational Employer Should Know*, MONDAQ (Aug. 28, 2013), <http://www.mondaq.com/x/260016/White+Collar+Crime+Fraud/Brazils+New+AntiCorruption+Law+What+Every+Multinational+Employer+Should+Know>.

⁵³ Accord Marques Gilberto, *supra* note 35 (calling the Act's delegation of powers to essentially any entity of Brazil's public administration a pressing concern).

⁵⁴ See Decreto No. 12,846 arts. 8 & 19 (Braz.); see also Carlos Ayres, *An Extraordinary Number of Enforcement Authorities Under Brazil's New Anti-Bribery Law . . . and the Potential Negative Consequences*, FCPÁMERICAS (Jan. 10, 2014) ("Brazil has approximately 5,700 municipalities, many of which have very few people and limited resources. As a result, under the new law an extraordinary number of au-

Natural Resources (“IBAMA”), the National Health Surveillance Agency (“ANVISA”), the National Agency of Petroleum, Natural Gas, and Biofuels (“ANP”), and many others, may seek accountability of companies for acts including “not only bribery, but also fraud in public procurement settings, bid rigging, and other acts committed against public administrations” under the Act.⁵⁵ What’s more, enforcement of the BACA will be decentralized at the state or local level for those matters not involving a foreign public official or federal agency.⁵⁶ Legislators believed the diffuse enforcement model would, in practice, lead to swift punishment for violators.⁵⁷

The diffuse enforcement model is consistent with previous Brazilian anti-corruption measures; however it stands in sharp contrast with both U.S. enforcement of the FCPA and with U.K. enforcement of the Anti-Bribery Act.⁵⁸ In the United States, enforcement authority is delegated solely to the Securities and Exchange Commission and the Department of Justice.⁵⁹ These two agencies work closely together and, for the most part, “have developed a uniform and consistent approach to the enforcement of the FCPA.”⁶⁰ In the United Kingdom, the Serious Fraud Office is the law enforcement authority primarily re-

thorities – at the federal, state, and municipal levels – can investigate wrongdoing and apply administrative sanctions for the acts prohibited by the new law.”).

⁵⁵ Ayres, *supra* note 54; see *Novos Riscos*, *supra* note 8.

⁵⁶ See Sheppard Mullin Richter & Hampton LLP, *The Brazilian Anti-Corruption Act of 2013 (Act #12846)*, MONDAQ (Feb. 16, 2014), <http://www.mondaq.com/x/292696/international+trade+investment/The+Brazillian+AntiCorruption+Act+of+2013+Act+12846>.

⁵⁷ Luísa Melo, *Lei Anticorrupção Já Vale; Muitas Podem Ser Milionárias*, EXAME (Jan. 29, 2014), <http://exame.abril.com.br/negocios/noticias/a-lei-anticorrupcao-esta-em-vigor-sua-empresa-se-preparou> (according to Sérgio Seabra, Secretary of Transparency and Prevention of Corruption at CGU).

⁵⁸ Simeon M. Kriesberg & Bruno Werneck, *Anti-Corruption Compliance in Brazil: The Challenges Facing US Companies*, MAYER BROWN LLP (Dec. 8, 2010), p. 23, http://www.mayerbrown.com/files/Event/ba843f1f-ad08-4caa-b364-e4be30ef2f18/Presentation/EventAttachment/d904060a-6f0b-4c9b-8308-b6ddc378506c/12-08-10_Global_Strategies_Webinar_Brazil.pdf (describing the multiple governmental agencies responsible for enforcing anti-corruption measures including the Office of the Comptroller General’s Corruption Prevention and Strategic Information Secretariat (CGU-SPCI), the Brazilian Court of Audit (TCU), the Brazilian Central Bank (BC), and the Brazilian Securities and Exchange Commission (CVM)).

⁵⁹ See *The Foreign Corrupt Practices Act*, SMART BUSINESS ONLINE (Dec. 26, 2007), <http://www.sbnonline.com/component/k2/11-indianapolis-editions/17516#.UzC1461dVbw> (reporting that DOJ enforces all criminal provisions of the FCPA as well as some civil provisions, while SEC is responsible for pursuing civil enforcement of the FCPA against issuers of securities).

⁶⁰ See dos Santos Barradas Correia, *supra* note 40.

sponsible for investigating and prosecuting cases relating to corruption under the Anti-Bribery Act.⁶¹

This article seeks to identify and address many of the potential pitfalls of the diffuse enforcement model.

A. *Lack of Uniformity in the Application and Interpretation of BACA*

Unfortunately, the interpretation and application of the law will occur unpredictably and inconsistently, as each administrative agency will follow different procedures and will be subject to the influence of different public policies.⁶² This is a major problem because certain aspects of the law (e.g., credit for compliance programs, leniency programs in bribery cases) are new in Brazil, and agencies have no guidelines to follow for instituting these procedures.⁶³

One specific problem is the possibility of contrasting regulations in administrative actions (adjudicated before the judiciary) versus civil actions (adjudicated before the affected administrative agency) brought under BACA.⁶⁴ Another is that different municipalities may apply the law to similar facts in different ways.⁶⁵ “With so many different enforcement authorities interpreting the law and making independent decisions, incoherent outcomes and bad precedents could develop.”⁶⁶ This would result in a greater level of uncertainty for companies.⁶⁷

Corruption cases are complex.⁶⁸ Without these doctrines in place and often without proper technical knowledge or resources, indi-

⁶¹ *See id.*

⁶² *See* Ayres, *supra* note 54 (“Authorities in localities with little-to-no experience in dealing with matters addressed in the new law will be able to bring cases against any company doing business within their jurisdictions. This lack of specialized expertise could have negative consequences, especially with respect to the proper application of the penalties (i.e., fines of up 20% of a company’s gross earnings in the previous fiscal year and publication of the condemnatory decision) and the nuanced evaluation of compliance programs.”); Katna Baran, *Órgãos Públicos de Controle Discutem Efectividade da lei Anticorrupção*, GAZETA DO POVO (Oct. 17, 2013 4:28PM), <http://www.gazetadopovo.com.br/vidapublica/conteudo.phtml?id=1417736> (citing the juxtaposition of the standards for administrative proceedings and civil proceedings as a potential problem).

⁶³ *See* Ayres, *supra* note 54.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Because of the complexity of corruption, the OECD specifically requires that “complaints of bribery of foreign public officials . . . be seriously investigated by competent authorities,” and “governments of parties to the Convention should pro-

viduals will have the power to make decisions regarding the culpability of a corporation, and they could potentially “inflict irreparable harm to the image of [an innocent] company.”⁶⁹ Even with a standard set of guidelines, there is concern that the small municipalities in particular may have difficulty applying this sophisticated law.⁷⁰

Recognizing the potential danger of multiple interpretations of BACA, Jorge Hage, the current Inspector General of the CGU, held a meeting with several Brazilian law firms and corporations to discuss ways to remedy the Act’s shortcomings.⁷¹ CGU will release draft legislation that gives guidance to regulatory agencies bringing charges against corporations.⁷² Nonetheless, many Brazilian firms and corporations expressed concern about the scope of CGU’s regulatory decree, particularly whether it would apply to state, municipal, and other branches of government in addition to federal agencies.⁷³ Although the decree will apply universally, each state and county can make its own rules, as the decree is only intended to create parameters for understanding BACA.⁷⁴ Accordingly, the risk for inconsistent applications

vide adequate resources to allow effective prosecution of such bribery.” Sonia Zaheer, *Brazil’s Landmark Clean Companies Act: Comparison to The OECD Anti-Bribery Conventions and Issues*, PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 44 (unpublished comment), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2417155 (citing OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Official Commentaries 27, Dec. 17, 1997, 37 I.L.M. 1).

⁶⁹ Senra Pereira da Cunha, *supra* note 8.

⁷⁰ *E.g.*, *Nova lei Brasileira Anticorrupção traz Temor de Abusos*, ASMETRO-SN (Jan. 10, 2014), <http://www.asmetro.org.br/portal/21-clipping/2696-nova-lei-brasileira-anticorruptao-traz-temor-de-abusos> (citing small Brazilian municipalities that have little infrastructure as a threat because they may begin to see the Act as a source of revenue); *cf.* J.P., *Brazil’s New Anti-corruption Law: Hard to Read*, ECONOMIST (Jan. 29, 2014 9:40PM), <http://www.economist.com/blogs/schumpeter/2014/01/brazils-new-anti-corruption-law> [hereinafter *Hard to Read*] (doubting the effectiveness of a set of federal guidelines because the country’s 27 states and 5,570 municipalities have the right to interpret the law as they see fit).

⁷¹ CGU, in English, the Office of the Inspector General of the Union, is an agency of the executive branch, responsible for internal control and corrective systems, as well as for overseeing the federal ombudsman.

⁷² *See Reunião no Instituto Ethos Debate Regulamentação da lei Anticorrupção Empresarial*, JOGOS LIMPOS, <http://www.jogoslimpos.org.br/destaques/reuniao-instituto-ethos-debate-regulamentacao-da-lei-anticorruptao-empresarial/> (last visited Dec. 20, 2013) [hereinafter *Reunião no Instituto Ethos*].

⁷³ *Id.*

⁷⁴ *Id.*; accord Ayres, *supra* note 54 (“[T]here are already regulatory developments at the state level – the State of Tocantins has issued regulations and the State of São Paulo is also working on regulations to minimize the side effects of the decentralized approach.”).

and interpretations remains because state and local governments will maintain some flexibility to make rules and regulations.⁷⁵

B. *Lack of Efficiency*

A lack of uniformity is not the only problem with BACA's decentralized enforcement model. With so many agencies potentially seeking sanctions against the same corrupt corporations for a single transaction, there is great potential for inefficiency.

1. Coordination Poses a Challenge

Properly and effectively enforcing BACA will require substantial cooperation between government agencies.⁷⁶ For example, the Federal Prosecutor's Office (*Ministério Público*) and Courts of Auditors (*Tribunais de Contas*) must work together to jointly prosecute actions for civil liability.⁷⁷ Such cooperation poses a serious challenge, however. Potentially hundreds of agencies across the federal, state, and local level may need to coordinate their efforts to prosecute corrupt corporations. Without a network of trained staff and technological support, which are not currently in place due to the novelty of these anti-corruption measures, such cooperation could be impossible, and enforcement would be slow.⁷⁸

Nonetheless, integration between the various regulatory agencies is feasible.⁷⁹ The Control Network of Public Management (*Rede de Controle da Gestão Públicas* ("RCGP")), founded in 2009, is increasing the amount of public data that may be shared, thereby promoting the

⁷⁵ *But see* Alex Rodrigues, *Lei Anticorrupção Empresarial Entra em Vigor, Mas Falta Regulamentação*, AGÊNCIA BRASIL – EBC (Jan. 29, 2014 11:53AM), <http://agenciabrasil.ebc.com.br/geral/noticia/2014-01/lei-anticorruptao-empresarial-entra-em-vigor-mas-falta-regulamentacao> (stating that many state and local governments are eagerly awaiting the CGU's regulations as they will form the basis for local regulations, and arguing that all governmental agencies are interested in harmonious enforcement in order to avoid confusion and legal uncertainty).

⁷⁶ *See Reunião no Instituto Ethos*, *supra* note 72.

⁷⁷ *See Baran*, *supra* note 62; *see also* Jorge Hage, *The Brazilian Experience in Fighting Corruption*, CGU, (Oct. 2013), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CDMQFjAD&url=https%3A%2F%2Fwww.canninghouse.org%2Fmedia-centre%2Fdocuments%3Fdownload%3D19%3Abrasil-s-comptroller-general-minister-jorge-hage-on-brazil-s-experience-tackling-corruption-part-1&ei=> (listing more than ten agencies with anticorruption mandates that may potentially need to partner with the CGU for effective enforcement).

⁷⁸ *See* Carlos Henrique Abrão, *Lei Anticorrupção Empresarial*, BRASIL247 (Nov. 11, 2013), <http://www.brasil247.com/pt/247/artigos/120430/Lei-anticorrupt%C3%A7%C3%A3o-empresarial.htm> (describing the technological challenges surrounding the decentralized enforcement approach).

⁷⁹ *See Baran*, *supra* note 62.

integration of intelligence agencies and training employees between the various institutions.⁸⁰

2. Stepping on Toes

Another issue with BACA is that the law fails to instruct agencies regarding how to proceed in the event that a corrupt transaction affects multiple branches of government, more than one level of government, or officials from different agencies, as the law provides several authorities in Brazil with jurisdiction to enforce its provisions.⁸¹ This creates many unanswered questions. For example, if a corporation attempts to bribe government officials at the state and federal level in a single transaction, who is responsible for seeking administrative remedies? If both the state and federal executive branches were affected, it would seem that both could initiate administrative proceedings against the responsible corporation. There is no clear authority that can proceed with a single prosecution against the corrupt corporation.

Alternatively, what happens if a corporation attempts to bribe officials in two different federal agencies? BACA gives the CGU concurrent power to conduct administrative proceedings for corruption involving the federal executive power.⁸² This seems to mean that, in the event that two federal agencies are affected, both agencies have jurisdiction and CGU could intervene at any time. This might further contribute to inefficiency if CGU takes over proceedings while the other agencies have already invested time and manpower investigating the improper behavior.

BACA also gives the “highest authority of each public body or entity” the ability to enter into leniency agreements.⁸³ This raises various questions related to bribery violations that touch multiple jurisdictions. For instance, will companies have to enter into different leniency agreements with agencies in the state of São Paulo and the state of Rio de Janeiro?⁸⁴ Moreover, it is unclear whether a company that settles with the Office of the Federal Comptroller General can force other entities to honor the settlement.⁸⁵

⁸⁰ *Id.*

⁸¹ See generally Ellis, *supra* note 48 (discussing the multiple authorities assigned with prosecuting under BACA).

⁸² See Decreto No. 12,846 art. 8 § 2 (Braz.).

⁸³ Ellis, *supra* note 48.

⁸⁴ *Id.*

⁸⁵ *Id.*

C. *Conflicts of Interest and the Potential for Greater Corruption*

A final source of potential controversy is the fact that the highest authority within each public body will preside over the proceedings concerning alleged corrupt conduct inside said body.⁸⁶ Politicians or commissioned officers normally occupy these posts.⁸⁷ Remember that for an administrative investigation, the affected agency will bring charges against the corporation allegedly in violation of BACA, and then the Chief Minister or President of that agency will adjudicate and make a final decision based on those allegations.⁸⁸ This could give rise to conflicts of interest and lead to situations of abuse, arbitrariness, and even more corruption.⁸⁹ Companies have voiced a number of specific situations where government agencies could abuse their newfound power.

In some smaller agencies, entities, or municipalities, the highest authority may have played a role in or had knowledge of the alleged illegal action or transaction under investigation.⁹⁰ Moreover, enforcement authorities could have professional or personal relationships with implicated individuals within their agency.⁹¹ This sharply increases the likelihood that corruption will not come to light because an agency has no incentive to “snitch” on itself. An agency head and her employees do, however, have incentive to conceal their involvement in alleged illegal conduct and to avoid further scandal.⁹²

In the alternative, the administrative process can be used to either punish or protect companies. Article 24 of BACA provides that the “fine and the loss of assets, rights or valuables applied” under the new law will be “allocated preferably to the public bodies or entities damaged.”⁹³ Local businesses and legal communities are worried that this feature may spur local agencies or entities (which often have budget constraints) to bring frivolous enforcement actions against companies in efforts to collect huge fines that could be allocated to their public coffers. Or, even more perverse, some agencies may use

⁸⁶ See *supra* note 49, and accompanying text.

⁸⁷ Elton Bezerra, *Advogados Alertam para Efeito Inverso de lei Anticorrupção*, CONJUR (Nov. 19, 2013), <http://www.conjur.com.br/2013-nov-19/especialistas-alertam-risco-lei-anticorrupcao-efeito-inverso>.

⁸⁸ *Para Especialista, Empresa é a Maior Interessada em Seguir a lei Anticorrupção*, MÍGALHAS (Sept. 9, 2013), <http://www.migalhas.com.br/Quentes/17,MI185896,21048Para+especialista+empresa+e+a+maior+interessada+em+seguir+a+lei>.

⁸⁹ Dos Santos Barradas Correia, *supra* note 39 (stating that the diffuse enforcement contemplated in the Act could give rise to conflicts of interest).

⁹⁰ Ayres, *supra* note 54.

⁹¹ *Id.*

⁹² Bezerra, *supra* note 87 (discussing possible illegal activities in municipal governments).

⁹³ See Ayres, *supra* note 54.

the law for further extortion or corruption by selectively applying the anti-corruption law to those organizations that do not pay bribes.⁹⁴

The most cited example centers on corrupt mayors who have an interest in harming construction companies to drive down bidding prices.⁹⁵ Specifically, government agents may blackmail businesses bidding in municipal tenders to pay backhanders.⁹⁶ The corporations must either pay the bribes or risk subjection to protracted legal proceedings.⁹⁷ If state and municipal governments do not follow clear federal guidance provided by CGU in how they implement the law, the result could be more corruption, not less.⁹⁸ The municipal level is further susceptible to this kind of corruption because the Act allows public officials and its agents to impose heavy fines depending on the current local political climate.⁹⁹ What this means is that a mayor up for re-election may become “tough on corruption” just long enough to regain his seat.¹⁰⁰

BACA increases the risk for any company relying on the government for funding or relying on the government as a major client.¹⁰¹ Yet, in an instance of impropriety, such as extortion by a government official, the affected corporation or business entity has no legal recourse. The decision of the administrative authority need not be supported by the opinion of a jury, and the legal standard for liability is remarkably low.¹⁰² Furthermore, there is no chance of appeal.¹⁰³

These problems are not exclusive to the administrative process established by BACA. On the civil liability side, driven by the Public Prosecutor, similar problems may exist. Under Brazilian law, the

⁹⁴ See *Siemens vê Risco de Abuso em lei Brasileira Anticorrupção*, EXAME (Jan. 1, 2014) <http://exame.abril.com.br/brasil/noticias/siemens-ve-risco-de-abuso-em-lei-brasileira-anticorruptao> [hereinafter *Siemens vê riscos*].

⁹⁵ See, e.g., Bezerra, *supra* note 87 (discussing possible illegal activities in municipal governments).

⁹⁶ See *Hard to Read*, *supra* note 70.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Sávio de Tarso, *Lei Anticorrupção Exige das Empresas Estrutura de Compliance*, INSTITUTO ETHOS (Nov. 6, 2013), http://www3.ethos.org.br/cedoc/lei-anticorruptao-exige-das-empresas-estrutura-de-compliance/#.UrM1R_b2PC9.

¹⁰⁰ *Id.*

¹⁰¹ See *Siemens vê riscos*, *supra* note 94.

¹⁰² See *id.*; see also *supra* note 34 and accompanying text.

¹⁰³ See Bezerra, *supra* note 87. *But see* Ayres, *supra* note 54 (“In the case of bribery of local officials at the Federal Executive branch level, the CGU has concurrent authority to initiate administrative proceedings against legal entities and to examine and correct proceedings handled by other authorities. While this may serve to minimize the negative impact of the decentralized approach at the Federal level, it may not be sufficient. The CGU is not expected (and probably would not have the resources) to intervene in all cases.”).

Prosecutor's Office is a functionally independent agency (or fourth branch of government).¹⁰⁴ Consequently, the process of decision-making is not subject to approval or control. Each prosecutor is free to begin an investigation into a corporation, with little chance of interference by a superior.¹⁰⁵ The citizenry's attention to issues related to corruption in Brazil, together with the independence of the Prosecutor's Office, may encourage prosecutors to prosecute cases against large companies under BACA simply because of societal pressures.¹⁰⁶ This could lead to inefficiency and frivolous investigations, and it could place a substantial burden on the judicial system.

The diffuse model of enforcement envisioned by BACA can lead to several problems. There are legitimate concerns about the efficiency of such a system, as well as the potential danger to corporations that will be subject to potentially hundreds of different sets of regulations and rules. Yet, perhaps most frightening is the possibility that the decentralization of enforcement under BACA could work against the objectives of the Act itself. The lack of oversight both for administrative agencies and the Public Prosecutor's Office might lead to further corruption as companies could be subject to pressures and attempts at blackmail in order to avoid sanctions from the very agencies that are bringing suit against them.¹⁰⁷

III. ELIMINATING THE RISKS: RECOMMENDATIONS FOR AN IMPROVED BACA

The success of the Brazilian Anti-Corruption Act and its power to reduce corruption in Brazil is entirely dependent on the agencies prosecuting and enforcing the new law.¹⁰⁸ Brazil has been a party for nearly two decades to three different international treaties battling corruption. Nevertheless, lacking adequate enforcement, the conventions did not address the problems. Perhaps prompted by last summer's protests, the *Mensalão* scandal, and a growing international discussion about corruption in the country, Brazil has taken significant steps to clean up both its corporate and political sectors. BACA

¹⁰⁴ See Mauro Figueiredo, *Ministério Público of Brazil: An Institution in Defense of Future Generations*, ELAW SPOTLIGHT (Aug. 7, 2013), <http://elawspotlight.wordpress.com/2013/08/07/ministerio-publico-of-brazil-an-institution-in-defense-of-future-generations/> (describing the role of the federal prosecutor in the Brazilian government).

¹⁰⁵ See *Novos Riscos*, *supra* note 8 (discussing the autonomy of the Public Prosecutor).

¹⁰⁶ *Id.*

¹⁰⁷ See Bezerra, *supra* note 87.

¹⁰⁸ *Contra Senra da Cunha Pereira*, *supra* note 8 ("A law, in and of itself, does not change anything. Corruption is a much more social than legal issue.").

can be extremely successful in curbing the perceived rampant corruption in Brazil, but only if agencies are willing and able to enforce it.

Ideally, the BACA should designate a specific government agency or group of agencies with responsibility for filing and pursuing both civil and administrative actions against corporate entities in violation of the Act.¹⁰⁹ Under this model, Brazil would enjoy two primary benefits: the designated agency or group of agencies would be able to develop the relevant technical expertise, and the business community would have consistent guidance, allowing corporations to implement effective internal compliance measures.¹¹⁰ To aid in its success, the legislature should consider amending the Act to delegate the enforcement of BACA to a set of specific agencies. It would seem that the CGU would be qualified to handle all prosecutions under BACA for the administrative liability, while the Public Prosecutor's Office could bring charges before the judicial branch under the civil liability section of BACA. The CGU already has exclusive responsibility over proceedings relating to foreign government officials, and has also been given the discretion to exercise jurisdiction over matters involving the federal executive branch.¹¹¹ Consolidating power into one or two agencies would lead to higher levels of efficiency, more uniform interpretations of BACA, and more consistently imposed sanctions. The CGU is uniquely qualified to handle anti-corruption litigation. As a central agency of the federal government, the CGU has a qualified technical team specialized in anti-corruption matters.¹¹² The agency has also been involved in discussions about BACA since the early stages of its legislative process, and therefore, it is familiar with the law's key features.¹¹³ Given the CGU's centralized approach and specialized expertise, one expects it to apply the law in a coherent way.¹¹⁴ In terms of efficiency, as a general rule, every CGU investigation must be concluded within a 180-day period.¹¹⁵ This would ensure that investigations and legal proceedings do not drag on, perhaps destroying the reputation and image of innocent corporations. Furthermore, affected agencies can coordinate with a single official at CGU, bringing all complaints in a single transaction rather than conducting multiple investigations and trying to contact each affected agency for information.

In lieu of this legislative change, there are several alternative solutions. First, Jorge Hage and the CGU, in their forthcoming draft

¹⁰⁹ *Accord dos Santos Barradas Correia, supra note 40.*

¹¹⁰ *Id.*

¹¹¹ *See Decreto No. 12,846 art. 8 § 2º, art. 9, & art. 16 § 10º.*

¹¹² *Ayres, supra note 54.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Dos Santos Barradas Correia, supra note 40.*

legislation, must set strict parameters to account for the lack of technical and legal criteria to render decisions under BACA. The Brazilian government should also incentivize reporting violations and provide protection to whistleblowers in order to encourage agency employees to report misconduct.¹¹⁶

Alternatively, Paragraph 1 of Article 8 of BACA provides for the delegation of powers, which could open the possibility that, through agreements, there could be some concentration of enforcement in a smaller number of agencies.¹¹⁷ This would hopefully allow those delegated agencies the opportunity to develop expertise in the complex field of corruption investigations and litigation and allow for more uniform decisions and impartial treatment of defendant-corporations.¹¹⁸

Finally, the legislature could create or denote an appellate body with the power to review all decisions from administrative agencies. This would provide the requisite oversight in order to reduce the risk of illegal “adjustments.”¹¹⁹

CONCLUSION

The Brazilian government has taken significant strides to combat corporate corruption. No matter their motives, BACA is a vital and sweeping piece of legislation that fights corruption by Brazilian and foreign entities. The penalties are stiff, and corporations doing business in Brazil have been quick to establish compliance divisions and began creating and implementing policies to avoid administrative and civil liability under BACA. Nevertheless, there is one particularly important shortcoming within the Act. A decentralized model of enforcement will lead to an inconsistent application of law, pose challenges to effective and cooperative enforcement between regulatory agencies, and potentially create conflict of interests. Sadly, this Act even has the potential to prompt further corruption due to lack of oversight. The Act is not beyond redemption, however. The Brazilian legislature could

¹¹⁶ Zaheer, *supra* note 68, at 47 (citing Transparency International, *Exporting Corruption Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery* 6, 23 (2013), available at http://www.transparency.org/whatwedo/pub/exporting_corruption_progress_report_2013_assessing_enforcement_of_the_oecd).

¹¹⁷ See Decreto No. 12,846 art. 8° §1° (Braz.) (“Responsibility for the initiation of administrative processes and the judgment of the legal entity for determining liability may be delegated.”).

¹¹⁸ MIGALHAS, *supra* note 88.

¹¹⁹ Bezerra, *supra* note 87 (quoting attorney Jair Jaloreto) (“Whenever there is an excessive concentration of power of decision on punishing or not punishing or on deciding whether an accused is guilty or innocent, we are faced with characteristics of the subtleties of human nature. Deviations of character and conduct are possible, some might even say predictable.”).

delegate enforcement powers to one or two regulatory agencies and/or create an appealable body that can review the decisions of all administrative bodies.

