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From Forum Non Conveniens to Open Forum: Implementing the Hague Convention on Choice of Court Agreements in the United States

Carolyn Dubay *

Introduction

Globalization can either be viewed as an unparalleled opportunity to reap the economic rewards of the global marketplace or as an unmitigated threat to state sovereignty. Embedded in this debate is the structural tension in the United States between the power of the states and the federal government. These complexities are particularly apparent in private international law, which transcends the state-to-state obligations of public international law and aims to infuse international legal obligations into private dispute resolution at the domestic level. Notwithstanding these sovereignty concerns, the United States has continued its trajectory towards concluding international agreements that facilitate international cooperation in private legal disputes.

Most recently, in 2009, the United States ended more than a decade of negotiations and became a signatory to the Hague Convention on Choice of Court Agreements ("COCCA"), an international agreement mandating the recognition and enforcement of foreign judgments resolving certain international business disputes. COCCA complements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and gives businesses involved in

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international trade more predictability and flexibility in negotiating dispute resolution agreements. The general objective of COCCA is to “promote international trade and investment through enhanced judicial co-operation” by enforcing judgments in international “civil or commercial matters” where the parties have entered into a valid and exclusive choice of court agreement.

COCCA affects international business litigation in three primary ways. The first component dictates the obligations and procedures to be used in courts designated in choice of court agreements, referred to in the Convention as “chosen courts.” The second component establishes the obligations of non-chosen courts when a party to a dispute subject to COCCA files an action in that court, despite an exclusive choice of court agreement dictating a different forum. The third component concentrates on procedures to enforce the judgments of chosen courts. Each of the three components of COCCA must be implemented in a manner consistent with the Convention’s language and intent, while simultaneously balancing the political and structural limitations of American federalism. This article

requires the enforcement of international arbitration agreements and provides a framework for the recognition and enforcement of arbitration.  


4 See Recent International Agreement, 119 HARV. L. REV. 931, 933 (2006) (“[C]onsumer contracts and contracts of employment are specifically excluded,” as are purely domestic disputes); see also BRAND & HERRUP, supra note 1, at 18 (explaining the exclusion included in COCCA Article 2); COCCA, supra note 3, art. 2(1).

5 See COCCA, supra note 3, art. 5; see also BRAND & HERRUP, supra note 1, at 11-12 (detailing the roles and responsibilities COCCA Article 5 gives to chosen court).

6 See COCCA, supra note 3, art. 6.

7 Id. art. 8. Under the third pillar of COCCA, courts asked to enforce judgments of chosen courts are required to do so. Id. Under Article 8(1), a judgment entered by a chosen court “shall be recognized and enforced in other Contracting States.” Id. This requires a basic reciprocity rule: if a judgment is valid and enforceable in the chosen State, then it is valid and enforceable in the State where the judgment is to be enforced. See BRAND & HERRUP, supra note 1, at 13-15. To avoid the common problem of objections to the validity of foreign judgments based on jurisdictional issues, under COCCA, conclusions of the chosen court as to its jurisdiction may not be challenged under Article 8(2). BRAND & HERRUP, supra note 1, at 13-15. Rather, defenses to enforcement are limited to those provided in Article 8 and Article 9 of COCCA. BRAND & HERRUP, supra note 1, at 13-15.
focuses on the particular problems associated with the implementation of the obligation of courts in the United States to enforce forum selection clauses in cases subject to the Convention. Specifically, COCCA mandates the exercise of personal jurisdiction by chosen courts and restricts a chosen court’s ability to dismiss cases on the grounds of forum non conveniens. Non-chosen courts in the United States are required to dismiss or suspend proceedings, unless one of five defenses to enforcement is established. As a result, COCCA lays the groundwork for the recognition and enforcement of judgments of chosen courts by eliminating potential future challenges based on lack of personal jurisdiction over the defendant and by discouraging parallel litigation in non-chosen courts. COCCA’s procedural provisions do not mandate a particular standard for determining the overall validity of exclusive choice of court agreements; instead COCCA leaves that determination to existing domestic law.

Although COCCA’s mandates are seemingly straightforward, two complicating factors have quickly emerged in determining the best approach for implementation. First, under COCCA, chosen courts in signatory states are to enforce forum selection clauses regardless of whether

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8 See BRAND & HERRUP, supra note 1, at 12.

9 COCCA, supra note 3, art. 6. Under COCCA’s second pillar relating to obligations of a non-chosen court, Article 6 requires that the court where the action is filed “shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies.” Id. Article 6 identifies only five defenses to enforcement of the forum selection clause that would allow proceedings in the non-chosen court to go forward: (1) the agreement is null and void under the law of chosen court; (2) a party lacked capacity to form a contract under the law of court where the action was filed; (3) giving effect to agreement would be “manifestly contrary to the public policy” of the State where the action was filed; (4) for exceptional reasons beyond the control of the parties, the choice of forum agreement cannot reasonably be performed; and (5) the chosen court decided not to hear the case. Id. art. 6(a)-(e). Under Article 7, a non-chosen court is not precluded from granting “interim measures of protection” (such as injunctions) as such procedures fall outside of COCCA. Id. art. 7.

10 Id. art. 5. This article adopts the position that COCCA’s rules as to the enforceability of forum selection clauses in chosen courts are procedural in nature, leaving the issue of the substantive law on the enforceability of forum selection clauses untouched. Id. art. 5(1) (dictating jurisdiction in the chosen court so long as the choice of court agreement is not “null and void under the law” of the chosen forum); id. art. 5(3) (suggesting that the rules of previous paragraphs are not meant to alter rules about the subject matter of the underlying claim). See also infra Part II on the dispute among the courts as to whether, under existing law, interpretation and enforcement of forum selection clauses is a procedural matter or an issue of substantive contract law governing the entire agreement to which the clause applies.
the dispute or the parties have any geographic nexus to the chosen location for dispute resolution.\textsuperscript{11} The United States may choose to invoke Article 19 of COCCA, which allows a state party to the Convention to “declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that state and the parties or the dispute.”\textsuperscript{12} This article will assume for purposes of analysis that no Article 19 declaration will take place, although issuing a declaration may alleviate state public policy concerns arising from the usurpation of state judicial resources to resolve disputes unconnected to the state.

The second, more vexing problem for implementation arises from the structural and political limitations inherent in the American federal system. The principle of dual sovereignty, the independence of state and federal courts, and the limited powers of Congress vis-à-vis the states creates a number of hurdles to effective and uniform implementation of COCCA.\textsuperscript{13} The fact that COCCA’s provisions for chosen courts are procedural and jurisdictional in nature ironically makes them more difficult to implement at the state level because of the complicated choice of law framework that has evolved under \textit{Erie Railroad Co. v. Tompkins}\textsuperscript{14} and \textit{Hanna v. Plumer}.\textsuperscript{15} As a result, the enforceability of forum selection clauses in the United States tends to turn on the procedural motions available in the federal or state court to enforce or avoid the agreement rather than the validity of the choice of court agreement itself.\textsuperscript{16} This

\begin{flushright}
11 COCCA, \textit{supra} note 3, art. 5(2).

12 \textit{Id.} art. 19.


14 304 U.S. 64, 78 (1938) (holding that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state”).

15 380 U.S. 460, 468 (1965) (holding that the evaluation of the outcome-determinative nature of a state or federal procedural rule must be analyzed under the “twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws”).

\end{flushright}
dichotomy occurs because the line between the procedural and substantive aspects of forum selection clause enforcement is often blurred when considering a choice of court agreement that designates a neutral forum with little or no connection to the dispute or the parties.17 Therefore, the public policy preferences of states opposed to forum selection clause enforcement may be expressed in procedural statutes, such as long-arm statutes, or statutes establishing contract formalities.18

With these difficulties in mind, the relevant inquiry then becomes determining the appropriate scheme for implementation of COCCA. Proposals have been put forward to adopt a federal implementation act that would preempt conflicting state laws as they relate to choice of court agreements subject to the Convention.19 At the same time, the Uniform Law Commission has been working to develop an implementation plan that would allow states to either adopt uniform mini-COCCA acts or face preemption of existing law.20 There are valid and useful aspects of the state law approach, especially in other private international law subject matter areas where Congress lacks legislative authority at the domestic level. But, in the context of the enforceability of international commercial dispute resolution mechanisms, it would be better to adopt a federal implementation law that would complement the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

As set forth in this article, while state law and public policy will continue to have a role in resolving disputes subject to the Convention, federal policy favoring the enforcement of choice of court agreements in international commerce will be better served through a federal framework. A federal scheme can resolve continued disputes over applicable law, conflicting rules on personal jurisdiction, and the uneven enforcement of forum selection clauses depending on the procedural posture of the case. To

17 Id. at 1934 (stating that procedure and substance can be hard to differentiate in practice).

18 See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10-11 (1972) (citing Nat’l Equip. Rental, Ltd. v. Szukent, 375 U.S. 311 (1964) (holding that “in federal courts a party may validly consent to be sued in a jurisdiction where he cannot be found for service of process through contractual designation of an agent for receipt of process in that jurisdiction…”)).

19 See, e.g., Burbank, supra note 13, at 309; Recent International Agreement, 119 HARV. L. REV. 931, 937-38 (2006) (opining that Congress could implement a narrow forum selection statute to serve as a basis for later legislation).

be effective, however, a federal implementation act needs to comprehensively incorporate standards to assess the validity of forum selection clauses and the procedural issues relating to personal and subject matter jurisdiction, venue and removal of cases to federal court. Existing law in the United States shows that the procedural and substantive issues in forum selection clause enforcement are inextricably linked, and thus a comprehensive federal scheme would promote clearer rules for forum selection validity and enforcement. This will serve the interests of American litigants in United States courts, as well as American firms sued abroad in contravention of a choice of court agreement subject to COCCA.

Part I of this article begins with an overview of COCCA’s enforcement provisions for choice of court agreements. Part II examines existing law in the United States on the enforcement of forum selection clauses. This part highlights the difficulty in differentiating the substantive from the procedural aspects of the enforcement of forum selection clauses in the United States, which has resulted in disagreements as to whether federal or state law applies when such clauses are enforced in federal courts. Part II also examines the interplay of personal jurisdiction and *forum non conveniens* with forum selection clause enforcement, especially where state statutes do not allow a forum selection clause to serve as an independent basis for personal jurisdiction over the parties. Part III argues that the best route to implementing COCCA’s provisions regarding the enforcement of forum selection clauses is to develop a comprehensive federal scheme, including substantive and procedural rules for federal or state courts to apply when interpreting or enforcing forum selection clauses subject to COCCA. Finally, Part IV urges lawmakers to codify the standard adopted in *M/S Bremen v. Zapata Off-Shell Co.* 21 that validates choice of court agreements in international commercial cases and to consider the procedural framework of the Foreign Sovereign Immunities Act of 1976 (“FSIA”) 22 to address procedural issues such as personal and subject matter jurisdiction, service of process, venue and removal. By drawing from both the FSIA and *Bremen*, Part IV asserts that a federal implementing law would balance party autonomy in dispute resolution dictated by COCCA with public policy.

21 407 U.S. 1, 15 (1972) (holding that forum selection clauses are prima facie enforceable unless the other party can show evidence that enforcement would be unreasonable and unjust, or that there was “fraud or overreaching”).

references of states to play a role in determining the overall validity of the choice of court agreement.23

Part I: An Overview of COCCA

When COCCA negotiations began in the early 1990s, the United States was not a party to any existing convention on the enforcement of foreign court judgments.24 To achieve consensus, COCCA carved out a narrow category of cases in which enforcement of commercial judgments would be easier to realize. Based on a model proposed by American law professor Arthur von Mehren, enforcement of foreign judgments would be facilitated by focusing on the facets of commercial litigation that could later stand in the way of the validity of the judgment.25 What emerged was a hybrid convention that applies to both the procedural fairness of the underlying litigation and the enforceability of the resulting judgment.26 Under this approach, if the jurisdiction of a court chosen by the parties is conclusively established under COCCA, precluding parallel litigation in non-chosen courts, foreign courts will be more likely to enforce the judgments of chosen courts.27

COCCA’s provisions relating to chosen courts are contained in Article 5. Specifically, Article 5(1) states that a chosen court in a Contracting State “shall have jurisdiction to decide a dispute to which the [exclusive choice of court] agreement applies, unless the agreement is null and void under the law of that State.”28 Despite the generic reference to

23 See id.; Bremen, 407 U.S. at 15 (holding that forum selection clauses are prima facie enforceable unless the other party can show evidence that enforcement would be unreasonable or unjust, or that there was “fraud or overreaching”).

24 Recent International Agreement, supra note 19, at 932 (noting that the United States is a signatory to the convention on enforcement of arbitral awards since 1958, but the United States, unlike many European countries, is not yet a party to any treaty regarding the enforcement of judgments).

25 See BRAND & HERRUP, supra note 1, at 7.

26 Id.

27 Id.

28 COCCA, supra note 3, art. 5(1).
“jurisdiction,” Article 5 only applies to \textit{in personam} jurisdiction.\textsuperscript{29} Article 5(3)(a) specifically provides that subject matter jurisdiction is not affected by the Convention.\textsuperscript{30} The focus on personal jurisdiction is to eliminate the most common challenge to enforcement of foreign judgments based on lack of personal jurisdiction over the defendant.\textsuperscript{31}

COCCA also addresses the continuing existence of \textit{forum non conveniens} in United States jurisprudence which can defeat the enforcement of an otherwise valid forum selection clause.\textsuperscript{32} The \textit{forum non conveniens} problem is heightened in the international commercial context, where parties may seek to find a neutral location for dispute resolution that offers expeditious resolution of cases in a competent and fair judicial system. In this context, COCCA is designed to promote the enforcement of forum selection clauses that choose a location for the resolution of future contract disputes with no geographic connection to the underlying dispute or the parties.\textsuperscript{33} Article 5(2) provides that a chosen court “shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a

\textsuperscript{29} \textsc{Brand \& Herrup}, supra note 1, at 84 (“The Convention creates rules of \textit{in personam} jurisdiction regarding persons party to an exclusive choice of court agreement . . . . It does not bestow subject matter jurisdiction or create venue. . . .”).

\textsuperscript{30} COCCA, supra note 3, art. 5(3)(a).

\textsuperscript{31} \textit{See} \textsc{Brand \& Herrup}, supra note 1, at 198.

\textsuperscript{32} \textit{Cf.} Buxbaum, supra note 1, at 189 (“\textsc{O}ther legal systems, by contrast, reject judicial discretion to dismiss a case based on convenience, many entirely, and virtually all in cases in which the parties have negotiated an exclusive forum agreement.”). The notion of empowering judges to dismiss a case when the parties have properly established jurisdiction and venue is foreign to many legal systems; in civil law countries, courts rely on more restrictive jurisdictional rules to confine the plaintiff’s selection of a forum, whereas in many common law countries, doctrines based on convenience are recognized to prevent oppression of the defendant, and not to reduce the administrative burden on courts. \textit{See id.} at 207.

\textsuperscript{33} \textit{See} COCCA, supra note 3, art. 19; \textsc{Brand \& Herrup}, supra note 1, at 229. Because the geographic nexus between the chosen court and the dispute may be controversial, COCCA Article 19 allows a Contracting State to declare that its courts may “refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.” COCCA, supra note 3, art. 19; \textsc{Brand \& Herrup}, supra note 1, at 229. Whether the United States opts to make an Article 19 declaration remains to be seen, though the political and policy downside of such a declaration would be to encourage countries in the EU to make similar declarations and restrict access to their courts.
court of another State.”  

Article 5(3)(b) also provides that in cases of discretionary transfer of venue “due consideration should be given to the choice of the parties,” although non-discretionary venue rules are not affected.  

Under COCCA’s provisions for the obligations of a non-chosen court, Article 6 requires that the court where the action is filed “shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies…” Article 6 identifies only five defenses to enforcement of the forum selection clause that would allow proceedings in the non-chosen court to go forward: (1) the agreement is null and void under the law of the chosen court; (2) a party lacked capacity to form a contract under the law of the court where the action was filed; (3) giving effect to the agreement would be “manifestly contrary to the public policy” of the state where the action was filed; (4) for exceptional reasons beyond the control of the parties, the choice of forum agreement cannot reasonably be performed; and (5) the chosen court decided not to hear the case.  
Under Article 7, a non-chosen court is not precluded from granting “interim measures of protection,” such as injunctions, as such procedures fall outside of COCCA.  

Not only does COCCA impose obligations relating to the procedural issues of jurisdiction and venue in chosen and non-chosen courts, but Article 3 also sets forth certain requirements on the formalities of choice of court agreements. Most significantly for United States practice, COCCA provides that courts are to presume that a selected forum is the exclusive forum for dispute resolution “unless the parties have expressly provided

34 COCCA, *supra* note 3, art. 5(2).

35 COCCA, *supra* note 3, art. 5(3)(b). Article 5(3) provides that choice of forum may not override rules on “internal allocation of jurisdiction among the courts.” *Id.* As a result, COCCA alone would not override existing state venue provisions that relate to forum selection clauses. *See id.* For example, in Texas, enforceability of forum selection clauses in commercial cases is subject to the Texas venue statute. *TEX. CIV. PRAC. & REM. CODE ANN.* § 15.020 (West 2009) (stating that under § 15.020, mandatory venue provisions may only be overcome by agreement of the parties in cases involving consideration equal to or above $1 million, denoted as “major transactions”).

36 COCCA, *supra* note 3, art. 6.

37 *Id.* art. 6(a)-(e).

38 *See Id.* art. 7.
otherwise.” 39 This interpretative rule runs contrary to the general rule of construction used in United States courts. 40

Despite the procedural and interpretative rules embodied in COCCA, local substantive law on the enforceability of forum selection clauses remains unchanged. For example, Articles 5 and 6 specifically provide that the overall validity of the forum selection clause is to be determined under the law of the chosen court. 41 If the choice of court agreement is void under the applicable law of the chosen court, none of the jurisdictional and procedural provisions apply and neither the chosen court nor the non-chosen court needs to consider the parties’ choice of forum in determining personal jurisdiction or forum non conveniens. 42

Part II: Enforcement of Forum Selection Clauses in the United States Under Existing Law

To understand how to implement COCCA’s provisions, it is necessary to also comprehend how forum selection clauses are enforced in the United States. In other unified legal systems, Articles 5 and 6 of COCCA provide a simple inquiry for courts: is the choice of court agreement valid under applicable law? 43 If so, then chosen courts must accept personal jurisdiction over the parties and deny motions to dismiss on forum non conveniens grounds. Non-chosen courts must suspend or dismiss the proceedings. 44 In the United States, however, this basic formula can become convoluted when applied in the dual system of federal and state law.

39 Id. art. 3(b).

40 See IntraComm, Inc. v. Bajaj, 492 F.3d 285, 290 (4th Cir. 2007) (“A general maxim in interpreting forum selection clauses is that ‘an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere unless it contains specific language of exclusion.’”).

41 See COCCA, supra note 3, arts. 5(1) & 6.

42 Id. art. 6. Under Article 6, a non-chosen court need not dismiss a case if it concludes that the forum selection clause would be void under the law of the chosen court. Id. art. 6(a). As set forth in Part III, if there is a uniform rule applicable in all cases in the United States, it would facilitate implementing Article 6 in other European countries that are parties to COCCA where a party might file an action in a non-chosen court. See infra Part III.

43 COCCA, supra note 3, arts. 5 & 6.

44 Id. art. 5(1)-(2).
courts. As former Chief Justice Rehnquist once wrote, “the idea of a federal judiciary sitting side by side with judiciaries in the 50 states, having concurrent jurisdiction over the same territory, is something of a rarity in the world.”

In the context of forum selection clause enforcement, the existence of concurrent jurisdiction in the United States has created a dichotomy in enforcement mechanisms available at the federal and state level. In federal courts, while forum selection clauses are generally valid under the Supreme Court’s formulation in *Bremen*, enforcement often turns on what procedural motions the defendant invokes to either defeat enforcement in a chosen court or to obtain dismissal or transfer in a non-chosen court. These include motions to dismiss for lack of personal jurisdiction, *forum non conveniens*, improper venue, and lack of subject matter jurisdiction, and motions to transfer venue (where applicable). Enforcement may also turn on the results of the complicated *Erie* choice of law analysis that courts use to determine whether federal or state law governs the enforceability of the choice of court agreement.

In state courts, similar issues arise in enforcing forum selection clauses, albeit under individual state rules of procedure. State courts may look to state statutes specifically pertaining to the enforceability of forum selection clauses against non-resident parties, especially state long-arm statutes that have specifically addressed this issue. State courts may also consider choice of law issues to determine the enforceability of a choice of


47 See J.B. Harris, Inc. v. Razei Bar Indus., Ltd., 37 F. Supp. 2d 186, 188 (E.D.N.Y. 1998) (stating that different federal district courts have held various procedural motions to defeat a forum selection clause, but there is a lack of consensus on the issue); *see also* Holt, *supra* note 16, at 1922 (stating that courts with diversity jurisdiction are required to use 28 U.S.C. § 1404(a) when a defendant attempts to enforce a forum selection clause through transfer).

48 See, e.g., Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”); Hanna v. Plumer, 380 U.S. 460, 468 (1965) (holding that the evaluation of the outcome-determinative nature of a state or federal procedural rule must be analyzed under the “twin aims” of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws).
Moreover, a defendant sued in a state chosen court may also seek removal to federal court if diversity or federal question jurisdiction exists.50

1. Enforcement of Forum Selection Clauses in Federal Courts

At the federal level, the Supreme Court’s decision in Bremen established a strong federal policy favoring enforcement of forum selection clauses in international commercial contracts.51 Bremen involved a foreign tow company that agreed to tow a rig from Louisiana to Italy according to a contract that contained a London forum selection clause.52 When the rig under tow was damaged in a storm, the owner brought an admiralty suit in federal district court in Florida, in contravention of the choice of court agreement.53 The defendant moved to dismiss on the grounds of forum non conveniens, which the district court denied and the court of appeals affirmed.54 The Supreme Court reversed, noting that:

[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts . . . . We cannot have trade and

49 See, e.g., Lease Finance Group v. Delphi, Inc., 266 Ga. App. 173, 174 n.1, 596 S.E.2d 691 (2004) (explaining that because forum selection clauses involve procedural and not substantive rights, the court must apply Georgia law to determine their enforceability notwithstanding a choice of law provision requiring that the laws of another State shall govern).

50 See 28 U.S.C. § 1441(b).

51 Bremen, 407 U.S. 1; George A. Davidson, Jurisdiction Over Non-US Defendants, in INTERNATIONAL COMMERCIAL LITIGATION, at 77 (PLI Commercial Law & Practice, Course Handbook Series No. A4-4539, 1998) (“[C]ourts appear particularly inclined to enforce forum selection clauses when the agreement is international in nature.”).

52 Bremen, 407 U.S. at 2-3.

53 Id. at 3-4.

54 Id. at 4.
commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.\textsuperscript{55}

Under the \textit{Bremen} standard, courts must enforce forum selection clauses unless the opposing party can “clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.”\textsuperscript{56} Fraud can render a clause unenforceable only if the fraud relates directly to the choice of court clause.\textsuperscript{57} As the Supreme Court stated in \textit{Scherk v. Alberto-Culver Co.} \textsuperscript{58}:

\begin{quote}
[t]his qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud . . . the clause is unenforceable. Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion.\textsuperscript{59}
\end{quote}

The \textit{Bremen} Court did not specify what factors would render a forum selection clause “unreasonable,” although the Court did find that a contractual choice of court clause should be held unenforceable if enforcement would contravene a strong public policy in the forum in which suit is brought.\textsuperscript{60}

Regarding the connection between the chosen forum and the parties to the dispute, the \textit{Bremen} Court rejected the notion that any connection was required for a forum selection clause to be reasonable and enforceable. In the context of international business disputes, \textit{Bremen} stressed that where

\textsuperscript{55} Id. at 9; see also Kawasaki Kisen Kaisha Ltd. v. Regal Beloit Corp., 130 S. Ct. 2433, 2448 (2010) (stating that forum selection clauses are indispensable in international trade, commerce and contracting).

\textsuperscript{56} Bremen, 407 U.S. at 15.

\textsuperscript{57} Davidson, supra note 51, at 77 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.14 (1974)). \textit{Cf.} Pearcy Marine v. Seacor Marine, Inc., 847 F. Supp. 57, 60 (S.D. Tex. 1993) (refusing to enforce a contractual forum selection clause providing for litigation in the High Court of Justice in London when the clause appeared to have been obtained by fraud or overreaching).

\textsuperscript{59} Id.

\textsuperscript{60} Id. at 15.
the parties to a freely negotiated private international commercial agreement select a remote forum for resolution of their disputes, they clearly contemplate the claimed inconvenience at the time they enter into the contract; therefore, inconvenience alone will rarely render the forum selection clause unenforceable. Thus, the Supreme Court found in *Bremen*, and in its later decision in *Carnival Cruise Lines v. Shute*, that even where the choice of court agreement calls for litigation in a forum with no connection to the parties, or the dispute and litigation in the chosen court will be more costly and burdensome, the agreement may not be considered unreasonable or unenforceable on the grounds of the inconvenience of the location of the chosen forum.

In reaching this conclusion about geographic nexus, the *Bremen* Court dealt head-on with existing decisions in the lower courts, finding that a forum selection clause “may nevertheless be ‘unreasonable’ and unenforceable if the chosen forum is seriously inconvenient for the trial of the action.” By approving the parties' choice of a neutral forum unconnected to the dispute itself, *Bremen* moved away from the notion of a “natural” or “appropriate” forum for international contract litigation. As the Court stated:

> We are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum. In such a case, the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause. The remoteness of the

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61 499 U.S. 585, 593-97 (1991) (holding that a forum selection clause was not unreasonable, and did not deny the individual plaintiffs' day in court, simply because they were Washington residents who purchased cruise tickets dictating a forum in Florida, even though the incident giving rise to the claim and the parties were not connected to Florida).

62 *Id.* at 594 (reasoning that “Florida is not a ‘remote alien forum,’ nor – given the fact that [respondent’s] accident occurred off the coast of Mexico is this dispute an essentially local one inherently more suited to resolution in the State of Washington than in Florida”).


64 *See* Buxbaum, *supra* note 1, at 194-95 (confirming the selection of a neutral forum unrelated to the parties and their transaction, despite any inconvenience resulting from litigation in a forum lacking such contacts, and finding that the question for reasonableness was whether the parties had a reason for selecting the neutral forum, such as London's status as a center for maritime law).
forum might suggest that the agreement was an adhesive one, or that the parties did not have the particular controversy in mind when they made their agreement; yet even there the party claiming should bear a heavy burden of proof. Similarly, selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the forum. For example . . . it would quite arguably be improper to permit an American tower to avoid [United States law] by providing a foreign forum for resolution of his disputes with an American towee.65

As a result, for a party to show that a selected forum is too remote and that the forum selection clause is unenforceable, the Bremen Court created a heavy burden of proof on the party seeking to avoid the chosen forum.66 Although the Bremen decision dealt explicitly with the problem of non-chosen courts refusing to enforce agreements in admiralty cases,67 Bremen has practical implications for all aspects of the enforcement of forum selection agreements in chosen and non-chosen courts, as well as enforcement in other federal question cases.68

65 Bremen, 407 U.S. at 17 (stating that even where the forum selection clause establishes a remote forum for resolution of conflicts, “the party claiming [unfairness] should bear a heavy burden of proof”).

66 Id. at 18.

67 Id. at 15.

68 Michael Gruson, Forum Selection Clauses in International and Interstate Commercial Agreements, in INTERNATIONAL COMMERCIAL AGREEMENTS, at 87 (PLI Commercial Law and Practice, Course Handbook Series A4-4354, 1991) (“[F]ederal courts have universally agreed that the teaching of Bremen is not limited to admiralty cases nor to cases involving the selection of a foreign forum but applies to all forum selection clauses, even if they select a domestic forum and even if they arise in a suit between parties of different states.”); see also Davidson, supra note 51, at 75 (noting that although Bremen was an admiralty case, its holding has been applied in federal question cases). But see Recent International Agreement, supra note 19, at 935-36 (noting that current United States law on international forum selection clauses is “muddled” as the Bremen Court indicated that it intended its decision to apply to the federal courts only when they are exercising federal common law admiralty jurisdiction, yet later noted that the ruling might well be “instructive” in other circumstances); TradeComet.com LLC v. Google, Inc., 647 F.3d 472, 476 (2d Cir. 2011) (“Bremen, therefore, did not create a narrow rule holding forum selection clauses to be prima facie valid solely in admiralty cases, or those involving international agreements, but rather approved of a pre-existing favorable view of such clauses.”).
Because *Bremen* involved federal question jurisdiction arising in admiralty, the Court did not clearly address whether the standard it announced was a substantive rule of decision applicable only in admiralty cases or a federal common law procedural doctrine. This ambiguity has led to disagreement among the federal circuit courts on the issue of what role the *Bremen* standard has in diversity cases filed in the federal courts.69 If the *Bremen* rule is considered a federal procedural rule, a federal court hearing diversity cases would continue to apply the *Bremen* standard under the *Erie* doctrine, which provides that federal courts sitting in diversity apply state substantive law and federal procedural law.70 The majority of circuits have concluded that the enforcement of a forum selection clause is a procedural matter affecting jurisdiction and venue, and thus the *Bremen* rule applies to determine the validity of such agreements.71 For example, the

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69 Davidson, supra note 51, at 79; see also Carolyn A. Dubay, *Federal Court Enforcement of Forum Selection Clauses in Franchise Contracts*, 5 A.B.A. SEC. ANTITRUST L. FRANCHISE & DEALERSHIP COMMITTEE DISTRIBUTION 2 (2001) (noting that federal courts are split over whether the effect of a forum selection clause is a matter of federal procedural law or state substantive law); Recent International Agreement, supra note 19, at 935-36 (noting that the *Bremen* Court’s lack of clarity raises distinct *Erie* questions over whether federal courts in diversity cases applying *Bremen* and ratification of COCCA would “finally lay to rest this uncertainty by requiring the recognition of international forum selection clauses in both state and federal cases”).


71 See, e.g., Albemarle Corp. v. AstraZeneca UK Ltd. 628 F.3d 643, 650 (4th Cir. 2010) (concluding that a federal court interpreting a forum selection clause must apply federal law because it waives venue of a federal court and implicates a procedural matter governed by federal law); Fru-Con Constr. Corp. v. Controlled Air, Inc., 574 F.3d 527, 538 (8th Cir. 2009) (“[E]nforcement . . . of the contractual forum selection clause was a federal court procedural matter governed by federal law.”); Doe 1 v. AOL, LLC, 552 F.3d 1077, 1083 (9th Cir. 2009) (“We apply federal law to the interpretation of the forum selection clause.”); Ginter ex. rel. Ballard v. belcher, Prendergast & Laporte, 536 F.3d 439, 441 (5th Cir. 2008) (“We begin with federal law, not state law, to determine the enforceability of a forum-selection clause.”); Phillips v. Audio Active Ltd., 494 F.3d 378, 384 (2d Cir. 2007) (“The rule set out in M/S Bremen applies to the question of enforceability of an apparently governing forum selection clause, irrespective of whether a claim arises under federal or state law.”); P & S Bus. Machs. v. Canon USA, Inc., 331 F.3d 804, 807 (11th Cir. 2003) (“Consideration of whether to enforce a forum selection clause in diversity jurisdiction cases is governed by federal law. . .”); Jumara v. State Farm Ins. Co., 55 F.3d 873, 877 (3d Cir. 1995) (“The effect to be given a contractual forum selection clause in diversity cases is determined by federal not state law.”).
Sixth Circuit in *Wong v. PartyGaming Ltd.*\(^{72}\) enforced an outbound forum selection clause after applying the federal *Bremen* standard, even though state law would provide the rule of decision as to the substantive contract claims.\(^{73}\) In reaching this decision, the Sixth Circuit expressed concern that “recent state cases reveal the possible emergence of differences in how state and federal law treat the enforcement of forum selection clauses.”\(^{74}\) Given the possibility of diverging state and federal law, the risk of inconsistent decisions in diversity cases, and the strong federal interest in procedural matters in federal court, the Sixth Circuit adopted the majority rule that questions of enforceability of forum selection clauses in diversity cases would be governed by federal law.\(^{75}\) Nonetheless, several circuits have held that the enforceability of a forum selection clause in diversity cases turns on the law that governs the contract as a whole, whether through a choice of law clause in the agreement or according to state choice of law rules.\(^{76}\)

To further confuse the determination of what law applies to the enforceability of forum selection clauses in diversity cases, the procedural posture of the issue may be outcome determinative. As set forth below, the analysis of the forum selection clause depends on whether a party invokes *forum non conveniens*, moves to transfer a federal case under the federal venue statute, or moves to dismiss on the basis of lack of personal jurisdiction.

With respect to the existence and the use of the *forum non conveniens* doctrine in the context of forum selection clause enforcement,

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\(^{72}\) 589 F.3d 821, 825 (6th Cir. 2009) (explaining that the plaintiffs brought suit against a Gibraltar-based corporation in a district court in Ohio in violation of the forum selection clause designating Gibraltar courts for the resolution of any disputes).

\(^{73}\) Id. at 826.

\(^{74}\) Id. at 826-27.

\(^{75}\) Id. at 827.

\(^{76}\) See, e.g., Abbott Labs. v. Takeda Pharms. Co., 476 F.3d 421, 423 (7th Cir. 2007) (“Simplicity argues for determining the validity . . . of a forum selection clause . . . by reference to the law of the jurisdiction whose law governs the rest of the contract . . . .”); Yavuz v. 61 MM, Ltd., 465 F.3d 418, 428 (10th Cir. 2006) (“We see no particular reason . . . why a forum-selection clause . . . should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties”). *But see* Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 16 (1st Cir. 2009) (citing Lambert v. Kysar, 983 F.2d 1110, 1116 (1st Cir. 1993)) (“[W]e need not reach the unsettled issue of whether ‘forum selection clauses are treated as substantive or procedural for Erie purposes.’”).
the law remains muddled. Absent a forum selection clause, the Supreme Court has long recognized the power of federal courts to decline to assume jurisdiction over disputes between foreign parties with no connection to the United States. In Belgenland v. Jensen, Justice Bradley remarked that the question of “whether, and in what cases, the courts of one country should take cognizance of controversies arising in a foreign country, or in places outside of the jurisdiction of any country... is not a new one.” It was not until 1947, however, that the Supreme Court formally recognized the inherent power of courts to dismiss a case pursuant to forum non conveniens in Gulf Oil Corp. v. Gilbert.

Gulf Oil sets out a number of private and public interests courts should consider in determining whether to decline to exercise jurisdiction in favor of another, more suitable forum abroad. In assessing the private interests at stake, the court “will weigh relative advantages and obstacles to fair trial.” This may depend on access to evidence, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining willing witnesses, the enforceability of a judgment once obtained, and “all other practical problems that make trial of a case easy, expeditious and inexpensive.” Courts may also consider the impact on the public of trying a case with no connection to the forum, including administrative difficulties, jury duty imposed in a community that has no relation to the litigation, and the difficulties attendant in applying foreign law.

77 See generally RONALD BRAND & SCOTT JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 66 (Oxford University Press 2007); Buxbaum, supra note 1, at 185, 188 (stating that although a clear trend in commercial litigation is to enforce the parties’ forum selection agreement, cases reflect substantial confusion in addressing the intersection between forum non conveniens doctrine and the law on enforcement of forum selection clauses).

78 114 U.S. 355 (1885).

79 Id. at 361-62.


81 See id.

82 Id. at 508.

83 Id.

84 Id. at 508-09.
When analyzing a forum selection clause, however, the continued use of the *forum non conveniens* doctrine in federal courts is limited. For example, federal courts applying the *Bremen* reasonableness standard to determine the validity of a choice of court agreement have rejected the continued use of *forum non conveniens*, finding that the reasonableness standard subsumes the *forum non conveniens* considerations. In this regard, the *Bremen* standard may be considered a reformulation of the *forum non conveniens* analysis when an international choice of forum clause is at issue. At the federal level, therefore, implementing COCCA’s mandate to eliminate *forum non conveniens* in circumstances where a valid forum selection clause exists may be straightforward given its limited application. Importantly, however, eliminating *forum non conveniens* will not prevent federal courts from considering the interest analysis as it is incorporated into the *Bremen* analysis of the overall validity of the forum selection clause. As will be discussed in Part IV of this article, COCCA’s implementing legislation must address what role if any *Bremen* will continue to have in the enforcement of forum selection clauses in the federal courts.

The doctrine of *forum non conveniens* is further limited in the forum selection clause context because federal courts may only invoke the doctrine when the more appropriate forum is abroad. When the more appropriate forum is in another district within the United States, federal courts are

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85 See, e.g., Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 280 (9th Cir. 1984) (rejecting use of the “balancing of convenience test” in the *forum non conveniens* doctrine and holding, “[t]o establish unreasonableness of a forum selection clause the party resisting enforcement of the clause has a heavy burden of showing that trial in the chosen forum would be so difficult and inconvenient that the party effectively would be denied a meaningful day in court”); see also Aguas Lenders Recovery Group v. Suez, S.A., 585 F.3d 696, 700 (2d Cir. 2009) (holding that where a forum selection clause exists, *Bremen* displaced the traditional *forum non conveniens* analysis, which only applies in the absence of a forum selection clause). Importantly, this rule only applies to exclusive choice of court agreements. Where the forum selection clause is merely permissive, and not mandatory, federal courts continue to apply *forum non conveniens* analysis. See, e.g., Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V., 145 F.3d 505, 509-10 (2d Cir. 1998).

86 See Am. Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994) (holding that Congress codified the doctrine of *forum non conveniens* in domestic cases and has provided for transfer, rather than dismissal, when a sister federal court is the more convenient place for trial of the action).
guided by 28 U.S.C. § 1404(a), which codified the *forum non conveniens* interest analysis for domestic purposes. The impact of the distinction between § 1404(a) and *forum non conveniens* under COCCA is apparent when examining the Supreme Court’s decision in *Stewart Organization, Inc. v. Ricoh Corp.*

In *Ricoh*, the Supreme Court held that when a defendant invokes § 1404(a) to enforce a forum selection clause through transfer to a chosen court within the federal system, the federal common law rule established in *Bremen* does not apply. *Ricoh* involved a contract dispute between a dealer located in Alabama and a manufacturer located in New Jersey who were subject to a choice of court agreement calling for dispute resolution in New York. After the plaintiff filed suit in federal district court in Alabama, the district court refused to grant a motion to transfer to the chosen district court under 28 U.S.C. § 1404(a), finding that the forum selection clause was invalid under Alabama law. The Eleventh Circuit reversed, finding that the district court should have applied the *Bremen* standard and determined the reasonableness of the forum selection clause for enforcement purposes.

The Supreme Court in *Ricoh* disagreed with both the district court and the Eleventh Circuit, finding that neither Alabama law nor the *Bremen* standard applied. Instead, the Court concluded that the district court should have considered whether the interests of justice required the transfer as the relevant standard under § 1404(a). Rather than granting a forum selection clause dispositive weight using the *Bremen* standard, the Court in *Ricoh*

87 See 28 U.S.C. § 1404(a) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”).

88 See *Miller*, 510 U.S. at 449 n.2.


90 Id. at 28-29.

91 Id. at 24.

92 Id. It is worth noting that the Supreme Court later ruled in *Miller* that § 1404(a) codified domestic application of the *forum non conveniens* doctrine. *Miller*, 510 U.S. 443.

93 *Ricoh*, 487 U.S. at 28.

94 Id. at 29.
held that the presence of such a clause is only a “significant factor that figures centrally in the district court's calculus.” However, § 1404(a) requires a district court to consider not only the parties' private agreement but also to weigh “the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of ‘the interest of justice.’” Since Ricoh, at least one district court has permitted § 1404(a) to be used defensively to defeat enforcement of a valid forum selection clause in a chosen court based on the interests of justice apart from the convenience of the parties.

In addition to deciding whether the Bremen standard or another federal procedural statute, such as § 1404(a), applies to forum non conveniens defenses, courts must also determine motions to dismiss for lack of personal jurisdiction. The issue of personal jurisdiction over the defendant may have an impact on the enforceability of a forum selection clause in federal courts, especially in diversity cases. In determining personal jurisdiction, federal courts sitting in diversity must look to state long-arm statutes to determine whether personal jurisdiction is

95 Id.

96 Id. at 30.

97 See FUL Inc. v. Unified Sch. Dist. No. 204, 839 F. Supp. 1307, 1313-14 (N.D. Ill. 1993) (finding that even though parties chose Illinois courts in a forum selection clause, § 1404(a) permitted transfer to another district that would be more convenient).
appropriate. As the Seventh Circuit found in *IFC Credit Corp. v. Aliano Bros. General Contractors, Inc.*, when

the issue is not the convenience of the forum selected by the plaintiff but whether the forum has personal jurisdiction over the defendant by virtue of a forum selection clause, application of federal law would collide with the countless decisions that hold that in a diversity case a federal court has personal jurisdiction over a defendant "only if a court of the state in which [the federal court] sits would have jurisdiction."

As will be discussed in more detail in this article, state long-arm statutes pose special challenges to enforcing forum selection clauses. Most states allow the exercise of personal jurisdiction over defendants to the same extent as permitted under federal constitutional analysis, and, thus, state long-arm statutes would pose no threat to the enforcement of a forum selection clause on personal jurisdiction grounds. However, where a state long-arm statute limits personal jurisdiction to a greater extent than the Constitution, this may prove problematic for the implementation of COCCA in federal courts. For example, in *Alexander Proudfoot Co. v. Thayer*, the Eleventh Circuit held that when the sole basis for personal jurisdiction over a party in a diversity case is a forum selection clause, the federal court

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98 See J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011) ("For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case, however."); see also Intera Corp. v. Henderson, 428 F.3d 605, 615 (6th Cir. 2005) (stating that in diversity actions, federal courts apply state law to determine questions of personal jurisdiction). Federal and state courts hearing federal claims may reach beyond state provisions and exercise personal jurisdiction over defendants found anywhere in the United States or the world pursuant to various statutory service of process provisions. See, e.g., Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of The Hague Convention on the Civil Aspects of International Child Abduction, 2008 Utah L. Rev. 221, 240 (2008)* (asserting that in an action based on a federal statute, Congress can subject a defendant to service of process that extends beyond the traditional reach of a court where it has authorized nationwide or worldwide service of process, such as under the False Claims Act, 31 U.S.C. § 3732; the Securities Exchange Act of 1934, 15 U.S.C. §§ 77aa, 78aa; and § 12 of the Clayton Act, 15 U.S.C. § 22).

99 437 F.3d 606 (7th Cir. 2006).

100 Id. at 609.

101 877 F.2d 912 (11th Cir. 1989).
must consider state long-arm provisions that limit the enforceability of forum selection clauses against non-resident defendants. 102 Similarly, in Preferred Capital, Inc. v. Sarasota Kennel Club, 103 the Sixth Circuit held that state law controls the enforceability of a forum selection clause when the clause is the sole basis for personal jurisdiction over the defendant. 104

Notwithstanding state long-arm statutes applied in federal diversity cases, federal and state courts must also determine whether the exercise of jurisdiction over a non-resident defendant satisfies federal constitutional norms. In the federal context, personal jurisdiction is determined according to the “minimum contacts test” set forth in International Shoe Co. v. Washington 105 and its progeny. 106 In a traditional due process analysis of personal jurisdiction, inconvenience to a foreign defendant is of central importance. 107 The Supreme Court’s decision in Asahi Metal Indus. Co. v.

102 See, e.g., id. at 919 (holding that state law governs if forum selection clauses confer personal jurisdiction because state long-arm standards govern issues of personal jurisdiction in the federal courts); Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 357 (3d Cir. 1986) (holding that when a forum selection clause confers personal jurisdiction because of long arm standards, state law governs).

103 489 F.3d 303 (6th Cir. 2007).

104 Id. at 305-06. See also Ahern v. Pac. Gulf Marine, Inc., No. 8:06-CV-2068-T-27MSS, 2008 WL 706501, at *5-6 (M.D. Fla. 2008) (ruling that in a personal jurisdiction analysis, federal courts are required to construe a long-arm statute according to the Florida Supreme Court, which has “unequivocally held that a [permissive rather than mandatory] forum selection clause is insufficient to confer personal jurisdiction over a non-resident defendant under the long-arm statute, absent an independent basis for jurisdiction under the Florida long-arm statute”).

105 326 U.S. 310 (1945).

106 Id. at 316 (holding that due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”). See also Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853 (2011) (“The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal’s authority to proceed against a defendant.”); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413-14 (1984) (“The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert in personam jurisdiction over a nonresident defendant.” (citing Pennoyer v. Neff, 95 U.S. 714 (1878))).

107 A. Benjamin Spencer, Jurisdiction to Adjudicate: A Revised Analysis, 73 U. Chi. L. REV. 617, 627 (2006) (noting that the Supreme Court has clearly made inconvenience to defendants a “central concern of the Due Process Clause within the doctrine of personal
Superior Court makes clear that the minimum contacts test is not satisfied in commercial disputes between two foreign entities where the dispute has no reasonable relationship to the United States, especially given the “unique burdens” on a non-United States defendant in defending itself in a foreign legal system. However, in Burger King Corp. v. Rudzewicz, the Supreme Court recognized that when a defendant has agreed in a contractual forum selection clause to be subject to personal jurisdiction in a particular court, that court’s concern about inconvenience to the defendant is minimized. As explained by the Supreme Court in

jurisdiction” based on the Supreme Court’s reasonableness requirement in considering “the burden on the defendant”).


109 Id. at 114-15 (concluding that a state court's exercise of personal jurisdiction over a Japanese manufacturer in a dispute with a Taiwanese plaintiff was unreasonable). The Supreme Court found that an unreasonable burden would be imposed on the Japanese manufacturer as it would be required not only to travel to California to defend itself, but would also have to submit its dispute to California's judicial system, which had little interest in the case. Id.


111 Id. at 472 n.14 (stating that because the personal jurisdiction requirement is a waivable right, there are a “variety of legal arrangements” by which a litigant may give “express or implied consent to the personal jurisdiction of the court,” including in the commercial context where the parties have entered into a freely negotiated forum selection agreement that meets the Bremen test). See also Jacobsen Constr. Co. v. Teton Builders, 106 P.3d 719, 728 (Utah 2005) (holding that “forum selection clauses need not make specific mention of a consent to jurisdiction when the language of the clause makes the parties’ intention to resolve disputes in a particular forum evident”); Kenncorp Mortg. Brokers, Inc. v. Country Club Convalescent Hosp., Inc., 610 N.E.2d 987, 988-89 (Ohio 1993) (“In our view, however, a minimum-contacts analysis as set forth in International Shoe Co. v. Washington and its progeny, is not appropriate in determining the validity of forum selection clauses in commercial contracts.”); Int’l Collection Serv., Inc. v. Gibbs, 510 A.2d 1325 (Vt. 1986).

“By entering into a contract containing a forum selection clause, the defendant [a field representative located in Wisconsin] expressly waived any claim of lack of jurisdiction over his person in Vermont. A due process analysis of other minimum contacts between the [field representative] and the chosen forum is unnecessary as long as the forum selection clause is enforceable.” Gibbs, 510 A.2d at 1325.

See also United States Trust Co. v. Bohart, 495 A.2d 1034, 1039-40 (Conn. 1985) (rejecting the argument that the due process rights of the nonresident defendants would be violated if suit in Connecticut were permitted based on a forum selection clause). But see Burger King, 474 U.S. at 482 (“Nothing in our cases, however, suggests that a choice-of-law provision should be ignored in considering whether a defendant has ‘purposefully
Ruhrgas AG v. Marathon Oil Co.,\(^{112}\) personal jurisdiction “represents a restriction on judicial power . . . as a matter of individual liberty” and “a party may insist that the limitation be observed, or he may forgo that right, effectively consenting to the court's exercise of adjudicatory authority.”\(^{113}\) In the vast majority of federal cases, therefore, personal jurisdiction is rarely an obstacle to forum selection clause enforcement because the defendant has expressly or impliedly consented to personal jurisdiction in the chosen court.\(^{114}\)

As Bremen, Ricoh, and the personal jurisdiction case law demonstrate, COCCA’s simple provision that the validity of the choice of court agreement is to be determined by the law of the chosen court requires an extremely complicated inquiry under United States law. Choice of court enforcement in the United States depends on whether the cause of action arises under federal or state law, as well as the procedural posture of the court in determining the issue. Furthermore, federal enforcement of forum selection clauses turns on whether the federal court is exercising its subject matter jurisdiction on the basis of a federal question or diversity among the parties. As remarked by the Sixth Circuit in Preferred Capital, Inc., “[w]hen deciding to apply federal or state law to a forum selection clause, the context in which the clause is asserted can be determinative.”\(^{115}\)

2. State Court Enforcement of Forum Selection Clauses

When enforcing forum selection clauses in state courts, many of the same complex issues of choice of law and personal jurisdiction are also apparent. As a substantive matter, most state courts have either adopted the

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invoked the benefits and protections of a State's laws’ for jurisdictional purposes . . . [a]lthough such a provision standing alone would be insufficient to confer jurisdiction.


113 Id. at 586 (citation omitted).

114 Cf. J. McIntyre Mach., Ltd. v. Nicastro 131 S. Ct. 2780, 2787 (2011) (“A person may submit to a State's authority in a number of ways. There is, of course, explicit consent.”).

115 Preferred Capital, Inc. v. Sarasota Kennel Club, 489 F.3d 303, 306 (6th Cir. 2007) (stating that when a party moves to transfer a case on the basis of a forum selection clause, the federal statute governing transfer motions controls the clause’s interpretation rather than delving into if “the sticky question of which law, state or federal,’ should govern the interpretation of forum selection clauses in diversity cases” (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29-30 (1988))

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Bremen reasonableness standard or follow something akin to it. In most state trial courts, therefore, an exclusive forum selection clause will be enforced unless the party opposing enforcement clearly shows that: (1) the clause is invalid for reasons of fraud or overreaching; (2) enforcement would be unreasonable or unjust; (3) enforcement would contravene a strong public policy of the forum where the suit was brought; or (4) the selected forum would be so seriously inconvenient for trial as to render the proceedings unfair.

Some state courts have also looked to additional factors to determine whether a clause is unreasonable, such as: (1) which state law governs the

116 Gruson, supra note 68, at 87-88 n.59 (listing a number of states that have expressly adopted Bremen, citing, for example, Kysar v. Lambert, 76 Wash. App. 470, 484, 887 P.2d 431, 440 (1995), review denied, 126 Wash. 2d 1019, 894 P.2d 564 (1995); Tandy Computer Leasing v. Terina's Pizza Inc., 105 Nev. 841, 784 P.2d 7, 8 (1989); Abadou v. Trad, 624 P.2d 287 (Alaska 1981); Societe Jean Nicolas et Fils, J.B. v. Mousseux, 123 Ariz. 59, 597 P.2d 541 (1979); Hi Fashion Wigs Profit Sharing Trust v. Hamilton Inv. Trust, 579 S.W.2d 300 (Tex. Civ. App. 1979); Elia Corp. v. Paul N. Howard Co., 391 A.2d 214 (Del. Super. Ct. 1978); Green v. Clinic Masters, Inc., 272 N.W.2d 813 (S.D. 1978); Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 551 P.2d 1206, 131 Cal. Rptr. 374 (1976)). See, e.g., Kennecorp, supra note 113, at 989 (“[I]n the light of present-day commercial realities, it has been stated that a forum selection clause in a commercial contract should control, absent a strong showing that it should be set aside.” (citing 407 U.S. at 15)); Preferred Capital, Inc. v. Power Eng’g Group, Inc. 112 Ohio St. 3d 429, 860 N.E.2d 741 (Ohio 2007) (noting that in Kennecorp, Ohio adopted a three-pronged test, “similar to the test in Bremen, to determine the validity of a forum-selection clause: (1) Are both parties to the contract commercial entities? (2) Is there evidence of fraud or overreaching? (3) Would enforcement of the clause be unreasonable and unjust?”).

117 See, e.g., O'Neil Farms, Inc. v. Reinert, 780 N.W.2d 55, 58, 61 (S.D. 2010) (stating that forum-selection clauses are “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances,” and finding that the clause was invalid for such reasons as fraud or overreaching or if enforcement would contravene a strong public policy of the forum in which it is brought); In re Int'l Profit Assoc's., Inc., 274 S.W.3d 672, 675 (Tex. 2009) (citing Bremen); Reiner, Reiner & Bendett, P.C. v. Cadle Co., 278 Conn. 92, 101-02 n.8, 897 A.2d 58 (2006) (revealing that the Connecticut Supreme Court has adopted the holding of the United State Supreme Court, that forum selection clauses are valid, unless the party seeking to preclude enforcement can meet the heavy burden of showing that its enforcement would be unreasonable, unfair, or unjust); In re AIU Ins. Co., 148 S.W.3d 109, 111-13 (Tex. 2004) (adopting the legal standard from Bremen); SR Bus. Servs. Inc. v. Bryant, 267 Ga. App. 591, 592, 600 S.E.2d 610 (2004) (adopting the United States Supreme Court’s ruling in Bremen); Manrique v. Fabbi, 493 So. 2d 437, 440 (Fla. 1986) (adopting the three-pronged test announced by the United States Supreme Court in Bremen); Crowson v. Sealaska Corp., 705 P.2d 905 (Alaska 1985) (noting that Volkswagenwerk v. Klippan, 611 P.2d 498, 503 (Alaska 1980) (rejected that the common law rule that forum selection clauses are per se invalid and adopted in its place the reasonableness approach set out in Bremen).
contract; (2) the residence of the parties and witnesses; (3) the place of execution and/or performance of the contract; and (4) the availability of remedies in the selected forum.\textsuperscript{118} These factors differ somewhat from the federal standard, which does not consider “[a] difference in the nature of the proceedings and remedies sufficient to void a choice of forum provision.”\textsuperscript{119}

The key distinction between \textit{Bremen} and most state law reasonableness tests is the importance of a connection to the chosen forum. \textit{Bremen} makes clear that, short of a litigant being deprived of a fair trial, the inconvenience of the chosen forum standing alone does not render a forum selection clause unreasonable in the international commercial context.\textsuperscript{120} However, inconvenience may be an influential factor in state court forum selection decisions that purport to apply the \textit{Bremen} standard.

For purposes of COCCA implementation, it is important to note that only a small handful of states continue to find forum selection clauses invalid as a matter of public policy, and usually only in certain limited circumstances.\textsuperscript{121} For example, several states have adopted anti-waiver statutes that prevent certain state statutory claims from being litigated outside the state, regardless of the existence of a forum selection clause. Courts in Idaho\textsuperscript{122} and Montana\textsuperscript{123} have ruled that outbound forum selection

\textsuperscript{118} Gruson, supra note 68, at 121-22 (noting that several diversity cases, although purporting to follow \textit{Bremen}, specify additional factors to the ones proposed by \textit{Bremen}, that must be considered in determining whether a forum-selection clause is reasonable). These additional factors are: (1) the law which governs the formation and construction of the contract; (2) the residence of the parties; (3) the place of execution and/or performance of the contract; (4) the location of the parties and witnesses likely to be involved in the litigation; (5) availability of remedies in the chosen forum; and (6) conduct of the parties. \textit{Id.} See, e.g., Carefree Vacations, Inc. v. Brunner, 615 F.Supp. 211, 214 (D. Tenn. 1985).

\textsuperscript{119} Davidson, supra note 51, at 77 (citing Interamerican Trade Corp. v. Companhia Fabricadora De Pecas, 973 F.2d 487, 489 (6th Cir. 1992)) (holding the forum selection clause providing for Brazil as the enforceable forum valid, even though the nature of Brazilian proceedings and remedies were different from those in the United States).

\textsuperscript{120} M/S \textit{Bremen} v. Zapata Off-Shore Co., 407 U.S. 1, 16-17 (1972).

\textsuperscript{121} See Davidson, supra note 51, at 80 (citing Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 437 (Iowa 1982); Mont. \textit{ex rel.} Polaris Indus. v. Dist. Court of the Thirteenth Judicial Dist., 695 P.2d 471, 472 (Mont. 1985)).


clauses cannot deprive state residents of a local forum where state statutory law provides for judicial resolution of certain claims. In both states, the courts held that it would violate public policy to allow a state anti-waiver statute to be trumped by private contractual agreements. Furthermore, in some states, an outbound forum selection clause is not enforceable per se, but the courts will consider the existence of such a clause on a motion to dismiss on the grounds of forum non conveniens.

The more significant hurdle to implementing COCCA in state courts is the existence of state statutes, including long-arm statutes, designed to prevent foreign cases lacking a connection to the state from usurping limited public resources of local court systems. As a result, although federal constitutional concerns do not prevent implementation of COCCA’s personal jurisdiction mandate, state legislatures are free to restrict the reach of their courts through statute. Generally, states control personal jurisdiction through long-arm statutes that either extend personal jurisdiction through judicial resolution of certain claims. In both states, the courts held that it would violate public policy to allow a state anti-waiver statute to be trumped by private contractual agreements. Furthermore, in some states, an outbound forum selection clause is not enforceable per se, but the courts will consider the existence of such a clause on a motion to dismiss on the grounds of forum non conveniens.

124 See Cerami-Kote, 773 P.2d 1143, 1146 (1989) (finding that Idaho’s anti-waiver statute expresses a strong public policy against the enforcement of foreign selection clauses that would require litigation outside of Idaho, for certain claims arising there, referring to Polaris Industries, 695 P.2d at 472, which interpreted a statute virtually identical to I.C. § 29-110, to void a forum selection clause in a contract which mandated an out-of-state forum; see also Rose v. Eiling, 255 Or. 395, 399-400, 467 P.2d 633, 635 (1970) (ruling that a specific statute providing for protection of the usual remedies granted to the buyer by statute under a retail installment sales contract operated to void a venue selection clause included in the retail installment sales contract of the seller); Morris v. Towers Fin. Corp., 916 P.2d 678, 679 (Colo. App. 1996) (finding that a contract’s forum selection clause should be held unenforceable, if its enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision, such as in the Colorado Wage Claim Act (CWCA), which provides that any employee aggrieved under that act may file a civil action in “any court having jurisdiction over the parties.”).

125 Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d at 437.

“We hold that clauses purporting to deprive Iowa courts of jurisdiction they would otherwise have, are not legally binding in Iowa. We further hold, however, that under a motion to dismiss an Iowa action without prejudice on the ground of forum nonconveniens such a clause, if otherwise fair, will be given consideration along with the other factors presented, in determining whether the Iowa court should decline to entertain the suit.” Id.

jurisdiction to the limits of due process,\textsuperscript{127} limit personal jurisdiction to specific acts connected with the state,\textsuperscript{128} or create “hybrid” schemes that include specifically enumerated acts and a due process “catch all provision” to govern personal jurisdiction questions.\textsuperscript{129}

Under state law, whether personal jurisdiction exists over non-resident parties to a forum selection clause when there is no other connection to the chosen state may depend on a number of factors. Rather than determine personal jurisdiction as a procedural issue, some courts may merge the question of personal jurisdiction into the overall assessment of the reasonableness and validity of the forum selection clause. For example, the Supreme Court of South Dakota recently ruled that the validity of a forum selection clause depended on a reasonable connection to the state, which simultaneously resolved the issue of personal jurisdiction because a valid clause amounted to consent to personal jurisdiction in the state.\textsuperscript{130} The court was particularly persuaded by the fact that the contract at issue was entered into with a South Dakota corporation, making the designation of South Dakota as the chosen court reasonable and thus sufficient to confer personal jurisdiction.\textsuperscript{131}

In other states, specific statutory provisions govern whether the court may exercise personal jurisdiction over non-resident defendants on the exclusive basis of a forum selection clause. Some of these statutes apply with no limitations on the amount in controversy and do not require a


\textsuperscript{129} See MacFarland, \textit{supra} note 126, at 497.

\textsuperscript{130} See \textsc{O’Neill Farms, Inc. v. Reinert}, 780 N.W.2d 55, 62 (S.D. 2010).

\textsuperscript{131} See \textit{id.} at 61; \textit{see also} LucidRisk, LLC v. Ogden, 615 F. Supp. 2d 1, 5-6 (D. Conn. 2009) (stating that under Connecticut law, “[a] party to a contract may voluntarily submit to the exercise of personal jurisdiction by agreeing to a contract’s forum selection provisions”); Solae, LLC v. Hershey Can., Inc., 557 F. Supp. 2d 452, 456 (D. Del. 2008) (stating that under Delaware law, “[w]hen [a] party is bound by a forum selection clause, [the] party is considered to have expressly consented to personal jurisdiction”).
geographic connection to the state. Under Michigan law, for example, state courts have general personal jurisdiction over foreign corporations that consent to Michigan jurisdiction through a forum selection clause that meets certain statutory requirements. Under Michigan’s version of the Model Choice of Forum Act, courts “shall entertain the action” where the forum selection agreement provides the only basis for the exercise of personal jurisdiction so long as: (1) the court has subject matter jurisdiction; (2) Michigan is a “reasonably convenient place for the trial of the action;” (3) the forum selection agreement was not induced through fraud or “other unconscionable means;” and (4) the defendant is served with process as provided by court rules. A similar standard is used under Nebraska law. If the forum selection clause is not valid in these states, the inquiry moves to whether the defendant has the necessary minimum contacts, excluding the forum selection clause, to satisfy due process.

132 MICH. COMP. LAWS § 600.711(2) (West 2011). See also Belanger, Inc. v. Car Wash Consultants, Inc., 452 F. Supp. 2d 761, 764 (E.D. Mich. 2006) (“Even when personal jurisdiction may not be established pursuant to the Michigan long arm statute, a foreign corporation may consent to Michigan jurisdiction through a valid forum selection clause.”).

133 MICH. COMP. LAWS § 600.745(2) (West 2011). See also MICH. COMP. LAWS § 600.745(3). § 600.745(3) provides that cases arriving in Michigan with a forum selection clause designating another state’s court have proper jurisdiction if:

“the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur: (a) The court is required by statute to entertain the action; (b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action; (c) The other state would be a substantially less convenient place for the trial of the action than this state; (d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; (e) It would for some other reason be unfair or unreasonable to enforce the agreement.” Id.


While the long-arm and statutory schemes in Michigan and Nebraska would not conflict with COCCA’s provisions, other states have adopted more restrictive statutes concerning personal jurisdiction on the sole basis of a forum selection clause. These statutes may require a minimum amount in controversy or a choice of law clause in the contract dictating application of the chosen state’s law to confer personal jurisdiction based on a forum selection agreement. In Florida, for example, parties may confer personal jurisdiction on the courts of Florida by contract, but only where the agreement: (1) includes a choice of law provision designating Florida law as the governing law; (2) includes a provision whereby the non-resident agrees to submit to the jurisdiction of the courts of Florida; (3) involves consideration of not less than $250,000; (4) does not violate the United States Constitution; and (5) bears a substantial or reasonable relation to Florida or at least one of the parties is a resident of Florida or incorporated under its laws. Applying this standard in *Johns v. Taramita*, a federal district court in Florida determined that Florida’s long-arm statute did not allow a forum selection clause to serve as the sole basis for Florida to exercise personal jurisdiction over objecting non-resident defendants.

New York has adopted a law similar to Florida’s long-arm statute, but with several key differences. Under New York law, any person may bring an action against a “foreign corporation, non-resident, or foreign state,” regardless of whether there is a reasonable connection to the state, so long as: (1) the action involves a contract that has a New York choice of law clause; (2) the contract involves consideration of at least $1 million; and (3) the contract contains a forum selection provision whereby the defendant non-resident agreed to submit to the jurisdiction of the New York courts.


138 Id. at 1028-29.

139 N.Y. Gen. Oblig. Law § 5-1402 (McKinney 2011). The key difference from Florida law, which requires a reasonable connection to the State, lies in the wording of their respective choice of law statutes. See §§ 685.101-102; §§ 5-1401 to -1402 (revealing that while Florida law requires a reasonable connection for the choice of law to be valid, under N.Y. Gen. Oblig. Law § 5-1401, a valid choice of law provision requires only a minimum of one million in controversy “whether or not such contract, agreement or undertaking bears a reasonable relation to this state”).
Unlike the statutory scheme in Florida, New York law does not demand a connection to the state. However, New York strips state courts of subject matter jurisdiction over cases between non-resident, foreign corporations where the dispute has no connection to New York and the statutory requirements of choice of law and choice of forum are not satisfied.  

In addition to the problem of satisfying state rules on personal jurisdiction, most state courts continue to recognize *forum non conveniens* as a defense to litigation in a forum with no connection to the underlying dispute, regardless of whether the court is applying state or federal law to substantive claims. *Gulf Oil* recognized this power, noting that “a state court ‘may in appropriate cases apply the doctrine of *forum non conveniens*’ . . . [e]ven where federal rights binding on state courts under the Constitution are sought to be adjudged.” *Gulf Oil* recognized this power, noting that “a state court ‘may in appropriate cases apply the doctrine of *forum non conveniens*’ . . . [e]ven where federal rights binding on state courts under the Constitution are sought to be adjudged.”*142* State courts consider similar factors in applying *forum non conveniens* as those set forth in *Gulf Oil,* even when guided by state statute. *144*

When applied at the state level, one of the primary concerns considered in a *forum non conveniens* analysis is avoiding usurpation of state judicial resources by cases unrelated to the state. For example, when

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140 See N.Y. BUS. CORP. LAW § 1314(b) (McKinney 2003); see also Jill Miller, Jurisdiction Lacking in Corporate Contract, THE DAILY RECORD, Sept. 12, 2003), available at http://findarticles.com/p/articles/mi_qn4180/is_20030912/ain10068680 (describing the decision by a New York State trial court finding that in a case between two foreign corporations, absent a New York choice of law and choice of forum provision in contract, the court lacked subject matter jurisdiction under § 1314(b) of the Business Corporation Law).


143 See, e.g., Aveta, Inc. v. Colon, 942 A.2d 603, 609 (Del. Ch. 2008) (citations omitted) (stating that the court considers (1) the applicability of local law; (2) the relative ease of access of proof; (3) the availability of compulsory process for witnesses (4) the pendency or non-pendency of a similar action or actions in another jurisdiction; (5) the possibility of a need to view immovable property; and (6) all other practical considerations that would make the trial easy, expeditious, and inexpensive).

144 In re Omega Protein, Inc., 288 S.W.3d 17, 20 (Tex. Ct. App. 2009) (noting that in 2003, the Texas Legislature codified the *forum non conveniens* factors, which echo the doctrine of *forum non conveniens* factors that the United States Supreme Court applied in *Gulf Oil*).
Florida’s Supreme Court adopted the doctrine of *forum non conveniens* in *Kinney Systems, Inc. v. Continental Insurance Co.*,¹⁴⁵ it did so to prevent foreign commercial litigants with no connection to Florida from filing suit.¹⁴⁶ In so doing, the *Kinney* court specifically commented that:

> While Florida courts sometimes may properly concern themselves with a suit essentially arising out-of-state, they nevertheless must take into account the impact such practices will have if not properly policed—an impact with substantial effect on the taxpayers of this state and on the appropriation of public monies at both the state and local level to pay for the costs of judicial operations. We must rightly question expenditures of this type where the underlying lawsuit has no genuine connection to the state. Florida's judicial interests are at their zenith, and the expenditure of tax-funded judicial resources most clearly justified, when the issues involve matters with a strong nexus to Florida's interests. But that interest and justification wane to the degree such a nexus is lacking.¹⁴⁷

Despite the cautionary words in *Kinney*, the status of the *forum non conveniens* defense in the face of a valid forum selection clause remains unclear in certain state courts. Similar to federal courts, some state courts have replaced the *forum non conveniens* analysis with the *Bremen* test and look simply at the validity of the choice of court agreement and whether it is “unreasonable” and thus invalid.¹⁴⁸ Other states have adopted specific statutory schemes that address not only the validity of forum selection clauses involving non-residents, but also the procedural aspects of enforcing such agreements. In New York, for example, if a choice of court agreement

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¹⁴⁶ *Id.* at 87-88 (“Commentators generally have noted a growing trend in private international law of attempting to file suit in an American state even for injuries or breaches that occurred on foreign soil. There already is evidence the practice is growing to abusive levels in Florida.”).

¹⁴⁷ *Id.* at 89-90.

¹⁴⁸ *See, e.g., Aveta*, 942 A.2d at 603 (stating that “under Delaware law, forum selection clauses are *prima facia* valid and should be enforced unless the clause is shown by the resisting party to be unreasonable under the circumstances,” which subsumes the *forum non conveniens* doctrine “to ascertain whether enforcement of the clause is unreasonable under the circumstances”).
meets the statutory requirements for validity, *forum non conveniens* motions cannot be entertained. Still other courts have followed the *Ricoh* approach and continue to apply *forum non conveniens* analysis to allow consideration of the public interest factors at stake in enforcing a forum selection clause.

As these state and federal cases demonstrate, the enforcement of forum selection clauses in the United States is a hodge-podge of procedural strategy, judicial prerogatives and, in rare cases, specific statutory guidelines limiting the enforceability of forum selection clauses where the dispute or parties are not connected to the chosen forum. Thus, while COCCA’s mandates seem to reflect the majority view in the United States that forum selection clauses are presumed valid and serve as a basis for personal jurisdiction, implementation will in certain circumstances conflict with detailed statutory schemes in states such as Florida and New York, states that probably carry a significant burden in international dispute resolution because of their location and reputation.

**Part III:** Developing a Comprehensive Federal COCCA Implementation Scheme for Chosen Courts in the United States

Balancing the constraints of federalism and the efficiency of legal uniformity is a struggle that permeates almost every area of public policy. This struggle is no different when applying international legal obligations in the United States, especially when treaty obligations must be enforced in state court proceedings. In particular, the decision of how to implement

149 N.Y. C.P.L.R. Rule 327(b) (McKinney 2008).

“[T]he court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part.” *Id.*

150 Buxbaum, *supra* note 1, at 197-99 (stating that courts vary in the weight they assign a forum selection clause in determining *forum non conveniens* motions depending on whether the clause is one of the factors to be balanced or whether it “heavily favors dismissal.”).

151 *Cf.* Medellin v. Texas, 552 U.S. 491, 504-05 (2008) (finding that, while some treaties are self-executing and automatically become federal law, Congress must enact federal legislation to make international obligations under the Vienna Convention on Consular Relations binding on state court proceedings).
international agreements in the area of private international law raises significant federalism concerns because traditional areas of state legislative competence and state court procedures are elevated to the international level. Not surprisingly, therefore, the Uniform Law Commission (“ULC”) has become actively involved in lobbying for a greater role of state law in treaty implementation. As a political matter, this approach makes eminent sense in many circumstances, especially where Congress lacks legislative authority and would encroach into state law-making solely by virtue of its treaty power.

It comes as no surprise, then, that implementation of COCCA’s mandates elicits these same federalism concerns and reflects a division of opinion on how to implement its provisions. On the one hand, the ULC has proposed implementing COCCA by adoption of uniform COCCA implementation acts on a state-by-state basis, subject to certain conditions imposed in a federal implementing law. The ULC model is based on the idea of “conditional preemption” where states can take legislative action to adopt the uniform law or face preemption of existing state law through the federal provisions. The other option is to adopt comprehensive federal legislation that preempts conflicting state rules relating to forum selection clauses and governs application of COCCA in its entirety. Until this debate is resolved, the future effectiveness of COCCA remains in question.

152 Henning, supra note 20, at 41.

153 See Missouri v. Holland, 252 U.S. 416, 434 (1920) (“No doubt the great body of private relations usually fall within the control of the State, but a treaty may override this power.”).


155 Henning, supra note 20, at 49-50 (“[C]onditional preemption uses coercion to convince the states that it is in their best interests to adopt legislation designated by Congress. The coercive threat is that the area of law at issue will be preempted by federal law if the designated legislation is not adopted.”).

156 See Burbank, supra note 13, at 309.

157 See Guy S. Lipe & Timothy J. Tyler, The Hague Convention on Choice Of Court Agreements: Creating Room for Choice in International Cases, 33 HOUS. J. INT’L L. 1, 12 (2010) (noting that until the federal government decides whether to implement COCCA through the Uniform Law Commission’s uniform state law approach or a pure federal implementation mechanism, United States accession will not occur.)
While a state-by-state approach may be a politically attractive choice, there are numerous reasons why the adoption of a federal scheme is more effective as a matter of policy and a matter of enforcement. Moreover, the ULC’s proposed provisions allowing states to strip their courts of subject matter jurisdiction over cases arising under COCCA raise significant constitutional concerns, especially in light of the Supreme Court’s recent decision in *Haywood v. Drown* detailed below.\(^{158}\)

1. **Policy Considerations Favoring a Federal Approach**

While there may be a number of policy considerations favoring the ULC’s state-by-state approach,\(^{159}\) the balance of factors from a policy perspective weighs in favor of a purely federal approach. In particular, a federal scheme will better promote COCCA’s goal to establish “uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters.”\(^{160}\)

First, as the existing case law in the United States shows, the *Erie* dichotomy between enforcement of forum selection clauses in federal and state courts will not be resolved through the promulgation of more state laws on the enforceability of forum selection clauses. Given the complicated nature of forum selection clause enforcement as a blend of substantive and procedural considerations and the disparity this confusion has caused between enforcement of such clauses at the federal and state level, a comprehensive federal implementation framework is needed to resolve the *Erie* issues that plague forum selection clause enforcement. Resolving the *Erie* issues would, therefore, better advance COCCA’s preeminent goal of uniformity in the enforcement of international choice of court agreements.\(^{161}\)

Second, state-by-state legislation to implement COCCA would not resolve the issue of the continued application of *Bremen*’s forum selection clause analysis after the implementation of COCCA. For example, if COCCA is implemented only at the state level, would federal courts continue to apply *Bremen* to enforce choice of court agreements in

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160 COCCA, *supra* note 3, Preamble.

161 See Buxbaum, *supra* note 1, at 190.
international cases? Would courts using the *Bremen* standard be able to simply shift the *forum non conveniens* analysis into the substantive reasonableness inquiry and potentially evade COCCA’s mandate? Would states that currently follow the *Bremen* rule in international commercial cases be required to adopt a more restrictive rule on forum selection clause enforcement under the state-by-state approach? These questions exemplify why a federal statute that addresses the *Bremen* standard is needed to implement COCCA. State legislation cannot address the *Bremen* issues posed above, nor can it address the status of the *Bremen* rule in the post-*Ricoh* context.\(^{162}\)

Third, a federal approach to implementing COCCA will make it easier for United States firms to enforce cases filed in non-chosen courts abroad. COCCA’s provisions allow a non-chosen court to hear a case if the forum selection clause is void under the law of the chosen court.\(^{163}\) This is important because, while judges and attorneys in foreign countries will undoubtedly appreciate the choice of law issues that arise in contract interpretation, the added layer of *Erie* complexity creates confusion about the correct standard to apply to determine forum selection clause validity.\(^{164}\) A federal approach to implementing COCCA will, therefore, promote uniform rules that will result in more consistent decisions in non-chosen courts abroad.

Finally, as a practical matter, federal implementation would be consistent with the implementation of the New York Convention and would solidify United States policy on the enforceability of negotiated dispute resolution mechanisms in international business-to-business contracts.

\(^{162}\) See supra text accompanying notes 90-97.

\(^{163}\) See COCCA, supra note 3, art. 6 (providing that a court may proceed to hear a case even if that court is not selected in the forum selection clause, if the court concludes that the forum selection clause would be null and void under the law of the chosen State).


“[G]reater complexity of ‘cooperative federalism’ puts a burden on the advocates of ‘cooperative federalism’ to make a compelling case and to show this approach can be accomplished without needless ambiguity and increased cost to litigants . . . We cannot ask middle-class litigants in this country or from elsewhere in the world to regard this Convention as a step forward if our implementing legislation creates new complexities and spawns litigation over interpretative issues, however interesting they may be to law professors.” Id.
2. Constitutional Authority and Preemption

At first blush, constitutional constraints on the power of Congress to dictate state court judicial procedures seem to favor a state-by-state approach to implementing COCCA. Nonetheless, while COCCA presents complex issues of procedural rule implementation in state courts, Congress’ federal treaty power and Article I power to regulate foreign commerce strongly support a comprehensive federal legislation scheme to implement COCCA. Significantly, once federal power is asserted in COCCA implementation, conflicting state laws and procedural rules will be preempted under the Supremacy Clause. This will create a uniform national standard for the enforcement of international choice of court agreements subject to the Convention, while leaving the enforcement of forum selection clauses in other contexts subject to existing state or federal law.

Importantly, COCCA seeks to regulate dispute settlement in international commerce, an area that falls squarely within Congress’ Article I powers, which include the power to regulate foreign commerce. The foreign commerce power is broad, and includes, for example, the power to regulate federal and state court procedures involving foreign sovereigns under the FSIA. As such, federal implementation of COCCA under the commerce clause avoids the difficult constitutional issues raised in the Supreme Court’s controversial decision in Missouri v. Holland, which held that Congress may legislate in areas outside of its Article I powers pursuant to treaty obligations.

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165 See U.S. Const. art. VI (“[T]he Laws of the United States. . .shall be the supreme Law of the Land; . . .any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”).

166 U.S. Const. art. I, § 8, cl. 3 (“The Congress shall have power. . .[t]o regulate commerce with foreign nations.”).

167 See Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983) (“[B]y reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States.”).


169 Id. at 433. See also Carlos Manuel Vazquez, Missouri v. Holland’s Second Holding, 73 Mo. L. Rev. 939 (2008) (commenting that while the Supreme Court in Missouri v. Holland held that Congress has the power to pass a law to implement a treaty even if the law would not fall within Congress’ legislative power in the absence of the treaty, essential
The success of a comprehensive federal scheme to implement COCCA depends on its ability to preempt conflicting state laws that either refuse to recognize the validity of forum selection clauses or otherwise limit the enforceability of these clauses through procedural rules relating to personal jurisdiction and *forum non conveniens*. The Supreme Court first recognized the federal power to preempt conflicting state laws in 1819 in *M'Culloch v. Maryland*,\(^{170}\) holding that state law that conflicts with federal law is “without effect.”\(^{171}\) More recently, in *Cipollone v. Liggett Group, Inc.*,\(^{172}\) the Supreme Court added that consideration of issues arising under the Supremacy Clause “start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.”\(^{173}\) Congress' intent may be “explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”\(^{174}\)

While federal legislation does not typically preempt state court procedures and jurisdictional rules, preemption can occur when those laws undermine the effectiveness of a federal statutory scheme specifically targeted at procedural issues. Case law relating to the Federal Arbitration Act (the “FAA”)\(^{175}\) is particularly instructive because, as the Supreme Court noted in *Scherk v. Alberto-Culver Co.*, an arbitration agreement “is, in

\(^{170}\) 17 U.S. (4 Wheat.) 316 (1819).

\(^{171}\) *Id.* at 399.


\(^{173}\) *Id.* at 545.

\(^{174}\) *Id.* (quoting Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta, 458 U.S. 141, 153 (1982)) (“In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”).

\(^{175}\) Federal Arbitration Act, 9 U.S.C. § 3 (2006). The FAA requires federal and stay courts to stay proceedings if they determine that the proceedings are subject to a valid written arbitration agreement. *Id.*
effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.\textsuperscript{176} Just as the United States is now a party to COCCA, which aims to encourage the recognition and enforcement of forum selection clauses in international contracts, the United States is a party to the New York Convention, which aims “to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”\textsuperscript{177} The Supreme Court in \textit{Scherk} thus concluded “that this country's adoption and ratification of the Convention and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy” to enforce arbitration agreements and awards.\textsuperscript{178}

Preemption under the FAA of conflicting state procedural and jurisdictional rules is broad. In \textit{Southland Corp. v. Keating},\textsuperscript{179} the Court held that the FAA preempted a California statute that prevented parties to certain franchise agreements from waiving the right to litigate in California.\textsuperscript{180} Chief Justice Burger found that “[i]n enacting Section 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by

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177 Id.
178 Id. at 522 (Douglas J., dissenting).
180 Id. at 16 (noting in diversity cases applying state law, federal procedural rules would apply even if they act to preempt state law). See, e.g., Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988) (holding that a federal court considering a contract dispute involving a forum selection clause could transfer the case to another federal district court designated in the choice of court agreement, notwithstanding a state anti-waiver law that invalidated forum selection clauses requiring certain disputes to be litigated outside the State). “[T]he instructions of Congress are supreme … where federal law’s ‘discretionary mode of operation’ conflicts with the nondiscretionary provision of Alabama law, federal law applies in diversity . . . Congress has directed that multiple considerations govern transfer within the federal court system, and a state policy focusing on a single concern or a subset of the factors identified in § 1404(a) would defeat that command.” \textit{Ricoh}, 487 U.S. at 30-31.
\end{flushright}
arbitration.”181 Importantly, the Court further stated: “We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.”182 More recently, the Supreme Court also held in Preston v. Ferrer183 that when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.184

Despite Southland, preemption issues are complicated when it comes to state court procedural rules. Famed law professor Henry Hart noted that when state courts adjudicate federal rights “[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.”185 This is particularly important for purposes of eliminating forum non conveniens analysis in state procedures as required by COCCA. For example, in American Dredging Co. v. Miller,186 the Supreme Court addressed whether federal rules on forum non conveniens preempted state law procedural rules regarding this doctrine, specifically in admiralty cases filed in state courts where federal law provided the rule of decision.187 The Louisiana trial court dismissed the action under the federal doctrine of forum non conveniens as applied in maritime cases.188 However, the Supreme Court of Louisiana reversed, holding that federal procedural rules on forum non conveniens did not preempt the Louisiana state rule in cases pending in Louisiana courts.189

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182 Id. at 11. Importantly, the Supreme Court found that the Arbitration Act’s substantive rules were to apply in state as well as federal courts. Id. at 15. The Court in Southland also found that the legislative history of the Act indicated the intent to apply its standards in more than only federal courts. Id. at 12-13.


184 Id. at 349-50 (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006)).


187 Id. at 445-46.

188 Id. at 453.

189 Id. at 445-46.
In affirming the Louisiana Supreme Court, the Supreme Court held that, 
“[j]ust as state courts, in deciding admiralty cases, are not bound by the 
venue requirements set forth for federal courts in the United States Code, so 
also they are not bound by the federal common-law venue rule (so to speak) 
of forum non conveniens.” 190 Similarly, in Missouri ex rel. Southern R. Co. 
v. Mayfield, 191 the Supreme Court held that a state court presiding over an 
action pursuant to the Federal Employers’ Liability Act (“FELA”) “should 
be free to decide the availability of the principle of forum non conveniens in 
these suits according to its own local law.” 192

Notwithstanding the holdings of Miller and Mayfield, there are 
exceptions to the principle of state court procedural autonomy that may 
require a state court to apply federal procedures when hearing a federal 
claim. Under the first exception, a state court must apply federal procedures 
that are “part and parcel of the remedy afforded” under federal law. 193 The 
second exception is that state procedures may be preempted if they unduly 
burden particular federal rights. 194 In implementing a comprehensive 
scheme under COCCA that combines the substantive and procedural rules 
that are so often intertwined in deciding forum selection clause issues, the 
procedural aspects would be “part and parcel” of the obligations arising 
under COCCA and would preempt conflicting state procedural rules.

Moreover, even beyond the FAA as discussed above, there are 
various examples of situations where Congress has enacted special 
procedural rules applicable in state court cases that support a finding that 
COCCA’s procedural rules would preempt conflicting state law. For

190 Id. at 453.
191 340 U.S. 1 (1950). Mayfield involved a FELA claim brought in Missouri state court 
by a non-resident plaintiff against a foreign corporation based on an accident that took 
place outside of Missouri. Id. at 2. The Missouri Supreme Court ruled that the case could 
not be dismissed on grounds of state forum non conveniens rules. Id. at 3. The United 
States Supreme Court reversed, finding that the state courts are free to apply neutral 
procedural rules that do not discriminate against federal claims, even where such rules 
result in denying access to the state courts for certain federal claims. See id. at 5.
192 Id. at 5.
procedural rules that discriminate against specific federal rights are preempted).
instance, in *Volkswagenwerk v. Schlunk*, the Supreme Court held that the
Convention on Service Abroad of Judicial and Extrajudicial Documents in
Civil and Commercial Matters (“Hague Service Convention”) preempts
state long-arm statutes to the extent they provide conflicting service
procedures in cases subject to that Convention. Other examples exist of
Congressional authority to dictate state court procedures pursuant to
international treaty obligations. For instance, Congress has preempted
state personal jurisdiction rules in cases that are decided exclusively under
state law in state courts, such as in domestic relations proceedings. The
Uniformed Services Former Spouses Protection Act (“USFSPA”) limits the
reach of state long-arm statutes to service members subject to divorce
proceedings in state courts. Several state courts have acknowledged the
preemptive effect of USFSPA's personal jurisdiction provisions, where
Congress created a test for personal jurisdiction for proceedings specifically
relating to the act.


196 *Id.* at 699 (“By virtue of the Supremacy Clause, . . . the Convention pre-empts
inconsistent methods of service prescribed by state law in all cases to which it applies.”).

197 *See* Weiner, *supra* note 98, at 240.

198 Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV.
1589, 1616 (1992) (stating that Congress can regulate the exercise of jurisdiction by state
courts in appropriate cases, such as the Parental Kidnapping Prevention Act and the
Uniformed Services Former Spouses’ Protection Act, which Congress made applicable to
states as well as federal courts and which are binding on state courts and preempt the state's
long-arm statutes).

199 10 U.S.C. § 1408(b)(4) (2006) (explaining that a state court may acquire jurisdiction to
divide a service member’s disposable retired pay in three circumstances: (1) if the member
is domiciled in the State; (2) if the member is a resident of the State; or (3) if the member
gives consent to the State’s jurisdiction).

768 A.2d 1112, 1117 (Pa. 2001); Mortenson v. Mortenson, 409 N.W.2d 20, 23 (Minn. Ct.
App. 1987); Sparks v. Caldwell, 723 P.2d 244, 245 (N.M. 1986).
As set forth above, Congress has the power to determine the circumstances under which foreign commercial disputes can be litigated in American courts based on its broad Article I powers to regulate foreign commerce.\textsuperscript{201} A carefully drafted and detailed federal scheme that incorporates substantive and procedural mechanisms to implement COCCA would preempt conflicting state substantive law and procedural rules regarding personal jurisdiction and \textit{forum non conveniens}.

3. The ULC Jurisdiction-Stripping Approach Raises Constitutional Concerns

The primary difficulty with implementing COCCA in the United States is that it allows parties to international commercial agreements to designate a court in the United States for dispute resolution, regardless of whether the parties or the dispute have any geographic nexus to the chosen forum. In federal and state courts following the \textit{Bremen} standard, the neutral location does not generally render the choice of court agreement invalid as a matter of law. As detailed in Part II, however, the lack of connection is problematic as a matter of procedure because some state long-arm statutes do not recognize a forum selection clause as the sole basis for personal jurisdiction absent compliance with state statutory guidelines for choice of court agreements.

To the extent COCCA Article 5 would preempt these long-arm provisions, the ULC state-by-state uniform law approach would accommodate state policy preferences in favor of a geographic nexus requirement, even if the United States decides not to issue an Article 19 declaration, undermining COCCA implementation. Under the ULC proposal, states that do not want to allow personal jurisdiction over COCCA cases can avoid this obligation by enacting legislation to strip their courts of general jurisdiction of subject matter jurisdiction to hear cases subject to COCCA where there is no relationship between the state and the parties or the disputes.\textsuperscript{202} A similar provision exists under New York law, where courts lack subject matter jurisdiction over contract disputes involving

\textsuperscript{201} See U.S. Const. art. I, § 8, cl. 3. These allowances are made so that foreign courts enforce the judgments of American courts in international business disputes. \textit{Cf.} Burbank, supra note 13, at 305 (explaining that the exercise of federal legislative power may be necessary to ensure a “credible and efficient system to ensure that we honor an international agreement in which jurisdiction is the critical \textit{quid} for a recognition and enforcement \textit{quo}”).

\textsuperscript{202} See Henning, supra note 20, at 50.
foreign parties with no connection to the state unless the contract contains a choice of court agreement that meets the New York statutory standards.\(^{203}\) As a result, states can essentially make Article 19-like declarations under the ULC proposal, even where the United States has decided as a matter of foreign policy that such a declaration is contrary to its interests in promoting international commerce.

The fact that states can strip their courts of subject matter jurisdiction to hear cases arising under federal law, including treaties under the Supremacy Clause,\(^{204}\) based solely on policy objections, raises serious concerns. As a policy matter, lawmakers must consider the precedential value of allowing states to opt-out of declarations made to international treaties, even where such an opt-out is arguably permitted by Congress. This practice may have a significant impact on the negotiation of future private international legal instruments. More importantly, the jurisdiction-stripping provision raises potential constitutional concerns in light of the Supreme Court’s recent decision in *Haywood v. Drown*\(^{205}\) discussed below.

While the Supreme Court has announced that Congress cannot “commandeer” a state’s legislative or executive authority, the Supreme Court has never ruled that state courts of general jurisdiction have the constitutional power to refuse to hear federal claims where Congress has granted concurrent jurisdiction to the federal and state courts.\(^{206}\) Furthermore, under Article III, the founding fathers left open the possibility

\(^{203}\) See N.Y. BUS. CORP. LAW § 1314(b) (McKinney 2003) (stating that New York courts lack subject matter jurisdiction over cases between non-resident, foreign corporations where the dispute has no connection to New York unless requirements of the General Obligations Law as to choice of law and choice of forum have been satisfied); N.Y. GEN. OBLIG. LAW § 5-1402(1) (McKinney 2011) (explaining that New York courts have jurisdiction over incidents arising out of transactions that are less than one million dollars and contain a provision whereby the foreign corporation submits to jurisdiction).

\(^{204}\) U.S. CONST. art. VI, cl. 2.

\(^{205}\) 129 S. Ct. 2108, 2112 (2009).

\(^{206}\) See, e.g., New York v. United States, 505 U.S. 144, 161 (1992); Printz v. United States, 521 U.S. 898 (1997). For example, Congress may not mandate States to pass state legislation that implements federal policy. See, e.g., *New York,* 505 U.S. at 161 (holding that federal law compelling states to enact legislation to provide for radioactive waste violated the Tenth Amendment). Nor can Congress demand action of state executive officers. See, e.g., *Printz,* 521 U.S. 898 (finding that Congress could not, in adopting interim provisions of the Brady Handgun Violence Prevention Act, dictate duties of state law enforcement officials to implement the restrictions imposed under the act).
that state courts would have to hear federal claims unless and until Congress created a system of lower federal courts. In addition, although federal district courts have full subject matter jurisdiction to hear federal question cases today, throughout the majority of American history state courts enforced most federal civil legislation and some federal criminal law.

However, as Congress expanded the number of federal causes of action, some state courts began to balk at the notion of compelled adjudication of federal claims. With the resurgent power of the federal government in the aftermath of the Civil War, the Supreme Court upheld the power of Congress to demand that state courts enforce federal law under the Supremacy Clause. In Testa v. Katt, the Supreme Court reaffirmed that state courts of “adequate and appropriate” jurisdiction “are not free to refuse enforcement” of federal claims. Even with the so-called “Rehnquist Revolution” to re-establish state sovereignty in the 1990s, the Supreme Court recognized the unique position of state courts as enforcers of federal law in our constitutional scheme. For example, in Printz v. United

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207 See U.S. CONST. art. III, § 1 (“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”); see also Howlett v. Rose, 496 U.S. 356, 367 (1990). Justice Stevens wrote:

“Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum - although both might well be true - but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.” Howlett, 496 U.S. at 367.


208 See Testa v. Katt, 330 U.S. 386, 389-90 (1947) (describing how the first Congress that convened after the Constitution conferred jurisdiction on the state courts to enforce important federal civil laws and succeeding Congresses conferred on the states jurisdiction over federal crimes and actions for penalties and forfeitures).

209 See Claflin v. Houseman, 93 U.S. 130, 137 (1876).


211 Id. at 394.

the Court recognized the anti-commandeering principle as applied to Congressional action towards state executive officials. Writing for the Court, Justice Scalia reasoned that “the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.”

For purposes of assessing the constitutionality of the ULC jurisdiction-stripping approach, the Supreme Court’s recent decision in *Haywood v. Drown* is instructive. In *Haywood*, the Court considered the validity of a New York state law that divested state courts of jurisdiction over § 1983 civil rights actions against state correction officers, a frequent target of prisoner litigation, although suits brought against other state officials were not within the scope of the statute. The question presented was whether New York’s exceptional treatment of a limited category of § 1983 claims was consistent with the Supremacy Clause. The majority 5-4 decision, written by Justice Stevens, found that the jurisdictional statute was an unconstitutional attempt to strip New York courts of general jurisdiction of the power to hear federal claims where Congress had granted concurrent jurisdiction. In particular, the Court in *Haywood* found that

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214 Id. at 907.

215 Id. One of the few limitations on state court enforcement of federal law was recognized in the Supreme Court’s decision in *Alden v. Maine*, 527 U.S. 706, 707 (1999) (holding that federal law could not compel state courts to hold state officials accountable for violations of federal law, as such an action would violate the Eleventh Amendment guarantee of state sovereign immunity).


217 Id. at 2112.

218 Id.

219 Id. at 2116-17. (Justice Thomas dissenting) (arguing that neither Article III nor the Supremacy Clause require state courts to hear federal cases), Instead:

“[T]he States have unfettered authority to determine whether their local courts may entertain a federal cause of action. Once a State exercises its sovereign prerogative to deprive its courts of subject-matter jurisdiction over a federal cause of action, it is the end of the matter as far as the Constitution is concerned.” Id. at 2122.
New York had not proffered a “valid excuse” for declining to exercise jurisdiction over § 1983 claims against state correctional officers.220

The Court in Haywood also remarked that there are only a “handful of cases in which this Court has found a valid excuse” for state courts to decline to exercise jurisdiction over federal claims, all of which arose under FELA.221 Because COCCA would require state courts to hear claims without a geographic connection to the state, it is important to note that some of the FELA cases cited in Haywood held that a state, by its own rules, could give its courts discretion to decline jurisdiction over FELA claims where neither party was a resident of the state or where proper venue was lacking because the cause of action arose outside the court’s territorial jurisdiction.222 However, none of these cases suggest that states can strip their courts of jurisdiction to enforce a federal statute, which includes detailed procedural provisions as part of the enforcement scheme, based on policy disagreements. In such circumstances, states may not decline jurisdiction to hear claims arising under federal law by relying on a state law that has been expressly preempted.223

The ULC model has very important and beneficial provisions that undoubtedly work to implement COCCA in a manner customized to the American federal system. Nonetheless, the ULC jurisdiction-stripping

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220 Id. at 2114. The New York Court of Appeals, applying the same test, found that New York did have a valid excuse for removing jurisdiction of civil rights claims against state corrections officers because it similarly granted immunity to corrections officers for state law civil rights claims and did not discriminate against the federal right. Haywood v. Drown, 9 N.Y.3d 481, 488, 491-93, 881 N.E.2d 180, 184, 187-88 (Jones, J., dissenting) (arguing that while the problem of baseless lawsuits by prisoners against corrections officers is a serious one, Congress decided that the threat of abuse of citizens by those acting under color of state law was more serious, and under the Supremacy Clause, the State of New York is not free to decide that DOCS employees must be immune from such suits and may not “selectively escape” the responsibility Congress gave its courts in § 1983).

221 Haywood, 129 S. Ct. at 2116.


223 Howlett v. Rose, 496 U.S. 356, 372 (1990) (“States may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law.”).
provision is not based on a concern over the competence of state courts to adjudicate contracts or other business disputes with an international component. Instead, the provision is intended to use subject matter jurisdiction to avoid the express preemption of state personal jurisdictional rules under COCCA. As Haywood instructs, although “States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.”224 Consequently, where Congress and the President have expressed the policy that international forum selection clauses are to be enforced regardless of a geographic nexus to the United States, local state public policy preferences must yield under the Supremacy Clause, notwithstanding the existence of conflicting state procedural rules.225

Part IV: Towards a Comprehensive Federal Scheme: Codifying Bremen in a FSIA Framework

It is one thing to argue for a federal implementation scheme, but quite another to suggest what it should look like. Drafting decisions in this difficult area require intense attention to detail without losing sight of COCCA’s overall goals. As set forth in this section, a broader federal scheme would bring greater clarity to COCCA implementation in the long-term, even though a narrow drafting of COCCA’s provisions would be simpler and less costly politically. Towards that end, this article aims to open debate on two key issues. First, whether COCCA’s implementing statute should codify the existing standard, as set forth in Bremen, on the enforceability of forum selection clauses in international contracts.226

224 Haywood, 129 S. Ct. at 2116.


“The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.” Mondou, 223 U.S. at 57.

226 M/S Bremen v. Zapata Offshore Co., 407 U.S. 1, 10 (1972) (holding that the forum selection clause is prima facie valid and is to be honored by the parties and enforced by the
Second, whether the FSIA can serve as a model for the structure and comprehensiveness of a COCCA statute. 227 By combining Bremen and the FSIA, COCCA implementation can eliminate the disparities between federal procedural and state substantive law that have encouraged the use of litigation strategy to determine case outcomes. 228

1. Adopting a Substantive Federal Rule of Decision Based on Bremen

For almost forty years, the Bremen rule favoring the enforcement of forum selection agreements in international business contracts has guided federal and state courts deciding the enforceability of domestic forum selection clauses in the international commercial context. 229 Bremen’s policy favoring the enforcement of international forum selection agreements is more consistent with COCCA’s goals than the ULC approach, which, as discussed in Part III, allows states to avoid COCCA’s obligations through jurisdiction-stripping provisions. 230 Therefore, codifying the Bremen rule as part of the implementation of COCCA is logical. Under a federal substantive rule based on Bremen, choice of court agreements subject to


228 See Holt, supra note 16, at 1926-27 (noting that depending on the type of procedural motion made, the outcome can vary based on the confused application of federal and state law to forum selection clauses).

229 See supra Part II; see, e.g., Prof’l Ins. Corp. v. Sutherland, 700 So. 2d 347, 350 (Ala. 1997) (finding that Bremen does not mandate that state courts enforce forum selection provisions outside of an admiralty context). The Court opined:

“declaring Alabama’s law of contracts, this Court is free to independently assess the public policy of this state, subject only to the requirements of federal law. However, we, as have the courts of almost all other jurisdictions, do now find the Supreme Court's reasoning in M/S Bremen on this issue to be persuasive. Thus, we determine that ‘outbound’ forum selection clauses such as those in this case are not void per se as against the public policy of Alabama.” Sutherland, 700 So. 2d at 350.


230 See supra Part III for discussion of COCCA.
COCCA would be enforced unless the opposing party clearly shows either: (1) the agreement is unreasonable or unjust; or (2) the forum selection clause was the result of fraud or coercion.\footnote{See supra note 56. However, Bremen also speaks to the strong public policy of the chosen forum as a basis for invalidating a forum selection clause. See supra note 62. Because Bremen was dealing with the obligation of non-chosen courts to evaluate outbound forum selection clauses, the public policy of the receiving State had to be considered. See generally supra Part II.1. In implementing obligations of a chosen court under COCCA, the adoption of the Bremen standard favoring the enforcement of forum selection clauses would obviate the need for a public policy exception for chosen courts considering the validity of the agreement. See generally supra Part I & Part II.1. Indeed, the point of the substantive rule in the implementing law is to reflect the public policy of the United States with respect to the enforceability of choice of court agreements subject to COCCA.}

Assuming the United States does not opt to issue an Article 19 declaration, a substantive rule of decision based on Bremen that incorporates COCCA’s provisions should also specifically address a lack of geographic connection to the chosen court and any limitations this places on the determination of the reasonableness of a choice of court agreement. Borrowing again from Bremen, a clarifying rule or comment could state that an agreement subject to COCCA should not be deemed unreasonable on the grounds of inconvenience to the parties unless the opposing party establishes that enforcement of the agreement in the chosen court will deprive that party of a fair trial.\footnote{See supra text accompanying note 56.} This standard would further Bremen’s goal of approving the parties’ choice of forum when the parties choose a neutral forum respected for its competence in a particular area.\footnote{See supra notes 56-62. While this standard is consistent with the decision not to issue an Article 19 declaration, it should be noted that requiring some connection to the United States as a mechanism to limit access to American courts for purely foreign disputes is a central component of the FSIA. In Verlinden, the Supreme Court noted in evaluating the FSIA’s jurisdictional provisions that: “the legislative history reveals an intent not to limit jurisdiction under the Act to actions brought by American citizens. [but] Congress was aware of concern that our courts [might be] turned into small ‘international courts of claims[,]’ . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world . . . by enacting substantive provisions requiring some form of substantial contact with the United States.” Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 490 (1983) (citations omitted).}
Codifying the *Bremen* standard and incorporating language acknowledging the circumstances under which remoteness or inconvenience may render a choice of court agreement unreasonable should make the elimination of the *forum non conveniens* defense, as required under COCCA Article 5, more palatable to state and federal courts. As discussed in Part II of this article, *Bremen* allows judges to consider the public interest factors at stake in enforcing a forum selection clause to ensure a fair trial. This standard, therefore, satisfies two competing considerations in adapting COCCA to the realities of litigation in the United States. First, it preserves the inherent authority of judges to consider the equities and reasonableness of the agreement. Second, it minimizes consideration of the personal convenience of the parties as required under COCCA’s procedural provisions regarding *forum non conveniens*.

Finally, a federal substantive rule on the validity of forum selection clauses subject to COCCA makes sense in the international context in which COCCA cases will be litigated. A federal substantive rule will promote simpler and more consistent decisions in foreign non-chosen courts, which benefits parties and the courts alike. Indeed, without a clear federal rule on the validity of forum selection clauses, the overall enforceability of such agreements continues to be limited by state public policy choices and by various procedural rules used at the federal and state level. From an international perspective, therefore, a uniform substantive standard may have a significant effect on the decisions of non-chosen courts outside the United States that “shall suspend or dismiss proceedings to which an

234 *See supra* Part I for a discussion of COCCA’s Article 5 provisions.

235 *See supra* Part II.

236 *Cf.* David Marcus, *The Perils Of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 1048 (2008) (discussing the evolution of the *Bremen* contractual approach to enforcement of forum selection clauses to tests based on extra-individual concerns, as well as party-centered interests, suggesting that the replacement of standard procedural doctrine with private contracts is inherently limited because the parties’ consent can only go so far toward legitimating the exercise of governmental power through adjudication).

237 *See supra* Part II for discussion about the confusion between substantive and procedural law in forum selection clause enforcement, and the role of state statutory law in limiting enforceability.
exclusive choice of court agreement applies,” unless the choice of court agreement is null and void under the law of the chosen court.238

2. Developing a Comprehensive Federal Procedural and Jurisdictional Scheme for COCCA

Codifying a substantive rule based on Bremen alone will not resolve the disparity among federal and state courts concerning what procedural law applies to the enforceability of forum selection clauses in international commercial cases.239 In particular, a federal substantive rule will not resolve the unpredictability of forum selection clause enforcement resulting from the Supreme Court’s ruling in Ricoh that allows federal chosen courts to transfer a case to a non-chosen federal court under § 1404(a) notwithstanding the choice of the parties.240 This procedural issue will likely continue to be litigated if a federal rule of decision based on Bremen is adopted in the absence of specific federal procedural rules relating to subject matter and personal jurisdiction, service of process, venue, and removal in COCCA cases. Drawing upon analogous provisions of the FSIA provides an excellent framework to meet this challenge.

A. Subject Matter Jurisdiction and Removal.

COCCA requires no change to existing rules on the subject matter jurisdiction of domestic courts.241 When implementing COCCA, however, serious consideration should be given to adopting language that specifically creates federal question jurisdiction in the federal courts as permitted under Article III of the Constitution.242 Establishing federal subject matter

238 See COCCA, supra note 3, art. 6(a).

239 See supra Part II for discussion about the problem relating to the application of procedural law.

240 See supra Part II.1 for discussion of Ricoh.

241 COCCA, supra note 3, art. 5(3)(a).

242 See U.S. CONST. art. III, § 2, cl. 1. Federal court subject matter jurisdiction is derived from the provisions of Article III of the United States Constitution, which created only one Supreme Court of limited jurisdiction, and such lower federal courts as Congress would deem to create. Id. Under Article III, federal courts may only be empowered to hear cases: (1) involving disputes between citizens of different states (the diversity clause); (2) controversies between “a State, or the Citizens thereof, and foreign States, Citizens or Subjects” (the foreign diversity clause); and (3) cases “arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their
jurisdiction for COCCA cases would have a number of beneficial effects for the efficient enforcement of choice of court agreements subject to the Convention. Among other things, it would open the door for the promulgation of rules of personal jurisdiction consistent with COCCA that can supplant conflicting state long-arm provisions. Federal question jurisdiction would also resolve any potential future debate about whether a federal Bremen standard applies in COCCA cases filed in federal or state court. Furthermore, because diversity jurisdiction in federal courts does not exist for cases brought by foreign plaintiffs against foreign defendants, federal question jurisdiction would pave the way for removal in purely foreign COCCA disputes in accordance with FSIA. Finally, express federal question jurisdiction would also make COCCA consistent with the implementation of the New York Convention, which COCCA is intended to complement.

Adopting a comprehensive federal legislative scheme that includes a substantive rule of decision using the Bremen standard and the procedural aspects of COCCA on personal jurisdiction, venue and forum non conveniens would also allow for the creation of federal question jurisdiction for COCCA cases. Actions subject to COCCA would “arise under” federal law for purposes of establishing federal question subject matter jurisdiction under the analysis used by the Supreme Court in Verlinden B.V. v. Central Bank of Nigeria. In Verlinden, the Supreme Court specifically considered whether Congress exceeded the scope of its Article III powers by granting federal courts subject matter jurisdiction over claims subject to the FSIA, even though the ultimate liability issues would be resolved according to

Authority” (the federal question clause). Id. See also 28 U.S.C. §§ 1331-32 (outlining federal courts subject matter jurisdiction).

243 Cf. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) (explaining that complete diversity is destroyed if there is a foreign plaintiff and a foreign defendant named as parties, even if they are from different countries).

244 See Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1119-20 (9th Cir. 2002). The Court opined:

“In 1970 Congress ratified the [New York] Convention. . . Congress implemented the Convention by passing Chapter II of the Federal Arbitration Act (“FAA”). . . which provides that an ‘action falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States ... shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.’” Id.

As in COCCA cases involving disputes between foreign parties litigated in the United States, FSIA raises the possibility of U.S. litigation involving foreign plaintiffs and a foreign state which would not support diversity jurisdiction in the federal courts.

In deciding whether FSIA supports federal question jurisdiction for foreign plaintiffs, the Supreme Court followed the framework for federal question jurisdiction presented in Chief Justice Marshall’s famous opinion in Osborn v. Bank of the United States. This opinion laid down the “broad conception of ‘arising under’ jurisdiction.” Under Osborn, federal question jurisdiction exists where the “right set up by the party may be defeated by one construction of the constitution or law[s] of the United States and sustained by the opposite construction.” The Court in Verlinden concluded that because a plaintiff’s claim could be defeated by the threshold application of the FSIA’s immunity provisions, an action against a foreign sovereign arises under federal law for the purposes of Article III jurisdiction. The Supreme Court further noted that the FSIA was more than a mere jurisdictional statute, but instead set forth “comprehensive rules governing sovereign immunity” and prescribed procedures for commencing lawsuits against foreign states in federal and state courts.

Based upon Verlinden, Congress has the authority to create federal question jurisdiction for claims under COCCA that incorporate governing substantive and procedural standards to be applied in federal and state courts. A plaintiff’s action subject to COCCA would require a court to

246 Id. at 491.

247 Id. at 492 (stating, with respect to actions between foreign citizens, “[s]ince Article III requires only ‘minimal diversity,’ . . . diversity jurisdiction would be a sufficient basis for jurisdiction where at least one of the plaintiffs is a citizen of a State). FSIA does require a connection to the United States for access to U.S. courts. Supra text accompanying note 233.

248 22 U.S. 738 (1824).

249 Verlinden, 461 U.S. at 492 (quoting Osborn v. Bank of the United States, 22 U.S. 738, 822 (1824)).

250 Id.

251 Id. at 494.

252 Id. at 495 n.22.
determine if COCCA applies to the dispute or if the choice of court agreement was valid. Courts applying COCCA would also have to determine whether personal jurisdiction was proper under the COCCA standard, rather than the conflicting state long-arm statute, and whether *forum non conveniens* could be applied. In these circumstances, given the “broad conception” of arising under jurisdiction recognized since *Osborn*, federal question jurisdiction would exist for all claims under a comprehensive COCCA scheme.

Federal subject matter jurisdiction also raises the question of removal of claims subject to COCCA from state courts to federal courts. As noted above, because of Article III’s diversity limitation, COCCA cases between only foreign parties normally would not be amenable to suit in federal courts. By enacting federal legislation that provides for federal question jurisdiction, Congress can allow for removal, as it did under the FSIA, which provides foreign states with the right to remove any civil action from a state court to a federal court. In determining whether to include removal provisions in any COCCA implementing law, however, Congress must also consider circumstances where the parties have negotiated a contract that calls only for submission to the jurisdiction of a particular state court, to the exclusion of federal courts in the same state. As a result, Congress may wish to consider a rule of interpretation as to when a choice of court agreement will be deemed to apply only to state courts.

Because COCCA does not contemplate removal, Congress must make a policy choice whether to include a removal provision in the COCCA implementing scheme. Under existing law, some courts consider an exclusive forum selection clause designating only state courts for dispute resolution as a waiver of the right to remove. For example, in *Snapper, Inc. v. Redan*, the Eleventh Circuit affirmed a decision construing a forum selection clause that allowed litigation to be brought in state or federal court in Georgia “as the Creditor may elect” to be considered a waiver by the guarantor of the right to remove an action filed by the creditor in Georgia state court. Other courts require waiver of the right to remove to be clear

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254 171 F.3d 1249 (11th Cir. 1999).

255 Id. at 1260 (11th Cir. 1999); see Ocwen Orlando Holdings Corp. v. Harvard Prop. Trust, LLC, 526 F.3d 1379, 1381 (11th Cir. 2008) (holding that language in the clause agreeing to “waive any right to transfer any such action filed in any court to any other court” effected a waiver of right to remove in addition to a right to transfer for the convenience of the parties and witnesses); Dominium Austin Partners, L.L.C. v. Emerson,
and unequivocal. If Congress does adopt a comprehensive federal scheme implementing COCCA, policy choices need to be made about whether to allow removal in violation of a choice of court agreement.

B. Personal Jurisdiction and Service of Process.

Federal personal jurisdiction is particularly important in the COCCA context because of potential conflicts with state long-arm statutes that are more restrictive than the due process test of *International Shoe*. As discussed in Part II, current Supreme Court precedent holds that a valid choice of law agreement amounts to consent to jurisdiction and raises no due process concerns. If COCCA cases are deemed federal question cases and federal personal jurisdiction rules are prescribed, then COCCA's requirements can be fully satisfied without any constitutional due process infirmities. Adopting a federal rule for personal jurisdiction in chosen courts would also help clarify existing rules on personal jurisdiction for enforcement proceedings that are subject to COCCA.

Personal jurisdiction under COCCA could mirror the FSIA's personal jurisdiction provisions. The FSIA's personal jurisdiction provisions provide in Section 2: “Personal jurisdiction over a foreign State shall exist as to every claim for relief over which the district courts have

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248 F.3d 720, 727 (8th Cir. 2001) (holding that “a forum selection clause may be viewed as a waiver of a defendant's right to object to venue”).

256 *See, e.g.*, City of New Orleans v. Mun. Admin. Servs., Inc., 376 F.3d 501, 505-06 (5th Cir.2004) (affirming denial of a remand motion where the forum selection clause was not a “clear and unambiguous waiver of removal” because the clause read, “The undersigned Contractor does further hereby consent and yield to the jurisdiction of the State Civil Courts of the Parish of Orleans and does hereby formally waive any pleas of jurisdiction on account of the residence elsewhere of the undersigned Contractor.”); Cadle Co. v. Reiner, Reiner & Bendett, P.C., 307 F.App’x. 884, 888 (6th Cir. 2009) (holding that to waive the right to remove, a forum selection clause must mention removal and set forth an explicit waiver of that right).

257 Congress could opt to add a provision to the list of “non-removable actions” in 28 U.S.C. § 1445 to include certain agreements subject to COCCA designating only the courts of a state. *See* 28 U.S.C. § 1445 (2006).

jurisdiction under subsection (a) where service has been made under . . . this title.” Implementing legislation for COCCA could provide similar language for service of process provisions or otherwise cross-reference the worldwide service of process provisions of the Hague Service Convention.

C. Venue

Nothing in COCCA replaces existing rules on proper venue, although if transfer of venue is discretionary, courts are directed to give “due consideration” to the choice of the parties. Strict implementation of this provision would uphold the existing standard announced in *Ricoh* that, notwithstanding the parties’ choice of forum in a valid forum selection clause, a court could exercise its discretion to transfer venue to a more appropriate forum under 28 U.S.C. § 1404(a). At least one commentator has suggested removing discretion under § 1404(a) in the enforcement of forum selection clauses and instead applying the *Bremen* standard to resolve all issues relating to enforceability in a single procedural framework. At a minimum, when Congress implements COCCA, it should clarify whether it intends to retain the *Ricoh* ruling regarding the scope of § 1404(a) once a treaty on the issue is in place.

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261 See COCCA, supra note 3, art. 5(3)(b).

262 See Stewart Org., Inc. v. Ricoh, 487 U.S. 22, 29 (1988); see also supra text accompanying notes 93-100.

263 See Holt, supra note 16, at 1945 (arguing for the creation of a single federal rule that would be the only available means to enforce forum selection clauses in federal court and would include language instructing courts to apply the standard from *Bremen* and ensure that defendants cease attempts to invoke the federal transfer statute by amending 28 U.S.C. § 1404(a) to indicate that courts must not consider the presence of a forum selection clause in their transfer analysis).

264 *Ricoh*, 487 U.S. at 30 (referring to 28 U.S.C. § 1404(a), which directs a district court to take account of factors other than those that bear solely on the parties’ private ordering of their affairs).
D. A Comprehensive Federal Scheme is Both Necessary and Practical.

As these procedural issues indicate, when Congress determines the circumstances under which foreign parties can litigate their claims in United States courts under COCCA, Congress must do more than simply legislate the terms of the Convention. The complexities of federal and state court relations, the limited jurisdiction of the federal courts, the prospects of removal, and the variety of procedural standards to determine personal jurisdiction, service of process and venue make implementation far from a matter of rote transcription. Looking to the FSIA’s provisions on how and when American courts will allow litigation by foreign sovereigns provides a useful baseline on crafting federal law that dictates some, but not all, of the applicable legal standards.

Conclusion

Implementation of international obligations in the United States is a complex issue. This is especially true when international obligations implicate state court procedures or judicial authority.\(^\text{265}\) While there are strong arguments in favor of a state-by-state approach to implementation of Article 5 in the American federal system, the interests that COCCA and the United States, as a signatory, seek to promote are better served through a comprehensive federal legal framework applicable in federal and state courts. By creating a uniform federal approach rather than a uniform state law approach, the United States can achieve legal uniformity that not only fulfills the requirements of COCCA, but also enhances the ability of American corporations to access foreign courts for the enforcement of commercial judgments and, thereby, better compete in the global market place. In this way, federal law implementing COCCA can bring a modicum of certainty to an otherwise uncertain legal landscape by untangling international choice of court agreements from *Erie*’s murky waters.

In implementing COCCA, Congress must also engage in a balancing act not simply between international and domestic law, but between federal

\(^{265}\) Cf. *Medellin*, supra note 153, at 517. The Court opined: “Given that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties to the relevant treaties to have clearly stated their intent to give those judgments domestic effect, if they had so intended. Here there is no statement in the Optional Protocol, the U.N. Charter, or the ICJ Statute that supports the notion that ICJ judgments displace state procedural rules.” *Id.*
and state power and the authority of the three co-equal branches of the federal government. As Chief Justice Roberts wrote, “Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes.”\(^2\) This task will include drafting provisions preempting state law on personal jurisdiction and forum non conveniens, while simultaneously preventing state attempts to evade COCCA’s goals through application of substantive standards that undermine the procedural rules necessary to realize the ultimate goal of enhanced recognition and enforcement of commercial judgments. By using Bremen and the FSIA as models, Congress can draw upon standards widely accepted in federal and state courts alike.

Finally, Congress must recognize the fact that choice of court agreements are not “alternate dispute resolution” procedures that can be dictated entirely by private parties considering private interests. When parties choose to have their disputes resolved in formal court systems rather than through private means, they must accept the risk and responsibility of participating in the public sphere. Private parties and Congress alike must acknowledge that courts have a fundamental institutional obligation to ensure that proceedings before them are fair, and that the interests of justice are satisfied, regardless of what private arrangements the parties have made. An implementation scheme for COCCA that does not allow American courts to consider the overall fairness of litigating in their forum would run contrary to the demands of an open and democratic society that depends on competent and impartial courts of justice. Bremen resolved this problem by incorporating public considerations into the determination of the reasonableness, and, thus, the enforceability, of forum selection clauses in international admiralty disputes. Congress too can solve this problem through a comprehensive set of legal standards that enforce choice of court agreements in international commercial transactions under COCCA while preserving the inherent authority of judges to ensure that the public interest in ensuring fair trials is maintained.

\(^2\) Id. at 521.

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Factors to Consider Before Arbitrating in the Arab Middle East:  
Religious and Legislative Constraints

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Abstract

This article discusses two significant factors affecting arbitration in the Arab Middle East: the effect of religion on arbitration and the effect of legislative constraints on arbitration. By presenting foreign investors and practitioners with an overview of some of the unique social, legal and religious issues distinctive to arbitration in the Arab Middle East, this article will provide foreign investors and practitioners with examples of factors to consider that can affect arbitration decisions in the Middle East.

Introduction

The Arab Middle East’s distinctive geographical position, the region’s availability of natural resources, and the recent population increases and corresponding burgeoning demand for Western products1 has primed Middle Eastern countries to be some of the largest participants in the global market. The Middle East is home to many dynamic trade and investment opportunities. For example, Saudi Arabia experienced an increase in foreign direct investment of $27 billion from 2005 to 2008.2 The Industrial & Commercial Bank of China Ltd., the largest Chinese commercial bank, is expanding widely in the Middle East and is considering acquisitions there to take advantage of China's booming...

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investment in the region.\(^3\) In 2007, Egypt was poised for the expansion of approximately 40 international franchises, including 25 fast food franchises such as KFC, McDonald’s and Pizza Hut.\(^4\) Finally, the Middle East countries possess the lion’s share of the planet’s crude oil resources, with Saudi Arabia, the largest exporter of petroleum, owning about twenty percent of world’s proved oil reserves.\(^5\) In fact, analysts predict that nine of the world’s ten largest oil refinery crackers will be located in the Middle East by 2012.\(^6\)

Due to these unique trade and investment opportunities, potential methods to settle contract disputes in the Arab Middle East must be considered. Arbitration is an increasingly accepted form of alternative dispute resolution. Indeed, commercial contracts increasingly include arbitration clauses. Arbitration is often more efficient than other judicial remedies and has many attractions including: expediency, professionalism, specialized decision makers, confidentiality, and freedom of choice of substantive and procedural laws and place of arbitration. However, arbitration is most efficient when the parties involved understand the different legal, social, religious, cultural and other factors that may affect the arbitration and the enforceability of the arbitration award.

These factors differ between legal systems, especially in the Arab Middle East. In some Islamic nations, the courts decline to enforce foreign arbitral awards on domestic public policy grounds, including precepts of Islamic law.\(^7\) For instance, in Saudi Arabia and the United Arab Emirates, public order is constituted by the Shari’a, the body of rules derived from the main sources of Islamic law. Accordingly any foreign arbitral award that is

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\(^5\) Saudi Arabia possesses 19.9% of the world’s proved oil reserves and the Middle East possesses 55.6%. U.S. Energy Information Administration, World Proved Reserves of Oil and Natural Gas, Most Recent Estimates (March 3, 2009), http://www.eia.gov/emeu/international/reserves.html.

\(^6\) Robert Westervelt, Mideast Advance, 171 Chemical Week 3 (2009).

inconsistent with Shari’a rules is set aside. A common example of this is setting aside foreign arbitral awards concerning contracts involving riba (interest). Because arbitration with an unenforceable award is pointless, foreign investors and practitioners must be aware of the issues affecting the enforceability of an arbitration award before they agree to an arbitration clause or include one in a contract.

Part I of this article will discuss religion as one of the factors affecting arbitration, particularly in the context of contracts. This section will demonstrate why religious influence on the legal system of a country must be considered before arbitrating in countries where the legal system is influenced by religious rules. Arbitration in Saudi Arabia provides a useful example of this process in a Middle Eastern country with a legal system based on Islamic Law (Shari’a). Part II of this article will discuss legislative constraints that warrant consideration before arbitrating to guarantee the enforceability of the arbitration awards, especially for technology licensing agreements. Egyptian law is analyzed as an example of a Middle Eastern country with exacting arbitration rules concerning technology licensing agreements.

I. Shari’a and Its Influence on Arbitration Laws in the Arab Middle East

In order to understand the influence of Shari’a on Middle Eastern arbitration, it is essential to understand the fundamentals of Shari’a law and its impact on national law and arbitration in the region. An example of Shari’a influence in Saudi Arabia illustrates the importance of considering religious issues for foreign investors working with the Arab Middle East.

A. Shari’a in Brief

Islamic rules and principles are provided by the Muslims’ holy book, the Qur’an. In the Islamic faith the Qur’an was dictated word for word by Allah to his Prophet Muhammad.

8 See ABDUL HAMID EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 608-09 (1999).
9 See id. at 609. Riba is an Arabic word which means usury. Glossary of Islamic Legal Terms, 1 J. ISLAMIC L. 89, 99 (1996).
Shari’a refers to the body of rules derived from the main sources of Islamic law. Shari’a is the body of law and Fiqh is the process of applying the rules of Shari’a to real or hypothetical situations. Shari’a is divided into primary sources and secondary sources. Primary sources include the rules set forth in the Qur’an and the Sunna. Secondary sources include Ijma’ and the Qiyas. Ijma’ is an Arabic word that literally means the

the Islamic law, explaining the main elements of the Shari’a, and discussing the methodologies and schools of the Islamic jurisprudence).

11 Glossary of Islamic Legal Terms, supra note 10, at 90 (“Islamic name for the creator, the one and only deity; God.”); see also THE HOLY QURAN ENGLISH TRANSLATION OF THE MEANINGS AND COMMENTARY, 1536 (The Presidency of Islamic Researchers, Fitra, Call and Guidance ed., 1994) [hereinafter THE QURAN]; Id. at 2028 (“Then we put thee on the right Way of Religion: so follow though that Way and follow not the desires of those who know not”); and id. at 2028 (“Say: He is Allah, the One; Allah, the Eternal, Absolute, He Begetteth not, nor is He begotten; And there is none like unto Him”) (quoting the meaning of the Qur’an 112).

12 Prophet Muhammad (PBUH) is the Prophet of Islam. When the name of Prophet Muhammad (PBUH) is mentioned, it is followed by the sentence Peace Be Upon Him (“PBUH”) as a mark of respect and veneration. Abdal-Haq, supra note 10, at n. 58. According to Abdal-Haq, supra note 10, at 40:

Muhammad had a very difficult time establishing Islam among the Arabs of his day. Ultimately he succeeded. Though born an orphan and unable to read or write, he was able to combine religious with the secular in one of the most backward corners of the earth, to establish a civilization that ushered in the Renaissance in Europe, among other things. For his accomplishment, he has been called the most influential person in the history of the world by a non-Muslim historian [Michael H. Hart].

13 Fiqh is an Arabic word which refers to the Islamic Jurisprudence and sometimes to the collection of decisions reached by specific individual or institution. Glossary of Islamic Legal Terms, supra note 9, at 92. According to Abdal-Haq, some authors use the words Islamic law, the Shari’a and Fiqh as simultaneous words which may confuse readers. Abdal-Haq, supra note 10, at 32.

14 See generally M. Cherif Bassiouni & Gamal M. Badr, The Shari’ah: Sources, Interpretation, and Rule-Making, 1 UCLA J. ISLAMIC & NEAR E. L. 135 (2002) (defining the Shari’ah and introducing its sources and methods of interpretation and discussing the possibility of formulating new rules of law to meet the situations that were unknown during previous centuries and currently need to be both Islamic and modern).

15 The word Sunna is an Arabic word that refers to the sayings and deeds of Prophet Muhammad (PBUH) and it is referred to sometimes as Hadit. Abdal-Haq, supra note 10, at 33.
unanimous agreement or consensus of opinion and refers to the consensus of opinion of the learned Muslim scholars. *Qiyas* is an Arabic word that literally means analogy and refers to the process of deducing legal decision on the basis of analogy by reference to the *Qur’an* and the *Sunna*.16

The *Qur’an* is the main source of the *Shari’a* and is a spiritual book and a guide for everyday behavior.17 The *Qur’an* consists of *Suras*18 (chapters) which are then divided into verses.19 Since the *Qur’an* is considered to be the highest source of *Shari’a*, its rules are not subject to challenge and cannot be modified by rules derived from any of the other sources of *Shari’a*.20

The *Sunna* refers to the practices of Prophet Muhammad, which includes: “(1) Muhammad's own words; (2) Muhammad's actions (such as descriptions of how he prayed, conducted war, treated the poor, etc.); (3) Muhammad's tacit approval of actions performed in his presence, i.e. his silence on a matter was interpreted as consent; and (4) descriptions of his physical attributes, personality, demeanor, and disposition.”21

Through the *Sunna*, Prophet Muhammad explained and completed principles stated in the *Qur’an*. The *Sunna* cannot contradict the *Qur’an*.22 An authentic *Sunna* that complies with the *Qur’an* is usually narrated and recorded in one of the *Sahih*, the best known and most trusted compilations of *Sunna*. These books are the *Sahih Al-Bukhari*, *Sahih Muslim*, *Sunan An-

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16 See *Glossary of Islamic Legal Terms*, *supra* note 9, at 94 (providing literal meanings); See also Bassiouni & Badr, *supra* note 14, at 152-57 (2002) (providing connotation of terms).


18 *Sura* is an Arabic word meaning chapter of the *Qur’an* and literally meaning a series of things. *Glossary of Islamic Legal Terms*, *supra* note 9, at 101.


21 Abdal-Haq, *supra* note 11, at 47.

Nasa’I, Sunan Abi Dawud, Sunan At-Tirmidhi, and Sunan Ibn Majah. If there is no guidance on an issue in the Qur’an or the Sunna, the secondary Shari’a sources (Ijma’ and the Qiyas) apply.

B. Shari’a as a Source of National Laws in Muslim Countries

Different countries treat Shari’a differently as a source of national law. Islamic countries can be divided into three categories based on the degree of influence of Shari’a on their legal system.

The first category includes countries like Lebanon and Turkey that do not consider Shari’a to be a source of their national law. In these countries, the influence of Shari’a on the actual practice of law and on legal decisions is limited or not formally clear. For instance, the Turkish Constitution provides that:

The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.

The second category includes countries like Algeria, Tunisia, Egypt, and Jordan. The effect of Shari’a on the legal systems of the countries in

23 See Abdal-Haqq, supra note 10, at 46-49.
24 See Abdal-Haqq, supra note 10, at 54, 56-57.
25 NISRINE ABIAD, SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY, 43-46 BRIT. Inst. of Int’l & Comp. L. 2008. Abiad places the countries into “a large and diverse spectrum” Id. at 43. On one end of the spectrum are secular countries like Turkey, and on the other end are countries such as Iran wherein Sharia is “the only source of legislation.” Id. at 44. “Between these two extremes are…[various countries ]…”which accord Sharia different degrees of status as a normative source of the law.” Id. at 46.
26 See id. at 35-36, 44 (using Lebanon and Turkey as examples of countries in which Islam is not constitutionally assigned a privileged status).
27 TURKEY [Constitution] art. 2.
28 See ABIAD, supra note 25, at 37-38, 46-51.
this category differs from one country to the next. The Algerian, Tunisian, and Jordanian Constitutions only provide that Islam as the formal religion of the country without providing for Shari’a as the primary source of law. Conversely, Article 2 of the Egyptian Constitution declares Islam as the religion of the State and the “principal” source its law. Therefore, according to the Egyptian Supreme Constitutional Court,

The principles of the Islamic shari’a are the major source of legislation (tashri). This imposes a limitation curtailing both the legislative and executive power, through which they are obliged, in whatever laws or decrees they enact, to avoid provisions that may contradict the provisions of Islamic law which are definite in terms of their immutability and their meaning…Whatever legislative enactment contravenes them must be declared null and void.

The third category of Islamic countries are countries like Iran, Qatar, the United Arab Emirates and Saudi Arabia which recognize Shari’a as the main source of their national laws to the extent that they consider the Qur’an to be the constitution of their countries. Article 1 of the Basic Law of 1992 of Saudi Arabia provides that: “Saudi Arabia is an Arab Islamic country with full sovereignty whose religion is Islam and its Constitution, the Book of Allah and the Sunna of His Prophet, peace be upon him”.

29 See id. at 47.
30 See id. at 37-38, 51.
33 ABIAD, supra note 25, at 39-46 (placing Iran, Pakistan, and Saudi Arabia at “one end of the spectrum” because they hold the Qur’an as their constitution/source of law).
independent Arab state. Islam is the State’s religion and the Islamic Shariah is the main source of its legislations.”  

The same rule is provided by the Constitution of the United Arab Emirates: “Islam is the official religion of the Union. The Islamic Shari’ah shall be a main source of legislation in the Union.” Likewise, Pakistan established the Islamic Council to confirm that the bills are in conformity with the Shari’a before issuance, and established the Federal Shari’a Court to examine the conformity of the application of the national laws with the Shari’a.

C. Arbitration in Shari’a

Arbitration, or tahkim, is well known in Shari’a through its different sources. The Quran refers loosely to arbitration in several of its verses. For instance, the theory of arbitration is presented in the Quran through the concept “...when ye judge between people that ye judge with justice...” Jurists argue that this verse allows judgment and accordingly it allows arbitration to settle disputes as a general rule. The Qur’an further provides for arbitration in the matrimonial context, “If ye fear a breach between them twain [i.e., husband and wife], [then] appoint (two) arbiters, one from his family and the other from hers...”

The Sunna also confirms arbitration. The Prophet Muhammad reportedly appointed an arbitrator and adhered to his decisions. He also reportedly counseled a tribe to have a dispute arbitrated. In addition, Arab arbitration expert Dr. Abdul Hamid El-Ahdab states, “The Idjma


37 ABIAD, supra note 25, at 45-46.

38 Glossary of Islamic Legal Terms, supra note 9, at 101.

39 The Qur’an 4:58.

40 See El-Ahdab, supra note 9, at 14-15.

41 The Qur’an 4:35.

42 EL-AHDAB, supra note 9, at 15.

43 Id.
(consensus) which is the third source of Moslem law, was even more explicit with respect to the definition and determination of the field of arbitration. Consequently, the validity of arbitration never was, and never could be, discussed in Islam.”44

While arbitration as a dispute resolution tool may not be questioned, Abdul Hamid El-Ahdab points out that a discussion took place among Islamic scholars with regard to the exact meaning of arbitration in Islam and its scope.45 The question is whether Islam understands arbitration as a mere attempt to conciliate, similar to the Islam concept of amiable composition or if Islam has an understanding of arbitration in line with the Western conception of arbitration, wherein arbitrators are empowered to decide upon disputes.46 Abdel Hamid El-Ahdab concludes that:

The answers given by Moslem Law to the problems raised by arbitration have been given before the commercial and economic evolution had reached today’s stage. However, they are not unalterable and do not constitute an exception to the universal rule that ‘the laws must change over the times’. Indeed, Shari’a is not static and rigid and it is only bound by the Koran, the Sunna, the Idjma’ and the Qiyas (analogy).47

D. The Influence of Shari’a on Arbitration in Saudi Arabia

In practice, important developments in arbitration in the Arab Middle East began with the enactment of modern legislation regarding international arbitration.48 In Bahrain, Jordan, Oman, and Tunisia, arbitration laws are drafted in accordance with the United Nations Commission on International Trade Law Model Law of 1985 (“Model

44 Id.
45 Id.
46 Id. at 13-18.
47 EL-AHDAB, supra note 940, at 19.
Law”). In Lebanon and Qatar, arbitration legislation is drafted based on European law.\(^{50}\)

However, \textit{Shari‘a} still has a clear effect on arbitration in the Middle East. Saudi Arabia is a good example of the influence of \textit{Shari‘a} on arbitration in the Middle East because Saudi Arabian law is an excellent model of the application of classic Islamic law.\(^{51}\) Saudi Arabia considers the \textit{Qur’an} to be its Constitution.\(^{52}\) Furthermore, Saudi Arabia is significant because it is one of the major emerging markets in the Middle East with a promising future in global investment and trade. Saudi Arabia has the largest economy in the Gulf region,\(^{53}\) so the influence of \textit{Shari‘a} law on arbitration holds important implications for future trade and investment.

The Saudi legal system has a dual nature, with both religious principles that conform to \textit{Shari‘a} and a legal system that helps solve disputes and deal with different legal issues.\(^{54}\) In this context, the \textit{Arabia v. Arab Am Oil Co.} (ARAMCO) case represents a turning point in Saudi arbitration.

In the 1958 case, the ARAMCO Company and the Saudi government entered into a petroleum concession contract to research, exploit, and market petroleum and provided for arbitration to resolve disputes.\(^{55}\) Later, Saudi Arabia effectuated the establishment of a private company, Saudi Arabia Maritime Tankers Company (“Tankers Company”) and gave it preferential rights to transfer petroleum from and to the Saudi


\(^{52}\) El-AHDAB, \textit{supra} note 9, at 537.


\(^{54}\) Trumbull, \textit{supra} note 51, at. 609, 629.

\(^{55}\) Thomas, \textit{supra} note 53, at 233; El-AHDAB, \textit{supra} note 9, at 558-560.
terminals. ARAMCO argued that its concession contract allowed it to choose its own method to transfer petroleum, and refused to accept the Tankers Company’s priority rights. The Saudi government brought the dispute to arbitration.  

The arbitral tribunal ruled in favor of ARAMCO. The tribunal determined that ARAMCO’s concession contract was subject to the Saudi legal system, whose main source of law is Shari’a. However, the tribunal also considered standard practices in the oil industry, international jurisprudence, and legal precedents. Ultimately, the tribunal found that Saudi law was not comprehensive enough and did not conform to standard industry practice. ARAMCO’s concession contract rights were upheld because “the (Saudi) government cannot abolish acquired rights in a concession contract by granting them, all or in part, to another person in a new concession contract.”

Although the Saudi Council of Ministers initially forbade government agencies from arbitration following the case, Saudi Arabia’s economic prominence and interaction with the West gradually made it more open to international arbitration, as shown by its adoption of the Arbitration Law of 1983 (“Saudi Arbitration Act”). However, like the rest of Saudi law, the Saudi Arbitration Act is subject to Shari’a. This means that Western and Asian practitioners must have a basic understanding of Islam and the application of Shari’a if they wish to interact with Islamic countries like Saudi Arabia in the global market.

Shari’a has multiple effects on the Saudi Arbitration Act. For instance, arbitration is not allowed in areas of law where conciliation is not allowed, such as criminal offenses, public order and other legal areas

56 EL-AHDAB, supra note 9, at 558-61 (quoting the arbitration tribunal).

57 See Thomas, supra note 68, at 233.

58 EL-AHDAB, supra note 9, at 561.

59 See Thomas, supra Note 53, at 233.


reserved to the state.62 Moreover, Article 3 of the Saudi Arabian Implementation Rules states that:

The arbitrator must be a Saudi national or a moslem foreigner chosen amongst the members of the liberal professions or other persons. He may also be chosen amongst state officials after agreement of the authority on which he depends. Should there be several arbitrators, the Chairman must know the Sharia, commercial law and the customs in force in the Kingdom.63

Finally, when the Saudi Arbitration Act is silent on certain issues, like whether foreign lawyers are allowed to appear in arbitration, the matter is referred to Shari’a rules as the source of Saudi laws and regulations.64

Furthermore, Saudi Arabia’s accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”) and the International Convention for the Settlement of Investment Disputes (“ICSID”) does not affect the fact that Saudi courts review arbitral decisions to ensure that they are consistent with Saudi Arabia’s public policy and Shari’a.65 As a result, arbitration awards against a Saudi Company in favor of a foreign company are almost never enforced for “public policy” reasons. Contracts which provide for the application of foreign law are also often accused of violating the Saudi public order and Shari’a ipso facto, and thus considered void.66

Examples of contracts that might violate Shari’a in Saudi Arabia include contracts for commercial transactions that include profit via interest

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62 Thomas, supra Note 53, at 233; see also Implementation Rules for the Arbitration Act, Royal Decree No. 71 2021/11, 09/08/1405 H May 27, 1985 [hereinafter Implementation Rules], Art. 3, reprinted in El-Ahdab, supra 9, at 909-12; Kutty, supra Note 7, at 599; El-Ahdab, supra 9, at 573-74.

63 Implementation Rules, supra 62, art. 3; see also Kutty, supra note 7, at 606.

64 See Thomas, supra note 53, at 235. With regard to the issue of whether foreign lawyers are allowed to appear in arbitration, the Qur'an and the Sunna have construed this silence as not prohibiting foreign representation according to the implementation of a principle of the Shari'a, which authorizes anything not expressly forbidden. Id.

65 See Kutty, supra note 7, at 600-02, 618.

66 See El-AHDAB, supra note 9, at 601.
or contracts that involve gambling.\textsuperscript{67} Any contract containing risky or hazardous dealings, where details concerning the transaction are unknown or uncertain such as transaction insurance contracts, would be subject to this rule. A contract’s validity under \textit{Shari’a} depends on the clauses of the contract, and foreign investors should be aware of potential complications in arbitration based on this.\textsuperscript{68}

\section*{II. Legislative Constraints on Arbitration in Technology Licensing Agreements in the Arab Middle East}

In addition to contemplating the religious impact of \textit{Shari’a} on arbitration in the Arab Middle East, investors and practitioners need to consider the legislative constraints on arbitration, particularly when resolving disputes over technology licensing agreements. A brief overview of the complications related to technology licensing agreements and the important role of arbitration to resolve these disputes is followed by an example of legislative restraints on arbitration in Egypt.

\subsection*{A. Technology Licensing Agreements and Arbitration}

One way to exploit technology owned by others is through a licensing agreement with the other.\textsuperscript{69} Licenses to use technology usually result in serious responsibilities for licensees. For instance, licensees are typically responsible for any manufacturing defects or inadequate quality control.\textsuperscript{70} Moreover, sometimes if the license is exclusive there is an overall obligation on the licensee to use all reasonable efforts to achieve the objectives of the license agreement.\textsuperscript{71}

As a result, huge and complicated disputes arise in connection with technology licensing agreements. These disputes occur in the following contexts: cross-licensing arrangements; international trademark or patent infringements; rights and obligations arising under joint research and

\begin{flushleft}
\textsuperscript{67} Kutty, \textit{supra} note 7, at 605-06; Thomas, \textit{supra} note 53, at 227.

\textsuperscript{68} See Kutty, \textit{supra} note 7, at 605-06.


\textsuperscript{70} See Id. at 67.

\textsuperscript{71} Id. at 71.
\end{flushleft}
development initiatives; agreements to settle prior litigation in several jurisdictions; copyrights; domain name issues; and generic commercial disputes like construction and business acquisitions.\textsuperscript{72}

Arbitration is an attractive method of solving disputes arising out of technology licensing agreements, particularly because it guarantees confidentiality to the parties and supports the special needs of commercial reputations and trade secrets related to technology licensing agreements. Arbitration also ensures expediency in resolving disputes and allows more flexibility to choose the place and language of proceedings. Finally, arbitration utilizes decision makers who understand the complex issues involved in these types of conflict.\textsuperscript{73}

In the Middle East, arbitration in technology licensing agreements is extremely important because:

Middle Eastern countries are generally characterized by weak judiciaries which are not independent from the executive branches of government. The Judges in the region are often government employees working under the executive through the minister of justice. This gives the executive branch the power to interfere in the judicial process. Egypt and Lebanon, for example, have highly developed judiciaries but are often under pressure from the executive branches of their governments. Further, the judiciary in Middle East countries is often characterized by a lack of binding precedent, lack of procedural transparency, sparsely developed doctrines, unavailability of remedies such as injunctive relief and lack of publicly available administrative or judicial decisions.\textsuperscript{74}

As a result, arbitration in the Middle East may be the most effective solution when there is conflict resulting from a complicated agreement like


\textsuperscript{73} See \textit{WORLD INTELLECTUAL PROP. ORG. & INT’L TRADE CTR., supra} note 69, at 75.

\textsuperscript{74} Michael K. Lindsey, \textit{Introduction to Franchising in the Middle East: Navigating the Risks and Rewards of the World’s Most Interested Market} 13 (The American Bar Association ABA Forum on Franchising and the ABA Center for Continuing Legal Education 2010).
a technology licensing agreement. However, although arbitration is a good choice as opposed to the traditional judicial systems of the Middle East, investors must take into account the constraints on arbitration in the Middle East and make sure they are completely aware of what they are signing up for.

B. Legislative Constraints on Arbitration in Egypt

The legislative constraints on arbitration in technology licensing agreements can be demonstrated through the situation in Egypt. In the late nineteenth century, Egypt became the first Arab country to adopt a Western influenced legal system. Egyptian law is influenced by European legal models, particularly the French “Code Civil” and “Code de Commerce.” Arbitration in Egypt is governed by Law No. 27 of 1994, known as the “Egyptian Arbitration Act,” which is modeled on the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law.

The Egyptian Arbitration Act has three primary functions. First, it distinguishes between national and international arbitration by providing in Article 1 that “the provisions of the present Law shall apply to all arbitrations when such arbitrations are conducted in Egypt or when the parties to an international commercial arbitration conducted abroad agree to subject it to the provisions of this Law.” Second, the Egyptian Arbitration Act gives the parties to an arbitration absolute freedom to choose procedural

75 See id.

76 SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST, SHARI’A, LEBANON, SYRIA, AND EGYPT, 335 Hart Publishing 2006; see also Herbert J. Liebesny, A Symposium on Muslim Law (Part II): Impact of Western Law in the Countries of the Near East, 22 GEO. WASH. L. REV. 127 (1953).

77 ARBITRATION AND MEDIATION IN THE SOUTHERN MEDITERRANEAN COUNTRIES (Giuseppe De Palo & Mary B. Trevor eds., 2007).

78 Law No. 27 of April 18, 1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, translated in EL-AHDAB, supra note 9, at 156, 820-35 [hereinafter Egyptian Arbitration Act].


80 Egyptian Arbitration Act, supra note 78, art. 1.
and substantive law applicable to the Arbitration. Finally, the Egyptian Arbitration Act applies to domestic and international arbitration, so it does not take a rigid position with regard to the place of arbitration; parties are free to agree to hold the arbitration in Egypt or abroad.

Technology licensing agreements in Egypt are governed by Law No. 17 of 1999, known as the “Commercial Code,” particularly articles 72-87 of the Code, referred to here as the “Technology Transfer Provisions.” In particular, the Technology Transfer Provisions concern agreements whose subject matter is the transfer of technology to be used in Egypt. The Provisions are very protective of the licensees. For example, Article 75 gives the licensee the permission to invalidate any clause in the agreement that restricts his rights in using, developing, producing or advertising the transferred technology. Some believe that the reason behind this cautious and protective approach to licensees in Egypt stems from the idea that licensees, as receivers of technology in developing countries, are often in a weak position compared to licensors. The outcome of this conservative

81 See SALEH, supra note 76, at 386. See Egyptian Arbitration Act, supra note 78, art. 25, which provides that “[t]he parties to the arbitration have the right to agree on the procedures to be followed by the arbitral tribunal, including the right to subject such procedures to the provisions in force in any arbitral organization or centre in Egypt or aboard…” Moreover, Article 39 provides that “The Arbitral Tribunal shall apply the rules agreed by the parties to the subject matter of the dispute…”

82 SALEH, supra note 76, at 388; see also Egyptian Arbitration Act, supra note 78, art. 28, which provides that “[t]he parties to arbitration may agree on a place of arbitration in Egypt or abroad…”


84 Egyptian Commercial Code No. 17 of 1999, supra note 83, art. 72. Article 72 states: The provisions of this Chapter shall apply to each contract for the transfer of technology to be used in the Arab Republic of Egypt, whether such transfer is international lying across the regional borders of Egypt, or inland, without taking into consideration in both cases the nationality of the parties to the agreement or their places of residence.”

85 Egyptian Commercial Code No. 17 of 1999, supra note 83, art. 75 (“Any condition prescribed in the technology transfer contract, which restricts the freedom of the importer in its use, development, acquaintance of the product or its advertisement, may be invalidated”).

86 Sameha El-Kalouby, <Transliterated Arabic Title> [The Explanation of the Egyptian Commercial Code Part Two], 105 Dar-Alnahda Al-arabeya 2005 (available in Arabic).
attitude is protective arbitration rules regarding technology licensing agreements that differ from the general, more flexible rules governing the Egyptian Arbitration Act.

One example of the difference between arbitration law under the Egyptian Arbitration Act and the Technology Transfer Provisions involves choice of law and location in arbitrations. Unlike Article 25 of the Egyptian Arbitration Act, which gives parties to an arbitration freedom to choose the procedural and substantive law applicable to the arbitration, Article 87 of the Technology Transfer Provisions provides that if parties to a technology transfer agreement choose to arbitrate, the arbitration will be subject to Egyptian substantive and procedural law. Any agreement to arbitrate under a different foreign law is null and void.87 As a corollary, while the Egyptian Arbitration Act Article 28 gives the arbitrating parties absolute freedom to choose the place of arbitration, Article 87 of the Technology Transfer Provisions provides that technology transfer agreement arbitrations must take place inside Egypt.88 Lastly, Article 72 of the Technology Transfer Provisions applies to all contracts for the transfer of technology to be used in Egypt, regardless of locality, whereas the Egyptian Arbitration Act Article 1 applies to international commercial arbitration conducted abroad only if the parties have agreed to be subject to the Arbitration Law.89

Resultantly, any foreign investor arbitrating a technology transfer agreement in Egypt is obliged to conduct the arbitration in Egypt and abide by Egyptian substantive and procedural law. Some critics argue that these protective technology transfer rules discourage foreign investors from transferring technology to Egypt.90 Licensors arbitrating technology

87 See Egyptian Commercial Code No. 17 of 1999, supra note 83, art. 87 (“In all cases, decided on the subject of the dispute shall be according to the provisions of the Egyptian law, and any agreement to the contrary shall be null and void.”).

88 See id. (“The Egyptian courts shall have jurisdiction to decide on disputes…Agreement may be reached on settling the dispute amicably or via arbitration to be held in Egypt according to the provisions of Egyptian law”); Egyptian Arbitration Act, supra note 80, art. 28 (“The parties to arbitration may agree on a place of arbitration in Egypt or abroad”).

89 Egyptian Commercial Code No. 17 of 1999, art. 1, supra, note 84; Egyptian Arbitration Act, supra note 78, art. 1 (“the provisions of the present Law shall apply…when such arbitrations are conducted in Egypt or when the parties to an international commercial arbitration conducted abroad agree to subject it to the provisions of this law”).

90 Sameha El-Kalouby, <Transliterated Arabic Title> [The Explanation of the Egyptian Commercial Code Part Two], 105 Dar-Alnahda Al-arabeya 2005 (available in Arabic).
transfer agreements in Egypt must be aware of legislative constraints they face when arbitrating a technology licensing agreement in Egypt.

Conclusion

Foreign investors in the Middle East must be aware of the constraints and legal frameworks that affect arbitration in the region before deciding to arbitrate their disputes in the Arab Middle East and avoid unenforceable arbitration awards. The importance of considering different legal, religious, social, and cultural issues that may affect arbitration is an essential part of doing business in the Middle East.

Though Middle Eastern arbitration laws are often based on Western arbitration law, Shari’a special rules and legislative constraints put into place to protect national interests have a significant influence on arbitration law in the Middle East.91 Arbitration in the Middle East is unique, and lack of a proper understanding of the situation can be costly. Foreign investors and practitioners who are looking at arbitrating in the Middle East must invest the time to become familiar with the special legal and religious context of the country in which they want to arbitrate. An understanding of different concerns and backgrounds and how they affect arbitration is essential for investors and practitioners before deciding to arbitrate in the Arab Middle East.

91 See, e.g., Saudi Arbitration Act, supra note 60, art. 3.
Improper Seizures by Sovereigns at Customs: Limiting EC 1383/2003 through the Effects Principle

Soji John∗

Introduction

On several recent occasions, European Union (“EU”) (formerly the European Community (“EC”))1 customs officials seized generic pharmaceuticals at Union ports that non-EU manufacturers sought to transship to non-EU markets.2 In order to secure the release of these drugs, the manufacturers have had to recall the shipments rather than sending them forward to the destination countries.3 These European nations seem to be within their rights to hinder the free passage of these goods. After all, vessels entering a port are typically subject to the jurisdiction of the sovereign state.4 However, by detaining legitimate goods, these nations are applying their domestic patent laws in a manner that is effectively extraterritorial. Although their actions are territorial, by using their customs facilities and ports in a manner that may be contrary to international norms and agreements, these European nations are essentially expanding their

∗ The author thanks Professor Anthony Colangelo of The Southern Methodist University Dedman School of Law for his help with this article. His comments and guidance were invaluable in its preparation. Any errors are attributable solely to the author.


3 See id. (reporting that a shipment of Losartan was returned to India after being held by Dutch customs).

patent laws, which are understood to be bounded nationally, to have significant extraterritorial effects.

Jurisdictional issues implicate limits on the rights of sovereigns to exert influence over other states, in particular the ability to affect legal interests. Although municipal law is the primary means of regulation within national boundaries, international law restricts a nation’s jurisdiction in applying its municipal law extraterritorially. Therefore, while municipal laws dominate national conduct, they are correspondingly limited internationally.

The modern view is that states must give an appropriate basis for exercising extraterritorial jurisdiction. For example, the Third Restatement of Foreign Relations Law supports jurisdiction over foreign conduct that is “directed against . . . a limited class” of national interests. At the same time, the Third Restatement limits this power, utilizing a reasonableness test to analyze the validity of the exercise of extraterritorial jurisdiction. Thus, while local law restricts jurisdiction nationally, additional international principles generally limit extraterritorial jurisdiction. As a result, nations need affirmatively to justify this extraterritorial exercise of power.

This paper considers the limits on the application of domestic customs law to transshipped goods at local ports. It proposes that the exercise of local customs laws to seize goods in transshipment should be restricted to those cases where there is an appropriate nexus between the supposed violations of domestic law and the interests of the port nation, even though it is internationally accepted that port states have jurisdiction over vessels that enter their port. In particular this paper contends that the broad application of EC Regulation No. 1383/2003 (“EC 1383”) by

5 Lori F. Damrosch et al., International Law Cases and Materials 757-58 (5th ed. 2009).

6 Id.

7 See id. at 758.


9 Id. § 403.

10 Council Regulation 1383/2003, Concerning Customs Action Against Goods Suspected of Infringing Certain Intellectual Property Rights and the Measures to be Taken Against
European nations’ customs officials to seize generic pharmaceuticals transshipped from India to Latin American nations improperly extends the reach of local patent laws extraterritorially and hinders trade. Further it asserts that in order to determine when applying domestic law to transshipped goods is appropriate, the EU should promote the use of the effects principle.

Part I of this paper explains that the seizure of goods purely in transit, such as generic pharmaceuticals, is controversial, even within the EU. Part II addresses the evolution of extraterritorial application of domestic customs regulations, including the use of the effects principle. Part III posits that the EU’s pharmaceutical transshipment intervention is illegitimate under the effects principle and international law. Finally, part IV advocates for using the effects principle to guide extraterritorial application of EC 1383 customs regulations.

I. EU and International Customs Regulations of Transshipped Goods

The seizure of goods that are solely transiting through a port state by customs officials is a highly controversial issue. International treaties have attempted to balance the competing interests of efficient trade and intellectual property (“IP”) protection by focusing on facilitating trade to the greatest extent possible within the parameters of minimum requirements of participating states to protect patent rights. Nonetheless, the conflict between safeguarding patent rights and promoting the free flow of goods remains apparent with the seizure of transshipped goods such as pharmaceuticals, even within the EU. For example, the United Kingdom (“U.K.”) has limited the application of EC 1383 to seize only goods that could enter and affect its markets, while Netherlands officials promote a broader reading of the statute, allowing seizure of goods without regard to direct effects on its market.11 This section will analyze the controversy surrounding the confiscation of pharmaceuticals transiting through the EU, within the context of international law.

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A. EU Customs Officials’ Controversial Seizures of Generic Pharmaceuticals in Transshipment

During the past two years, EU member nations have intercepted and prevented the onward shipment of generic medicines en route to developing Latin American countries for IP violations. Largely at the behest of multinational pharmaceutical corporations (“MNCs”), EU member nations seized these goods despite the absence of patent protection or trademark infringement in the manufacturing or destination country. World organizations monitoring access to drugs are concerned that these seizures are not incidental, but rather a tactic of MNCs to increase the market for their patented, brand-name drugs by persuading intermediary port nations to disrupt the legitimate global trade in generics.

For example, developing nations which were denied transshipments of these pharmaceuticals were especially critical of a December 2008 seizure of Losartan, a generic version of the brand name drug, Cozarr. Customs officials in Rotterdam, Netherlands seized this shipment en route to Brazil at the prompting of Merck Inc., which holds the Dutch patents on Cozarr. These officials relied on their national interpretation of EC 1383, designed to restrict goods violating IP rights, and confiscated these drugs

12 Khor, supra note 2. Germany and the Netherlands have intercepted the following medicines: Clopidrogel, a blood thinner; Rivastigmine for Alzheimer’s disease; Olanzapine, an anti-psychotic; and Losartan, for high blood pressure. Id.


14 See Peter Maybarduk, Stop Fakes, Not Generics, ACCESS TO MED. PROJECT (May 13, 2009), http://www.essentialaction.org/access/index.php?/archives/181-Stop-Fakes,-Not-Generics.html#extended (stating that pharmaceutical companies deliberately confuse patent rights and trademark counterfeiting issues and exploit public safety concerns to protect their monopolies).


16 See id.
ostensibly for patent violations and to prevent the proliferation of substandard medications.\textsuperscript{17}

The quality of medicines can be a genuine concern since counterfeit medicines have caused health issues throughout the world. Because counterfeiting occurs for generics as well as brand-name medicines, there is a legitimate concern over the authenticity of generic drugs, in this case, Losartan, entering Latin America.\textsuperscript{18} However, the goods that the Rotterdam customs officials seized were \textit{not} counterfeit versions of Cozarr or Losartan, and no evidence indicates there was any suggestion to that effect.\textsuperscript{19} Rather, the manufacturers accurately designated these medicines as the generic drug Losartan.\textsuperscript{20}

Moreover, even if there are legitimate concerns as to the authenticity of the generic drug,\textsuperscript{21} these apprehensions do not trigger the trademark rights of manufacturers of \textit{brand name} drugs or the anti-counterfeit laws of

\textsuperscript{17} See Seizure of Medicines a Blow to Developing States, ECON. JUST. NETWORK (Aug. 18, 2009), \url{http://www.ejn.org.za/index.php/ejn-on-the-move/ejn-on-the-move-news/211-seizure-of-medicines-a-blow-to-developing-states}. Reasons given for the seizure “include cracking down of counterfeit drugs and substandard potentially hazardous products, and preventing patent violation.” Id. Nonetheless, the generic was manufactured in a country where Dutch patents do not apply and was en route to a country where Dutch patents do not apply. Thus, the seizure appears to be a power play to sell more brand-name drugs. \textit{See id.}

\textsuperscript{18} See INT’L MED. PRODS. ANTI-COUNTERFEITING TASKFORCE, WORLD HEALTH ORG., COUNTERFEIT DRUGS KILL! 2 (2008), available at \url{http://www.who.int/impact/FinalBrochureWHA2008a.pdf}; \textit{Wyatt Yankus Pharmacy Near You} 1-2 (Am. Council on Sci. & Health ed., 2009), available at \url{http://www.acsh.org/docLib/20090202_counterfeitdrug09.pdf}. The World Health Organization (“WHO”) has defined counterfeit drugs as medicines that are “deliberately and fraudulently mislabeled with respect to identity, composition, and/or source.” Yankus, \textit{supra}, at 1, anization estimated that about ten percent of the world’s drug supply is counterfeit. Yankus, \textit{supra}, at 1, 3 n.4. The WHO has estimated that the amount of counterfeit drugs in less developed countries reaches up to twenty-five percent. JULIAN MORRIS & PHILIP STEVENS, COUNTERFEIT MEDICINES IN LESS DEVELOPED COUNTRIES: PROBLEMS AND SOLUTIONS 3 (Int’l Policy Network ed., 2006), available at \url{http://www.policynetwork.net/sites/default/files/IPN_Counterfeits.pdf}.

\textsuperscript{19} Danilovic, \textit{supra} note 15; Khor, \textit{supra} note 2.

\textsuperscript{20} Khor, \textit{supra} note 2.

\textsuperscript{21} INT’L MED. PRODS. ANTI-COUNTERFEITING TASKFORCE, \textit{supra} note 18, at 4; Morris & Stevens, \textit{supra} note 18, at 3.
European countries through which these generics merely transit. These drugs, properly manufactured and labeled, were not made for EU national markets, but for Latin American countries. As a result, this effectively extraterritorial application of IP laws does not comply with the Agreement on the Trade Related Aspects of Intellectual Property Rights (“TRIPS”).

By applying EC 1383 broadly under the guise of IP violations to goods that are not to be imported and do not have any credible way of entering the EU marketplace these customs officials are inadvertently encumbering the free trade of legitimate pharmaceuticals. This consequently affects the health and economy of Latin American nations and essentially applies local patent laws internationally.

B. International Agreements Governing Shipment in Trade

Despite these situations of EU nations extending the extraterritorial reach of domestic patent regulations, these countries are subject to international law, including their obligations to international organizations such as the World Trade Organization (“WTO”). Shortly following World War II, nations set up a charter for an International Trade Organization (“ITO”) to “apply uniform principles of fair dealing with regards to trade.” The ITO eventually failed to come into force but led to the development of the General Agreement on Trade and Tariff (“GATT”) protocol. After several rounds of negotiations and modifications, the “WTO” was formed in 1994 as a permanent trade body under the GATT.


24 Id. at 1576.


26 DAMROSC, supra note 23 at 1577.
Most nations are now part of this multilateral organization created to reduce trade barriers and promote tariff-free trade.27

As part of the WTO, members are obliged to follow GATT protocols.28 In particular, GATT Article V discusses the agreement between nations concerning the *transit* of goods.29 GATT dictates that goods, and vessels transporting these goods, are in transit through a WTO member’s territory when “the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier” of the member’s territory.30 GATT requires that member nations allow goods to move “via the routes most convenient for international transit.”31 Nations may require goods to enter into customs houses for routing and traffic control but should not otherwise unnecessarily delay or restrict the transshipment of goods through their port.32

In addition to GATT, EU nations are also subject to other international obligations on their ports and customs. For example, EU member states have agreed to the United Nations Convention on the Law of the Sea (“UNCLOS”), a generally accepted body of principles ratified by many nations.33 In fact, “nearly all of the substantive provisions in the Convention reflect existing customary international law, which is binding

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28 Id.

29 GATT, supra note 25, art. V.

30 Id. ¶ 1.

31 Id. ¶ 2.

32 Id. ¶ 3.

even on those states that do not become members to the Convention.\textsuperscript{34} Thus, UNCLOS, serving as a body of international law to which all nations should adhere, applies to the transit of goods.

UNCLOS requires port nations to open their ports to facilitate trade with landlocked states.\textsuperscript{35} In particular, port states must take all measures “to avoid delays or other difficulties of a technical nature in traffic and in transit.”\textsuperscript{36} Therefore, while it is true that ports and customs are under the sovereignty of the territorial authority, this local authority must also take into account international obligations that limit how they apply national laws.

C. TRIPS and the Territoriality of Patent Rights

In addition to international obligations such as GATT and UNCLOS, the WTO set up the TRIPS Agreement in April 1994 to establish the minimum standard that WTO member nations must meet for the protection of intellectual property.\textsuperscript{37} This modern agreement is successful and almost universally accepted. Its principles are based upon the Paris Convention of 1884, which historians characterize as the first true international legislation of patent law.\textsuperscript{38} Prior to the Paris Convention, nations held patents as “dependant,” so if an inventor obtained patents in two nations and let the patent lapse in one, the second nation could hold the patent lapsed as well.\textsuperscript{39} In this way, the application of the patent law in one

\textsuperscript{34} Richard J. McLaughlin, \textit{UNCLOS and the Demise of the United States’ Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources}, 21 ECOLOGY L.Q. 1, 4 (1994).

\textsuperscript{35} UNCLOS, \textit{supra} note 33, art. 124.

\textsuperscript{36} Id. art. 130.


\textsuperscript{38} ROBERT P. MERGES, ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGY AGE 331-32 (4th ed. 2007) (“The Paris Convention was . . . a product of the first true “internationalization” wave in the field of patent law.”).

country was linked to the validity of the patent in another. Therefore, local application of patent laws had extraterritorial implications prior to the Paris Convention.

Conversely, the Paris Convention explicitly promoted the principle of independence. Independence originated with the notion of state sovereignty and the view that national patents are property rights granted by the sovereign. Although independence limited the extraterritorial application of local patent law, other problems remained. Because states implemented patent protections independently, there were huge disparities in the protections available in different nations. Though some technologies could be patented in one nation, they were not afforded protections in another because of variations in the law. For example, in India, protections for pharmaceuticals were not present until 2005, allowing a large generics industry to develop that capitalized on copying drugs that were invented in countries with patent protection. In addition to inequality resulting from protection for some technologies, nations also gave stronger protection to nationals than to citizens of foreign countries. As a result, when patents became national in scope and states acted independently, trade barriers resulted from these global inconsistencies in protection.

To reduce these disparities, developed nations promoted TRIPS as a WTO obligation, setting a minimum level of protection for inventions and encouraging national implementation of IP laws by all WTO member

40 Id.


42 See Schroeder, supra note 39, at 65.

43 See id.

44 Id.


46 Schroeder, supra note 40, at 65.

47 See id. at 65-66.
states. While TRIPS seeks to establish a uniform level of protection, it maintains the independence of national patent systems. Furthermore, since TRIPS is a non-self executing agreement, each member nation must implement its requirements within their own patent system. Accordingly, when nations offer greater protections than the minimum required by TRIPS, variations between IP laws inevitably result. Consequently, signatories of TRIPS, like EU nations, are required to recognize the sovereignty of other states and apply their patent laws only territorially.

A fundamental basis for jurisdiction is territoriality: the sovereign has supreme authority over its land. Nations can voluntarily limit these territorial rights when they enter into international treaties such as GATT and UNCLOS or join international organizations such as the WTO. At the same time, there is a presumption that the laws of the sovereign are confined to his territory. Thus, from a strictly territorial view, “every state enjoy[s] broad exclusive jurisdiction over person[s] and activities within its territory, but no state [can] assert its jurisdiction extraterritorially.” This applies to patent law, based on the independence doctrine under TRIPS, such that each nation is limited to applying its patent system nationally.

II. Flag State v. Port State Jurisdiction: Rights of the Sovereign at Port

As discussed above, both GATT and TRIPS recognize the importance of limiting the jurisdiction of sovereigns for efficient trade. Also to promote trade, international law “presumes that ports of every state

48 Kapczynski, supra note 45, at 1579; Schroeder, supra note 39, at 65-66.

49 TRIPS Agreement, supra note 22, art. 2.

50 Schroeder, supra note 39, at 66.

51 Id. at 66.

52 DAMROSCH, supra note 5, at 768.


54 Id. at 8 n.28.
should be open to all commercial vessels.” These commercial vessels are treated as having the nationality of the flags they fly, known as flag-state jurisdiction, as long as there is a “genuine link” between the vessel and the nation whose flag is flown. In international waters, the jurisdiction of the flag state traditionally dominates. Generally it is only when a flag-state vessel enters port voluntarily that the vessel is subject to the jurisdiction of the port state. In some instances, though, it is possible for port states to exercise authority over actions that take place in international waters or in ports where international agreements generally limit sovereign authority. This extension of jurisdiction is based upon the effects principle, under which extraterritorial conduct having domestic consequences can be regulated by the impacted state.

A. Port States and Transshipments

Although the extraterritorial expansion of sovereign jurisdiction under the effects principle has important implications for transshipment, international agreements have, at the same time, circumscribed some of the jurisdiction that port states typically wield in their own territory. This section considers the evolution of the jurisdiction and actions of port states concerning the transshipment of cargo. First, an early twentieth century case regarding alcohol transshipment through United States ports during Prohibition is examined. Second, a more recent case of Chilean transshipment of swordfish caught by European fishermen is considered. In


56 UNCLOS, supra note 33, art. 91, para. 1; DAMROSCH, supra note 23, at 1466-67. Aircraft are treated as having the nationality of the state in which they are registered. Convention on International Civil Aviation art. 17, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

57 See Suzanne Bostrom, Comment, Halting the Hitchhikers: Challenges and Opportunities for Controlling Ballast Water Discharges and Aquatic Invasive Species, 29 ENVTL. L. 867, 890 (2009) (“As exemplified by the International Convention for the Prevention of Pollution from Ships (MARPOL) and UNCLOS, international law tends to favor flag state enforcement over port state powers.”).

58 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 512, reporters’ nn.5-6 (1987).

59 See United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945).
both cases, the transshipment had sufficient effect on the port state that it justified the expansion of sovereign jurisdiction hindering international norms set up to facilitate trade.

i. **Transshipments of Liquor at United States Ports under the Volstead Act**

This case study examines United States port jurisdiction over the transshipment of liquor. The United States adopted a national prohibition of alcohol with the passage of the Eighteenth Amendment. In particular, the Eighteenth Amendment provided that “the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purpose is hereby prohibited.” The Volstead Act enforced the Eighteenth Amendment, stating that “no persons shall . . . manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor” unless explicitly exempted by the act. This act, like most United States statutes, should be strictly territorial and should apply only domestically.

However, United States customs officials applied the Volstead Act to have extraterritorial effect by restricting the transport of liquors between foreign nations through United States ports. In one case in the Eastern District of Michigan, the United States collector of customs and other officials attempted to prevent the shipments of liquor to foreign countries through the United States.

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60 Thomas H. Walters, *Michigan’s New Brewpub License: Regulation of Zymurgy for the Twenty-First Century*, 71 U. DET. MERCY L. REV. 621, 635 (1994). The national prohibition bill passed through Congress and was sent to the states in 1917 and ratified in 1919. Id.

61 U.S. CONST. amend. XVII, *repealed by* U.S. CONST. amend. XXI.


63 Grogan v. Hiram Walker & Sons, Ltd., 259 U.S. 80, 93 (1922) (McKenna, J., dissenting) (“It is certainly the first sense of every law that its field of operation is the country of its enactment.”); *see also* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (stating that “a construction of any statute [is] intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power”).

injunction to prohibit the United States officers from interfering with the transshipment of the liquors. In contrast, a second case in the Southern District of New York denied the plaintiff’s motion to enjoin officials from stopping transshipments of liquor to foreign countries on the basis that transshipment violated the Volstead Act.

The Supreme Court joined and decided both cases. The Court analyzed a treaty with England that allowed passage through United States ports when items were brought to port strictly for transshipment to British territories. The transshipment companies argued that this treaty and a strict reading of the Volstead Act permitted transshipment because the liquor was not intended for consumption in the United States. The Volstead Act was concerned with domestic consumption and did not explicitly restrict transshipment at United States ports. The majority, however, found that although Congress had not strictly prohibited transshipment, such was its intent because it had explicitly forbidden all other customs actions while expressly allowing transshipments through the Panama Canal. In considering whether the Act covered transshipments, the majority also explained that the Volstead Act took into consideration that liquor could be diverted for local use. Since it was possible for a quantity of the liquor entering for transshipment to be diverted to the domestic marketplace, the alcohol was indeed entering the United States.

65 Id. at 379.
67 Grogan, 259 U.S. at 87.
68 Id. Also, note that this case was decided in 1922, prior to GATT.
69 Id. at 89.
70 Id.
71 Id. at 90.
72 Id. at 89-90.
73 Id. at 89. In fact, liquor was known to be stolen from the Port of New York. In 1921, it was documented that approximately 100,000 bottles of liquor were stolen from docks, lighters, and trucks in two years. Bars Foreign Rum from U.S. Ports – Court Decides Law Prohibits Transshipment of Liquors Through this Country, N.Y. TIMES, Oct. 21, 1921 (reporting the decision of Anchor Line (Henderson Bros.) v. Aldridge, 280 F. 870 (S.D.N.Y. 1921)).
“for beverage purposes.” Thus, the transshipment directly resulted in a violation of the Volstead Act.

However, the dissent argued that the Volstead Act only prohibited the type of transportation that was “within . . . the United States and ‘for beverage purposes.’” The dissent contended that the transshipped liquor did not fall under the ambit of the Volstead Act and, therefore, should be transshipped per the treaty with England. The dissent also argued that the majority’s application of national law resulted in “direct[ing] the practices of the world” by essentially applying the local law extraterritorially. That is, by setting up barriers to free trade in liquor, the United States was indirectly hindering the extraterritorial consumption of alcohol. Moreover, the dissent noted that even if there is some diversion of the liquor into domestic markets, the quantity must be significant before that diversion justified the prevention of transshipment per the Volstead Act.

Unfortunately, rather than resorting to an analysis akin to the effects principle, the majority relied primarily upon the notion of sovereignty and its interpretation of Congressional intent authorizing the customs actions, showing little concern for international duty. Although the majority did attempt to bolster its analysis with some inquiry into the effect of the transshipped liquor, it was primarily the dissent that considered whether there could be a significant impact on domestic markets that justified limiting transshipments. Today, United States courts make greater efforts to associate the exercise of jurisdiction with the prevention of domestic

74 Grogan, 259 U.S. at 88-89.
75 Id. at 90.
76 Id. at 94 (McKenna, J., dissenting) (emphasis added).
77 Id.
78 Id. at 95.
79 See id. at 89 (majority opinion).
80 Id. at 96-97 (McKenna, J., dissenting).
81 Comment, Does the Eighteenth Amendment Violate International Law?, 33 YALE L.J. 72, 77-78 (1923) (“[I]t must be conceded, perhaps, that the United States is under an international duty not to prevent the enjoyment of [a state’s privilege to transport liquor on the seas] under international law by any act proximately causing the inhibition.”).
harm through the effects principle due to greater international obligations and the potential for subsequent international response. 82

ii. The Chilean Swordfish Dispute: Modern View on Extraterritorial Application

The shift in modern extraterritorial application is further illustrated through the modern case study of Chile’s refusal to permit transshipment of Chilean fish. Chile restricted access to its ports by Spanish deep-sea fishers carrying swordfish destined for the United States. In doing so, Chile applied its local Fisheries Law, which has been described as preventing “any vessels from transshipping or landing vessels in Chilean ports when its catches do not comply with Chilean law.” 83 Chile found that swordfish were an over-exploited species and contended that the Spanish fishing just outside of Chile’s 200-mile exclusive economic zone (“EEZ”) resulted in depletion that had devastating effects upon Chile’s own industries. 84 As a result of Chile’s action, ANAPA, the Spanish National Association of deep-sea long liners, brought a complaint in the EC that Chile was creating unnecessary obstacles to trade. 85 According to ANAPA, the Chilean practices prevented “[c]ommunity vessels . . . [from expanding] their fishing capacity within the South Pacific fishing area . . . [so as to make] it unprofitable to invest in the exploitation of the fishing resources in this area.” 86

Based upon these complaints, the EC conducted an examination and brought action against Chile in the WTO. 87 The EC based its action upon Article V of the GATT, which requires “freedom of transit for goods


84 Id. at 519.


86 Id.

87 Id.; Shamsey, supra note 83, at 520.
through the territory of each contracting party.”

In defense, Chile claimed that its actions were neither discriminatory nor a “disguised restriction on international trade,” but were “necessary to protect human, animal, or plant life or health” as allowed per Article XX(b) of the GATT.

In response to the WTO action, Chile brought a claim against the EC in the International Tribunal for the Law of the Sea (“ITLOS”). Chile explained the steps it took to establish restrictions and controls for its own fishing vessels within its EEZ and stated that the Spanish vessels had not provided the necessary documentation to show their compliance with these requirements. Moreover, Chile stated that because these fish are a migratory species, unrestricted fishing directly outside of its EEZ has a direct impact upon Chile’s economic interests. Chile contended that its “good-faith non discriminatory, domestic environmental regulations that reach[ed] activities beyond its sovereign jurisdiction can stand up to international free trade concerns.”

In the end, the EC and Chile came to an agreement allowing a limited number of EC ships to call at Chile’s ports. However, Chile made a strong case by linking its extraterritorial activity to a direct domestic detriment. In this way, the effects principle played a significant role in justifying Chile’s effectively extraterritorial action.

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88 Shamsey, supra note 83, at 520-21 (quoting GATT, supra note 25, art. V, ¶ 2).
89 Id. at 521-22 (quoting GATT, supra note 25, art. XX(b)).
90 Id. at 523.
91 Id. at 523-24.
92 Id. at 524.
93 See id. at 525 (detailing Chile’s assertion that “a state's support of its nationals' right to fish should end when those fishing practices contravene Articles 63, paragraph 2, and 64-67, which provide that states shall work to protect highly migratory species occurring within and outside of the coastal state's EEZ”).
94 Id. at 526.
95 Id. at 538. In a prior WTO dispute, Tuna/Dolphin I, the WTO panel held that a state could not undertake an environmental measure that has “the effect of regulating cargo caught outside of a nation’s jurisdiction.” Id. at 531. However, ITLOS may have allowed broader protection for the environment at the detriment of trade. Id. at 536.
B. The Effects Principle

Given the trend in justifying extraterritorial jurisdiction based on negative domestic impact, it is essential to outline the emergence and limitations of the effects principle. Jurisdiction in a port is typically based upon the territoriality principle: when a ship enters a port it submits to the jurisdiction of that sovereign.96 Thus, the port state would have jurisdiction over violations of domestic law committed by the foreign-flag vessel at port.97 Violations committed out of the territory of the sovereign, however, would not be subject to its jurisdiction.98 In addition, when considering the application of domestic law extraterritorially, courts often consider whether the legislature intended the domestic law to apply extraterritorially and whether such application would comply with international law.99 Under this analysis, application of domestic law to conduct outside sovereign ports is possible only if it has been authorized and the application complies with international law.

In this context, several courts began to hold that the effects principle permitted the regulation of extraterritorial conduct that impacted the state. For instance, the Permanent Court of Justice recognized the effects principle in the S.S. Lotus case.100 Under the effects principle, a violation of a state’s law need not occur in the state’s territory for the state to have jurisdiction; it is enough that the violation leads to effects in the state.101 Furthermore, the effects principle was acknowledged in the United States v. Aluminum Company of America102 case, where the Second Circuit stated, “it is settled

96 Oliver, supra note 55, at 219.

97 Id. at 231.

98 Id. at 233.

99 Id. at 233-34.

100 Julie L. Henn, Note, Targeting Transnational Internet Content Regulation, 21 B.U. INT’L L.J. 157, 161 (2003) (citing Case of the S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)) (“In the S.S. Lotus case, the Court [in 1927] found that Turkey had jurisdiction to prosecute French citizens for injuries sustained by Turkish citizens after a collision [on the high seas] between a French steamer and a Turkish boat.”).


102 148 F.2d 416 (2d Cir. 1945).
law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequence within its borders which the state reprehends.”

Indeed, with the increase in international trade and cooperation resulting from lowered barriers to human and capital mobility and to information exchange, the effects principle provides a method to regulate extraterritorial conduct. At the same time, the effects test has flaws. For example, the test is difficult to apply in determining what an “effect” is and when an effect is sufficient to warrant action. Nonetheless, even though scrutiny is less mechanical than with the territorial jurisdiction principle, the effects principle provides a straightforward analysis in many instances. For example, economic effects are relatively easy to recognize, as evidenced through the acceptance of the extraterritorial application of federal securities law and anti-trust actions. Thus, when applying the effects test, the primary issue is determining whether the effect is sufficient to warrant action.

When read broadly, the effects principle could result in universal application of domestic law since any act could have some effect, however tenuous, upon the interests of a state. Therefore, most jurisdictions recognize some limitations of the principle. For instance, the United States applies a “‘reasonableness’ requirement as a threshold for applying national law to extraterritorial activities.”

As another constraint in administering the effects principle in the United States, extraterritorial application is only available when the

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103 Id. at 443 (emphasis added); Gerber, supra note 101, at 294.
104 See Parrish, supra note 82, at 1456-60.
105 Id. at 1480-82.
106 See Born, supra note 53, at 29.
107 Id. at 33-34, 45-48.
domestic effects are “direct, substantial, and reasonably foreseeable.” For example, the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”) limits the Sherman Act to domestic application except where foreign conduct “significantly harms imports, domestic commerce, or American exporters.” In particular, the FTAIA states that the effect must be “direct, substantial, and reasonably foreseeable,” codifying common law limitations on the effects test.

The FTAIA limits on the effects principle are clearly illustrated in the F. Hoffman – La Roche Ltd. v. Empagram S.A. case. In Empagram, the Court considered price fixing by vitamin manufacturers outside the United States and concluded that the FTAIA can only apply to significant adverse effects within United States territory from a foreign action and not to foreign adverse effects independent of any adverse domestic effect. The Court imposed a territorial limit to the effects of harmful foreign action when applying the Sherman Act although it ultimately found the domestic economic effects to be significant enough to bring a claim. Generalizing this notion, the effects principle must be limited to direct, substantial, and reasonably foreseeable actions that have domestic impact. When applied to economic effects, the principle serves as a viable method to determine whether the application of domestic laws resulting in significant extraterritorial effects is warranted.

C. UNCLOS and Environmental Harm from Actions in International Waters

Similar to jurisdictional limitations in the United States extraterritorial application of domestic anti-trust law, the effects principle also plays a significant role in the application of port state jurisdiction to


113 Id. at 164.

114 Id. at 173.
international issues, such as environmental pollution. Environmental harms are the result of the tragedy of the commons, where the producer of a harm is not naturally subject to its cost and, therefore, does not have sufficient incentive to desist from acting in a destructive manner. In the context of maritime law and commercial shipping, this may occur from substandard vessels that pollute the environment or from poor shipping practices, like high speeds or improper routes that harm ocean life. Because these harms affect port nations, potentially damaging the nation’s tourism industry or polluting the nation’s hydrological resources, customary laws and treaties have extended port state jurisdiction to vessels in international waters.

For example, UNCLOS was designed to control several laws-of-the-sea issues, including pollution, and it has largely been accepted as customary international law. General obligations under Article 192 of Part XII of UNCLOS mandate that “[s]tates have the obligation to protect and preserve the marine environment.” This limits the state’s right to dispose of resources freely, recognized by Article 193, based upon the impact to the environment. In addition, Article 194(2) requires states to


118 See generally Nicholas H. Berg, Bringing It All Back Home: The Fifth and Second Circuits Allow Domestic Prosecutions for Oil Record Book Violations on Foreign-Flagged Vessels, 34 TUL. MAR. L.J. 253, 258 (2009) (explaining that “UNCLOS created an international legal regime to govern the use of the high seas” and was signed by 159 nations); Foley & Nolan, supra note 116, at 58 (“UNCLOS is considered customary international law to which the United States adheres.”); John T. Oliver, Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction Over Foreign-Flag Vessels in U.S. Ports, 5 S.C.J. INT’L L. & BUS. 209, 213 (2009) (stating that although the U.S. is a signatory to UNCLOS, the U.S. Senate has not yet ratified the convention).

119 UNCLOS, supra note 33, art. 192.

120 See id. art. 193.
take necessary measures to control their pollution so it does not damage “other [s]tates and their environment.”\textsuperscript{121} These articles set customary environmental requirements for vessels operating on the open seas.

In addition, Article 218 of UNCLOS goes beyond traditional port state jurisdiction, which only allows port states to exercise authority over foreign flag vessels for actions in their territorial waters or ports. Article 218 allows states to exercise enforcement jurisdiction over vessels in their territory for acts that have occurred in either international waters or the waters of another state at the request of that state.\textsuperscript{122} Thus, Article 218 of UNCLOS provides a mechanism to restrict harmful actions outside of a state’s normal jurisdiction. The purpose of this regulation is to prevent one state’s ships from using the most expedient course of travel when it harms unassociated states.

As shown above, UNCLOS extends port state jurisdiction, however, there must be a relationship similar to the effects principle, between the harm suffered and the state exercising jurisdiction. The port state must show that it has suffered a cognizable harm. “[T]he port state may institute legal proceedings against offenders” if a violation occurred in another state’s maritime zone and “the violation has caused or is likely to cause pollution” in its own maritime zones.\textsuperscript{123} Thus, “the powers enjoyed by the port state authority under Article 218(2) are in essence those under the ‘effects’ principle,” where the action must have a recognizable effect on the state.\textsuperscript{124}

D. Weapons of Mass Destruction and Port States

Combating terrorism is another instance in which port states may extend their traditional jurisdiction through the effects principle to restrict vessels of another flag. Following the attacks on September 11, 2001, the

\begin{footnotes}
\item[121] Id. art. 194(2).
\item[122] Ho-Sam Bang, Port State Jurisdiction and Article 218 of the UN Convention on the Law of the Sea, 40 J. MAR. L. & COM. 291, 296 (2009). Note, however, that by taking action themselves, flag-states may preempt such action by a foreign state for unlawful discharges or other environmental harm. Id.
\item[123] UNCLOS, supra note 33, art. 218; Bang, supra note 122, at 297.
\item[124] Bang, supra note 122, at 297 (emphasis added).
\end{footnotes}
United States government extended efforts to contain weapons of mass destruction (“WMDs”).\(^\text{125}\) The United States strengthened diplomatic efforts such as the Treaty on the Non-Proliferation of Nuclear Weapons and the Chemical and Biological Weapons Conventions.\(^\text{126}\) In addition, the United States undertook new initiatives like the Proliferation Security Initiative (“PSI”), in which a loose alliance of countries focuses on restricting the movement of WMDs through shipping routes.\(^\text{127}\) The PSI has been especially contentious because it envisions using combined intelligence from member nations to hinder ships on the open seas, extending beyond the traditional jurisdiction allowed by customary international law or UNCLOS.\(^\text{128}\)

This controversy stems from the widely accepted international norm of the right of innocent passage. UNCLOS Article 19 requires states to permit the passage of ships unless the passage is “prejudicial to the peace, good order, or security of the coastal state.”\(^\text{129}\) For a state to have jurisdiction to hinder a vessel under UNCLOS, it would have to show that the transport of WMDs results in a threat by force that endangers its “sovereignty, territorial integrity, or political independence”\(^\text{130}\) or that violates some other principle of international law contemporaneously with


\(^{129}\) UNCLOS, *supra* note 33, art. 19, ¶ 1.

\(^{130}\) *Id.* art. 19, ¶ 2(a).
Thus, it is the transport of the WMD that must pose a threat and not the possible future use of the WMD.132

Under Article 25 of UNCLOS, a nondiscriminatory stoppage of all vessels is allowed for conducting routine searches for temporary bans within 12 nautical miles of the state's coastal territory.133 Beyond these routine searches, there must be credible evidence that the passage is not innocent.134 Thus, for states to circumscribe a traditional international norm there should be a significant nexus between the harm and the territory in question, a direct application of the effects principle.135

As the above examples clearly illustrate, a state must justify the application of its national laws extraterritorially to transport vessels or to transshipped goods based on substantial domestic effect.136 In the older case of liquor transshipment, the direct harm from the potential illegal entry of a regulated substance into the domestic market met the effects test.137 More recently, the transshipment of Chilean swordfish demonstrated that significant, direct depletion of natural resources upon which a state relies economically may be sufficient to grant authority to restrict transshipments

131 See Logan, supra note 126, at 259.

132 Id. at 259.

133 Id. at 261. Regarding the 12 nautical miles, the suspension of right of innocent passage must, among other requirements, “only cover specified areas of the territorial sea,” wherein “territorial sea” is a limit not exceeding 12 nautical miles. UNCLOS, supra note 33, arts. 3, 25.

134 Logan, supra note 126, at 261-62. However, it is likely that the world may accept some collateral damage in the hindrance of innocent passage to accomplish such an important goal. Id.

135 However, in the internal water of a State and at its ports, that State has more freedom; subject to the international principles discussed earlier, it will have the freedom to inspect the contents of a foreign vessel at its port and seize its illegal cargo. Id. at 265.

136 However, some United States Courts hold that these actions may be justified by the protective principle, recognized under international law to apply in a strict sense to dangers of security. Oliver, supra note 55, at 234-35, 239-40. On the other hand, federal courts have required what has been described as an “adequate nexus between the prohibited activity and the United States,” demonstrating a limitation of the protective principle by some requisite effect. Id. (citing United States v. Perlaza, 439 F.3d 1149, 1162 (9th Cir. 2006)).

and apply domestic laws having extraterritorial effects. In addition, regulation of environmental pollution issues resulting from substandard vessels establishes that direct harm to a state’s resources may justify extraterritorial jurisdiction. Finally, a direct threat resulting from the actual transshipment of WMDs may represent sufficient harmful effect to warrant extraterritorial jurisdiction.

III. Generic Pharmaceuticals as Legitimate Goods in International Trade

Similar to the diverse transshipment and foreign vessel issues governed by the effects principle above, EU nations must also show a direct, substantial, and reasonably foreseeable effect upon their states by the transshipment of drugs through their ports in order to seize legitimate pharmaceuticals. In this sense, considerations beyond the protection of MNCs and their patented brand name drugs must be taken into account. Latin American countries, for example, converted their healthcare from public institutions to privately managed companies, resulting in significant health crises throughout Latin America due to dwindling healthcare access for the poor. International organizations encouraged and assisted less developed countries in increasing access to life preserving medicines, in particular by using TRIPS flexibilities. This enabled Latin American


139 See Bang, supra note 122, at 291.

140 See Logan, supra note 126, at 269-70.

141 Celia Iriart et al., HMOs Abroad: Managed Care in Latin America, in SICKNESS AND WEALTH 69-71, 73-76 (Meredith P. Fort et al. eds., 2004).

countries, whose poverty rates are generally between twenty to sixty percent, to more easily obtain generic medicines. Such assistance is necessary because economic development and output are intimately tied to a healthy population. Thus if EU nations are to infringe upon Latin American countries’ need for generic medicines, they must present a justifiable effect upon their interests.

The present controversy involves generic pharmaceuticals that Indian companies have manufactured and shipped to Latin America. The WTO TRIPS Preamble requires that members should “ensure that measures and procedures [they undertake] to enforce intellectual property rights do not themselves become barriers to legitimate trade.” Therefore, the legitimate generic drugs that Rotterdam customs officials seized and sent back to India are entitled to be shipped under the provisions of TRIPS, as well as GATT and UNCLOS. Thus, intervening actions by EU nations require justification based on substantial and foreseeable harm under the effects principle to warrant pharmaceutical seizures in contravention of international law.

make full use of the flexibilities in the TRIPS agreement, . . . particularly those that refer to the production or importation of generic medicines . . .”).

143 See generally U.N. Econ. Comm’n for Latin Am. and the Caribbean, The Reactions of Latin American and Caribbean Governments to the International Crisis: an Overview of Policy Measures up to 30 January 2009, 37-69, U.N. Doc. LC/L 3000 (Jan. 30, 2009) (reporting poverty rates of Latin American countries, such as 21% for Argentina in 2006, 54% for Bolivia in 2007, and 30% for Brazil in 2007). Analysts expect the 2007 values to worsen with the global recession as Latin American countries have been hurt by the global economic recession of 2008 and 2009. See id. at 3. The availability of flexibilities, such as compulsory licensing under the TRIPS Agreement, is based upon the country’s stage of development and its manufacturing capabilities. See generally World Trade Organization, Ministerial Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 (2011), available at http://www.wto.org/english/tratop_e/minist_e/min01_e/mindecl_trips_e.pdf.


145 TRIPS Agreement, supra note 22, Preamble (emphasis added).
A. TRIPS and Latin American Importation of Generics

In this context, it is important to examine international provisions that support the transshipment of generic drugs through EU nations. In particular, TRIPS allows Latin American governments to use compulsory licenses to acquire medicine. Although TRIPS establishes a modern framework for IP protection “grounded” in the principles of national and most favored nation treatment, it also incorporates limitations on patents for national emergency and public health, allowing compulsory licenses to force a patent holder to license its technology at a fair rate. TRIPS also enables least developed countries (“LDCs”) to forgo patent protection for pharmaceuticals until 2016. In this way, TRIPS supports patent protections while balancing the potentially detrimental impact of IP protection on access to medicine in developing nations by promoting the use of generics to meet pharmaceutical needs.

However, until the 2003 TRIPS Council Agreement following the 2001 Doha Declaration, compulsory licensing limited generic medicines to domestic use. While the Doha Declaration explicitly recognized a government’s power to issue compulsory licenses, the Council Agreement waives the provisions of Article 31(f) that prohibit exporting compulsory licenses.

147 Id. at 784.
148 Id. at 788. TRIPS effectively allows compulsory licenses to make the patent protected material without the authorization of the rights holder under limited circumstances. Subhasis Saha, Patent Law and TRIPS: Compulsory Licensing of Patents and Pharmaceuticals, 91 J. PAT. & TRADEMARK OFF. SOC’Y 364, 366-67 (2009).
150 Id.
151 Jessica J. Fayerman, The Spirit of TRIPS and the Importation of Medicines Made Under Compulsory License After the August 2003 TRIPS Council Agreement, 25 NW. J. INT’L L. & BUS. 257, 262-63 (2004). Article 31, which “implicitly provides for compulsory licensing,” and Article 27(2), which recognizes the conflict of public health and IP protection, were used by South Africa to support compulsory licensing. See id. at 260.
licensed products.\textsuperscript{152} Using the Council Agreement’s waiver, a country in need of a drug may ask the government of another country “that produces a generic version of the drug to authorize one of its manufacturers to export it, without the consent of the patent holder.”\textsuperscript{153} Therefore, Latin American nations that provide generic medicines to combat national health crises are TRIPS compliant when using compulsory licensing, the waiver of Article 31(f)’s limitations in exporting, or the waiver for patent requirements for LDCs. As a result, TRIPS supports transshipment of generic pharmaceuticals through EU nations.

B. International Organizations’ Support of Latin American Use of Generics

Importantly, the use of TRIPS’ compulsory licensing to obtain necessary medicines in Latin American is strongly encouraged. For example, non-governmental organizations ("NGOs") have encouraged Latin American countries to retain as much flexibility as possible under TRIPS\textsuperscript{154} to maximize access to generic drugs for developmental and humanitarian reasons.\textsuperscript{155} Furthermore, multilateral trade agreements such as the South-South Cooperation ("SSC") agreement support Latin American access to generics.\textsuperscript{156} The United Nations recognizes the SSC as a useful tool to encourage “a better quality of life for the world’s poor” by improving

\begin{footnotesize}
\begin{enumerate}
\item[152] Id. at 260-64 (proposing a waiver to allow export of items created under compulsory license by article 31(f) of the TRIPS Agreement); Roberta Parrish, Does Waiver of Patent Restriction Clear Way for Generics in Poor Countries, 16 HEALTH LAW. 12, 14 (2004) (requiring that exporters differentiate the goods to avoid confusion in the marketplace and avoid re-exportation).
\item[153] Parrish, supra note 153, at 15 (“The requests have to be made in good faith and for no commercial gain.”).
\item[154] See Doctors Without Borders, supra note 142.
\item[155] ESPICOM, THE LATIN AMERICAN MARKET FOR GENERIC DRUGS – A COMPARATIVE STUDY OF 7 KEY MARKETS (2006) (documenting an increase between 2004 and 2005 in the generic sector in Latin America, which increased by 26.9% from $1.3 to $1.7 billion (USD)).
\end{enumerate}
\end{footnotesize}
health, and Brazil, India, and South Africa are concentrating on the pharmaceutical sector as an area to increase SSC activities.

Although compulsory licensing, waivers for patent requirements and for export limitations, and multilateral trade agreements promoting access to generic pharmaceuticals may result in revenue pressures for MNCs, these tools fully comply with international agreements. Thus, the importation of generic medicines by Latin American countries is legitimate trade protected by TRIPS and championed by international organizations.

IV. EU Member Nations’ Seizure of Generic Pharmaceuticals as Goods in Transit: Use of the Effects Principle

MNCs are increasing the cost of generic drugs shipped to Latin American countries by improperly advocating for the use of EU regulations to hinder the transfer of goods from manufacturers to purchasers. By using EC 1383 to impound medicines intended for developing Latin American countries, some EU member nations are improperly administering national IP protections extraterritorially. Such an application of EC 1383, using the manufacturing fiction doctrine discussed below, oversteps TRIPS IP protections available to WTO member


160 See Martin Khor, supra note 2.

Moreover, it is inconsistent with international agreements such as GATT and UNCLOS. Rather than using the manufacturing fiction doctrine to support the seizure of legitimate goods, EU nations should apply EC 1383 under the effects principle.

A. Need to Regulate Counterfeit Pharmaceuticals

There is a clear need to balance the importance of IP protection with the danger of counterfeit drugs. Counterfeit medicines that are deliberately and fraudulently labeled to mislead the consumer or that have improper active ingredients are an issue for both the brand name and generic medicine marketplace. They pose a health risk, causing drug resistance, therapeutic failure, and possibly even death. This is a problem for both developed and developing nations, but counterfeiting is especially serious in developing countries, where “supply shortages, lax regulations and oversight, and corruption allow the trade to thrive.”

Recognizing problems created by counterfeits, TRIPS obligated member states to implement national laws to prevent goods with counterfeit trademarks and pirated copyrights from entering their markets. In particular, rights holders having “valid grounds” may file an application with the government to have customs authorities detain suspect goods. At the same time, TRIPS requirements and GATT provisions requiring members to prevent hindrances of trade, as discussed above, limit how states can apply their anti-counterfeit laws to prevent the entry of illegal


163 INT’L MED. PRODS. ANTI-COUNTERFEITING TASKFORCE, supra note 18, at 2.

164 Id.

165 Yankus, supra note 18, at 2.

166 TRIPS Agreement, supra note 22, art. 51.

167 Id.
goods into their markets.\textsuperscript{168} Aware of these limitations, EU nations modified their border protections and implemented EC 1383.

\textbf{B. Improperly Broad Application of EC 1383 to Seize Transshipped Goods}

In order to understand the application of EC 1383 to the seizure of legitimate pharmaceuticals in transshipment, a brief overview of EU efforts to protect IP is essential. EC nations implemented EC 1383 as the latest in a series of measures undertaken to limit IP infringement within their member states. First, in 1986, the EC enacted Council Regulation EEC No. 3842/86, prohibiting the circulation of goods that infringed trademark rights.\textsuperscript{169} Then, in 1994, the EC expanded protection through EC Regulation No. 3295/94 ("EC 3295/94") to prohibit the circulation, exportation, and importation of counterfeit goods and goods violating copyright protection.\textsuperscript{170} The EC added enforcement for patent violations in 1999.\textsuperscript{171} Finally, the latest regulation, EC 1383, expanded the power of customs officials and made it easier for rights holders to request action to impound goods violating IP rights.\textsuperscript{172}

EC 1383 grants member nations’ customs authorities the right to take action against goods suspected of infringing an intellectual property right, stating in particular that

\begin{quote}
[i]n cases where . . . goods infringing an intellectual property right originate in or come from third countries, their introduction into the Community customs territory, including their transshipment, . . . should be prohibited and a procedure set up to enable the customs authorities to enforce this prohibition as effectively as possible.\textsuperscript{173}
\end{quote}

\textsuperscript{168} Id. (clarifying that members have no obligation to apply such seizures to transshipped goods).

\textsuperscript{169} Council Regulation 3842/86, 1986 O.J. (L 357) 1 (EEC).

\textsuperscript{170} Council Regulation 3295/94, 1994 O.J. (L 341) 8 (EC).

\textsuperscript{171} Council Regulation 241/1999, 1999 O.J. (L 027) 1 (EC).

\textsuperscript{172} See EC 1383, art. 5, 2003 O.J. (L 196) 9-10.

\textsuperscript{173} Id. ¶ 3, at 7.
Therefore, EC 1383 could provide for the seizure of both infringing imported goods and infringing goods that are not destined for countries within the EU but are merely being transshipped.\footnote{174 See id.} In fact, this particular issue has been considered by the Dutch Group AIPPI, an NGO that formulates local IP policy.\footnote{175 See GERTJAN KUIPERS ET AL., BORDER MEASURES AND OTHER MEANS OF CUSTOM INTERVENTION AGAINST INFRINGERS 16 (AIPPI ed., 2009), available at http://www.aippi.nl/uploads///Q208%20NL%201.PDF (Neth.).} Supporting the seizures by customs officials, they have stated that Article 16 of EC 1383 prohibits any further trade in goods that “infringe an IP right,” including goods in transit that have entered the EU customs territory.\footnote{176 Id. at 12.} The important element, however, is that the goods must infringe an intellectual property right, even if they are only being transshipped through the EU.

For this reason, Dutch courts permitting seizures of transshipped goods employ the manufacturing fiction doctrine under which courts treat goods in transit as manufactured in the state where the customs action is brought.\footnote{177 Paul Maeyaert, Grey and Counterfeit Goods in Transit: Trademark Law in No-man’s Land, IAM MAGAZINE, June 8, 2009, at 12, 14, available at http://www.iammagazine.com/issues/Article.ashx?g=e5225bb7-e7ac-4231-853e-6415dae67879; see also Kuipers, supra note 175, at 12 (explaining that the manufacturing doctrine that the Netherlands employs is based on language in EC 1383 that has been removed).} Application of this doctrine causes goods in transit to infringe an exclusive right of the patent holder to “make, use, put on the market or resell, hire out or deliver the patented invention, or otherwise deal in it commercially, or to offer, import or stock it for any of those purposes,” because the goods are assumed to be made in the EU nation where such manufacture would be illegal.\footnote{178 LUCIE GUIBAULT & O. VAN DAALLEN, UNRAVELLING THE MYTH AROUND OPEN SOURCE LICENSES 91 (TMC Asser Press, 2005). The European Patent Convention (‘‘EPC’’) which grants patents is entirely separate from the European Community; however, these patents form a ‘‘bundle’’ of national patents which have to be validated, maintained and litigated separately in each Member State.’’ Id. In the Netherlands, an inventor may choose to obtain a strictly national patent per the Dutch Patent Act or an EPC Patent with a Netherlands designation. Id. at 92. Pharmaceutical MNCs almost universally choose the latter.}
The manufacturing fiction doctrine was applied under EC 3295/94 in the European Court of Justice (“ECJ”) case Polo Lauren v. Dwidua.\textsuperscript{179} In this case, a United States trademark owner brought an action against an Indonesian consignee shipping goods through Austrian customs.\textsuperscript{180} The ECJ held that because the goods would have been illegal \emph{if manufactured in Austria}, the trademark owners could prohibit their transit.\textsuperscript{181} In fact, the Netherlands has applied the manufacturing fiction doctrine to patent infringement since 2004, when its Supreme Court held that a consignment of CD-R disks from Taiwan violated Philips, Inc.’s patent rights without requiring the rights holder to show that the goods would enter the European market.\textsuperscript{182} Thus, the Netherlands customs authorities’ seizure of Losartan is consistent with their previous application of domestic law to prevent the transshipment of goods that violate local patents using the manufacturing fiction doctrine.

However, recent ECJ decisions bring the application of this doctrine to EC 1383 into question.\textsuperscript{183} For example, in \emph{Class International BV v. Colgate-Palmolive Company}\textsuperscript{184} the ECJ held that trademark owners attempting to prevent infringement under the Trademark Directive 89/104 (“89/104”)\textsuperscript{185} must show that items \emph{will} be released into the member nation’s market before obstructing the movement of goods in transit.\textsuperscript{186} The


183 \textit{See} Theuws, \textit{supra} note 182.


court further limited importation to mean goods *to be placed* in the EU market, not simply entering the member nation for external transit or transshipment.\(^{187}\)

Furthermore, in *Montex Holdings Ltd. v. Diesel SpA*,\(^{188}\) the ECJ analyzed whether 89/104 allowed a trademark owner the right to prohibit transit of goods. The court followed its previous *Class International* decision that allowed unencumbered external transit of fake Diesel jeans to countries that did not protect the trademark.\(^{189}\) The ECJ also held that infringement must be determined by the legal status of the mark in the destination country.\(^{190}\) Finally, the court found that the trademark owner must establish, “either the existence of a release for free circulation of the non-Community goods bearing his mark in a Member State in which the mark is protected, or of another act necessarily entailing their being put on the market in such a Member state” to prohibit transit.\(^{191}\)

Nevertheless, the *Montex* decision fueled debate about whether the manufacturing fiction doctrine applies to EC 1383 in general, and to patents in particular. Opponents of the doctrine hold that *Montex* essentially did away with the doctrine while proponents argue that *Montex* was not analyzing EC 1383 but rather 89/104, so the court did not speak to the viability of the doctrine applying to EC 1383.\(^{192}\) In the 2008 *Sosecal v. Sisvel*\(^{193}\) case, the District Court for The Hague, which decides Dutch patent cases, held that the latter interpretation of *Montex* was correct and that the manufacturing fiction is applicable in its jurisdiction.\(^{194}\)

\(^{187}\) *Id.* ¶ 34, at I-8775, ¶ 2, at I-8788.


\(^{189}\) *Id.* ¶¶ 20-23, at I-10907 to -10908, ¶ 27, at I-10909, ¶ 1, at I-10913.

\(^{190}\) *Id.* ¶ 1, at I-10913.

\(^{191}\) *Id.* ¶ 26, at I-10909.

\(^{192}\) Theuws, *supra* note 182.


\(^{194}\) *Id.* ¶ 4.14.
The ECJ still has to speak on the issue. By interpreting EC 1383 to apply to goods purely in transit, the legality of shipped pharmaceuticals is dependent on the IP rights in the EU port where it makes an incidental stop.\(^{195}\) As a result, although the ECJ prohibited seizing goods that will not enter the member nation’s protected market, the practice continues in some EU member nations like the Netherlands, where customs officials seized Losartan.\(^{196}\)

**C. Need for EU Member Nations to Comply with EU Laws and International Trade Agreements in Applying EC 1383**

When determining how to apply EC 1383 to the transshipment of generic pharmaceuticals, EU nations should consider both EU law and international agreements. EU member nations generally have an obligation to interpret national laws to comply with EU regulations.\(^{197}\) Following this principle, the United Kingdom’s High Court of Justice’s Chancery Division used *Montex* to support Her Majesty’s Commissioners of Revenue and Customs’ refusal to detain fake cell phones in transit through the EU under EC 1383.\(^{198}\) Nokia, Inc., sought the seizure of cell phones manufactured in Asia and transported to third nations through the U.K.\(^{199}\) The Court held that these items were not counterfeit because *as goods in transit*, they were *never to be placed on the U.K. market* to infringe the trademark.\(^{200}\) The Court also refused to espouse the manufacturing fiction doctrine, stating

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\(^{195}\) EC 1383, art. 2, 2003 O.J. (L 196) 7 (defining infringing items based on the law of the Community port, such as “goods which, in the Member State in which the application for customs action is made, infringe . . . a patent under that Member State’s law”) (emphasis added). The ECJ found in *Rolex* that EC 3295/94 enumerated measures regarding the entry, export, and re-export in and out of the Community of goods that infringe certain intellectual property rights, and, therefore, EC 1383 applies to goods in transit *between two non-member nations*. Case C-60/02, Criminal Proceedings Against X, 2004 E.C.R. I-665, ¶ 1, at I-688 (emphasis added).

\(^{196}\) See supra, Part I.A.


\(^{198}\) Nokia Corp. v. Her Majesty’s Comm’r of Revenue & Customs, [2009] EWHC (Ch) 1903, [79]-[80].

\(^{199}\) *Id.* [3]-[13], at 1094-95.

\(^{200}\) *Id.* [49], at 1107.
that it was contrary to *Montex.*201 Most importantly, the Court specified that it is unlikely that EC 1383 authorizes “goods lawfully made in one territory and intended for lawful use in another but transshipped through a Member State in which the mark is registered . . . [to] be . . . seiz[ed].”202 Unfortunately, this is exactly what occurs when member nations like the Netherlands, who are under the same obligation as the United Kingdom to apply ECJ holdings, seize generic pharmaceuticals in transit to Latin America. Rather than relying upon the manufacturing fiction doctrine, EU nations who wish to seize drugs in transit should link the effects of the transport of these drugs through their ports to a significant effect on their market under the effects principle.

In addition to applying EU law, EU nations that are members of the WTO are obligated to implement TRIPS.203 TRIPS requires member countries to establish IP laws that enforce IP rights only “in such a manner [so] as to avoid the creation of barriers to legitimate trade.”204 The agreement defines legitimate trade as being “justifiable . . . by relevant public policies,”205 which take into account public interest.206 As shown above, the international community recognizes generic pharmaceuticals as legitimate goods in which there is a strong public health interest.207 Although TRIPS only sets minimum requirements to allow member nations to expand IP protections, TRIPS also sets mandates on the application of IP law to goods in transit by requiring that the rights in the *country of importation* should determine the infringement status of goods.208 TRIPS

201 *Id.* [76], at 1112.

202 *Id.* (emphasis added).

203 See TRIPS Agreement, *supra* note 22, art. 8.

204 *Id.* art. 41 (emphasis added).

205 *Id.*


207 See TRIPS: Negotiation, Implementation, and TRIPS Council Work, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/trips_e/min99_e/min99_e/10trips_e.htm (last visited Oct. 16, 2011); see also *supra* Part III.

208 TRIPS Agreement, *supra* note 22, art. 52.
requires that EU member nations evaluate goods in transit according to the IP laws in the goods’ destination countries.\(^{209}\) Therefore, while Dutch officials interpret EC 1383 through the manufacturing fiction doctrine to justify seizing legal pharmaceuticals,\(^{210}\) ECJ holdings, other EU nations’ execution of EC 1383, and TRIPS requirements indicate that EC 1383 may not support the seizure of legitimate pharmaceuticals in transit under the manufacturing fiction doctrine.

D. The Effects Principle Applied to Analyze Seizures under EC 1383

In applying EC 1383 to goods in transit, the ECJ should explicitly endorse the effects principle. As shown above, the United States and other nations have used the effects principle to justify the regulation of foreign conduct. For example, in the United States anti-trust context, enforcement mechanisms for businesses or persons in foreign countries that violate United States domestic law are typically applied through multinational agreements with the local governments of the violating entity.\(^{211}\) In this instance, application of a nation’s laws abroad would be directly extraterritorial in nature and must be justified by substantial negative domestic effects.

Also, EU officials acting in their homeport should use the effects test to justify territorial actions that have indirect extraterritorial consequences, such as seizures of transshipped goods. It is important to justify these seizures because EU nations have entered into international agreements that constrain their actions at their ports and the resultant extraterritorial expansion of their national patent laws. This is a balancing test, considering whether the national effects from continued transshipment of the pharmaceuticals outweighs the international effects from seizure. In order for EU nations to seize and prevent the onward transport of these drugs, the transshipment through their ports must have a direct, substantial, and reasonably foreseeable effect on their domestic market that significantly outweighs foreign detriment from restrictions in transshipment.

\(^{209}\) Id. art. 51.

\(^{210}\) See, e.g., Kuipers, supra note 175.

Detractors of the effects principle claim the principle gives too much discretion to the judiciary, which could lead to universal application of domestic laws. However, this is not the case when only direct, substantial, and reasonably foreseeable effects compel seizures. This effects test only applies in pure transshipment cases where goods could credibly find their way into EU markets. If domestic leakage is substantial enough to have a reasonably foreseeable effect on the market, the state would then have a legitimate right to enforce its local patent laws to transshipped goods. The goods in transshipment could be confiscated and seized on the basis that they were contributing to this leakage. Thus, when the measure of effect is economic harm, as in the anti-trust and securities context, the result of damage from leaked goods into the market should be evident from the use of the pharmaceuticals in the market and the subsequent financial losses to the brand name drug manufacturers.

As in the case of environmental law under UNCLOS, if the acts that are outside of a state’s borders, such as the manufacture and sale of “infringing” goods involving only non-EU nations, would lead to a cognizable harm to the state itself, the state should have a right to seize these goods. Such enforcement has already occurred through the application of the Volstead Act, and it has been further debated in the Chilean swordfish dispute, where extraterritorial action significantly, directly, and reasonably foreseeably affected national interests. However, unlike the transshipment of liquor under the Volstead Act, a modern view should be espoused that attempts to appropriately justify the seizure of goods that pose a substantial economic threat to domestic markets. In the case of the seizure of Losartan by Dutch authorities, justification of the seizure to divert the goods back to the source country would require credible evidence of both a leakage into protected markets and a significant economic effect of that leakage on domestic markets.

In addition to substantial justification underlying the seizure of Losartan by the Netherlands, other economic factors should be considered

212 Parrish, supra note 82, at 1478-82.
214 See id. at 33-34, 45-48.
when applying the effects principle to extraterritorial actions. The EU should consider the increasingly interconnected nature of trade and the possible retaliatory action resulting from unjustifiably restricting the trade of legitimate goods. Although EU customs officials’ actions are in the strictest sense territorial, they have significant extraterritorial effects, and EU customs officials must justify their conduct in an international context using the effects principle.

**Conclusion**

EU customs officials have applied EC 1383 to seize transshipped generic pharmaceuticals under the manufacturing fiction theory that local intellectual property laws apply to pharmaceuticals manufactured in and destined for foreign nations. These actions result in raising barriers to legitimate trade and are contrary to EU nations’ international obligations. These actions also result in local patent laws, which are territorially restricted, having extraterritorial implications. Rather than rely upon a legal fiction, these EU states should use an effects principle analysis to determine whether the impact of these goods upon local markets justifies restricting their transshipment through seizures. This impact is objectively measurable, and the effects principle can be adequately constrained to provide a reasonable basis to analyze the appropriateness of these seizures.
Combating Fraud in the Caribbean Region:  
Lessons from Recent Events

John H. Walsh *

On November 26, 2010, I had the opportunity to meet with the Caribbean Group of Securities Regulators (“CGSR”) during its 7th Annual Conference1 and speak about combating fraud and lessons learned from recent events. Following the meeting, representatives of the host, Financial Services Commission of Jamaica, requested a written version of my remarks in a format suitable for wider distribution. I would like to express my sincere appreciation to the CGSR and the Financial Services Commission of Jamaica for the opportunity to meet and speak with them about important matters of mutual interest.

Introduction

Nothing is more damaging to a healthy financial sector or more opposed to economic growth and prosperity than fraud. All securities regulators must focus on fraud. Fraud is the enemy of every investor, market, and securities regulator.

Fraud is not new. It is a long-standing problem that requires constant vigilance. While fraud is not new, recent frauds have dramatically
raised the stakes for securities regulators. Over the last few years financial
frauds of extraordinary scale have been alleged, including several that
involve the Caribbean Region. This article will focus on the lessons taught
by recent events. Part I of this article will outline historical background and
types of fraud to provide context to contemporary fraud activities. Part II
will address ongoing fraud cases and their impact on securities regulators.
Part III posits that securities regulators must be ready to change
significantly to enhance their anti-fraud programs and identifies ten lessons
that have been taught by recent events.

I. Regulators Must Never Relax Their Vigilance Against Fraud

Fraud is a centuries old issue. In fact, the first Encyclopedia
Britannica, published in 1771, provides an excellent working definition of
fraud. “Fraud, in law, signifies deceit in grants, or conveyances of lands,
[etc.] or in bargains and sales of goods, [etc.] to the damage of another
person.”

Moreover, efforts to combat fraud have a long history. Organized
government has battled against fraud for thousands of years. For example,
3,700 years ago, at the dawn of human civilization King Hammurabi of
Babylon set forth a code of laws that included a law about fraud. Law 265
stated that if someone to whom property has been entrusted engages in
fraud and makes false returns, then he shall be convicted and pay the victim
ten-times the loss.

Despite being an age-old problem, fraud is highly adaptable to new
conditions. For example, the Internet recently revolutionized

2 ENCYCLOPÆDIA BRITANNICA 631 (William Smellie ed., 1st ed. 1771), available at

3 Hammurabi’s Code is dated to approximately 1,755 BCE. See generally DOMINIQUE
CHARPIN, WRITING, LAW, AND KINGSHIP IN OLD BABYLONIAN MESOPOTAMIA, 71-82
(2010) (noting that while Hammurabi drew on earlier collections, his code seems to have
desired a special status in Babylonian culture, both because of its diffusion through
monumental stelas (slabs), and also because it seems to have acquired the status of a
cultural classic even though we do not possess any quotations from the Code in ancient
legal documents).

4 Law 265 reads, “If a herdsman, to whose care cattle or sheep have been entrusted, be
guilty of fraud and make false returns of the natural increase, or sell them for money, then
shall he be convicted and pay the owner ten times the loss.” EAWC Anthology:
hammurabi.htm (last visited Sept. 25, 2011).
communications, but as people began to use the Internet, so did fraudsters.\(^5\) Remarkably, although the technology was novel, the frauds were not, leading commentators to note that Internet fraud was an “old trick” in a “new medium.”\(^6\)

Today, society is going through yet another transformation in its communication technologies. Social media like Facebook and Twitter have taken a prominent place in the social dialogue. Just as with the Internet, the fraudsters have taken advantage of new opportunities. The U.S. Securities and Exchange Commission (“SEC”) is starting to bring fraud cases involving social media, such as the Carol McKeon case below.

While frauds perpetrated on new social media can be the same old tricks, these cases can also present novel elements. For instance, in June 2010 the SEC brought an emergency enforcement action against Carol McKeon and various related entities and individuals.\(^7\) The SEC alleged that the defendants had touted various stocks through Facebook, Twitter, email, text messages, and on a website. The defendants did not disclose that at the same time they were actively selling these stocks.\(^8\) This is the old-fashioned fraud known as “scalping,” where fraudsters profit from the upward movement in price created by their own promotions.\(^9\) However, two elements in this case were novel. First, the fraudsters used state-of-the-art social media to communicate with their victims. Second, the SEC and securities regulators in Quebec worked together across international borders.

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\(^5\) For example, the Better Business Bureau has reported that there are approximately 23,000 videos on YouTube, a popular Internet site, that appear to be fraudulent schemes. *BBB Warns Cash Gifting Pyramid Schemes Flourishing Online*, BETTER BUS. BUREAU (May 17, 2010), www.bbb.org/us/article/bbb-warns-cash-gifting-pyramid-schemes-flourishing-online-9865.


\(^8\) *Id.*

boundaries to investigate and prosecute the case.\textsuperscript{10}

The facts and circumstances differ from fraud to fraud across time, but certain underlying themes appear again and again. As a result, it is useful to review some of the types of frauds that regularly appear and require regulators’ constant vigilance.

First, fraudsters often try to act as if they are legitimate, regulated businesses.\textsuperscript{11} For example, in the Caribbean Region, at least one questionable operation has used a formal business location, as well as facilities and structures similar to those in the formal financial sector.\textsuperscript{12} Alternatively, in the U.S. securities market, there has been a problem with fraudsters selling “Prime Bank Notes.”\textsuperscript{13} Investors are told these notes are available only to major financial institutions and they pay tremendous rates of return with no risk.\textsuperscript{14} In the recent SEC case against Elite Resources LLC, victims were told that if they paid a fee of more than $200,000, they would be allowed to participate in a “Top 25 Bank” guarantee program that would give them access to $100 million in credit that they would not have to repay.\textsuperscript{15} Unfortunately, as the SEC noted, such investments do not exist.\textsuperscript{16}

\textsuperscript{10} Litigation Release No. 21580, \textit{supra} note 7. Hopefully, this type of international cooperation will be as widespread in the future as new communication technologies. \textit{See infra} pp. 22-23.

\textsuperscript{11} For examples of the steps fraudsters may take to try to give authenticity to their lies, see \textit{Fake Seals and Phony Numbers: How Fraudsters Try to Look Legit}, U.S. SEC. & EXCH. COMM’N (Dec. 2, 2009), www.sec.gov/investor/pubs/fakeseals.htm (last visited Oct. 16, 2011).

\textsuperscript{12} This problem is discussed in Claremont Kirton, \textit{Informal Financial Activity in Jamaica: A Preliminary Analysis of the Recent Experiences with Pyramid Schemes, in THE CARIBBEAN ECONOMY: A READER} 464, 470 (Dennis Pantin, ed., 2005).


\textsuperscript{14} \textit{Id.}


\textsuperscript{16} \textit{Id.} at 2.
Second, pyramid scheme fraud is a constant menace. The hallmark of a pyramid scheme is “the promise of sky-high returns in a short period of time for doing nothing other than handing over your money and getting others to do the same.” In the Caribbean Region, several recent pyramid schemes have exploited a traditional form of mutual self-help known as “partnering.” U.S. securities markets confront similar problems. In a recent SEC case, respondent James H. Park claimed to be operating a multilevel marketing company selling English and Spanish language tutorial DVDs through a network of associates around the world, that particularly preyed on communities in Puerto Rico and Florida. New sales associates would make an investment in the DVDs and then recruit other sales associates to do the same thing, thereby profiting from recruiting new associates. Indeed, Park claimed that once they made an investment, associates would receive a lifetime of passive income with no further effort on their part. Unfortunately, as noted in the SEC’s complaint, pyramid schemes are destined to collapse.

Third, regulators must be vigilant for Ponzi schemes. These schemes are named after Charles Ponzi, a fraudster of the early Twentieth Century. In a Ponzi scheme, new investor’s money is used to make payments to earlier investors. The Association of Certified Fraud Examiners has effectively described this fraud: “A simple investment scam rakes in as much money as possible and then disappears. A Ponzi stays in


18 See Kirton, supra note 12, at 467-68.


business by turning some of the money back into the game.” Through this practice, some Ponzi schemes have been able to stay in business for years.

The variety of possible Ponzi schemes is limited only by the human imagination. The Caribbean Region, as discussed in the next section of this article, has witnessed several alleged Ponzi Schemes. Similarly, in recent months the SEC has brought cases against Ponzi schemes in which investors allegedly thought they were participating in a program for trading diamonds, investing in real estate construction and oil ventures, loans to doctors, or a day trading system, to name a few.

Finally, offering frauds are another continuing threat. Offering frauds depend on spreading false information about the financial product being sold. For example, the Pension Fund of America, an enterprise including both U.S. and Cayman Islands entities, used a network of agents to sell millions of dollars worth of “retirement trust plans” to thousands of investors in Central and South America. The Pension Fund assured prospective clients that their investment would be safe because large and well-established U.S. banks would serve as “trustees.” Unfortunately, in reality up to 90% of the invested funds were used to pay exorbitant

24 ASS’N OF CERTIFIED FRAUD EXAMINERS, FRAUD EXAMINERS MANUAL 1.1730 (2010).
25 Id.
commissions, an “administrative fee,” and other costs. In addition, insiders at the firm misappropriated millions of dollars for themselves.\textsuperscript{33}

Importantly, the Pension Fund case also illustrates another important point about fraud: the risk of collateral damage to otherwise legitimate financial institutions. In this case, the Pension Fund’s offering fraud ended up ensnaring a global financial services firm. The SEC sanctioned HSBC USA because it had served as trustee.\textsuperscript{34} The SEC stated that HSBC had allowed the Pension Fund to: (1) use HSBC’s name and logo in the offering materials; (2) use marketing materials that falsely suggested that the trust plans had been co-developed by HSBC; and (3) claim that investors’ money would be “totally safe” because it would be deposited into a trust account at HSBC, when the funds were actually deposited into an ordinary checking account for the Pension Fund.\textsuperscript{35} The SEC also noted that HSBC had received warning of problems with the Pension Fund.\textsuperscript{36}

In the face of these ongoing frauds, a regulator could wonder what the purpose of combating fraud and remaining vigilant might be. If fraud will always be present, with a constant stream of fake products, pyramid schemes, Ponzi schemes, and offering frauds, what is the value of regulators’ vigilance? The answer is not simply moral, although the moral harm done to markets by fraud is receiving new attention.\textsuperscript{37} Rather, the answer also implicates pragmatic economic policy. Having a vigorous enforcement program is a critical element in lowering the cost of capital. Academic research has demonstrated that there is a correlation between markets with active enforcement programs and markets with lower costs of capital.\textsuperscript{38}

\textsuperscript{33} \textit{id.}


\textsuperscript{35} \textit{id.}

\textsuperscript{36} \textit{id.} at ¶ 20.

\textsuperscript{37} For an excellent synopsis of the new focus on “moral markets,” see e.g., Ronald J. Colombo, \textit{Exposing the Myth of Homo Economicus}, 32 HARV. J.L. & PUB. POL’Y 737 (2009).

\textsuperscript{38} Perhaps the best-known expression of this work is found in John Coffee, \textit{Law and the Market: The Impact of Enforcement}, 156 U. PA. L. REV. 229 (2007). \textit{See also} Ziven Scott Birdwell, \textit{The Key Elements for Developing a Securities Market to Drive Economic
No one can promise a fraud-free market. However, by being vigilant for fraud and punishing it severely when it is found, regulators help keep fraud in check, giving investors more confidence. The more regulators enforce, the more confidence investors have and the lower the price they will demand to invest. Working to lower the cost of capital and to support our respective economies’ growth and prosperity is an important mission for all securities regulators, especially in light of recent events.

II. Recent Events Have Raised the Stakes

Fraud will always be present; thus, regulators must always be vigilant. However, in recent years the growth in fraud’s scale is a new development of great consequence. In particular, three frauds of extraordinary scale have been alleged that warrant note.

The first of these frauds is the Bernard Madoff scandal. In December 2008, the SEC sued Madoff for securities fraud, alleging he had conducted a Ponzi scheme into which billions of dollars had been deposited over many years.39 The SEC’s complaint against one of Madoff’s associates described the scheme:

For decades, Madoff and others orchestrated a massive Ponzi scheme . . . [in which] Madoff solicited funds from direct investors and feeder funds by promising to invest those funds in equity securities and hedge the related downside risk, and thereby make certain rates of return. . . . In fact, however . . . Madoff [did not invest] . . . these funds in the manner described. Instead, Madoff directed that investor funds be kept in highly liquid form, including cash, certificates of deposit, and treasury bills. A large portion of these funds were used to pay investor redemption requests and to line Madoff’s pockets and the pockets of those around him.40

Madoff was also charged with federal criminal violations arising from his scheme. In March 2009, he pled guilty and was sentenced to 150

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40 Id. at 6.
years in prison. Related proceedings continue. As recently as November 18, 2010, the SEC sued more of his associates.

The second recent mass-scale alleged fraud is the Robert Allen Stanford scandal. The SEC filed a complaint against Stanford and Stanford International Bank (“SIB”) alleging a large-scale Ponzi scheme from the sale of SIB Certificates of Deposit (“CDs”) totaling over $7.2 billion by the end of 2008. SIB promoted its safety, security, and high rates of return on investments and CDs that surpassed U.S. commercial bank rates. Stanford allegedly misappropriated billions of investor dollars and invested in speculative businesses controlled by Stanford. Stanford allegedly lied to investors and invented the investment portfolio’s performance to hide its fraudulent activities. The SEC alleged that Stanford made principal redemption and interest payments from these CD sales instead of earnings.

In June 2009, federal criminal authorities indicted Stanford and certain SIB employees, and he was ordered detained in jail pending his criminal trial. The proceedings against Stanford continue.

In addition to the allegations against Stanford and SIB, the SEC has alleged that Stanford bribed regulatory officials to sustain the Ponzi scheme. The SEC alleges that Stanford:

bought Leroy King, the CEO of Antigua's Financial Services Regulatory Commission [“FSRC”], who accepted thousands of dollars of Stanford bribes per month to ignore

41 Id. at 4-5.


44 Id.

45 Id.
Stanford's Ponzi scheme. Accordingly to [the SEC’s] complaint, King showed Stanford the SEC letters to the FSRC seeking information about Stanford's operations. He even permitted Stanford and his lawyers to draft the FSRC's responses back to the SEC containing false assurances that Stanford's Antiguan operations were in compliance with the law.\footnote{Robert Khuzami, Director, Div. of Enforcement, U.S. Sec. and Exch. Comm’n, Remarks before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), http://www.sec.gov/news/speech/2009/spch080509rk.htm (last visited Oct. 16, 2011).}

The Director of the SEC’s Division of Enforcement, an experienced prosecutor, said that this was “one of the more disturbing aspects of any case” he has ever seen.\footnote{Id.}

The third example of recent high-stakes fraud is David Smith’s currency trading scandal. On August 18, 2010, federal criminal authorities charged Smith for fraudulent activity related to the Overseas Lockett International Corporation.\footnote{Information at 1-7, United States v. Smith, No. 6:10-cr-00232-MSS-DAB (M.D. Fla. Aug. 18, 2010).} Smith promised to use investors’ funds to engage in foreign currency trading and claimed investors could expect a high rate of return with only 20% of their investment at risk.\footnote{Id. at 4.} However, instead of engaging in the trading, he reportedly misappropriated clients’ funds, transferring the funds to his private bank accounts and using them to furnish a lavish and expensive life style.\footnote{Id. at 6.} Moreover, the criminal charges allege that Smith employed numerous employees and created client account statements showing large and false monthly returns.\footnote{Id. at 7.} Smith raised over $220 million from thousands of investors in Florida, Jamaica, and the Turks and Caicos Islands.\footnote{Update: International Forex Ponzi Swindler David A. Smith Sentenced To 30 Years In U.S. Jail, PATRICKPRETTY.COM (Aug. 15, 2011, 7:27 PM), http://www.patrickettjohn.com/2011/08/15/update-international-forex-ponzi-swindler-david-a-smith-senetenced.} Smith has pled guilty and been sentenced to prison in
the U.S. and Turks and Caicos Islands.  

Several important points arise from the expansive nature and consequences of these on-going proceedings. First, the scale of these allegations is quite extraordinary considering the amounts raised, the number of investors, and the operations’ duration. These allegations are measured in millions or even billions of U.S. dollars, thousands of investors, and time spans possibly of decades.

Second, these cases have received intense scrutiny. In particular, questions arose about how the frauds continued for as long as they did and grew to the size they did. In the United States, there have been a number of forensic reviews of regulators’ performance, including by Congressional committees and by internal investigations of the SEC’s Inspector General.

Third, long-term ramifications from these immense frauds should be anticipated. To gauge an event’s long-term impact, it is often useful to see how the matter has been discussed in the academic community, which is usually more detached from the heat of the moment. Nonetheless, recent academic literature suggests there will be significant consequences. One recent article, for example, describes how Madoff has spawned a new social narrative, shaped by his victims, in which financial fraud is viewed as singularly evil. As a result, white-collar crime is now viewed as more dangerous to society than violent crime and deserving of harsher sanctions

53 Id.


when detected.\textsuperscript{57}

Finally, the Caribbean Region has figured prominently in several of these allegations. At least one academic has argued that in light of the role offshore financial centers played in these allegations, a serious reconsideration of the onshore-offshore relationship is in order.\textsuperscript{58} Moreover, the problems were not isolated to the offshore sector. Many residents of the Caribbean Region were victims.\textsuperscript{59} As societies respond to the scale, the scrutiny, and the long-term impact of these events, the Caribbean Region is likely to play a prominent role in the dialogue.

In sum, recent events have dramatically raised the stakes of the fight against fraud and several significant lessons must be considered.

III. Regulators Must Be Ready to Change Significantly to Enhance Their Anti-Fraud Programs

In the summer of 2009, in the midst of the crisis following revelation of the Madoff fraud, I served as Acting Director of the SEC’s examination program. Through that experience I had the opportunity to learn first hand how regulators could respond to recent events, and formulated those experiences into ten lessons.

Lesson Number 1: Regulators Must Recognize that There Are Important Lessons to Learn, and that Addressing Them Will Involve Significant Change.

Often the most difficult lesson of all is recognizing that change is needed. The SEC had the benefit of multiple forensic reviews and the recommendations that emerged from that process. For example, the SEC’s Inspector General made a significant number of specific recommendations for the examination program to address the problems and challenges he identified in his investigation of the agency’s handling of the allegations against Madoff. The recommendations covered a wide range of topics, including the conduct of risk assessments, the preparation of scope memoranda, tracking examinations, and training. The SEC made it a

\textsuperscript{57} Id. at 984-86.


\textsuperscript{59} See id. at 1350-51.
priority to ensure that the agency took all necessary actions in response to the lessons learned from its handling of the Madoff fraud.\textsuperscript{60} All of the Inspector General’s recommendations for the examination program have been successfully implemented.\textsuperscript{61}

The challenge for regulators is to recognize the need for change, engage in thoughtful analysis to address the issue, and implement the needed changes. It is essential for regulators to make sure they are learning the lessons from these frauds.

\textbf{Lesson Number 2: Regulators Must Understand Fraud}

A serious weakness of many investors and regulators is their unfounded belief that they will recognize fraud when they see it. Unfortunately, this may not be the case. For many people, it is difficult to believe just how convincing and appealing a fraudster can be.

To address this concern, the SEC’s examination program decided to give its staff more professional training in fraud detection through massive participation in a program offered by the Association of Certified Fraud Examiners. Over one third of the more than 900 SEC examiners became Certified Fraud Examiners.\textsuperscript{62} The staff also held training sessions establishing third-party verification of customer assets.\textsuperscript{63} Finally, examiners worked with other interested regulators at the federal, state, and self-regulatory levels to share anti-fraud techniques and experiences.\textsuperscript{64}

\footnotesize
\begin{itemize}
\item \textsuperscript{62} Testimony Concerning the SEC’s Failure to Identify the Bernard L. Madoff Ponzi Scheme, supra note 55. As a member of the SEC staff at the time of the speech to the CGSR, the author did not recommend or endorse any private organization, including the ACFE.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Id.
\end{itemize}
Regulators can no longer rely on the belief that they will know fraud when they see it. A more professional approach is essential.

**Lesson Number 3: Regulators Must Apply Effective Anti-Fraud Techniques**

To catch a fraudster, regulators must often ask embarrassing questions that reveal that they do not necessarily believe what they are being told. This can be awkward, particularly in a highly professional setting. Of course, the fraudsters are quite ready to use those settings to hide their operations. Therefore, there are three types of questions that are particularly useful.

First, questions addressed to third parties that verify the information the regulator possesses are essential. This is called “Third Party Verification.” SEC examiners now regularly reach out to third parties to verify information provided by registered firms. The two general approaches are verifying “up” and verifying “down.” When a regulator verifies “up,” he approaches custodians, depositories, counter-parties, and other institutions. For example, the regulator may ask a custodian to verify that the firm under review actually has the assets it claims. When a regulator verifies “down,” it approaches customers. Generally, the purpose of this review is to confirm that the assets visible at the firm and custodian level are consistent with the customers’ understanding.65 Regulators should always approach customers with care, to avoid setting off any unnecessary panic.

Questions focused on computer forensics are also critical. The SEC’s examination program recently created a new position for a computer security specialist, who is supporting information security reviews and other examinations. The specialist has been asking questions about the production of information in examinations, such as whether the information is true and complete or if items were deleted prior to production. Testing the accuracy of a production through review of the computer of origin can be very revealing.

Finally, perhaps the most uncomfortable question to address is associated with testing the misuse of original documents. Many firms now scan originals into an electronic system, and fraudsters may try to use those

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systems to mask forgery. One of the best ways to test a system is to select documents that were recently scanned into the system and compare the electronic version to the original. Documents can look perfect on the electronic system, but when compared to the original, often taken from the shred bin, one can readily see when someone used white-out to redirect a previously authorized wire transfer or scissors and glue to attach a client’s signature to a new document. Firms do not like when the contents of their shred bin are examined, but this can help catch fraud.

**Lesson Number 4: Regulators Must Deploy Robust and Multi-Faceted Approaches to the Problem**

Fighting fraud cannot be done by one program alone, however good that program may be. Fraud is so elusive that an effective anti-fraud program requires multiple levels of response.

Criminal and civil enforcement are necessary. There are some fraudsters who will be deterred only by the threat of criminal sanctions. But enforcement cannot be limited to jail time; greater depth is needed. Civil enforcement is also necessary. A strong cadre of civil sanctions is very useful, such as penalties, bars from working in the regulated business, and paying back the illegal profits (disgorgement).

Anti-fraud programs also need improved examination and reporting to promote enforcement. On-site examinations can be invaluable, as examiners are often the first to arrive on the scene of a fraud. Investor education is another necessity. Investors can help fight fraud by asking questions before they invest and by contacting regulators before too much damage is done. Finally, private sector compliance and self-regulation also have positive roles to play.

Moreover, in a robust anti-fraud program, all of these tools are fully deployed and coordinated. At the SEC, bringing together different programs to enhance effective coordination has been a key initiative of Chairman Schapiro. She has described this as establishing a “culture of collaboration, information exchange, and idea sharing” that includes interdisciplinary teams and other integration initiatives. Over the last two years the staff of the SEC has been focused on ensuring that all these different functions are working together. Every regulator should consider

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66 Testimony Concerning Oversight of the U.S. Securities and Exchange Commission, supra note 60.
Lesson Number 5: Regulators Must Obtain the Intelligence They Need, and Make Use of It Once They Have It

One of the more challenging aspects of fighting fraud is obtaining useful information while the fraud is in progress. Few victims complain while they think they are making money. But regulators do not want to wait until a scheme crashes before they get involved. To get ahead of the curve, regulators must respond properly to early warnings of fraud referred to as Tips, Complaints, and Referrals (“TCRs”).

Improving the SEC’s handling of TCRs has been a major initiative for the agency.67 As part of this initiative, the Division of Enforcement has established an Office of Market Intelligence (“OMI”) and staffed it with market surveillance specialists, accountants, and attorneys. OMI's mission is to ensure that the agency collects all TCRs in one place, combines them with other public and confidential information, and then dedicates investigative resources to those TCRs presenting the greatest threat of investor harm. In April 2010, OMI implemented an interim central system for collecting TCRs. Going forward, OMI also will strategically mine the TCR databases to identify emerging techniques and trends in securities fraud.68 This strategic function should help identify misconduct as early as possible in the life-cycle of a fraud.

Regulators understand that it is not enough to handle a single complaint appropriately. The real challenge is to identify the crucial information in the masses of data that are constantly inundating regulatory agencies. Focusing on TCRs is a critical step towards achieving that effort.

Lesson Number 6: Regulators Need the Right Expertise

To fight fraud effectively, regulators must have expertise in the business practices it seeks to exploit. To address this need at the SEC, the examination program created a new position, the Senior Specialized Examiner (“SSE”). These positions are staffed with individuals who bring


68 Id.
new and special expertise to the program. The examination program has recruited a variety of skills to both SSE and regular staff positions, including risk management, trading, operations, portfolio management, options, compliance, valuation, new instruments and portfolio strategies, forensic accounting, information security, derivatives, structured products, and hedge fund activities.69

This program began in 2009, but the new expertise has already helped the SEC in a number of ways to understand the businesses it regulates.

**Lesson Number 7: Regulators Need the Right Technology**

Technology is both a blessing and a curse to regulators. It is a blessing because it is such a powerful tool. Today, one examiner with a laptop and standard off-the-shelf applications can screen and review a large portfolio in ways that would have been impossible before, even to large teams of examiners. Unfortunately, technology is also a curse because it is expensive and constantly evolving. Generally, government agencies do not have a lot of money to throw at new technology. Regulators constantly struggle with how to spend their limited technology budgets, but it is critical that they keep up with advances.70

**Lesson Number 8: Regulators Must Cooperate Across International Borders**

Today fighting fraud is an international imperative. Fraudsters can easily move from jurisdiction to jurisdiction. If regulators are to fight them, they cannot stop pursuing fraud at their borders. International cooperation is essential.

The SEC is committed to enhancing international cooperation through targeted coordination and ongoing dialogue to establish a “collaborative, efficient, international regulatory structure that protects

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69 Walsh, *supra* note 65

70 See Mary Schapiro, Chairman, U.S. Sec. and Exch. Comm’n, Brodsky Family Lecture at Northwestern University School of Law (Nov. 9, 2010) (“[T]hough we are making progress on technology, we still have far to go to keep up with our markets.”), http://www.sec.gov/news/speech/2010/spch110910mls.htm (last visited Oct. 16, 2011).
investors across borders and promotes stable economic growth.\textsuperscript{71} In the examination program, for example, the staff works with foreign regulators in a variety of ways, including providing technical assistance, sharing information, and conducting coordinated examinations.\textsuperscript{72} The possibility of conducting more coordinated examinations is particularly exciting. If a pattern of conduct arises that appears to encompass both the U.S. and other jurisdictions, such as suspicious sales in a jurisdiction other than the U.S. where the records are all located in the U.S., the SEC’s Office of International Affairs should be contacted about the possibility of conducting coordinated examinations.\textsuperscript{73}

International cooperation is a powerful regulatory tool. It also sends a sharp message to those who might try and arbitrage their frauds across international borders.

\textbf{Lesson Number 9: International Cooperation Must Be Timely and Effective}

Even with international cooperation, the fraudsters will succeed if they can move faster than the regulators. For example, it can take weeks or months of processing for one regulator to obtain information from the other, while the fraudster can move money from one jurisdiction to the other in a matter of minutes. The time has come for faster cooperation and information sharing. Many jurisdictions have established financial intelligence units to conduct real-time information gathering and sharing, and, in some cases, to assist in restraining the proceeds of fraud.\textsuperscript{74} Commentators have observed that securities regulators and financial intelligence units must continue to develop their capacities to work

\begin{footnotesize}
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\item\textsuperscript{72} See PRACTICING L. INST., THE SEC SPEAKS IN 2009 1053-54 (Linda Chatman Thomsen & Andrew J. Donohue eds., 2009).
\item\textsuperscript{73} See Office of International Affairs, SEC International Initiatives, U.S. SEC. & EXCH. COMM’N (Aug. 29, 2011, 9:07 PM), \url{http://www.sec.gov/about/offices/oia/oia_initiatives.shtml#bilateralregcoop}. For contact information for the SEC’s Office of International Affair, see Contact the SEC, U.S. SEC. & EXCH. COMM’N, \url{http://www.sec.gov/about/offices/oia/oia_contact.shtml} (last visited on Oct. 16, 2011).
\item\textsuperscript{74} Birdwell, \textit{supra} note 38, at 151-55.
\end{enumerate}
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together.\textsuperscript{75} Regardless of the method used, regulators must start moving as quickly as fraudsters to effectively deter fraud.

**Lesson Number 10: Regulators Must Restore Confidence in the Markets and Themselves**

As a final recommendation, regulators must restore confidence in the system. One area requiring immediate attention is due diligence. As Ben Bernanke, Chairman of the Board of Governors of the U.S. Federal Reserve said, “the origins of most financial crises…can be traced to failures of due diligence or market discipline.”\textsuperscript{76} In recent months, the SEC has brought several enforcement cases in this area. One case alleged that Hennessee Group LLC promised to follow certain due diligence procedures before making recommendations and then failed to do so.\textsuperscript{77} Another case alleged that Banc of America Investment Services claimed it would treat affiliates and third-parties the same in its due diligence process, and then secretly favored affiliates.\textsuperscript{78} In the case against Spencer International Advisors, the firm claimed it would conduct due diligence, collected a due diligence fee, and then simply relied on whether an issuer had obtained bank credit.\textsuperscript{79} These cases highlight the importance of restoring confidence in those who promote due diligence in our markets.

Regulators must also restore confidence in themselves. They must move actively and visibly to assess themselves and correct their flaws. They must recognize why they may be viewed unfavorably and why the regulatory practices of the past may no longer suffice. In sum, they must change and learn the lessons of recent events.

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\textsuperscript{75} Id.

\textsuperscript{76} See DAVID WESSEL, IN FED WE TRUST 180 (2009). Bernanke also added, “excluding, perhaps, those attributable to natural disasters, war and other nonfinancial events.” \textit{Id.}


Conclusion

Fraud will always be present, but fighting it provides real benefits to financial markets. Recently, extraordinary allegations have dramatically raised the stakes for investors, markets, and regulators to combat fraud. Regulators must be ready to change significantly and publicly based on the ten lessons above to address today’s fraud challenges.
Dodd-Frank: Regulating Systemic Risk in the Offshore Shadow Banking Industry

Alexander Goodenough*

Introduction

The shadow banking industry consists of entities that are not traditional banks, but yet perform bank-like functions.¹ Shadow banks include some hedge funds, private equity funds, and a variety of nontraditional financial vehicles.² Estimates vary concerning the exact size of the global shadow banking sector,³ but there is some agreement that problems in shadow banking can quickly translate into systemic problems in the traditional banking sector.⁴

In a politically-stated attempt to counter the threat of future crashes caused or exacerbated by systemic risks to the financial system, the United States recently enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).⁵ This act expands the reporting requirements for investment advisers, defined to include those who manage

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shadow banks. The Dodd-Frank Act in Title IV expands the reporting requirements by amending the Investment Advisers Act of 1940 to eliminate the private adviser exception and replace it with the foreign private adviser exemption. The extremely narrow nature of the new foreign private adviser exception means that many foreign investment advisers with little professional contact with the United States will be caught within the reporting requirements of the act.

This article begins with a background consideration of the origins of the 2007 financial crisis and its impact on financial markets around the globe. Part I(a) introduces shadow banks and discusses their possible benefits to the financial system along with their demonstrated weaknesses. Part I(b) considers the role offshore financial centers play in the world financial system. Part I(c) discusses the problem of systemic risk and considers its sources. Part II(a) discusses past regulation and attempts at regulation of shadow banks in the United States. Part II(b) introduces the new reporting requirements of the Dodd-Frank Act and considers whether they have extra-territorial scope. Part II(c) analyzes the meanings ascribed by the SEC to certain key phrases in the Dodd-Frank Act in order to determine the scope of the Act’s reporting requirements. Part III(a) discusses reasons why international cooperation will be necessary to control systemic risk. Part III(b) analyzes current and past international cooperation and information sharing agreements. Part IV considers the contemporaneous development of systemic risk regulation in the European Union and compares it with that of the Dodd-Frank Act. Finally, Part V discusses the nature of international cooperation necessary to enable systemic risk regulation of the shadow banking sector.

**Background:**

**Origins and Consequences of 2007 Financial Crisis**

There are many factors that set the stage for the 2007 financial crisis: macro-economic imbalances, financial innovation, rapid growth, increasing leverage, over-reliance on complex financial models, and hard-wired procyclicality in the financial system. While these set the stage, the

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6 § 404, 124 Stat. at 1571-72.

7 § 403, 124 Stat. at 1571.

8 See § 402(a), 124 Stat. 1570.

9 See THE TURNER REVIEW, supra note 1, at 11-25. Procyclicality refers to the tendency to exacerbate rather than retard the effects of the business cycle.
triggering event of the crisis was a collapse of confidence in the asset backed security (“ABS”) market caused by doubts about the quality of the packages of mortgages that were the underlying assets. This resulted in a sudden freezing of a previously liquid market. Traditional banks found themselves unable to sell the assets they had been securitizing and therefore were left with these assets on their balance sheets. Confidence in the wider commercial paper market rapidly deteriorated making it impossible for certain institutions to re-finance their debt. These factors combined meant that both traditional and shadow banks could neither continue to finance their balance sheets nor reduce them by selling assets.

In the United States this lack of liquidity combined with falling asset prices claimed two of Bear Stearns’ hedge funds and then necessitated a rescue of the entire bank itself. The process snowballed with the Lehman Brothers bankruptcy and a government bailout of American International Group. The panic filtered down to the level of retail depositors, resulting in runs and causing the failures of Washington Mutual and IndyMac even though those banks were not dependent on the credit markets for funding.

In the United Kingdom the disappearance of the market for securitized assets along with a lack of liquidity in the commercial paper market claimed Northern Rock, Bradford & Bingley, and HBOS, thus requiring government intervention. Retail withdrawals in the United

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11 See THE TURNER REVIEW, supra note 1, at 27.

12 THE TURNER REVIEW, supra note 1, at 35.

13 See THE TURNER REVIEW, supra note 1, at 27.


15 See THE TURNER REVIEW, supra note 1, at 27.

16 See id. at 95.

17 See id. at 27.
Kingdom claimed Icelandic bank Landsbanki, forcing international cooperation to ensure that deposit insurance obligations were met.\textsuperscript{18} Traditional banks in many other countries also suffered significant losses because of their purchase of securitized instruments.\textsuperscript{19}

Worldwide, mandatory capital requirements at traditional banks forced those institutions to hoard cash as falling asset prices threatened their balance sheets.\textsuperscript{20} The resulting lack of commercial lending then transmitted the crisis from the financial to the nonfinancial economy, as businesses found it difficult to raise financing or had their existing credit lines withdrawn or reduced.

\textbf{Part I(a): The Nature of Shadow Banks}

The phrase “shadow banking” is perhaps an unfortunate one as it suggests an industry involved in shady dealings. However, shadow banking merely refers to the fact that this industry performs many of the same functions of the traditional banking industry, such as maturity and liquidity transformation, but differs in that shadow banks do not accept deposits.\textsuperscript{21} Instead, shadow banks rely on the credit markets for funding. For instance, the now notorious structured investment vehicles (“SIVs”) enabled maturity transformation similar to that of banks borrowing short and lending long.\textsuperscript{22} SIVs did this by using very short term borrowing to facilitate the purchase of longer maturity assets.\textsuperscript{23}

However, SIVs enabled traditional banking institutions to conceal off balance sheet the risks they were taking.\textsuperscript{24} Those risks arose because, while a traditional bank that created an SIV might have sold the equity in the SIV, the equity holders may have retained a right effectively to return

\begin{footnotes}
\item[18] See \textit{id.} at 38.
\item[19] See \textit{id.} at 36.
\item[20] \textit{Id.} at 59.
\item[21] \textit{Id.} at 21.
\item[22] \textit{Id.} at 21.
\item[23] \textit{Id.} at 21.
\item[24] \textit{Id.} at 20.
\end{footnotes}
the assets of the SIV to the bank if things went wrong.\textsuperscript{25} Thus, SIVs earned their notoriety when they suffered enormous losses during the crisis, and traditional banks were forced to move those liabilities back onto their balance sheets.\textsuperscript{26}

Therefore, some shadow banks were effectively branches of traditional banking entities, which were already subject to extensive regulation,\textsuperscript{27} but poor regulatory oversight enabled traditional banks to use shadow banking entities to conceal off balance sheet the risks they were taking.\textsuperscript{28} Also, the complicated nature of the securitized assets held by these shadow banks made it particularly difficult to assess their risk.\textsuperscript{29} This process hindered the ability of investors and regulators to judge the risks to which traditional banks were exposed.\textsuperscript{30} The Dodd-Frank Act addresses in the Volcker Rule the problems caused by the use of shadow banks by traditional banks.\textsuperscript{31} This rule forbids traditional banks from having certain proprietary trading operations such as those often conducted through shadow banks.\textsuperscript{32} Thus, the rule may have closed an important channel for systemic risk transfer between the traditional and shadow banking sectors.

Notably, certain hedge funds can fall within the definition of shadow banks. Good examples of how hedge funds can operate as shadow banks are the two Bear Stearns funds that failed at the beginning of the 2007 crisis. Those funds were invested in collateralized debt obligations (“CDOs”), which were packages of securitized mortgages.\textsuperscript{33} That investment was financed by loans and credit lines from other banking

\textsuperscript{25} See id. at 20.

\textsuperscript{26} See id. at 20.

\textsuperscript{27} See Dam, supra note 2, at 612-17.

\textsuperscript{28} See Dam, supra note 2, at 615-16.

\textsuperscript{29} Dam, supra note 2, at 615-16.

\textsuperscript{30} Dam, supra note 2, at 615-16.

\textsuperscript{31} See Inci Ötker-robe and Ceyla Pazarbasioglu, Impact of Regulatory Reforms on Large Complex Financial Institutions 24 (IMF Staff Position Note No. 10/16, 2010).


\textsuperscript{33} See Pittman, supra note 14.
institutions, including Merrill Lynch, Goldman Sachs, JPMorgan Chase, and Bank of America. The hedge funds failed when declining prices in the CDO market caused those funds’ creditors to call in their loans. While many hedge funds do not fall within the definition of shadow banks because they do not perform large scale liquidity transformation, the Volker rule might have the effect of increasing the number of hedge funds that do operate as shadow banks. The exclusion of traditional banks from this market will provide an opportunity for hedge funds to expand in this area.

**Part I(b): Offshore Financial Centers and Shadow Banks**

Offshore Financial Centers (“OFCs”) are generally geographically small jurisdictions characterized as having economies with disproportionately large financial sectors, which are geared to handling transactions for nonresidents. Together, a few OFCs are home to a significant portion of the world’s shadow banking industry. For instance, the Cayman Islands alone are the domicile of almost 40% of the world’s hedge funds. Thus, despite their geographically small size, OFCs are very important to the world’s financial system.

There are two primary reasons shadow banking entities may choose to incorporate offshore: taxation and regulation. OFCs tend to have much

34 Pittman, supra note 14.

35 Pittman, supra note 14.

36 The Turner Review, supra note 1, at 72.


38 Id.


lower levels of taxation on investment income than traditional onshore centers.42 Historically, regulation has not been a major reason for shadow banks to incorporate offshore, since domestic regulation was minimal or non-existent. This may change with the stricter reporting requirements of the Dodd-Frank Act.

Shadow banks are valuable to the modern economy because they provide an alternative to maturity and liquidity transformation by traditional banks.43 These entities can play an important role in securitization.44 Securitization can be beneficial by diversifying the holding of credit risk from traditional banks to a larger set of investors who should in theory be better able to absorb losses.45 Unfortunately this result was not achieved in the years running up to the 2007 crisis.46 However, there is no reason why this desirable end cannot be achieved.47 Indeed this end might have been achieved already but for two factors: the over-leverage used by shadow banks, which forced them to liquidate assets at disadvantageous prices; and the fact that the traditional banks that originated the securitized assets held by the shadow bank retained risk in the event those assets declined in value.48

Shadow banks domiciled in OFCs allow advisers in the United States both to compete for funds to manage and to invest globally.49 Shadow banks’ organization in OFCs enhances competitiveness by

42 GAO, CAYMAN ISLANDS, supra note 39, at 9.

43 THE TURNER REVIEW, supra note 1, at 21, 52.


45 THE TURNER REVIEW, supra note 1, at 42.

46 THE TURNER REVIEW, supra note 1, at 42.


48 See Dam, supra note 2, at 625-30.

49 GAO, CAYMAN ISLANDS, supra note 39, at 16.
reducing double taxation of investment returns.50 Shadow banks such as hedge funds and private equity funds are considered important alternatives to investors because they provide a means of increasing investment portfolio returns by providing diversification with reduced correlation to other asset classes.51 Indeed, they also played an important role in resolving the 2007 financial crisis by purchasing distressed assets, thereby providing much needed liquidity to the credit markets.52 Shadow banks based in OFCs provide an important channel for foreign investment in the United States.53 Because of the perceived litigation risk, some foreign investors hesitate to invest in the United States directly.54

Part I(c): Systemic Risk

Systemic risk is a by-product of the inter-connectedness of the global financial system.55 Systemic risk may be regarded as being similar to pollution in that it is a negative externality.56 This externality occurs because investors transacting in the financial markets consider only the risks their transactions pose to them rather than the risks the transactions pose to their creditors, counter-parties, or other third parties. Therefore, systemic stability seems to be a public good to the extent that everyone benefits from it, but no one individually has the incentive to provide it.57 While there may not be an incentive deliberately to minimize systemic risk individually, protection may be provided as a mere by-product of individuals’ desire to avoid losses. As individuals minimize their individual

50 GAO, CAYMAN ISLANDS, supra note 39, at 30.

51 IMPACT OF THE PROPOSED AIFM DIRECTIVE ACROSS EUROPE, supra note 40, at 53-56.


53 GAO, CAYMAN ISLANDS, supra note 39, at 19.

54 GAO, CAYMAN ISLANDS, supra note 39, at 16.


56 Id. at 5.

57 Id. at 6.
risk exposure, they simultaneously provide incentives that minimize systemic risk.\footnote{See generally \textit{David Mayes, A More Market Based Approach to Maintaining Systemic Stability} (FSA Occasional Paper Series, 2000), available at http://www.fsa.gov.uk/pubs/occpapers/op10.pdf (arguing that greater transparency and the possibility of failure would reduce risk taking and strengthen the traditional banking system).}

There are two general ways in which systemic risk can spread. The market channel conveys systemic risk when forced asset sales by one or more entities cause market prices for those assets to decline.\footnote{See \textit{Assessing Possible Sources of Systemic Risk from Hedge Funds}, supra note 4, at 3; \textit{Impact of the Proposed AIFM Directive Across Europe}, supra note 40, at 79-80.} These declining market prices then trigger further forced sales and cause prices to cascade downward. This process stems from a failure by investors to judge correctly the downside risk of their investment or to hedge this risk correctly. The market channel is particularly dangerous when many investors in a market are using high levels of leverage, because then losses lead quickly to forced sales. The credit channel conveys systemic risk when the failure of an entity causes losses to that entity’s creditors that in turn threaten the creditors’ financial stability.\footnote{See \textit{Assessing Possible Sources of Systemic Risk from Hedge Funds}, supra note 4, at 78-79.} Credit risk stems from a failure of creditors to judge risk accurately, require adequate security for their loans, and/or to diversify across risks. Credit risk is also more prevalent when high levels of leverage are used because then losses lead more quickly to failures.

As its name suggests, the boundary of systemic risk is determined by the boundaries of the system of which those risks are a part.\footnote{See \textit{IMF, Global Financial Stability Report}, at 113 (2009), available at http://www.imf.org/external/pubs/ft/gfsr/2009/01/pdf/text.pdf.} As the 2007 crisis illustrated, the interconnectivity of the financial system can quickly cause international contagion of financial disturbances.\footnote{See \textit{The Turner Review}, supra note 1, at 27.} The extent of the risk posed by an individual entity to the international financial system may be judged by the size of the entity and how inter-connected it is with the rest of the financial system, that is, by network analysis.\footnote{European Central Bank, \textit{Recent Advances in Modelling Systemic Risk Using Network Analysis}, at 6, (Jan. 2010), available at http://www.ecb.europa.eu/en/pub/pdf/scibrief/scb201001en.pdf.}
systemic importance of an entity, whether it is a traditional or a shadow bank, may also be judged by looking at its balance sheet. The asset side of the balance sheet will provide information relating to the systemic risk the entity poses through the market channel, while the liabilities side will show which other entities are exposed to risk via the credit channel and the extent of that risk.

Systemic risk is not limited to any particular type of financial institution; both traditional banks and shadow banks can pose systemic risks. The problem in the 2007 financial crisis was that traditional banks did not publicly disclose the risks that they were taking, since those risks were often concealed in off balance sheet shadow banking entities. While some issues can be addressed by regulation of the traditional banking sector, problems remain because many shadow banks do not publicly disclose the information necessary for market participants to judge the systemic risk posed by those shadow banks.

While the shadow banking sector did not itself cause the financial crisis in 2007, it did exacerbate the crisis. Shadow banking institutions had to react very quickly to changes in asset prices and the availability of credit due to the short-term nature of their funding and high levels of leverage. De-leveraging in the shadow banking sector due to the liquidity


65 See The Turner Review, supra note 1, at 27.


67 See The Turner Review, supra note 1, at 21.


69 See The Turner Review, supra note 1, at 11-25, 27.

70 Id. at 21.
crunch led to asset depreciation caused by forced asset sales.\textsuperscript{71} Those sales spread risk via the market channel by causing further declining asset prices.\textsuperscript{72} Many shadow banks could neither continue to finance their balance sheets because of the credit crunch, nor reduce their balance sheets by asset sales, because asset prices were either very depressed or the market for such assets had ceased to function altogether. Creditors of shadow banks were then faced with losses that threatened their own stability.\textsuperscript{73} Uncertainty generated by this sequence of events then caused disruption to the broader commercial paper market.

**Part II(a): Past Reporting Requirements in the United States**

The Investment Advisers Act of 1940 required that investment advisers register and make their records available to the SEC.\textsuperscript{74} However, the reporting requirements contained exemptions that enabled many advisers to avoid having to register or provide information.\textsuperscript{75} Most importantly, these exceptions included the private adviser exception.\textsuperscript{76} This exemption allowed advisers with fewer than 15 clients to avoid having to report to the SEC at all.\textsuperscript{77} The term client referred only to the number of funds managed by the private adviser, rather than counting the individual investors in them.\textsuperscript{78} Many important advisers had fewer than 15 separate

\begin{itemize}
\item \textsuperscript{71} *Id.* at 22.
\item \textsuperscript{72} See *IMPACT OF THE PROPOSED AIFM DIRECTIVE ACROSS EUROPE*, *supra* note 40, at 79-80.
\item \textsuperscript{73} See *id.* at 78-79.
\item \textsuperscript{75} 15 U.S.C. § 80b-3.
\item \textsuperscript{77} Investment Advisers Act, 15 U.S.C. § 80b-3(b)(3) (2006) (“The provisions of subsection (a) of this section shall not apply to any investment adviser who… has had fewer than fifteen clients…”).
\end{itemize}
funds and, therefore, were exempt from registration under the act. The SEC attempted to close this loophole by broadening the definition of “clients” in its Hedge Fund Rule.

In 2004 the SEC attempted to narrow the private adviser exception by producing new regulations that redefined “clients” to include “shareholders, limited partners, members or beneficiaries.” Thus, every adviser managing funds with more than 15 investors had to register, and after registering, advisers could be required to provide records to the SEC.

The hedge fund rule was challenged in Goldstein v. SEC and vacated by the D.C. Circuit. Although the Court acknowledged that the SEC’s reading was not foreclosed by the wording of the Advisers Act, the Court held that the SEC’s reading of clients was arbitrary and too broad. The D.C. Circuit found that the relationship between advisers and the investors in the funds advised was not sufficiently close to justify treating the investors as clients of the advisers, because investors were not given individualized advice by the adviser. Rather, the court held the adviser had only a uniform fiduciary duty to the fund.

Following Goldstein, the SEC tightened regulation of hedge funds concerning only misleading statements to investors. Thus, prior to the

79 Goldstein, 451 F.3d at 876.


81 See Goldstein, 451 F.3d at 877 (quoting 17 C.F.R. § 275.203(b)(3)-2(a)).

82 See id. at 874.


84 Goldstein, 451 F.3d at 884.

85 Id.

86 Id. at 882-83.

87 Id. at 883.

Dodd-Frank Act, many investment advisers to shadow banks were not subject to reporting requirements in the United States.\textsuperscript{89}

The United States had previously exempted from regulation shadow banks that only accepted investments from “accredited investors.”\textsuperscript{90} Accredited investors have been defined by the SEC to include high-net-worth individuals, worth in excess of $1,000,000, and certain entities with assets exceeding $5,000,000.\textsuperscript{91} The rationale behind allowing those investors to invest in less regulated shadow banking entities was that, due to their assumed level of sophistication, such investors do not require the protection of the SEC.\textsuperscript{92} Sophisticated investors are thought capable of protecting themselves from investing losses and frauds. If this is true, then sophisticated investors should, as a by-product, protect others from systemic risk. This is because if these investors are capable of ensuring that the entities they invest in do not fail, then systemic risk contagion via the credit channel is eliminated. Systemic risk via the market channel is also reduced because these investors will ensure the entities they invest in are appropriately leveraged and not subject to forced sales due to margin calls. Sophisticated investors will seek to avoid margin calls because they force the liquidation of assets, usually at times when the prices of those assets are depressed. Thus, limiting the ability of non-sophisticated investor to invest in shadow banking entities should have tended to increase the effectiveness of market forces in ensuring these entities did not fail, thereby reducing systemic risk.

This theory obviously did not work with shadow banks for Long Term Capital Management (“LTCM”) in 1998 or SIVs during the 2007 crisis. Those entities lost their sophisticated investors very large sums of money. However, the market seems to have partially resolved these problems itself. SIVs are now an extinct species.\textsuperscript{93} Hedge funds no longer

\textsuperscript{89 See Pearson & Pearson, supra note 68, at 49-51.}

\textsuperscript{90 Investment Advisers Act, 15 U.S.C. § 80a-6 (This section has been amended by the Dodd-Frank Act). Strictly speaking non-accredited investors are not excluded from investing in such asset classes but marketing to non-accredited investors triggers registration requirements. Given that such funds wished to avoid those requirements the effect was the same as an outright exclusion.}

\textsuperscript{91 Accredited Investor, 17 C.F.R. § 230.215 (1982).}

\textsuperscript{92 Cf. Howard M. Friedman, On being Rich, Accredited, and Undiversified: The Lacunae in Contemporary Securities Regulation, 47 OKLA. L. REV. 291, 299 (1994) (arguing that the rich are not in fact as sophisticated in their investment as has been assumed).}

\textsuperscript{93 See, e.g., Paul J. Davies, Anousha Sakoui and Gillian Tett, Sigma collapse ends shadow
operate at the same level of leverage as was used at LTCM, and counterparts to hedge funds are now more careful to monitor exposure and require more information about risk-taking by the funds.\(^{94}\) Thus, investors appear to have altered their behavior to take into account new information regarding the levels of risk posed by certain investing activities, particularly in shadow banking entities.

**Part II(b): The Dodd-Frank Act**

The Dodd-Frank Act amends the Investment Advisers Act of 1940 by, among other things, eliminating the private adviser exception,\(^{95}\) and creating the foreign private adviser exception.\(^{96}\) The Bill also sets up a Financial Stability Oversight Council ("FSOC").\(^{97}\) Advisers must register with the SEC and may be required to provide systemic risk data to it and the FSOC.\(^{98}\)

The Supreme Court found in *Morrison v. National Australia Bank Ltd.* that, unless there is specific Congressional indication to the contrary, federal law is interpreted not to have effect outside the United States.\(^{99}\) In *Morrison* the Supreme Court found that Congress did not intend section 10(b) of the Securities and Exchange Act of 1934 to have extra-territorial application.\(^{100}\) A similar question may be raised as to whether Congress intended Title IV of the Dodd-Frank Act to have extra-territorial application.

There are two levels at which a statute can be found to have extra-territorial application according to the Supreme Court in *Morrison*: at the

\(^{94}\) IMPACT OF THE PROPOSED AIFM DIRECTIVE ACROSS EUROPE, supra note 40, at 77-78.


\(^{96}\) §§ 402-03, 124 Stat. at 1570-71.

\(^{97}\) § 111, 124 Stat. at 1392-93.

\(^{98}\) § 404, 124 Stat. at 1572.


\(^{100}\) Id.
section level,\textsuperscript{101} or at the statutory level.\textsuperscript{102} Accordingly, the Dodd-Frank Act must be analyzed at both levels to determine whether the act contains an affirmative indication of Congressional intent for extra-territorial application.\textsuperscript{103}

Section 10(b) of the Securities and Exchange Act of 1934 governs fraud “in connection with the purchase or sale of any security…”.\textsuperscript{104} The focus of section 10(b) is on the transaction rather than the parties to it.\textsuperscript{105} Section 402 of the Dodd-Frank Act defines the new foreign private adviser exception.\textsuperscript{106} The focus of this exception is the person advised rather than any transactions performed or services rendered.\textsuperscript{107} The reporting requirement is triggered if the adviser has clients or investors in the United States. Therefore, it seems the term ‘foreign private adviser’ is intended to have territorial scope as far as the clients or investors being advised are concerned, but, as its name suggests, extra-territorial scope as far as advisers are concerned.

Section 403 of the Dodd-Frank Act amends section 203 of the Investment Advisers Act of 1940 to eliminate the private adviser exception and to replace it with the foreign private adviser exception.\textsuperscript{108} So amended, the phrase “investment adviser” will have extra-territorial reach to all foreign advisers who do not fall within the foreign private adviser exception.\textsuperscript{109} Unlike section 10(b),\textsuperscript{110} section 203(b) will not reach only to

\begin{enumerate}
\item See id. at 2883 (discussing the clear statement of extra-territoriality in subsection 30(a)).
\item See id. at 2882 (discussing how the definition of interstate commerce does not defeat the presumption against extra-territoriality).
\item See id. at 2882-83.
\item Morrison, 130 S. Ct. at 2884.
\item Id. (there are other exceptions to the registration requirements but those relate to
\end{enumerate}

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transactions in the United States, but will follow the funds of United States clients or investors anywhere in the world. 111 Therefore, amended section 203 has broad international scope by virtue of the narrowness of the foreign private adviser exception.112

Section 404 of the Dodd-Frank Act requires investment advisers to provide systemic risk information to the SEC.113 Other than the extra-territorial reach conveyed to it by its use of the phrase “investment adviser,” section 404 does not make reference to the collection of data outside the United States.114 Thus, the only indication that section 404 was intended to have extra-territorial application is the scope of the exception to it. Whether this would be an affirmative indication of Congressional intent for extra-territoriality is doubtful in light of the narrow statutory reading in Morrison. Therefore, it is necessary to consider other sections of the Dodd-Frank Act to determine whether Congress indeed intended the collection of systemic risk data from outside the United States.115

Congress certainly anticipated the necessity of gathering information from foreign nonbank financial companies outside the United States in the Dodd-Frank Act.116 For instance, in order to mitigate the burden of reporting, section 112 provides that the FSOC, whenever possible, will make use of information already collected by foreign regulators.117 Section

activities within the United States).

110 Morrison, 130 S. Ct. at 2884.


112 See id.

113 § 404, 124 Stat. at 1571-72.

114 Id.

115 See Morrison, 130 S. Ct. at 2884-85.

116 See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 102, 124 Stat. 1376, 1391 (2010) (defining a foreign nonbank financial company as a company incorporated or organized in a country other than the United States that is predominantly engaged in financial activities); § 112, 124 Stat. at 1394-95 (the function of the council is to monitor such companies for systemic risks).

113 grants the Board of Governors of the Federal Reserve (“the Board of Governors”) the authority to determine which foreign nonbank financial companies it should supervise because of the systemic threat posed by those companies to the United States. The Board of Governors is authorized to consider, when making that determination, the regulation these companies are already subject to by foreign supervisory authorities, and to consult with those regulators. Once the Board of Governors has determined it should supervise a company, it is authorized to regulate that company’s behavior. All that appears to be necessary is a determination that the company poses a threat to the financial stability of the United States.

Section 175 of the Dodd-Frank Act provides for the cooperation of the FSOC and the Board of Governors with foreign counterparts and governments, international organizations, and multilateral organizations. Sections 929K and 981 facilitate this international coordination by allowing the sharing of privileged regulatory information with foreign supervisory authorities. Section 929J is the sharper end of the stick, in that it requires foreign accounting firms to produce the documents at the request of the SEC or Board of Governors.

Thus, several other sections of the Dodd-Frank Act explicitly provide for the regulation of, and data collection from, foreign entities because of the systemic risk they might pose to the financial system of the United States. Although the aim of the Securities and Exchange Act of 1934 was at least in part to control systemic risk, it seeks to achieve this

118 § 113(b)(1), 124 Stat. at 1398-99.
119 §§ 113(b)(2)(H), 115(b)(2), 124 Stat. at 1399, 1403.
120 § 113(f)(3), -(i), 124 Stat. 1376, 1402.
121 § 121(d), 124 Stat. at 1411.
122 See § 113(b), 124 Stat. at 1398-99.
123 § 175, 124 Stat. 1376, 1442 (2010).
125 § 929J, 124 Stat. at 1859-60.
126 See, e.g., § 113(b), 124 Stat. at 1398-99.
through regulation of domestic securities transactions. The Dodd-Frank Act knows no such bounds. Instead the criterion that the Dodd-Frank Act uses to determine its reach is the extent of systemic risk to the United States. Therefore, the SEC is justified in reading Title IV of the Dodd-Frank Act to have extra-territorial scope in its rules.

Part II(c): Foreign Private Adviser Exception

The definition of a “foreign private adviser” requires a foreign based investment adviser with only minimal contacts with the United States to register with the SEC. A foreign private adviser is defined as:

any investment adviser who--
(A) has no place of business in the United States;
(B) has, in total, fewer than 15 clients and investors in the United States in private funds advised by the investment adviser;
(C) has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than $25,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this title; and
(D) neither--


(i) holds itself out generally to the public in the United States as an investment adviser; nor 
(ii) acts as--
(I) an investment adviser to any investment company registered under the Investment Company Act of 1940; 
or 
(II) a company that has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a-53), and has not withdrawn its election.\(^{132}\)

The words “in private funds” do not appear in the original private adviser exception.\(^{133}\) The inclusion of this phrase now indicates that Congress intends the phrase “clients and investors” in this instance to have the meaning the SEC attributed to clients in the Hedge Fund Rule, which was rejected in *Goldstein*. This results in the new foreign private adviser exception being much narrower in scope than the old private adviser exception. The narrowness of the new exception widens the scope of the registration requirements.\(^{134}\)

There are a number of phrases in the foreign private adviser exception that are not defined in the Dodd-Frank Act. Indeed, the Congressional record is oddly devoid of discussion of the foreign private adviser exemption.\(^{135}\) Therefore, the SEC has had to promulgate regulations defining those phrases used in the exception with little legislative guidance. This section will consider the definitions the SEC has published in its updated rules for the Investment Advisers Act of 1940 in response to the Dodd-Frank Act,\(^{136}\) and how those definitions affect the scope of the act.

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In rule 202(a)(30)-1 the SEC defines as a single “client” a natural person, that person’s minor children, relatives or spouse with the same address, and all accounts and trusts of which the first two categories are the sole beneficiaries.\textsuperscript{137} Fictional persons such as corporations, partnerships, LLCs, and trusts are also a single client provided that the adviser provides advice only on the basis of the organization’s investment objectives.\textsuperscript{138} Multiple fictional persons can count as a single client provided those organizations have identical shareholders, partners, limited partners, members or beneficiaries.\textsuperscript{139} Double counting is avoided since an organization or private fund is not counted as a client if any investor in it has been already counted.\textsuperscript{140} The definition is not entirely clear because of the uncertainty introduced by the question of whether the advice given is solely for the objectives of an organization. The SEC states that whether or not an advisory relationship should be characterized as with a single client must be determined on a case by case basis.\textsuperscript{141} This introduces uncertainty as to whether an adviser can count an organization as a single client or must look-through and count the investors in that entity.

Also in rule 202(a)(30)-1 the SEC defines investor as:

Any person who would be included in determining the number of beneficial owners of the outstanding securities of a private fund under section 3(c)(1) of the Investment Company Act (15 U.S.C. 80a-3(c)(1)), or whether the outstanding securities of a private fund are owned exclusively by qualified purchasers under section 3(c)(7) of that Act (15 U.S.C. 80a(c)(7)); and Any beneficial owner of any outstanding short-term paper, as defined in section 2(a)(38) of the Investment Company Act of 1940 (15 U.S.C. 80(a)(38)), issued by the private fund.\textsuperscript{142}

\footnotesize{\textsuperscript{137} Foreign private advisers, 17 C.F.R. § 275.202(a)(30)-1 (a)(1) (effective July 21, 2011).}
\footnotesize{\textsuperscript{138} 17 C.F.R. § 275.202(a)(30)-1 (a)(2)(i).}
\footnotesize{\textsuperscript{139} 17 C.F.R. § 275.202(a)(30)-1 (a)(2)(ii).}
\footnotesize{\textsuperscript{140} 17 C.F.R. § 275.202(a)(30)-1 (b)(5).}
\footnotesize{\textsuperscript{141} Exemption for Advisers, \textit{supra} note 130, at 77211 n.231.}
\footnotesize{\textsuperscript{142} Foreign private advisers, 17 C.F.R. § 275.202(a)(30)-1 (c)(2) (effective July 21, 2011).}
Thus, persons who hold either equity or debt in the private fund would be counted as an investor.\textsuperscript{143} The definition of investors looks-through to find the “underlying holders” of private fund issued securities.\textsuperscript{144} Therefore, use of nominee or intermediate accounts will not avail an adviser in avoiding the reporting requirements as such structures will be looked through to count individual investors.\textsuperscript{145} Similarly, a look-through will be employed to count investors in any entity formed for the specific purpose of investing in a private fund, as investors in that fund.\textsuperscript{146} An adviser to a master fund must count as investors the holders of securities in any feeder fund.\textsuperscript{147} Also, the holders of certain derivatives based upon the private fund, such as a total return swap, and the holders of short-term paper, less than nine months in duration, fall within the definition of investors.\textsuperscript{148} The status of entities that provide margin facilities is not mentioned, but, if so, they would be in a similar position as the holders of short term debt and, therefore, might also be counted as investors. Thus, reaching the $25,000,000 limit for the foreign private adviser exemption is possible without any direct investor in the funds being a U.S. person.

The phrase “in the United States” is defined to conform with the meaning of “U.S. person” under Regulation S.\textsuperscript{149} The operative time for determining a person’s status is when that person becomes a client or investor.\textsuperscript{150} This means that advisers are not required to keep track of the movements of their clients and investors in order to determine whether they have to register. Under Regulation S, a U.S. person includes: any resident of the United States, any corporation or partnership formed under the laws of the United States, any estate of which any executor or administrator is a U.S. person, any trust of which any trustee is a U.S. person, any agency or

\textsuperscript{143} Id.

\textsuperscript{144} Exemption for Advisers, supra note 130, at 77212 n.241.

\textsuperscript{145} Id.

\textsuperscript{146} Id. at 77212 n.244.

\textsuperscript{147} Id.

\textsuperscript{148} Id. at 77212.


\textsuperscript{150} § 275.202(a)(30)-1 note to paragraph(c)(3)(i).
branch of a foreign entity located in the United States, and partnerships or corporations formed by natural U.S. persons in foreign jurisdictions for the purpose of investing in unregulated securities.\(^{151}\) Discretionary accounts owned by U.S. persons are also treated as U.S. persons.\(^{152}\) So far the foreign subsidiaries of US corporations that qualify as accredited investors are not designated as U.S. persons.\(^{153}\) As it will be difficult to categorically distinguish foreign subsidiaries set up to avoid the reporting requirements from those set up for normal business purposes, the SEC will probably designate foreign subsidiaries as U.S. persons on a case by case basis to prevent the use of foreign subsidiaries to avoid the reporting requirements.

A place of business is defined to be any office where the investment adviser regularly provides advisory services, solicits, meets with, or otherwise communicates with clients, and any location held out to the public as a place where the adviser conducts any such activities.\(^{154}\) Thus, merely having a trading office in the United States is not enough to qualify as having a place of business in the United States. This narrow definition of a place of business will help reduce the potential negative effect the reporting requirements could have of reducing the participation of foreign investment advisers in the United States’ capital markets by enabling such advisers to continue to have offices in the United States for trading or other management purposes.

The SEC has defined “assets under management” by reference to regulatory assets under management as calculated for Item 5 of Form ADV.\(^{155}\) Item 5 of Form ADV requires that an adviser include in the value of assets under management the full value of any portfolio, including securities purchased on margin, that is greater than 50% invested in securities.\(^{156}\) Securities are defined to include cash and cash equivalents.\(^{157}\)


\(^{152}\) 17 C.F.R. § 230.902(k)(vii).

\(^{153}\) 17 C.F.R. § 230.902(k)(viii).


\(^{155}\) 17 C.F.R. § 275-203A-3(d).

\(^{156}\) 17 C.F.R. § 279.1.

\(^{157}\) SEC, Form ADV: General Instructions, at 17, available at
Non-securities include collectables, commodities and real estate. Thus, some advisers may be able to avoid reporting by altering the proportion of asset classes held by the funds they manage.

The SEC interprets the term advisers to include subadvisers; therefore, the exemptions to the registration requirements are available to subadvisers who meet all the criteria for the exemption. Mere existence as separate legal entities is not sufficient; rather, the two entities must be operated independently. This will have to be determined on a case by case basis.

The SEC seems to have closed the most obvious methods of structuring investments to avoid reporting requirements, particularly with its inclusion of extensive look-through provisions in its definition of investor. But from the point of view of regulating systemic risk, a few points of concern remain. The first point of concern regards the foreign subsidiaries of U.S. non-natural persons, which qualify as accredited investors. Such foreign subsidiaries are not considered to be U.S. persons themselves. Not only does it open a potential avenue for circumvention of the reporting requirements, but it also leaves open an important avenue of systemic risk as the losses of a foreign subsidiary could threaten the stability of the U.S. parent. Second is the fact that holders of debt of maturity longer than nine months are not counted as investors. From the systemic risk point of view, long-term debt holders are not obviously in a better position than short-term debt holders should the debtor default; both are at risk of contagion of systemic risk through the credit channel. Perhaps it is unusual for debt with duration of more than nine months to be unsecured. Whatever the reason for the distinction, this avenue for systemic risk contagion remains outside the reporting requirements. Third, and most importantly, Title IV of the Dodd-Frank Act does not address an important aspect of international systemic risk via the market channel. This is


158 Id. at 19.

159 See Exemption for Advisers, supra note 130, at 77214.

160 Id.

161 The author readily admits that he is not an expert in finding loopholes in securities regulation and has no doubt that legal advisers much more ingenious than himself will be able to devise other clever ways to enable their clients to take advantage of the foreign private adviser exception.
basically a result of the foreign private adviser exception. By virtue of the
exception, the Dodd-Frank Act does not require that every shadow bank
that invests in the United States register and make systemic risk information
available to the SEC, let alone every shadow bank in the world. ¹⁶²
Nonetheless these entities pose a systemic risk to other participants in the
United States’ markets. Forcing every shadow bank that invests money in
the United States to register with the SEC would raise the costs of investing
in the United States, thereby tending to deter foreign investment. This is
undesirable for numerous policy reasons.¹⁶³ As for requiring every
investment adviser in the world to register with the SEC, this is a ridiculous
proposition. The United States simply does not have lawful jurisdiction to
enforce any such requirement and it would be contrary to accepted
standards of international comity.¹⁶⁴

Part III(a): International Regulatory Cooperation Necessary

International regulatory cooperation is necessary in connection with
the Dodd-Frank Act for two reasons. First, regulatory cooperation will be
necessary for the SEC to be able to verify that the information disclosed to
it by advisers to foreign entities is accurate and in accordance with the
Dodd-Frank Act. In the event that the SEC believes that such information
might be false, the SEC will have to be able to obtain sufficient information
from the foreign entity to verify the accuracy of the disclosures made by its
adviser. Second, regulatory cooperation will be necessary for effective use
of the information obtained under the Dodd-Frank Act for systemic risk
regulation. There may arise situations in which the systemic risk
information provided in accordance with the Act will indicate that a foreign
entity could pose a threat to the financial stability of the United States. A
foreign entity that is not required to provide systemic risk information under
the act could be judged to pose a threat to the financial system of the United
States if: (1) a significant number of reporting advisers indicated that they

¹⁶² See generally Michael I. Overmyer, Note: The “Foreign Private Adviser” Exemption:
A Potential Gap in the New Systemic Risk Regulatory Architecture, 110 COLUM. L. REV.
2185 (proposing that the foreign private adviser exemption should be eliminated because it
constitutes a chink in the SEC’s ability to regulate systemic risk).

¹⁶³ As the United States currently runs a rather large current account deficit, it is reliant on
the willingness of foreigners to invest money in it in order to maintain the value of its
currency. Therefore it seems dangerous to deter such foreign investment.

¹⁶⁴ See generally Richard K. Gordon, On the Use and Abuse of Standards for Law: Global
transgressions on national sovereignty).
had exposure to that entity; (2) a few advisers to large, systemically
important entities indicated that they had significant exposure to the non-
reporting entity; or (3) many reporting advisers had exposure to a market to
which that entity could pose a systemic risk. In such a situation United
States regulators may wish to obtain information relating to the stability of
the non-reporting entity. Alternatively, the necessity of making a request
may be avoided if United States regulators are satisfied that the non-
reporting entity is subject to adequate foreign regulation.

**Part III(b): Current International Cooperation and Information
Sharing Agreements**

This section will consider past efforts to obtain international
information sharing agreements and to achieve international harmonization
of law. This will indicate whether current information sharing agreements
are adequate for United States regulators to obtain the information
necessary to regulate systemic risk in accordance with the Dodd-Frank Act,
or, if not, how easily such agreements could be obtained and whether
significant harmonization of regulation is likely to be achieved in the realm
of systemic risk regulation.

**Organization for Economic Cooperation and Development**

The Organization for Economic Cooperation and Development
(“OECD”) has shown great interest in combating what it refers to as
harmful tax competition. The OECD apparently believes that a “level
playing field” in taxation is necessary to ensure continued global economic
growth. The OECD’s initial plan to counter this problem, the 1998
Report, was ambitious and involved a broad attempt to harmonize
international tax codes. This plan included promulgating model bilateral
information sharing agreements on tax matters.

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165 Org. for Econ. Cooperation and Dev. [OECD], *Harmful Tax Competition, An
http://www.oecd.org/dataoecd/33/0/1904176.pdf [hereinafter *Harmful Tax Competition*].

166 Id. at 37-40.

http://www.oecd-ilibrary.org/taxation/implementing-the-tax-transparency-standards/the-
2002-model-agreement-on-exchange-of-information-on-tax-matters-and-its-commentary_9789264088016-7-en;jsessionid=10hqyeyl9to8.delta.
The recommendations of the OECD’s 1998 Report included the adoption of certain domestic legislation to eliminate what it characterized as harmful tax practices, the adoption of tax treaties, and an agreement that countries take collective action against jurisdictions that did not implement the agreed tax standards. An important shift in focus began in the 2000 Progress Report. Rather than focusing on eliminating tax competition altogether and leveling the playing field, the OECD in 2000 shifted its focus to obtaining the cooperation of non-members with member countries on tax matters. The OECD developed an internationally agreed tax standard, which provides that domestic law will not prevent countries from exchanging information on tax matters.

In its 2004 Progress Report the OECD catalogued its success in getting member countries to abolish their allegedly harmful tax practices. The OECD was also successful in obtaining commitments from non-members to cooperate in the exchange of tax information. However, progress toward the level playing field of the 1998 Report had not moved beyond a general agreement that this ideal was about fairness.

The 1998 Report identified a tax haven as a country with zero or only nominal taxation, a lack of effective exchange of information, a lack of transparency, and a lack of a substantial activities requirement. Yet now it seems the only requirement for a country to be substantially compliant with the internationally agreed tax standard is effective exchange of


172 See id. at 13-14.

173 See id. at 12.

information.\textsuperscript{175} Gone are mentions of “leveling the playing field.”\textsuperscript{176} It seems the OECD has had, for the time being, to give up its ambitious plans to harmonize tax systems and to settle for international information exchange agreements.\textsuperscript{177} Even these information exchange agreements are very narrowly drawn.\textsuperscript{178} Thus, despite the importance of taxation to its members, the OECD was only able to obtain limited information exchange agreements from non-members.

**Bank for International Settlements**

The Bank for International Settlements (“BIS”) “is an international organization which fosters international monetary and financial cooperation and serves as a bank for central banks.”\textsuperscript{179} BIS has spawned a series of subcommittees, several of which are concerned with ensuring global financial stability.\textsuperscript{180}

The most famous of these is the Basel Committee on Banking Supervision (“BCBS”), which issues the Core Principles for Effective Banking Supervision and the Concordat on Cross-Border Banking Supervision, otherwise known as the Basel Accord.\textsuperscript{181} Basel I set minimum capital requirements for the traditional banks of member countries.\textsuperscript{182}

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\textsuperscript{176} See *Harmful Tax Competition*, supra note 165, at 9, 56, 70.
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\textsuperscript{177} See generally Gordon, *supra* note 164, at 526-638.
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\textsuperscript{179} Bank for International Settlements [BIS], *About BIS*, http://www.bis.org/about/index.htm (last visited Jan. 12, 2011).
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\textsuperscript{181} BIS, About the Basel Committee, http://www.bis.org/bcbs/index.htm (last visited Jan. 12, 2011).
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These capital requirements were calculated on the bases of a bank’s capital structure and the risk categories into which a bank’s assets fell. Basel I did succeed in raising the average capital ratios of member’s banking systems. However, Basel I faced enforcement problems because regulators were under pressure to interpret loosely the requirements of the accord to favor domestic banks.

In 2004 Basel II was adopted in response to criticism that Basel I failed to level the regulatory playing field because its provisions were subject to diverse interpretation and failed to weigh capital and asset risks realistically. Basel II allowed regulators to permit supervised banks to conduct their own internal risk management assessments. Despite its formidable size, Basel II failed to achieve consistent international application.

BCBS recently made public the Basel III agreement. Basel III increases bank reserve requirements and creates a fluctuating conservation buffer. Basel III builds on the foundations set by Basel II and is estimated to increase market risk capital requirements by three to four

183 Id.
184 Id. at 8-13.
187 See id. at 139-40.
188 See id. at 140.
190 See Verdier, supra note 186, at 142.
times. Only time will tell whether Basel III will be more uniformly applied than Basel I and II and will succeed in achieving a more stable international banking system.

**The International Organization of Securities Commissions**

The International Organization of Securities Commissions (“IOSCO”) has succeeded in getting 71 countries to sign its Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (“MMOU”). This was achieved comparatively easily because of homogeneity of interests. All countries share an interest in having a reputation for sound, non-fraudulent financial markets to attract foreign investment.

The MMOU states that securities regulators of signatories will provide broad assistance to requesting regulators about financial transactions and that the transfer of information will not be hampered by secrecy laws. The MMOU states: “The Authorities will, within the framework of this Memorandum of Understanding, provide each other with the fullest assistance permissible to secure compliance with the respective Laws and Regulations of the Authorities.” This assistance includes not only providing the requesting authorities with all relevant documents held in the files of the responding regulatory agency, but also obtaining further information. This information may include:

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194 *See* Verdier, *supra* note 186, at 143.


196 *Id.* at 4.

197 *Id.*
contemporaneous records sufficient to reconstruct all securities and derivatives transactions, including records of all funds and assets transferred into and out of bank and brokerage accounts relating to these transactions; records that identify: the beneficial owner and controller, and for each transaction, the account holder; the amount purchased or sold; the time of the transaction; the price of the transaction; and the individual and the bank or broker and brokerage house that handled the transaction; and information identifying persons who beneficially own or control non-natural Persons organized in the jurisdiction of the Requested Authority.198

Assistance under the MMOUs cannot be denied merely because “the type of conduct under investigation would not be a violation of the Laws and Regulations of the Requested Authority.”199 Requests for assistance under the MMOUs are to be made in writing and include the nature of “the laws or regulations that may have been violated and that relate to the subject matter of the request.”200 The information obtained through the use of the MMOUs can be used only for the purposes stated in the request for assistance, and must be kept confidential.201 The MMOU does require all authorities to provide to other authorities, without request, any information which is likely to be of assistance to those other authorities.202 Any authority can terminate its agreement to the MMOU upon 30 days notice.203 Importantly the MMOU requests do not require that regulatory authorities take steps to prevent, or mitigate the consequences of, the activity that is the subject of a request for assistance under an MMOU.204

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198 Id. at 4-5.
199 Id. at 5.
201 Id. at 6-8.
202 Id. at 8.
203 Id. at 9.
204 See id. at 9.
resulting from the information obtained cannot be enforced by virtue of the MMOU.\textsuperscript{205} Therefore, under the MMOU the regulators of one country could not request that regulators of a second country prevent an entity in that country from entering into transactions that create or increase systemic risk.

The MMOU has done nothing to harmonize countries’ securities laws.\textsuperscript{206} The MMOU provides for specific instances of cooperation rather than broad or continuing cooperation. However, the MMOU does enable United States regulators to request information from entities in other countries if the United States regulators have reason to believe that false disclosures have been made. But, crucially, the MMOU does not facilitate international information exchange for systemic risk purposes, absent an allegation of a breach of securities law.

\textbf{Financial Action Task Force}

The Financial Action Task Force (“FATF”) is an inter-governmental policy making body that promotes and coordinates the harmonization of national laws to combat money laundering and terrorist financing.\textsuperscript{207} The FATF has promulgated a number of recommendations to countries regarding how they should implement effective anti-money laundering (“AML”) and counter-terrorist financing (“CTF”) laws.\textsuperscript{208} FATF recommends the adoption of laws requiring financial institutions to conduct customer due diligence, commonly known as “know your customer rules,” and to keep appropriate records.\textsuperscript{209} Additionally, FATF recommends the passage of laws requiring financial institutions to report suspicious behavior,\textsuperscript{210} and that countries set up regulatory bodies for the purpose of

\begin{itemize}
  \item \textsuperscript{205} See Verdier, \textit{supra} note 186, at 147 (citing William S. Dodge, \textit{Breaking the Public Law Taboo}, 43 HARV. INT’L L.J. 161, 187-89 (2002)).
  \item \textsuperscript{206} \textit{Id}.
  \item \textsuperscript{208} See FATF, \textit{Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations} (2004), available at http://www.fatf-gafi.org/dataoecd/16/54/40339628.pdf.
  \item \textsuperscript{209} \textit{Id.} at 15-23.
  \item \textsuperscript{210} \textit{Id.} at 25.
\end{itemize}
enforcing compliance and analyzing information collected.\textsuperscript{211} FATF encourages countries to sign treaties and to ensure that domestic law facilitates international cooperation on AML and CTF actions.\textsuperscript{212} This cooperation not only extends to supplying information, but also to seizing assets and evidence.\textsuperscript{213} FATF urges that the greatest assistance possible should be provided even if the activity deemed suspicious is not a breach of domestic law.\textsuperscript{214}

The FATF seeks to encourage compliance with its recommendations by conducting mutual evaluations of countries.\textsuperscript{215} Lists of countries that deemed non-cooperative due to lack of AML and CFT enforcement systems have been published by FATF.\textsuperscript{216} The FATF then recommends and coordinates preventative measures against such countries.\textsuperscript{217} These preventative measures include enhanced scrutiny of transactions involving those jurisdictions: \textsuperscript{218} “In addition to enhanced scrutiny, the FATF will, if necessary, ultimately call for the application of appropriate counter-measures in order to protect the financial system.”\textsuperscript{219}

As demonstrated above, FATF begins the process of obtaining compliance softly, by merely making recommendations, but if these

\textsuperscript{211} \textit{Id.} at 34-37.

\textsuperscript{212} \textit{Id.} at 42, 45.


\textsuperscript{214} \textit{Id.} at 43-44 (“Technical differences between the laws in the requesting and requested states, such as differences in the manner in which each country categorizes or denominates the offence should not pose an impediment to the provision of mutual legal assistance.”).

\textsuperscript{215} \textit{Id.} at 2-3. See also FATF, Key Principles for Mutual Evaluations and Assessments, available at http://www.fatf-gafi.org/document/34/0,3343,en_32250379_32236963_45572898_1_1_1_1,00.html.

\textsuperscript{216} See FATF, High-risk and Non-cooperative Jurisdictions, http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236992_1_1_1_1,00.html (last visited Jan. 12, 2011).

\textsuperscript{217} See id.

\textsuperscript{218} \textit{Id.}

\textsuperscript{219} \textit{Id.}
“recommendations” are not followed then harder enforcement follows. Increased scrutiny of transactions with a non-cooperative country appears likely to encourage compliance by increasing the difficulty of doing business with that country, thereby reducing its trade and/or attractiveness as a destination for investment.

Financial Stability Board

The Financial Stability Board (“FSB”) has a mandate from its members to monitor risks to global financial stability and make recommendations.220 The FSB serves as an overseer of international coordination across a broad range of financial regulation.221 It has as members not only countries,222 but also international organizations such as the BIS, OECD, IOSCO, IMF, and the World Bank.223 The G20 established the FSB as the successor to the Financial Stability Forum (“FSF”) in 2009.224

The FSF was founded in 1999 to promote cooperation between the already existing national and international supervisory bodies.225 The FSF has compiled a list of 12 standards that it has deemed to be “key for sound financial systems and deserving of priority implementation depending on country circumstances.”226 The standards were not produced by the FSF, but rather represent the collective wisdom of other international


222 See FSB, Links to FSB Members, http://www.financialstabilityboard.org/members/links.htm (last visited Jan. 12, 2011). Current member countries of the FSB include all G20 members plus Hong Kong, The Netherlands, Singapore, Spain and Switzerland. Id.

223 Id.


225 Id.

organizations such as the OECD, FATF, BCBS, and IOSCO. These standards include FATF’s Forty Recommendations, BCBS’s Core Principles for Effective Banking Supervision, and IOSCO’s Objectives and Principles of Securities Regulation.

The FSB does not possess any power to enforce its recommendations. Rather it coordinates the adoption of standards to promote financial stability and reports on the progress of that adoption. Also, the FSB conducts reviews of individual member countries’ progress in implementing its standards. Overall the FSB aims to convince countries that adopting certain standards of financial regulation is not only individually beneficial for countries, but is mutually beneficial to all the members of the international financial community.

Overview of International Cooperation

International information sharing is limited to an exchange of the information requested. Countries do not share all of their tax or regulatory information in the absence of a specific request since this information is both voluminous and subject to misuse. In neither area has significant global harmonization been achieved.

227 Id.

228 FATF, FATF 40 Recommendations (2003), available at http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236920_33658140_1_1_1_1,00.html.


Although there were attempts by the OECD to harmonize global tax laws, the OECD has backed away from this goal and settled for narrow information exchange agreements. The fact that such a desirable outcome for many powerful countries could not be achieved by an organization as influential as the OECD is an indication of just how difficult it is to achieve harmonization of national laws.

Certain organizations, however, have been quite successful in obtaining international harmonization. The Basel Committee, despite some bending of its rules by regulators, has been successful in obtaining a general increase in the reserve requirements of banking systems around the world. Also, the FATF has obtained nearly universal cooperation in the anti-money-laundering and counter terrorist financing areas, along with a great degree of harmonization of national laws in these areas. The explanation of these successes probably lies with a greater alignment of interests and backing by a more powerful global political will.

As far as securities regulation is concerned, IOSCO has obtained broad cooperation in the realm of information sharing. However, information sharing is the only form of cooperation agreed to. There must have been a suspected breach of law or regulation for information to be shared, and no harmonization of securities regulation has been achieved. These attempts at international cooperation in the regulation of banking, taxation, and AML/CTF show that harmonization of national law is unlikely, absent an alignment of national interests and/or strong global political will, but that limited agreements to cooperate can be achieved with comparative ease.

The MMOU allows countries to gain specific information relating to violations of securities regulations. Thus, United States regulators could obtain information if they believed that systemic risk information provided in accordance with the Dodd-Frank Act was false. However, and most importantly, present agreements do not allow for information exchange absent an allegation of a breach of securities regulations. This condition


236 See Verdier, supra note 187, at 148.
hampers the ability of United States regulators to judge the risks posed to the United States’ financial system by entities not required to report under the act. Also, cooperation in securities enforcement is limited to information exchange; therefore, the SEC could not necessarily get its decisions enforced by foreign regulators.

Past attempts to harmonize national laws, like the OECD’s tax initiatives, have met with limited success. Such attempts have only succeeded where there was an incentive for countries to implement those laws. Therefore, it will be important for regulators to emphasize the mutual benefits that will be achieved by reductions in systemic risk caused by the adoption of harmonious standards of regulation. Systemic stability is a public good that spans the global financial system, and every country stands to gain if systemic risk in the international financial system is reduced. Also, harmonization of systemic risk regulation would probably mean that international financial companies will not be subjected to duplicative or redundant regulation.

Information sharing for purposes of systemic risk regulation is of greater value to OFCs than agreements for the sharing of tax information. Whereas it is primarily large onshore jurisdictions that benefit from the information sharing provisions of tax treaties, information sharing for systemic risk regulation has the potential to yield mutual benefits. Therefore, in light of the OECD’s success in obtaining information sharing agreements for taxation, it is reasonable to believe that it will be possible to obtain information sharing agreements for systemic risk regulation.

This system of regulation will look much more like banking supervision overseen by BCBS than traditional securities regulation. Traditional securities regulation was aimed primarily at protecting investors from specific fraud, market manipulation, and insider trading. The focus of new regulations, such as those provided for in the Dodd-Frank Act, is to protect investors from the general contagion of individual financial failures. This function more closely resembles the protection of individual depositors by maintaining the soundness of the banking system than it does traditional securities regulation. Given the divergent standards adopted in the United States and in the European Union, harmonization like that achieved by BCBS appears unlikely in the area of systemic risk regulation.

Part IV: Alternative Investment Fund Managers Directive

Although there has so far been comparatively little regulation of shadow banking entities, the United States was not the only jurisdiction
which the recent financial crisis spurred to legislate in this area. The European Union ("EU") has passed the Alternative Investment Fund Managers ("AIFM") Directive ("AIFM Directive"). It will regulate European shadow banks exempt from the UCITS Directive, which regulates mutual funds. It is interesting to compare the AIFM Directive with the Dodd-Frank Act because both pieces of legislation represent a move into relatively uncharted regulatory territory.

Importantly, unlike the Dodd-Frank Act, the AIFM Directive has the effect of preventing AIFM based in a country outside the EU from marketing their funds in the EU unless that country has appropriate information exchange agreements with an EU Member State. Similar rules apply even if AIFM are based in the EU and only the funds they manage are outside the EU. These prohibitions differ from the foreign private adviser exception of the Dodd-Frank Act because they bar outright foreign advisers from marketing their funds in the EU unless those funds are based in countries that allow information exchange. Dodd-Frank allows advisers to market their funds in the United States provided that they register and provide systemic risk information as requested. However, Dodd-Frank does not provide a mechanism to ensure that this information can be verified.


238 Id. at 1.

239 The author would like to caveat his discussion of the AIFM Directive by stating that because of space constraints the discussion of the directive’s provisions here will be brief and simplistic.

240 See AIFM Directive, supra note 237, art. 40(2)(a). This is actually a great simplification. The AIFM Directive contains several different articles setting forth the rules for AIFM depending on their location and the location of the funds they manage. Article 40 sets forth the rules for an AIFM based outside the EU to market a fund also based outside the EU within the EU by use of the "passport" provision. A "passport" basically enables an AIFM to market its funds in the EU provided it is authorized by a member state in accordance with the AIFM directive. See AIFM Directive, supra note 237, art. 32.

241 AIFM Directive, supra note 237, arts. 35 and 36.
Apart from its scope, the AIFM Directive differs in that it asserts control over the actions of advisers to shadow banks. The AIFM Directive provides that AIFM must make annual reports for the funds they manage available upon request.242 Also AIFM are required to make certain other disclosures to investors including a description of the investment strategy of the fund, the techniques they may employ, the liquidity of their investments and the leverage they use.243 The AIFM Directive also governs the remuneration of AIFM and allows a member state to regulate conflicts of interest between AIFM and the funds they manage.244 The directive requires AIFM to review and maintain risk management systems and conduct stress tests to assess the liquidity risk of the funds they manage.245

The exact extent of the information required under the Dodd-Frank Act can vary because the FSOC and the SEC are allowed to require such further information as they deem necessary,246 but there is a general difference in the information collected by the Dodd-Frank Act and the AIFM Directive. Whereas the Dodd-Frank Act aims to collect raw data from the adviser for the benefit of regulators, the AIFM Directive appears to be concerned both with regulating AIFM’s methodology and requiring public disclosures so that investors in funds managed by AIFM can make informed investing decisions.247 The AIFM Directive tries to regulate AIFM behavior to lower risks of systemic problems ex ante whereas the Dodd-Frank Act seeks to provide regulators with the information necessary to take action to avert a developing systemic crisis.

So from the start, global regulation of shadow banking entities will not be harmonious. Therefore, shadow banks will potentially have to deal with distinct, but largely repetitive, regimes of systemic risk regulation. The AIFM Directive anticipates such problems by exempting AIFM from

242 Id. art. 22.
243 Id. art. 23.
244 Id. arts. 13 and 14.
245 Id. arts. 15 and 16.
compliance with its provisions provided they are already in compliance with incompatible rules or regulations that provide investors with an equivalent level of protection.\textsuperscript{248} Indeed, it will be interesting to see whether EU regulators will hold that the Dodd-Frank Act “provides for an equivalent rule (as the AIFM Directive) having the same regulatory purpose and offering the same level of protection to… investors…”\textsuperscript{249}

Despite the differences between the Dodd-Frank Act and the AIFM Directive, both sets of regulation do take into account the fact that entities might already be subject to foreign regulation.\textsuperscript{250} Proposals have been made in the United States that securities regulators should take greater account of compliance with foreign securities regulations when determining whether full SEC regulatory oversight is necessary.\textsuperscript{251} Therefore, even if regulatory regimes differ in important ways, it is possible that the necessity of international information sharing and the burden of complying with redundant layers of regulation will be reduced if governments accept that entities are already adequately regulated by foreign countries.

Part V: New agreements needed to allow exchange of systemic risk information.

The efforts of the OECD and IOSCO show that it is very difficult to convince countries to harmonize their laws. Even if such harmonization of national laws could be achieved, BCBS’s experience with national regulators bending its rules to favor domestic entities indicates that such regulation is unlikely to be uniformly applied. Therefore, it is unlikely that

\textsuperscript{248} AIFM Directive, supra note 237, art. 37.

\textsuperscript{249} Id. art. 37(2)(b).


\textsuperscript{251} See Ethiopis Tafara & Robert J. Peterson, A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework, 48 HARV. INT’L L.J. 31 (2007). “Instead of being subject to direct SEC supervision and U.S. federal securities regulations and rules, foreign stock exchanges and broker-dealers would apply for an exemption from SEC registration based on their compliance with substantively comparable foreign securities regulations and laws and supervision by a foreign securities regulator with oversight powers and a regulatory and enforcement philosophy substantively similar to the SEC’s.” Id. at 32.

See also International Disclosure Standards, 64 F.R. 6261 (proposed Feb. 9, 1999) (codified at 17 C.F.R. 210, 228, 229, 230, 239, 240, 249, 260).
true harmonization of systemic risk regulation will be achieved.\textsuperscript{252} Differences between the AIFM Directive of the EU and the Dodd-Frank Act in the United States show that even onshore jurisdictions differ in how they believe shadow banks should be regulated. But harmonization may not be necessary provided countries share systemic information. Indeed the Dodd-Frank Act and the AIFM Directive anticipate such international cooperation.\textsuperscript{253}

IOSCO’s MMOU should be modified specifically to allow for cooperation in systemic risk regulation. Although the SEC has more rigorous cooperation agreements with certain foreign jurisdictions,\textsuperscript{254} it is desirable that there be broadly-based international agreements, as systemic risk can originate in and threaten multiple jurisdictions at once. Given the past successes of international organizations in obtaining information sharing agreements, systemic risk information exchange agreements can probably be readily obtained. This is because all jurisdictions, both on and off shore, have strong interests in preventing the international contagion of financial failures.

The OECD’s model tax treaties and IOSCO’s MMOU show that in order for them to be widely accepted, international cooperation agreements must have strict prerequisites for information exchange and controls on how the information obtained may be used.\textsuperscript{255} Systemic risk information exchange agreements will probably require that the requesting regulator


specify the reasons why a given shadow bank is thought to pose a threat to the financial system of the requesting country, and the request will have to state the nature of the information desired. Further, the agreement should contain provisions restricting the purposes for which the information obtained may be used so as to prevent fishing expeditions for tax information under the auspices of systemic risk regulation. The agreements will have to provide that information will not be released publicly, both to prevent proprietary strategies of shadow banks from being revealed, and to ensure that the mere fact of the request does not have adverse effects on any particular shadow bank.

If some jurisdictions do not accede to sign information-sharing agreements, then other jurisdictions can follow the familiar steps to obtain these agreements. First, organizations like the FSB could perhaps persuade noncompliant jurisdictions that adopting information sharing agreements is really in their own self interest. Second, jurisdictions that do not share information could be named and shamed in the same way as the OECD and FATF named and shamed jurisdictions that did not adopt their recommendations. If this is not sufficient, then domestic entities transacting with noncompliant jurisdictions could be subjected to a heightened level of systemic risk scrutiny. This would raise the cost of doing business with these jurisdictions and provide them with a strong incentive to enter into information sharing agreements.

As shadow banks in OFCs cater to nonresidents, these shadow banks will experience high costs if they have to comply with multiple foreign regulatory standards in order to be able to market their services in onshore jurisdictions. These costs will encourage OFCs to adopt levels of regulation that onshore regulators will accept as sufficient to make additional onshore regulation unnecessary. This does not necessarily require that the OFC adopt identical systemic risk regulation. OFCs probably will attempt to adopt lighter, perhaps more efficient regulations that would nonetheless be found to be substantially similar in their effects to those of onshore jurisdictions.

256 See, e.g., AIFM Directive, supra note 237, art. 52 (permitting the transfer of information to third countries to the extent necessary to further the purposes of the AIFM Directive).

257 For instance, investors, upon learning that there had been a request for information, might attempt to withdraw their investment from the shadow bank fearing that regulators know something the investors did not. The Dodd-Frank Act anticipates such problems and in section 112 exempts the Financial Stability Oversight Committee from certain Freedom of Information Act requirements.
Conclusion

The aim of global systemic risk regulation should be to fill risk-information gaps. Individual shadow banks have an incentive to maintain the secrecy of their operations to preserve the value of their proprietary trading strategies. This impedes the ability of participants in the market for asset management to deter excessive risk taking with investors’ funds. Regulators should ensure that investors obtain the maximum amount of information that is compatible with preservation of proprietary strategies, thus allowing risk-averse individual investors to minimize systemic risk as far as possible. Regulators should then focus on collecting confidential information nationally and internationally that will enable them to monitor systemic risk through network analysis and examination of systemically important shadow banks’ balance sheets.

Although international harmonization of systemic risk regulation is desirable to minimize compliance costs for shadow banks and ease the burdens of information sharing on national regulators, both past experience of attempts at such harmonization and the significant differences between the American and European approaches to systemic risk regulation indicate that such harmonization is unlikely. A mixture of international information sharing agreements to allow the exchange of systemic risk regulation, combined with acceptance in appropriate instances that foreign entities are already subject to adequate regulation, is the most efficient and feasible course. The fact that many countries have already signed agreements to share information relating to securities regulation indicates that agreements for systemic risk information sharing should be obtainable.
“Direct Effect in the United States” under the Foreign Sovereign Immunities Act after *Cruise Connections v. Attorney General of Canada*

Y. David Huang*

**Introduction**

In the global marketplace, private parties often transact with foreign nations or their instrumentalities. When disputes arise, under what circumstances can a private party sue a foreign nation in U.S. court for the breach of a contract relating to commercial activity occurring outside U.S. territory? How much connection between the foreign commercial activity and the U.S. is necessary for jurisdiction?

The Foreign Sovereign Immunities Act1 (FSIA) of 1976 was intended to address these questions. The FSIA is the codification of the “restrictive” view of sovereign immunity that aims to balance traditional absolute foreign sovereign immunity with practical interests of private domestic parties dealing with foreign nations.2 By default, the FSIA provides immunity by denying jurisdiction over a foreign sovereign in U.S. federal or state court.3 However, the statute also provides exceptions that form the sole mechanisms for obtaining jurisdiction over a foreign sovereign.4 One set of exceptions is known as the “commercial activity exception,”5 codified at § 1605(a)(2). Under § 1605(a)(2), if the action is

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3 28 U.S.C. § 1604 (“Subject to existing international agreements . . . a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter”).


based upon an act outside the territory of the United States in connection with commercial activity of the foreign sovereign, jurisdiction over the foreign sovereign can be obtained if the act “causes a direct effect in the United States.” But what constitutes a “direct effect in the United States”? With little statutory or legislative guidance, courts have struggled to interpret the meaning of “direct effect,” a seemingly simple phrase that has proven to be very troublesome in legal analysis.

The Supreme Court’s 1992 Republic of Argentina v. Weltover, Inc. decision only added additional problems to “direct effect” jurisprudence. The Court rejected foreseeability and substantiality of the alleged effect as requirements and, instead, stated that an effect is “direct” if it follows as “immediate consequence” of the foreign sovereign’s actions. Stripped of the useful guideposts of foreseeability and substantiality, courts have had much trouble using the immediacy standard, which did very little to clarify the term “direct.” For breach of contract cases, modern “direct effect” jurisprudence contains at least two major issues, neither of which is straightforward. One issue, a subject of circuit splits, relates to how a foreign government’s scope of contractual obligation should play a role in determining the types of “effects” that may qualify. Another issue is the application of the “immediate consequence” rule in determining whether an effect was “direct,” a term that can be overly abstract, as the case of this note illustrates.

The 2010 D.C. Circuit case Cruise Connections Charter Management 1, LP v. Attorney General of Canada creates additional ambiguity in “direct effect” jurisprudence. In Cruise Connections, the Royal Canadian Mounted Police’s alleged breach of a contract was found to have had a direct effect because it resulted in the “loss of revenue” under the plaintiff party’s third-party agreements, even though the Royal Canadian Mounted Police contracted with the plaintiff only and had no performance obligations in the United States. This holding departs from traditional case

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6 NANDA & PANSIUS, supra note 5, § 3:12.


8 Id.


10 Id. Judge Tatel wrote the opinion for a unanimous panel including Judge Silberman and Judge Williams.
law in the circuit, which found direct effect in breach of contract cases only when the foreign government had agreed to render payment at a U.S. location. Furthermore, although established principles require a direct effect to have no intervening cause, the court found the third-party agreement losses to be “immediate consequences” of the alleged breach, even though such losses were one or more steps removed from the alleged breach, as they were tied to third-party obligations.

This note will argue that the D.C. Circuit’s departure from earlier case law is based on flawed reasoning, and that as a result, direct effect jurisprudence has been made even more ambiguous. Part I provides an overview of sovereign immunity, the 1976 Foreign Sovereign Immunities Act, and subsequent case law. Part II provides an overview and summary of *Cruise Connections*. Part III analyzes the D.C. Circuit’s reasoning, concluding that its finding of direct effect in third-party agreement losses is illogical, inconsistent with earlier case law, and based on flawed legal reasoning. Part IV discusses the implications of the case, including a broadening of a court’s discretion in finding direct effect, and possible future emphasis on generalized economic effect in the U.S. and disappointed expectation of economic gain as factors for finding direct effect. Part IV also provides possible approaches toward more uniformity and clarity in view of the ambiguities resulting from this decision.

I. Background

This section begins with a description of the restrictive theory of sovereign immunity which formed the basis of the FSIA. The section then describes the ambiguity of the “direct effect” element, and proceeds by highlighting case law interpretations of this element.

A. The FSIA’s Codification of the Restrictive Theory of Sovereign Immunity

In common law courts, the plea of sovereign immunity was originally recognized as an absolute bar to any lawsuit, based on the theory of implied consent among sovereigns to withhold jurisdiction. The drawback of absolute sovereign immunity is the outright denial of recovery against foreign governments in U.S. courts. Over time, increase in trade activity gradually eroded absolute immunity in favor of a more practical,

balanced approach known as the “restrictive theory of sovereign immunity.” 12 This later theory is based on a dichotomy that a foreign sovereign should be immune for its public acts, but not immune for its private acts. 13 Private acts include those of commercial or private law nature, while public acts are those performed in the exercise of sovereign power, such as military deployment. 14 Justice Marshall laid out this public-private dichotomy in the seminal 1812 case *Schooner Exchange v. McFaddon*, 15 which inaugurated foreign sovereign immunity jurisprudence in the United States. 16

The restrictive theory developed on a case-by-case basis until the need for a more definite and reliable doctrine led to codification under the Foreign Sovereign Immunities Act (FSIA) of 1976. 17 The major portion of the FSIA was codified at 28 U.S.C. §§ 1602-11, which forms chapter 97 of the title. 18 One court wrote, “The statute seeks a balance between the provision of a convenient forum for claimants aggrieved in commercial dealings with foreign states and the promotion of comity and harmony between the United States and other nations.” 19

Section 1604 provides that subject to preexisting international agreements, “a foreign state shall be immune from the jurisdiction of the

12 Fox, supra note 11, at 35.

13 Id.

14 Id.; Pandey, supra note 5, § 3:12 (citing Republic of Austria v. Altmann, 541 U.S. 677, (2004)) (explaining that the restrictive theory still protects “the sovereign’s right to act in a governmental manner free from suit.”); The Schooner Exch. v. McFaddon, 11 U.S. 116 (1812) (“[t]here is a manifest distinction between the private property of a person who happens to be a prince and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation”).

15 The Schooner Exch. v. McFaddon, 11 U.S. 116, 137 (1812) (laying out the public-private dichotomy in dicta).

16 Pandey, supra note 5, § 3:12 (citing Republic of Austria v. Altmann, 541 U.S. 677, (2004)).

17 Id.


courts of the United States and of the States,” unless an exception given in §§ 1605-07 applies. Procedurally, sovereign immunity is an affirmative defense which must be pled in the defendant’s answer.20

However, the statute provides exceptions that destroy immunity. Section 1605(a)(2), known as the commercial activity exception, provides jurisdiction if the action is “based upon”21 (1) the foreign state’s commercial activity carried on in the United States; (2) “an act performed in the United States in connection with a commercial activity of the foreign state elsewhere”; or (3) “an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” Thus, for commercial activity outside the United States, the third prong must be used to gain jurisdiction over the foreign sovereign. Of course, if the foreign sovereign conducted activity inside the United States, the “direct effect” element is absent in the corresponding first and second prongs. The statute provides definitions for “foreign states” (which includes the foreign state’s “agency or instrumentality”), the geographical meaning of “United States,” and the term “commercial activity,” but it contains no definition of “direct effect.”

B. Interpreting “Direct Effect:” Weltover’s Rejection of Foreseeability in Favor of an “Immediate Consequence” Standard, and Emphasis on Payment location

The lack of statutory definition meant that courts had to supply their own definition of “direct effect.” One approach was to interpret “direct effect” as “one that is substantial and foreseeable,”22 a view shared by many courts at the time.23 This view had some asserted basis in legislative history, but later authority rejected this view and deemed legislative history to be

20 FOX, supra note 11, at 319.

21 See Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993) (“‘based upon’ . . . is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case”).


inconclusive as to the meaning of “direct effect.” However, the Supreme Court expressly rejected both the “substantial” and “foreseeable” criteria in *Weltover, Inc. v. Republic of Argentina.* In *Weltover,* two Panamanian corporations and a Swiss bank brought a breach of contract suit against Argentina in New York federal court, alleging that Argentina unilaterally rescheduled the maturity dates for certain bonds. The contract allowed the plaintiffs to choose the location of payment, and before the breach occurred, the plaintiffs chose a New York bank. The court rejected the contention that § 1605(a)(2) “contains any unexpressed requirement of substantiality or foreseeability.” It instead held that an effect is “direct” if it follows “as an immediate consequence of the defendant’s . . . activity.” Note that, although “immediate” commonly refers to nearness in time, federal courts have interpreted “immediate” in the direct effect context to mean the lack of an intermediate event or the lack of intervention, which is the other definition of “immediate.”

In *Weltover,* the Court found direct effect, reasoning that because Argentina was contractually obligated to pay the plaintiffs in a New York bank, “[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming.” Thus, besides the endorsement of

24 NANDA & PANSIUS, *supra* note 5, § 3:12. The House Report reference stated that “direct effect” should be consistent with section 18 of the Restatement (Second) of Foreign Relations Law, which uses the terms “foreseeable” and “substantial.” *Id.* However, this restatement section was later deemed to be irrelevant to direct effect. *See,* e.g., *Texas Trading & Mill. Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 311 (2d Cir. 1981) (“[Section]18 concerns the extent to which substantive American law may be applied to conduct overseas, not the proper extraterritorial jurisdictional reach of American courts . . .”). Regardless, the Supreme Court later rejected the criteria of foreseeability and substantiality in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). The ultimate result is that legislative history of the FSIA contains no conclusive explicit or inferable definition of this phrase.


26 *Id.* at 617.

27 *Id.*

28 *Id.* at 618 (internal quotations omitted).

29 Lyon v. Agusta S.P.A., 252 F.3d 1078, 1083 (9th Cir. 2001) (“While one meaning of immediate is ‘occurring, acting, or accomplished without loss of time,’ the more relevant meaning in this context is ‘acting or being without the intervention of another object, cause, or agency’”).

30 *Weltover,* 504 U.S. at 617-19 (1992) (the contract allowed the plaintiffs to choose the
C. Cases after Weltover: “Legally Significant Acts” and the Focus on Payment Location Obligations

Weltover’s “immediate consequence” test was not met well. The Tenth Circuit remarked that Weltover’s rejection of foreseeability and substantiality eliminated useful “guideposts” to a statutory phrase that was already “hopelessly ambiguous when applied to any particular transaction.”

The rejection of foreseeability and substantiality was seen as allowing immunity to be destroyed too easily. One commentator humorously summarized the development of sovereign immunity jurisprudence through Weltover as moving from “the king can do no wrong” to “your king can be sued here.” In light of this potential problem, one circuit split in “direct effect” jurisprudence revolves around an additional, judicially created requirement for direct effect. In adding more substance to Weltover’s immediacy test while also preserving the decisiveness of the U.S. place of payment in Weltover, the Second, Eighth, and Ninth Circuits have imposed a judicially created requirement that a foreign location of payment, and before the breach, the plaintiffs chose a New York bank).

31 United World Trade v. Mangyshlakneft Oil Prod. Ass’n, 33 F.3d 1232, 1237 (10th Cir. 1994).

32 See, e.g., David E. Gohlke, Comment, Clearing the Air or Muddying the Waters? Defining “A Direct Effect in the United States” Under the Foreign Sovereign Immunities Act After Republic of Argentina v. Weltover, 18 Hous. J. Int’l L. 261, 296 (1995) (in addressing an argument that Weltover simplified direct effect analysis, the comment responded, “[M]atters are simplified only because the standard against which to judge the directness of an “effect in the United States” has been set so low that virtually any determination will not be a manifest abuse of discretion.”).

33 Id. at 264.

34 NANDA & PANSIUS, supra note 5, § 3:12.

35 Adler v. Federal Republic of Nigeria, 107 F.3d 720, 727 (9th Cir. 1997) (in adopting the legally significant act test, the Ninth Circuit noted that the Second, Eighth and Tenth Circuits also apply this test). The Tenth Circuit later expressly rejected this test. Orient Mineral Co. v. Bank of China, 506 F.3d 980, 998 (10th Cir. 2007) (expressly rejecting the legally significant act test in the Tenth Circuit).
sovereign’s act or omission having a direct effect in the United States must be legally significant (a formulation known as the “legally significant act” rule).\textsuperscript{36} In the breach of contract context, a legally significant act is the failure to render performance (such as making payment) contractually obligated to be performed in the United States (such as payment at a U.S. bank).\textsuperscript{37} Under this rule, if the foreign sovereign had a contractual obligation to make payment to a U.S. party, but the payment location is either never specified or is specified at a foreign location, there can be no direct effect following a breach. Thus, for breach of payment cases, while a U.S. payment location is a \textit{sufficient} condition to find direct effect under

\textsuperscript{36} Guirlando v. T.C. Ziraat Bankasi A.S., 602 F.3d 69, 76 (2d Cir. 2010) (equating acts with omissions); Filetech S.A. v. Fr. Telecom S.A., 157 F.3d 922, 931 (2d Cir. 1998) (“This test requires that the conduct having a direct effect in the United States be legally significant conduct”).

\textsuperscript{37} Adler, 107 F.3d at 727 (the Ninth Circuit stating that because Nigeria was obligated to make payment in New York, “failure to satisfy that obligation necessarily had a direct effect in the United States”); United World Trade v. Mangyshlakneft Oil Prod. Ass’n, 33 F.3d 1232, 1237 (10th Cir. 1994) (finding no legally significant act when “no part of the contract in this case was to be performed in the United States”).

There has been some confusion regarding whether the “legally significant act” has to occur in the U.S. under the “legally significant act” test. The Second Circuit once used the phrase “legally significant conduct in the United States.” Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 34 (2d Cir. 1993). Such formulation has led some authorities and commentators to recognize the test, at least in one variation, to require that the foreign sovereign must actually perform some activity in the United States. See Orient Mineral Co. v. Bank of China, 506 F.3d 980, 998 (10th Cir. 2007); Matthew Bensen, Comment, \textit{The All New (International) “People’s Court”: The Future of the Direct Effect Clause After Voest-Alpine Trading USA Corp. v. Bank of China}, 83 MINN L. REV. 997 (1999) (“an act has ‘legal significance’ only if . . . the foreign government engaged in some activity in the United States”). This formulation naturally leads to confusion in breach of contract situations, because the actual breach of a contract is not itself a physical act tied to a location. In light of this, the Second Circuit has recently provided explicit clarification that in its version of the “legally significant acts” test, only the “direct effect” needs to be in the United States. Guirlando v. T.C. Ziraat Bankasi A.S., 602 F.3d 69, 75-77 (2d Cir. 2010).

In the breach of contract context, \textit{Guirlando} stated that the foreign sovereign’s decision to breach occurs abroad, but the direct effect, if any, would be in the United States. \textit{Id.} at 77. \textit{Guirlando} did not expressly address whether a U.S. payment location is required to satisfy the “legally significant act” test. However, \textit{Guirlando} suggests that a U.S. payment location is still required because (1) it recounts that a direct effect occurred in Weltover because “a foreign state’s failure to make payment in the United States as required by contract,” \textit{id.} at 75; (2) it recounts \textit{Antares}, 999 F.2d 33, in which the circuit found no direct effect because the contract had no provisions for obligations in the United States, \textit{id.} at 77; and (3) it restates the rule that mere injury to a U.S. citizen is insufficient to find a direct effect, \textit{id.}
Weltover, the legally significant act rule makes it also a necessary condition.

The Fifth, Sixth, and Tenth Circuits expressly reject this test. 38 For example, in Voest-Alpine Trading USA Corp. v. Bank of China 39 the Tenth Circuit found direct effect in a banking transaction, even though the Bank of China was not obligated to pay the plaintiff in the United States. 40 Voest-Alpine broadly and expressly held that “financial loss incurred in the United States by an American plaintiff, if it is an immediate consequence of the defendant's activity, constitutes a direct effect.” 41 Circuits requiring a legally significant act can connect contractual obligations with the geographical United States to find direct effect, while in circuits adopting Voest-Alpine’s view, the analysis becomes more open-ended and unpredictable, as there are no guidelines other than “direct.” 42 However, commentators have also argued that the legally significant act requirement is not ideal because contractual clauses specifying performance in the United States by the foreign sovereign essentially become waivers of immunity. 43 Because neither side in this circuit split has an ideal method for finding direct effect, commentators have criticized the Weltover decision for causing the split and eliminating useful guideposts for evaluating a foreign sovereign’s degree of involvement with parties in the U.S. 44

38 Orient Mineral Co. v. Bank of China, 506 F.3d 980, 998 (10th Cir. 2007); Am. Telecom Co., LLC v. Republic of Lebanon, 501 F.3d 534, 540 (6th Cir. 2007) (“the Fifth and Sixth Circuits have renounced any legally-significant-act test”); Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887 (5th Cir. 1998).

39 142 F.3d 887 (5th Cir. 1998).

40 Id. at 893.

41 Id. at 893, 897.

42 See NANDA & PANSIUS, supra note 5, § 3:12 (stating that due to Weltover’s rejection of foreseeability, either “immediate” effect is interpreted as providing jurisdiction in almost every instance where a U.S. person is injured; or “immediate” is interpreted as engrafting requirements of conduct or performance that is or was to be performed in the United States”).

43 Id.

The D.C. Circuit has not explicitly adopted the legally significant act test. However, it has required something similar, at least prior to *Cruise Connections*. For payment situations, the traditional D.C. Circuit rule is that “there is no direct effect unless payment was ‘supposed’ to have been made in the United States.” This rule is based on the D.C. Circuit’s emphasis of the payment obligation in *Weltover*, which used the term “money supposed to have been delivered.” This rule has also been formulated to require either an express agreement of a U.S. payment location or an implied agreement of the same based on customary practice between the parties. Thus, within the payment context, this requirement is similar to what a legally significant act test would require, except that the U.S. payment location agreement may be customary rather than express.

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45 Global Index, Inc. v. Mkapa, 290 F. Supp. 2d 108, 113 (D.D.C. 2003) (“While other circuits have expressly adopted or rejected the ‘legally significant act’ test, the D.C. Circuit follows the . . . more general approach set forth in *Weltover*”).

Interestingly, the D.C. Circuit used the “legally significant act” analysis in *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988) (noting that in cases where courts have found direct effect “something legally significant actually happened in the United States”). However, this analysis was interwoven with the concept of foreseeability. *Id.* After *Weltover*, the D.C. Circuit has not mentioned a legally significant act test.

46 *Global Index*, 290 F. Supp. 2d at 113; *See also* Goodman Holdings v. Rafidain Bank, 26 F.3d 1143 (D.C. Cir. 1994)) (finding no direct effect where “neither New York nor any other United States location was designated as the ‘place of performance’ where money was ‘supposed’ to have been paid” to the plaintiffs).

47 *See Agrocomplect AD v. Republic of Iraq*, 304 Fed. Appx. 872, 873 (D.C. Cir. 2008) (no direct effect where plaintiff failed to show that “payments under its contract with Iraq were supposed to pass through an American bank, as *Weltover* requires”); *Global Index*, 290 F. Supp. 2d at 113 (“the D.C. Circuit follows the same, more general approach set forth in *Weltover*”)

48 Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992) (“Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming”).

49 *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86, 88-89 (D.D.C. 2010) (“In short, before the breach occurs, the parties must have agreed – either expressly or impliedly – that payment would occur in the United States”), rev’d, 600 F.3d 661 (D.C. Cir. 2010).

50 Regarding the technical differences between the two standards, the D.C. District Court has stated that “the Second Circuit’s ‘legally significant act’ test requires express provision of payment in the U.S.,” while the “D.C. Circuit follows the same, more general approach set forth in *Weltover*” where “[t]here is no direct effect unless payment was ‘supposed’ to have been made in the United States.” *Global Index*, Inc. v. Mkapa, 290 F. Supp. 2d 108, 112 (D.D.C. 2003). As mentioned, “supposed” has been interpreted to require either an implied or express agreement. Whether an implied agreement in this sense is actually broader than the type of obligations required by the “legally significant act” test is not
However, as will be discussed, the D.C. Circuit found direct effect in *Cruise Connections* even though there was no agreement for the defendant to render payment in the United States and the payment (at a bank not necessarily in the U.S.) was the defendant’s only obligation to the plaintiff.

**D. Intervening Act Analysis**

Courts have also used alternative definitions of direct effect consistent with *Weltover’s* immediacy definition. The D.C. Circuit has stated that a direct effect is “one which has no intervening element, but, rather, flows in a straight line without deviation or interruption,” a definition recited in *Cruise Connections*. Some courts in other circuits have recited this same definition in whole, while others do so while omitting “straight line without deviation.” *Zedan v. Kingdom of Saudi Arabia* provides one example of an intervening act analysis.

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dispositive to *Cruise Connections*, and is beyond the scope of this note. Although the holding in *Voest-Alpine*, described earlier, was rather sweeping in adopting a bare-minimum immediacy test, the D.C. Circuit probably would have arrived at the same result given the particular facts in *Voest-Alpine* because of the D.C. Circuit’s recognition of customary agreements. The *Voest-Alpine* court found direct effect because the Chinese bank customarily sent payment to a payment location requested by the U.S. party, and the U.S. party requested the payment to be sent to a bank in the United States.

*Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 896 (5th Cir. 1998).

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52 *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 74 (2d Cir. 2010) (citing *Martin v. Republic of South Africa*, 836 F.2d 91, 95 (2d Cir. 1987) which recited this same definition).

53 *Morris v. People’s Republic of China*, 478 F. Supp. 2d 561, 568 (S.D.N.Y. 2007) (noting that “A line of cases interpreting “direct effect” in the context of tort liability has found that an intervening act, or an extended causal chain, can keep an effect from being characterized as direct,” citing *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 237 (2d Cir. 2002); *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1084, n. 3 (9th Cir. 2001) (using an intervening act analysis for a tort case, but not expressly adopting the “flows in a straight line” definition)); see also *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass’n*, 33 F.3d 1232, 1238 (10th Cir. 1994) (“We agree with the district court that UWT’s efforts to provide a guarantee to ISAB were dependent on an intervening factor”).

54 849 F.2d 1511 (D.C. Cir. 1988).
In *Zedan*, a U.S. citizen entered into a contract with Saudi Arabia whereby he would perform construction services in Saudi Arabia. Saudi Arabia breached the contract, but because the plaintiff was in Saudi Arabia at the time, an intervening act—the plaintiff’s return to the United States—stood between the breach and a “direct effect in the United States.”

Thus, the question is not whether the intermediate step was foreseeable (as it was arguably quite foreseeable that the plaintiff would eventually return to the U.S.), but whether there was an intervening act at all. In *Upton v. Empire of Iran*, the roof of an Iranian airport collapsed, causing injury to American citizens. The survivors charged that Iran’s acts “caused the deaths and injuries to Americans which caused direct effects in the United States” (emphasis added). However, the court found no direct effect, stating that the very way the events are phrased “attenuates the connection between the act and the effect.”

Causation in direct effect analysis differs from the concept of proximate cause. In proximate causation, a reasonably foreseeable intervening act does not break the chain of causation. In contrast, foreseeable is not a requirement or a part of the formal analysis after *Weltover*. Cases like *Zedan* suggest that even a very foreseeable intervening cause would still violate the “no intervening element” definition of “direct effect.” After all, the definition of “direct effect” is “no intervening element,” not “no unforeseen intervening element.” The district court in *Cruise Connections* implied that foreseeability has no role in direct effect analysis, stating that the plaintiff’s arguments in favor of finding direct effect were flawed because “there was an intervening element between the defendants’ actions and [plaintiff’s] losses, not that those losses were

55 Id. at 1512.

56 Id.


58 Id. at 265.

59 Id. at 266.

60 Id.

61 See, e.g., Cleveland v. Piper Aircraft Corp., 890 F.2d 1540, 1555 (10th Cir. 1989) (“If an intervening act or cause is one which is reasonably foreseeable, the intervening act does not break the chain of causation”).
unforeseeable to the defendant.” On reversal, the D.C. Circuit did not explicitly apply the concept of foreseeability to the facts, but its analysis of intervening acts suggests that foreseeability might have played some role in qualifying what constitutes an intervening act. The issue of foreseeability is explored in depth in Part III.E.

II. Statement of the Case

In most “direct effect” cases, the presence or absence of a designated payment location is decisive. Unlike these typical cases, *Cruise Connections* was decided on how the foreign sovereign’s actions affected the plaintiff’s third-party contracts.

A. The Facts

The adverse parties were Cruise Connections Charter Management 1 (“Cruise Connections”), a U.S. corporation, and the Royal Canadian Mounted Police (RCMP), a Canadian national police service. In July of 2008, the two parties contracted for Cruise Connections to provide cruise ships to house RCMP personnel on ships berthed in Vancouver Harbor so that RCMP could coordinate security for the 2010 Winter Olympics. The contract price was approximately $54 million (CAD). Cruise Connections had no ships of its own, so it was required to negotiate subcontracts, called


63 Global Index, Inc. v. Mkapa, 290 F. Supp. 2d 108, 113 (D.D.C. 2003) (“As a factual matter, however, in almost every case, in this circuit and others, involving the direct effect exception, the existence or absence of an expressly designated place of payment has been decisive.”).

64 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 665 (D.C. Cir. 2010) (“In both instances, then, RCMP’s termination of the Cruise Connections contract led inexorably to the loss of revenues under the third-party agreements. This is sufficient.”).


67 *Id*. The contract price was initially set at approximately $54 million (CAD) when the parties reached agreement in July, but was increased to approximately $55 million (CAD) in August. Complaint, *supra* note 65, at 4.
chart party agreements, with two American cruise lines: Royal Caribbean International and Holland America Line. Under the charter party agreements, the two cruise lines would supply three ships for approximately $39 million (USD). The agreements also provided that Cruise Connections would guarantee the cruise lines a certain amount of onboard sales revenue, but if the sales revenue exceeded that amount, the excess proceeds, estimated at $4.5 million (USD), would go to Cruise Connections.

As requested by the cruise lines, Cruise Connections asked RCMP to assure that RCMP would pay Canadian taxes incurred by the cruise lines. RCMP initially complied, but just before the cruise lines were set to sign the charter party agreements with Cruise Connections, RCMP reversed its tax commitments and additionally required a 90% letter of credit. As a result, Cruise Connections was unable to secure financing to obtain the ships. RCMP then terminated the contract, citing Cruise Connections’ failure to secure financing in a timely manner. Before RCMP terminated the contract, Cruise Connections had also agreed to lease one of the ships to a U.S. travel agency for $1.25 million (USD) during the ship’s transit from San Diego to Vancouver. The transactions thus consist of three components summarized as follows:


69 Id. at 663-64.

70 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 663-64 (D.C. Cir. 2010).

71 Id.

72 Cruise Connections, 634 F. Supp. 2d 86, 87 (D.D.C. 2010); see also Complaint, supra note 65, at 6.

73 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 663 (D.C. Cir. 2010).

74 Id. at 663-64.
1. The main contract between Cruise Connections and RCMP, allegedly breached by the latter, whereby RCMP would pay Cruise Connections approximately $54 million (CAD);

2. The charter party agreements, thwarted by the cancellation of the main contract, whereby: (2a) Cruise Connections would pay $39 million (USD) to the cruise lines for three ships, and (2b) earn an estimated $4.5 million (USD) from onboard sales revenue;

3. The travel agency agreements, whereby Cruise Connections would receive $1.25 million (USD) to lease a ship in transit to Vancouver, also thwarted by RCMP’s termination of the main contract.

During litigation, RCMP claimed that the main contract entailed no performance taking place in the U.S.\(^{75}\) Eventually, the D.C. Circuit found direct effect based on the charter party and travel agency agreements, even though they were third party in nature.

Cruise Connections filed suit in the United States District Court for the District of Columbia alleging breach of contract by RCMP, represented in name by the Attorney General of Canada.\(^{76}\) RCMP moved to dismiss for the lack of subject matter jurisdiction, arguing that the alleged breach did not cause a “direct effect in the United States.”\(^{77}\) Since RCMP conceded that the action was based upon an alleged breach of contract in connection with Canadian commercial activity,\(^{78}\) jurisdiction thus hinged on the “direct effect” element of § 1605(a)(2).

\(^{75}\) Id. at 665 (citing Brief of Appellees at 23, Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 665 (D.C. Cir. 2010) (No. 08-2054)). This point was also advanced at the district court. Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss at 25, Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 634 F. Supp. 2d 86 (D.D.C. 2010) (No. 08-2054) (“Plaintiffs have not alleged a single aspect of the underlying transaction that was to take place in the United States”).

\(^{76}\) Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 663 (D.C. Cir. 2010).

\(^{77}\) Id. at 663.

B. The District Court’s Finding of No Direct Effect

The district court first examined the loss of payment by RCMP due to its alleged breach of the main contract. Based on Weltover and D.C. Circuit precedent, the district court observed that to find direct effect, the parties must have agreed expressly (such as by a contractual provision) or implicitly (by longstanding custom between the parties) that payment would occur in the United States.79 Although Cruise Connections alleged that RCMP agreed to make payment in the U.S., the district court disagreed and found no such agreement, express or implied.80

Next, the district court found no direct effect in Cruise Connections’ inability to perform the travel agency contract and its inability to secure the cruise line charter party agreements.81 The district court recited the “straight line” definition, quoting Princz v. Federal Republic of Germany,82 wherein the D.C. Circuit wrote, “A direct effect . . . has no intervening element, but, rather, flows in a straight line without deviation or interruption.”83 The district court reasoned that because the travel agency and cruise line charter party agreements were not part of the main contract, Cruise Connections’ inability to perform contractual obligations to the travel agency and cruise lines constituted an “intervening element” between RCMP’s actions and Cruise Connections’ financial loss.84

79 Id. at 88-89. The district court observed that under Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992), and subsequent D.C. Circuit cases, a direct effect requires one of four situations occur before the breach, a list implied by the court to be exhaustive at least for payments scenarios: (1) the contract expressly designated an American payment location; (2) the contract allowed the payee to designate a payment location and the payee designates an American location (citing Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992)); (3) the contract is silent on payment location, but both parties subsequently agree to an American location (citing I.T. Consultants, Inc. v. The Islamic Republic of Pakistan, 351 F.3d 1184 (D.C. Cir. 2003)); and (4) the contract is silent on payment location, the parties had a longstanding and consistent customary practice to use an American payment location (citing Goodman Holdings v. Rafidain Bank, 26 F.3d 1143 (D.C. Cir. 1994)).


81 Id. at 90.

82 26 F.3d 1166 (D.C. Cir. 1994).

83 Cruise Connections, 634 F. Supp. 2d at 90 (quoting Princz, 26 F.3d at 1172).

84 Id.
C. Reversal by the D.C. Circuit

In a unanimous panel decision by Judge Tatel, the D.C. Circuit reversed, finding direct effect because RCMP’s termination led to loss of revenues under the third-party agreements. First, the court acknowledged the dispute regarding an alleged U.S. payment location (designated in Part II.A, supra, as “item 1”), but it surprisingly declined to decide the case on this issue. To the court, it made “no difference where RCMP would have paid Cruise Connections,” as there were links to the U.S. other than mere payment by RCMP sufficient for direct effect. Importantly, by taking its direct effect analysis outside of payment location analysis, the court expanded the category of “effects” that could constitute direct effect.

Next, the court examined Cruise Connections’ loss of potential onboard revenue (item 2b), the subsidiary component of the charter party agreement. The court cited the same Princz rule cited by the district court. It then acknowledged that because onboard revenue would have depended on specific choices of security personnel to purchase drinks or gifts, there might be “merit” to an argument that such dependence created an “intervening event” between RCMP’s alleged breach and onboard revenue, according to the court. But the court also declined to rule on whether the onboard revenue was sufficient for direct effect.

However, because “RCMP’s termination of the Cruise Connections contract led inexorably to the loss of revenue under the third-party agreements” (in addition to the loss of potential on-board revenue), the

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86 Id. at 663-65.

87 Id. The court analyzed the charter party agreement as two separate components: the onboard revenue, and the general charter party agreement. In contrast, the district court analyzed the charter party agreements as a whole, rather than separating out the issue of the onboard revenues. See Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 634 F. Supp. 2d 89-90 (D.D.C. 2010).

88 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 663 (D.C. Cir. 2010).

89 Id.
The court found direct effect. The “loss of revenue” under either the travel agency contract (item 3) or the main component of charter party agreements (item 2a) was sufficient. The court’s reasoning is as follows.

First, it reasoned that “no intervening event stood between RCMP’s termination of the contract and the lost revenues from the travel agency contract and the charter party agreements.” The travel agency agreement was a “done deal,” with nothing left to negotiate, and Cruise Connections would have received a flat fee but for RCMP’s termination. Thus, to the court, the loss of the travel agency agreement followed as “an immediate consequence” of RCMP’s termination of the main contract. Likewise, although the charter party agreements were not formally complete between Cruise Connections and the cruise lines, they would have been completed if not for RCMP’s termination of the main contract with Cruise Connections.

The court then addressed the effect itself, apparently finding that generalized economic effect in the U.S. was sufficient. It pointed out that Weltover found direct effect because money supposed to have been delivered to a U.S. bank “was not forthcoming.” In a questionable analogy, the court then reasoned that because of RCMP’s cancellation, “revenues that would otherwise have been generated in the United States were not forthcoming.” The court then rejected RCMP’s contention that there can be no effect because Cruise Connections was not harmed by the termination. It reasoned that only a “direct effect” is necessary, and

90 Id. at 664.
91 See Id. at 665. The sufficiency of either is suggested by the court’s use of the terms “likewise” and “in both instances” in comparing the charter party agreements and the travel agency agreements (“Likewise, all that remained for the Charter Party Agreements to be formally consummated” and “In both instances, then, RCMP’s termination of the Cruise Connections contract led inexorably to the loss of revenues under the third-party agreements. This is sufficient.”) (internal quotations and brackets omitted).
92 Id. at 644.
93 Id. at 664-65.
94 Id.
95 Id. at 665 (citing Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992)).
96 Id.
97 Id.
“nothing in the FSIA requires that the direct effect in the United States harm the plaintiff.” Here, the thwarting of “revenues that would otherwise have been generated in the United States,” was sufficient to find direct effect.98 “Revenue” here refers to revenue under the third-party agreements, not the loss of RCMP’s payment to the plaintiff Cruise Connections.

Finally, the court cited additional ties to the United States to justify its decision. Although acknowledging that mere harm to a U.S. party is insufficient for direct effect, it found more than mere citizenship: Cruise Connections’ efforts in negotiating the charter party agreements occurred in the United States; at least one of the ships would have moved through U.S. waters to Vancouver; RCMP’s contract termination “thwarted over $40 million (U.S.) worth of cruise-related business in the United States”; and “the travel agency agreement was negotiated in and called for performance in the United States.”99 To the court, these factors distinguished the situations from cases like United World Trade where all the work covered by the contract, including the plaintiff’s obligations, was to be done outside the United States.100

RCMP also argued that it made no agreements effectuating the third party travel agency and charter party agreements, as its contract with Cruise Connections did not even contain provisions of performance outside of Canada. The court responded by stating that the effect only needs to be “direct, [and] not that the foreign sovereign agree that the effect would occur.”101 In responding to the argument that RCMP could not foresee the effects in the United States, the court also recited Weltover’s rejection of a foreseeability criterion.102 Thus, RCMP’s rebuttals were rejected.

III. Analysis of the D.C. Circuit’s Reasoning

In finding direct effect from the “loss of revenue under third-party agreements,” a ruling in tension with established case law, the court attempted to nominally adhere to established rules, but overruled or at least modified them implicitly, while setting forth few clear rules. As a result,
Cruise Connections is best characterized not as a straightforward opinion but as a conglomerate of thoughts that lack consistency when closely scrutinized.

This part of the note first provides a useful frame of reference to examine the case by discussing the significance of the third parties. The analysis then proceeds to explain the flaws in the court’s analysis of the two main facets of direct effect jurisprudence: (1) the contractual obligations of the foreign sovereign, based on the factual circumstances of Weltover; and (2) the “immediate consequence” test, the legal standard established by Weltover. The analysis then examines the remaining parts of the court’s rationale.

A. The Significance of Third Parties in Cruise Connections

Because the finding of direct effect centered on the “loss of revenue under the third-party agreements,” this analysis should begin by examining the legal consequence of the third parties. Two questions are particularly relevant: What if there were only two parties involved such that there could be no third party agreements? In this case, would the court still have found direct effect? For the reasons below, the answer appears to be no, at least not under the same reasoning. This observation, that direct effect was found only because of third party agreements, leads to a strange conclusion that the foreign sovereignty’s immunity is compromised because it happened to be dealing with a U.S. entity that was in turn dealing with additional U.S. third parties.

Assume that Cruise Connections and the third parties were a single entity that entirely operated its own cruise ships, instead of having to subcontract for ships, and one that could sell its own cruise tickets for a transit trip from San Diego to Vancouver as the travel agency did. Here, the scenario in Cruise Connections is reduced to a simple payment transaction and, as the district court recognized, D.C. Circuit case law required agreement of an American payment location for there to be direct effect. The district court found no express or implied agreement between

103 Id.

104 In the actual case, Cruise Connections was to obtain ships from subcontracts (charter party agreements) with third party cruise lines, and had leased one of those ships to a third party travel agency during its transit from San Diego to Vancouver. Cruise Connections, 600 F.3d 661, 663-64 (D.C. Cir. 2010).

105 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 634 F. Supp. 2d
Cruise Connections and RCMP for an American payment location, and this finding was not ruled on during appeal.\footnote{106} Assuming that the district court was correct, then there would have been no direct effect if Cruise Connections and the third parties were a single entity. This hypothetical scenario illustrates that RCMP lost immunity only because it was dealing with a group of entities connected by subcontracts rather than a single entity.

This leads to another question. What difference does it make between dealing with a single party and a middleman party that then subcontracts its obligations? The D.C. Circuit’s opinion offers some starting points. Notably, RCMP alleged that the only connection between the plaintiff and the U.S. was citizenship.\footnote{107} (This argument is relevant to our single-entity hypothetical, wherein citizenship would probably be the only connection with the U.S.) In response to RCMP’s argument, the court said that more than citizenship was involved: negotiation of the third party agreements occurred in the United States, one of the third party agreements was to be performed in the United States, the ships would have sailed through U.S. waters, and the thwarting of $40 million (USD) of cruise-related business in the United States occurred.\footnote{108} These factors relate to dealings between Cruise Connections and the third parties. For example, the $40 million figure is the amount that Cruise Connections would have paid the cruise lines. In our single-entity hypothetical, these factors concerning third party dealing would become irrelevant, as they become internal transactions within the single entity, and thus would not lend additional support to finding direct effect. Similarly, the “loss of revenue under the third-party agreements,” considered sufficient to find direct effect in the actual case, would also be irrelevant as there are no third parties.

\footnote{86, 88-89 (D.D.C. 2010), rev’d, 600 F.3d 661 (D.C. Cir. 2010); See supra note 79 (the district court’s list of four situations required to find direct effect).}

\footnote{106 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661,663-65 (D.C. Cir. 2010) (acknowledging the finding by the district court, but declining to review, as it “made no difference where RCMP would have paid Cruise Connections); Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 634 F. Supp. 2d 86, 89-90 (D.D.C. 2010), rev’d, 600 F.3d 661 (D.C. Cir. 2010).}

\footnote{107 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 665 (D.C. Cir. 2010).}

\footnote{108 Id. at 665 (D.C. Cir. 2010).}
Thus, if Cruise Connections and the third parties had been a single entity, the court probably would not have found direct effect. This observation is underpinned by the court’s statement that “[n]othing in the FSIA requires that the ‘direct effect in the United States’ harm the plaintiff.”\textsuperscript{109} This statement essentially endorses the finding of sufficient direct effect through third-party relationships. The sufficiency of third-party effects puts the result of the case in a strange light because RCMP’s primary goal was obtaining ships, not dealing with a middleman that would compromise its sovereign immunity. But because RCMP did deal with a middleman rather than a cruise line that had ships of its own, it lost immunity in U.S. courts.

B. The Court’s Standard of Revenue Generation “Not Forthcoming” is Based on an Unwarranted Analogy With \textit{Weltover}

Having underlined the significance of the third parties in the case, this note examines the court’s legal analysis. Here, the court questionably analogized \textit{Weltover} to support a proposition that the thwarting of revenue generation in the United States is a “direct effect.” It observed that, in \textit{Weltover}, “money supposed to have been delivered to a New York bank for deposit was not forthcoming.”\textsuperscript{110} It then reasoned that similarly, because RCMP terminated the contract, “revenues that would otherwise have been generated in the United States were not forthcoming.”\textsuperscript{111}

As an initial matter, it is important to emphasize that “revenues” refer to payments among Cruise Connections and the third parties.”\textsuperscript{112} That is, part of RCMP’s payment to Cruise Connection under the main contact would have then been passed onto the cruise lines, thereby generating “revenue” for the cruise lines. Cruise Connections would also obtain “revenue” from the travel agency agreement by using the ships leased from the cruise lines.

Turning to the analogy, several flaws are apparent. First, the court improperly compares payment with generation of revenue. In \textit{Weltover}, the

\textsuperscript{109} Id. at 666.

\textsuperscript{110} Id. (citing Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992)).

\textsuperscript{111} Id.

\textsuperscript{112} The overall context here is “loss of revenues under third party agreements.” Id. (emphasis added).
defendant was contractually obligated to make payment in a U.S. bank.\textsuperscript{113} Such payment can be described as a cash flow into the United States. If, \textit{arguendo}, there are only two parties to a transaction, a cash flow necessarily results in revenue to one party. However, the revenue described here is not between the party sending and the party receiving payment, but is among the receiving party and third parties. Thus, “revenues that would otherwise have been generated in the United States” do not describe a cash flow from the foreign sovereign to the private party. Instead, they describe a local economic activity within the United States unrelated (or perhaps, not “directly” related) to the foreign sovereign.

Second, the analogy effectively deprives the scope of contractual obligation of legal consequence. In \textit{Weltover}, the payment was part of the defendant’s obligation. In contrast, the described revenue generation in \textit{Cruise Connections} contains no such obligations. RCMP may have had an obligation to pay Cruise Connections, but it had no obligations to any of the third parties.\textsuperscript{114} Like the circuits that have placed weight on \textit{Weltover}’s emphasis on contractual obligation apparent from its facts (i.e., those expressly endorsing the legally significant act test),\textsuperscript{115} the D.C. Circuit has traditionally adhered to these same principles.\textsuperscript{116} As some circuits have done,\textsuperscript{117} the D.C. Circuit could have expressly abandoned this stance in favor of a broad reading of \textit{Weltover}, where the facts regarding contractual obligation are ignored and only a bare “immediate” direct effect, in an unrestricted, abstract sense is required. However, the D.C. Circuit tried to remain faithful to its narrow, factual reading of \textit{Weltover}, even though only a broad reading of \textit{Weltover} could have reasonably supported its holding.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{114} The D.C. Circuit’s opinion states that “the contract itself required the ships to come from Holland America and Royal Caribbean cruise lines,” \textit{Cruise Connections}, 600 F.3d 661, 665 (D.C. Cir. 2010), and in its Brief, Cruise Connections emphasized that negotiating the charter party agreements was a “a substantial portion of Cruise Connections’ performance of the contract up to the point that the RCMP breached.” Plaintiffs’ Memorandum of Points and Authorities in Response to Defendants’ Motion to Dismiss at 5, Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 634 F. Supp. 2d 86 (D.D.C. 2010) (No. 08-2054). However, none of these statements refer to are obligations to be performed by RCMP.
\item \textsuperscript{115} NANDA & PANSIUS, supra note 5, § 3:12; See supra Part I.C.
\item \textsuperscript{116} See supra Part I.C.
\item \textsuperscript{117} See, e.g., Orient Mineral Co. v. Bank of China, 506 F.3d 980, 998 (10th Cir. 2007); Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887 (5th Cir. 1998).
\end{enumerate}
\end{footnotesize}
The facts of the case cannot reasonably be compared to *Weltover* because the third party “revenues” were not payments from RCMP and were outside of RCMP’s contractual obligations.

Therefore, the holding of the case is built on flawed reasoning. Because the court endorses a factual comparison with *Weltover*, and yet performs a flawed and implausible comparison, the case only muddles the already confusing area of direct effect jurisprudence. A possible consequence of the court’s reasoning is that if direct effect in the D.C. Circuit still revolves around whether “payment was ‘supposed’ to have been made in the United States,”\(^\text{118}\) the “payment” need not be payment from the foreign sovereign and what qualifies as something “supposed to be made” is not limited to the foreign sovereign’s obligations from express or implied agreement.\(^\text{119}\) Due to the court’s focus on terms like “forthcoming” while generalizing the concept of “payment” to include general economic revenue, *Cruise Connections* may be read to stand for the proposition that a disappointed expectation of economic gain can qualify as an “effect” in the context of “direct effect.”

C. The D.C. Circuit Improperly Found that the Losses Under the Third-party Agreements were “Immediate Consequences” of RCMP’s Actions

*Cruise Connections* turned out to be a logically inconsistent opinion because the court unreasonably analogized the facts with *Weltover*’s facts. But the court did not have to even discuss *Weltover*’s facts in the first place. As mentioned earlier, some circuits broadly read *Weltover* as to merely require an immediate direct effect and nothing else regarding contractual obligations.\(^\text{120}\) The D.C. Circuit could have expressly adopted such a stance and directly proceeded to the bare minimum immediacy analysis without analogizing *Weltover*’s facts at all. Regardless, its “immediacy” analysis was similarly flawed.

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\(^\text{118}\) Global Index, Inc. v. Mkapa, 290 F. Supp. 2d 108, 113 (D.D.C. 2003); See also Goodman Holdings v. Rafidain Bank, 26 F.3d 1143 (D.C. Cir. 1994)) (finding no direct effect “neither New York nor any other United States location was designated as the ‘place of performance’ where money was ‘supposed’ to have been paid” to the plaintiffs”).

\(^\text{119}\) See *supra* note 79 (the district court’s list of four situations required to find direct effect).

\(^\text{120}\) See *supra* Part I.C.
As mentioned, the rule in the D.C. Circuit, consistent with the meaning of “immediate,” is that a “direct effect . . . has no intervening element, but, rather, flows in a straight line without deviation or interruption.”\(^{121}\) To the district court, Cruise Connection’s inability to perform those obligations stood as an “intervening element” between RCMP’s conduct and the third party losses because the cruise line and travel agency agreements were not part of RCMP’s contract with Cruise Connections.\(^{122}\) In reversing, the D.C. Circuit instead focused on the “done deal” aspect of those agreements to find no intervening element.\(^{123}\) Since either of the charter party agreements or the travel agency agreement was alone sufficient for direct effect,\(^{124}\) each will be discussed in turn.

1. The Travel Agency Agreement

It is hard to justify the court’s finding that Cruise Connections’ loss from the travel agency agreement followed immediately from RCMP’s termination of the main contract. Even though the agreement was a “done deal” in the sense that Cruise Connections was set to receive the payment, it still could have received the payment even if RCMP terminated the contract. The lack of an immediate effect is illustrated by the multiple-steps from RCMP’s termination to Cruise Connections’ loss: (1) RCMP terminates the main contract; (2) Cruise Connections is unable to fulfill its intended agreement with the cruise lines; (3) the cruise lines withdraw from their nearly-complete agreement with Cruise Connections; (4) Cruise Connections is unable to supply the cruise ships to perform the travel agency agreement; and (5) Cruise Connections is unable to obtain the payment from the travel agency. Here, steps 2, 3, and 4 are intervening factors, i.e., factors standing in between steps 1 and 5. When there are intervening factors, the loss should not be deemed to follow as an immediate consequence.

\(^{121}\) Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 664 (D.C. Cir. 2010) (quoting Prinz v. Federal Republic of Germany, 26 F.3d 1166, 1172 (D.C. Cir. 1994)).


\(^{123}\) Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 66-65 (D.C. Cir. 2010).

\(^{124}\) See supra note 91.
Furthermore, the loss did not flow in a “straight line without deviation or interruption” from step 1 to step 5 because the events could have unfolded differently. For example, Cruise Connections could potentially have found a substitute deal with the cruise lines. Furthermore, even without a substitute deal, the cruise lines might not have actually pulled out, given that their decision to do so was based on their own independent assessment of the situation. More importantly, Cruise Connections could have found another way to supply a ship before performance was due.125 The D.C. Circuit’s “done deal” argument only shows that Cruise Connections would have made revenue if RCMP had not breached. It does not necessarily mean that Cruise Connections would have lost revenue if RCMP had breached. Although this distinction might not be meaningful if causation is determined by foreseeability, it is significant in the context of intervening factor analysis in determining immediacy. Here, whether the travel agency agreement would have been fulfilled depended on Cruise Connections’ ability to perform, which stands as an intervening factor dependent on factors other than RCMP’s breach.

When faced with circumstances involving third-party agreements, including “done deal” agreements, federal courts have not been favorable to third-party losses in finding direct effect. In Millicom International Cellular, S.A. v. Republic of Costa Rica,126 the defendants’ conduct allegedly caused the plaintiffs to default on a third party investment agreement.127 Regarding losses under the third-party agreement, the D.C. District Court held that “any consequences of the defendants’ conduct affected only the plaintiffs’ obligations to third parties and therefore cannot . . . cause a ‘direct effect’ in the United States.”128

Similarly, in Corzo v. Banco Central de Reserva del Peru,129 the defendant’s conduct allegedly caused the plaintiff to breach contracts with

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125 RCMP solicited bids in April 2008, and allegedly breached in September of that year, still well before the Olympics. Complaint, supra note 65, at 4-7.


127 Id. at 17.

128 Id. at 22. Likewise, repercussion felt by their shareholders and creditors also failed to establish direct effects because they were “derivative harm . . . too indirect to qualify as an ‘immediate consequence’ of the defendants’ conduct.”

129 Corzo v. Banco Cent. De Reserva Del Peru, 243 F.3d 519 (9th Cir. 2001).
computer companies in the United States. However, the Ninth Circuit held that the losses from third party contracts did not follow as immediate consequences, but were rather, “at best secondary or incidental results” of the defendant’s actions. These cases illustrate a general principle that a resulting failure to fulfill third-party obligations, as in Cruise Connections’ inability to fulfill the travel agency agreement, is insufficient to constitute direct effect.

2. The Charter Party Agreements

It is similarly difficult to justify the court’s reasoning that the loss of the charter party agreements followed immediately from RCMP’s termination of the main contract. Here, we have a potential series of events as follows: (1) RCMP terminates the main contract; (2) Cruise Connections is unable to fulfill its intended agreement with the cruise lines; (3) the cruise lines withdraw from their nearly-complete agreement with Cruise Connections, thereby resulting in (4) the “loss of revenues.” The same analysis used for the travel agency agreement applies. Here, the chain involves the intervening step of Cruise Connections’ ability to fulfill a third-party obligation, and the intervening step of the cruise lines’ withdrawal from contract negotiations. Because of the intervening steps, the loss did not occur immediately.

Two additional factors support the lack of immediacy in the loss that effectively weakens the link from event 3 (withdrawal from the nearly-complete agreement) to event 4 (the “loss of revenues”). First, unlike the “done deal” travel agency agreement, the cruise lines never actually completed their contract with Cruise Connections. Because there were no actual obligations, it is unreasonable to state that the cruise lines lost something when they did not have the revenue secured in the first place. The situation is perhaps better described as a loss of opportunity for revenue, rather than a direct loss of revenue. In a chain of events, actual loss of revenue is at least one step removed from a loss of opportunity for revenue.

130 Id. at 522.
131 Id.
133 Id. at 663.
Secondly, the particular loss of potential revenue recognized by the court was suffered not by Cruise Connections but by the cruise lines, who would have received $39 million (USD) from Cruise Connections for the lease of the ships.\textsuperscript{134} RCMP was contracting only with Cruise Connections, not with the cruise lines. Tying RCMP’s dealings with the cruise lines’ losses requires a leap from one course of dealing to another course of dealing, as well as two leaps among parties—from defendant to plaintiff and from plaintiff to third party.

For all of the above reasons indicating intervening events before the losses in revenue, the court’s finding of direct effect is therefore questionable.

D. Traveling Through U.S. Waters and the Place of Negotiations

A central principle among some circuits is that mere harm to a U.S. citizen is insufficient to find direct effect.\textsuperscript{135} The D.C. Circuit acknowledged the validity of this principle\textsuperscript{136} but then went on to list multiple factors showing that “Cruise Connections relies far more than its U.S. citizenship” because the contract encompassed work to be done in the United States: (1) Cruise Connections negotiated the charter party agreements in the United States; (2) “at least one of the ships would have moved through U.S. waters to Vancouver”; (3) “the termination of the contract thwarted over $ 40 million (U.S.) worth of cruise-related business in the United States”; and (4) “the travel agency agreement was negotiated in and called for performance in the United States.”\textsuperscript{137} The third factor (economic harm) and the performance portion of the fourth factor are probably the most important and the merits of which have already been discussed in detail. This leaves us with the factors of the ship’s travelling through U.S. waters (factor 2) and negotiation of the third party agreements in the U.S (factor 1 and part of factor 3).

\textsuperscript{134} Id.

\textsuperscript{135} See, e.g., Guirlando v. T.C. Ziraat Bankasi A.S., 602 F.3d 69, 78 (2d Cir. 2010) (“The mere fact that a foreign state’s commercial activity outside of the United States caused physical or financial injury to a United States citizen is not itself sufficient to constitute a direct effect in the United States”).

\textsuperscript{136} Cruise Connections, 600 F.3d at 665 (“RCMP next argues that harm to a U.S. citizen, in and of itself, cannot satisfy the direct effect requirement. True enough . . .”).

\textsuperscript{137} Id.
Although these factors show that the contract implicated obligations (on the part of the Cruise Connections\textsuperscript{138}) that resulted in performance in the U.S., the court does not articulate their relevance to direct effect analysis. Indeed, there are problems with using these factors in direct effect analysis. It is unclear how the place of negotiation of the third party agreement is relevant, because it is not an effect resulting from any action of RCMP, but a precursor event. The factor of the ship’s moving through U.S. waters is also unsatisfactory. In \textit{Zedan v. Kingdom of Saudi Arabia}, a U.S. citizen was hired on the phone to perform road construction work for Saudi Arabia.\textsuperscript{139} Therefore, the contract effectively required that he travel through U.S. territory to reach Saudi Arabia, but this traveling did not prevent the court from denying direct effect.\textsuperscript{140} Although there’s a factual difference between one person traveling by plane and an entire crew traveling on a boat, no clear legal distinction based on established rules is offered by the court.\textsuperscript{141}

Nevertheless, the court distinguished \textit{Zedan} on the basis that the work in \textit{Zedan} was to be done “entirely” abroad.\textsuperscript{142} Although the court did not expressly state that Cruise Connection’s contract with RCMP required work to be done in the U.S., the court implies that there is significance in how Cruise Connections was required to negotiate with the specific American cruise lines.\textsuperscript{143} This resulted in negotiations actually occurring in

\textsuperscript{138} Cruise Connections emphasized that negotiating the charter party agreements was a “a substantial portion of Cruise Connections’ performance of the contract up to the point that the RCMP breached.” Plaintiffs’ Memorandum of Points and Authorities in Response to Defendants’ Motion to Dismiss at 5, Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 634 F. Supp. 2d 86 (D.D.C. 2010) (No. 08-2054).

\textsuperscript{139} Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511 (D.C. Cir. 1988).

\textsuperscript{140} \textit{Id.}

\textsuperscript{141} Another flaw with the ship argument is that movement through U.S. water is due to the travel agency agreement, wherein the ship would move from San Diego to Vancouver. The D.C. Circuit’s opinion noted that “the contract itself required the ships to come from Holland America and Royal Caribbean cruise lines,” citing to Exhibit 6, Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 634 F. Supp. 2d 86 (D.D.C. 2010) (No. 08-2054), showing that the main contract identified and recognized the origin of the ships from the specific cruise lines. But if the travel agency agreement was not in place, the ships could have arrived from a foreign port without entering U.S. waters.

\textsuperscript{142} Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 665 (D.C. Cir. 2010).

\textsuperscript{143} \textit{Id.} at 662 (“The contract required Cruise Connections to subcontract with two U.S.-based cruise lines”).
the United States and the further involvement of American third parties. Yet, the court gives no express rule as to how to evaluate the plaintiff’s fulfillment of its obligations, or even a clear statement that it’s relevant. Confusingly, the court stated that the FSIA “requires only that [the] effect be ‘direct,’ not that the foreign sovereign agree that the effect would occur.”\textsuperscript{144} RCMP had argued that it never agreed to a “single aspect of the underlying transaction” to take place in the United States.\textsuperscript{145} Perhaps the court is suggesting that as long as Cruise Connections did something in the United States to obtain the ships required by the contract, there would be direct effect even if the negotiations with the American cruise lines could have been held outside the U.S., and even if the ships could have sailed in from a foreign port without crossing U.S. waters.

If the court intended to make the plaintiff’s performance in the United States (whether it was actually obligated by the contract or reasonably followed) a substantial factor in direct effect analysis, such a rule would also lack basis in established case law, which has focused on the foreign sovereign’s obligations rather than the plaintiff’s obligations. While some opinions have commented on the plaintiff’s obligations generally, such opinions did not find them decisive.\textsuperscript{146} The commercial activities exception, where it implicates direct effect analysis, deals with acts “in connection with a commercial activity of the foreign state.”\textsuperscript{147} Placing emphasis on plaintiff obligations entails the possibility of straying too far from the purpose of the statute. In the end, \textit{Cruise Connections} offers no clear guidelines to analyze plaintiff obligations of a contract breached by the foreign state, if such obligations are relevant at all.

\textsuperscript{144} \textit{Id.} at 665.

\textsuperscript{145} \textit{See supra} note 75 and accompanying text.

\textsuperscript{146} \textit{See, e.g.,} Am. Telecom Co., LLC v. Republic of Lebanon, 501 F.3d 534, 541 (6th Cir. 2007) (holding that its situation “where both parties’ performance is to occur entirely in a foreign locale, does not, standing alone, produce an immediate consequence in the United States, and therefore, does not ‘cause a direct effect in the United States’”) (emphasis added); UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia, 581 F.3d 210 (5th Cir. 2009) (holding that “[a]n effect of a contract is also direct when it is to be primarily performed in the United States” but the contract also specified a U.S. payment location, which the court acknowledged to be dispositive). Thus, in both of these cases, the plaintiff’s obligations in the U.S. (or lack thereof) were not dispositive.

\textsuperscript{147} 28 U.S.C. § 1605(2) (2010).
E. Did Foreseeability and Substantiality, Supported by Policy Considerations, Play a Role in the Decision?

Despite the numerous problems in the court’s reasoning, the result itself is perhaps not unfair. After all, if the allegations are correct, RCMP did cause commercial disruption, even if the disruption was not properly immediate under the above analysis. Furthermore, RCMP understood that it was dealing with a middleman and that the middleman (Cruise Connections) was dealing with American cruise lines. Cast in this light, it is not unreasonable to say that RCMP could have foreseen the consequences relating to the third party contracts. Was the court strained to find direct effect because the third party effects were foreseeable?

Some commentators have observed that even though Weltover rejected foreseeability as a required condition, certain opinions have used foreseeability as an implicit standard to finding direct effect (or lack thereof). Regarding one Second Circuit case, Antares Aircraft, which

148 And furthermore, foreign immunity is only a matter of jurisdiction, and even then, only one possible method of denying jurisdiction; nothing on the merits was decided in this case.

149 See NANDA & PANSIUS, supra note 5, § 3:12 (commenting that one could argue that the Supreme Court did not abandon foreseeability, as the facts in Weltover “probably satisfied a foreseeability test of direct effect”; and that in cases such as Hanil Bank v. PT. Bank Negara Indonesia (Persero), 148 F.3d 127 (2d Cir. 1998), and Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33 (2d Cir. 1993) essentially employed a foreseeability standard).

Regarding Cruise Connections, Nanda and Pansius write that “Judge Tatel’s opinion in Cruise Connections lends some support to a foreseeability analysis” and that in view of decisions such as this one, “foreseeability remains the easiest means to distinguish situations where a defendant knowingly invokes legally significant activity in the United States from those where the only real connection to the United States is that plaintiff is a U.S. person.”

The Second Circuit has recently stated that “To be a ‘direct’ effect within the meaning of the third clause of the commercial activity exception, the impact need not be either substantial or foreseeable.” Guirlando v. T.C. Ziraat Bankasi A.S., 602 F.3d 69, (2d Cir. 2010). The use of the terms “need not be” implies that foreseeability (and substantiality) may sometimes be a sufficient condition.

The Second Circuit has also propagated the rule that in Weltover’s immediacy test, “‘the requisite immediacy’ is lacking where the alleged effect ‘depend[s] crucially on variables independent of the conduct of the foreign state.’ Guirlando, 602 F.3d at 75 (citing Virtual Countries, Inc. v. Republic of South Africa, 300 F.3d 230 (2d Cir. 2002), wherein the court denied direct effect for a suit alleging that South Africa’s announcement of intentions to challenge the plaintiff’s ownership “southafrica.com,” impaired the
involved a tort injury to a particular individual, a commentator observed that it was fortuitous (i.e. unforeseeable) that the individual happened to be a U.S. citizen, and the court did not find direct effect.\footnote{Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33 (2d Cir. 1993).} Contrast this with \textit{Cruise Connections}, wherein RCMP knew its actions were affecting multiple American parties. Did the D.C. Circuit implicitly require intervening event analysis to be qualified such that only unforeseen intervening events are intervening, or that foreseeable events are not considered intervening? Note that the district court considered intervening events and foreseeability to be unrelated concepts in direct effect analysis: “\textit{Cruise Connections’} problem is that there was an intervening element between the defendants’ actions and its losses, not that those losses were unforeseeable to the defendant.”\footnote{\textit{Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.}, 634 F. Supp. 2d 86, 90 (D.D.C. 2010), \textit{rev’d}, 600 F.3d 661 (D.C. Cir. 2010).} The D.C. Circuit did not address the above statement made by the district court, and in the end provides no clear rules. The court only recites \textit{Weltover}’s explicit rejection of foreseeability to support its statement that direct effect does not require that “the foreign sovereign agree that the effect would occur.”\footnote{Id. at 666.} If foreseeability is an appropriate standard, then what is it that must be foreseeable—the plaintiff’s harm, the third parties’ harm, or the substantiality of the harm? Regardless, no further discussion of foreseeability is provided, and no form of the word “foreseeability” or “foreseeable” appears anywhere else in the opinion. Thus, while the court appears to acknowledge that foreseeability is not a required condition, it declined to comment on whether foreseeability can be a sufficient condition. Thus, the role of foreseeability in direct effect jurisprudence remains enigmatic. However, one can also argue that the lack of discussion on foreseeability is not because the court does not consider foreseeability to be relevant, but that the court does not want to be limited by foreseeability.

\footnote{\textit{NANDA & PASIUS, supra} note 5, \S \textit{3:12}.}
Foreseeability is not often a clear-cut issue, and a court would probably prefer not to have to rely on foreseeability.

On the other hand, Weltover’s explicit rejection of substantiality was not cited, and for a good reason. There is a clear, reoccurring tone in the court’s opinion, exemplified by statements such as “the alleged breach resulted in the direct loss of millions of dollars worth of business in the United States.”\(^{154}\) It appears that the court felt the need to protect the economic interest of domestic parties, which it probably felt was substantially impaired. But, again, there is no explicit endorsement of substantiality, and we are left to speculate the role it might play in future opinions.

IV. Direct Effect Jurisprudence After Cruise Connections

A. Implications of Cruise Connections

The following six points highlight the case’s potential impact on direct effect jurisprudence. Notably, the common thread is the lack of certainty and definiteness in this area of the law. Cruise Connections offers very little in express rules. Its departure from D.C. Circuit precedent, when compounded with the lack of clear rules, probably only increases the ambiguity of direct effect jurisprudence.

1. **Even if the foreign sovereign’s only obligation was to make a payment, an express or implied agreement for a U.S. payment location is no longer necessary to find “direct effect,” even though it is sufficient to find “direct effect”**

Prior to Cruise Connections, a finding of direct effect based on an alleged failure to render payment required that the parties expressly or implicitly (i.e., by custom) agreed to a U.S. payment location.\(^ {155}\) In Cruise Connections, although the district court focused on whether a U.S. payment location was designated,\(^ {156}\) the D.C. Circuit declined to rule on this issue.

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154 Id. at 666.

155 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 634 F. Supp. 2d 86, 88-89 (D.D.C. 2010). (“In short, before the breach occurs, the parties must have agreed – either expressly or impliedly – that payment would occur in the United States”).

156 Id. at 88-90.
altogether and instead decided the case on third party agreement losses.\footnote{Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 663-65 (D.C. Cir. 2010) (in deciding the case on other grounds, the court remarked, “It thus makes no difference where RCMP would have paid Cruise Connections.”).} \textit{Cruise Connections} therefore establishes that a U.S. payment location is not required to find direct effect. The effect of the holding, read broadly, is that, although an express or implied agreement for a U.S. payment location is sufficient for direct effect, it is not required. Thus, when there is no such agreement, in the D.C. Circuit, it is now necessary to look beyond the geographical elements of the foreign sovereign’s contractual obligations. The next point pertains to where we should actually look to find direct effect in such circumstances.

2. Harm to the plaintiff is not necessary (or sufficient) for “direct effect”

One of the few explicit rules in the case is that “[n]othing in the FSIA requires that the ‘direct effect in the United States’ harm the plaintiff.”\footnote{Id. at 666.} This statement, combined with the court’s acknowledgement that mere harm to a U.S. citizen is insufficient,\footnote{Id. at 665.} results in the rule that harm to the plaintiff party is neither necessary nor sufficient for direct effect. Of course, although this rule is explicit in language, it is anything but a useful guideline because it answers only what does \textit{not} always constitute direct effect. If interpreted broadly, this statement may open the floodgates to pleading third-party effects as a way of defeating immunity or designing contracts with immunity-destroying third-party effects in mind.

3. “Direct effect” may be found where (1) the overall scope of the breached contract entails substantial commercial activity in the U.S. and (2) breach of the contract caused general economic disruption across an industry

\textit{Cruise Connections} does emphasize two factors that may be important to find direct effect: (1) the fact that RCMP’s contract with Cruise Connections necessarily or naturally entailed commercial activity, including commercial transactions, inside the United States; and (2) that the
breach of the contract caused generalized economic disruption of the cruise ship industry.

The first factor is based on the court’s emphasis on a U.S. place of performance and place of negotiation of the third party.\textsuperscript{160} Inquiry into this factor would focus not on RCMP’s own contractual obligations, but the larger overall scope of activity related to the transaction, or perhaps foreseen or implied in the transaction. The court noted that the contract “required” the ships to come from American cruise lines.\textsuperscript{161} In this context, “require” does not refer to RCMP’s contractual obligations, but the act necessary to fulfill (by non-defendant parties) in order to complete the contract. Of course, as suggested earlier, a contract between a U.S. and a foreign party could very easily require some activity in the United States, such as operational work in the U.S. party’s American headquarters needed to carry out a contract, or for in the case of a single person, traveling through U.S. airspace to perform the contract abroad. Thus, it is difficult to draw a line as to what type of activity in the U.S. would be substantial enough to give rise to direct effect, or how closely tied the U.S. activity must be to the defendant’s contract.

The second factor is based on the court’s emphasis that RCMP’s conduct caused revenue under the third-party agreements to be “not forthcoming.”\textsuperscript{162} But because mere harm to a U.S. citizen is not sufficient for direct effect, the case also suggests that the key factor is the multitude of U.S. parties. Such a view is supported by the court’s remark that RCMP’s conduct “thwarted over $40 million (U.S.) worth of cruise-related business in the United States,”\textsuperscript{163} where the phrase “cruise-related business” implies interaction among parties, particularly of a related industry. Therefore, this second factor is very similar to the first factor (extent of activity in the United States) in that emphasis is placed on U.S. activity related to the defendant’s contract. The case suggests that a knowing use of a third party in a deal raises the likelihood of direct effects. However, other than the facts of \textit{Cruise Connections}, there are no standards to determining how many third parties, and how involved those third parties must be, to sustain

\textsuperscript{160} See \textit{supra} Part II.D.

\textsuperscript{161} \textit{Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.}, 600 F.3d 661, 662 (D.C. Cir. 2010).

\textsuperscript{162} \textit{Id.} at 665.

\textsuperscript{163} \textit{Id.}
industry-wide economic effect. In other words, it is not clear how much more is needed beyond mere harm to a U.S. business entity.

Because the factors suggested above are not accompanied by explicit rules, their implications will depend on whether Cruise Connections will be read broadly or be limited to its particular facts. It remains to be seen how federal courts, including those outside the D.C. Circuit, will use Cruise Connections in future cases.

4. Weltover’s standard that an effect is “direct” if it follows as an “immediate consequence of the defendant’s activity” remains devoid of substance and thus gives the court a large amount of discretion

The inefficacy of Weltover’s immediacy is, of course, an old critique, but Cruise Connections highlights the problem once again. As discussed, the court’s intervening act analysis (where the presence of an intervening act eliminates immediate consequence) contains numerous flaws. However, the D.C. Circuit was able to take advantage of the absence of a clear standard governing “intervening act” or “immediate consequences” to effectively rule that the intermediate steps in the causal chain leading to the third-party losses were not intervening. Part of the problem with intervening act analysis is that it is unclear as to what constitutes an “act.” Since there is no precise standard, a court can easily collapse all the third-party mechanisms into a simplified timeline, something like: “RCMP breached the contract, thus causing lost revenue,” as it did here (as opposed to a chain-of-events description like: RCMP breached the contract, causing the cruise lines to balk, causing Cruise Connections to be unable to obtain ships for the travel agency agreement, causing Cruise Connections to breach its agreement with the travel agency). Thus the case underlines the lack of substance in the “immediate consequence” standard in Weltover, the same concern that led to much criticism and additional judicial requirements such as the Second Circuit’s legally significant acts test and the D.C. Circuit’s apparent “express or implied agreement” standard (which Cruise Connections has qualified as not absolute). It is quite easy to see that either statutory or additional Supreme Court clarification is needed in this area. Until then, under the unduly vague “immediate consequence” standard, courts like the D.C. Circuit in Cruise Connections have utmost discretion in declaring what is considered a direct effect.

5. Substantiality, and possibly also foreseeability, may still be part of direct effect analysis to some informal
extent, even though they were rejected as requirements in Weltover.

Although Weltover rejected foreseeability and substantiality as requirements, cases such as Cruise Connections show that they might still serve an informal role. It is not unreasonable to say that RCMP could have foreseen the third-party effects, given its knowledge of circumstances, and this consideration might have influenced the court’s decision. But in the end, we have no clear guidelines as to how foreseeability affects “intervening” or “straight line” in the D.C. Circuit’s definition of “direct effect,”164 particularly when the Court expressly cited Weltover’s rejection of a foreseeability requirement. However, given that federal courts are currently endowed with vast discretion under Weltover’s immediacy standard, one can argue that they would prefer not to expressly bring foreseeability into play as it could restrain that discretion if it were to become a more formal part of the analysis.

While Weltover’s similarly rejected substantiality, the theme of substantiality permeates the Cruise Connections opinion, as seen by the court’s emphasis on disruption of economic activity that could easily be described as substantial. Still, with no explicit endorsement of substantiality, which we can infer only by the tone of the opinion, the exact role of substantiality is ultimately left unclear. If substantiality is an implicit standard, we are left with no guidelines as to how substantial the effect must be. Would it make a difference if the amount in question is $40,000 rather than $40 million?

6. Cruise Connections may stand for the proposition that a breach of a contract between a foreign nation and a U.S. business entity will generally result in destruction of foreign sovereign immunity.

The court’s focus on terms like “forthcoming” while generalizing Weltover’s concept of “payment” to include general economic revenue suggests that any disappointed expectation of economic gain relating to a contract can qualify as an “effect” in “direct effect” analysis. Although “effect” might be potentially qualified by factors such as whether the scope of the contract entailed U.S. commercial activity, and whether a breach

would cause disruption across an industry, these factors aren’t clear standards or rules. If Cruise Connections is read broadly, these factors are not difficult barriers to finding direct effect, since a contract between a U.S. party, particularly a business entity, and a foreign nation could easily have at least some economic effect on U.S. commercial activity. The non-requirement of harm to the plaintiff further expands the potential “effects” that can destroy immunity.

As for whether an effect is “direct,” this case has shown that the intervening act analysis is very malleable, at least in the D.C. Circuit, and it is not too difficult to find something that is “direct.” These observations, when combined, leads to a reasonable conclusion that if Cruise Connections is read broadly, an alleged breach of a contract between a foreign nation and a U.S. business entity will usually result in destruction of foreign sovereign immunity. Stated another way, if the contract envisions significant U.S. commercial activity, direct effect is likely found, under a broad interpretation of Cruise Connections.

Accordingly, the sovereign immunity defense is weaker under this rule than under a rule that requires the agreement to include payment in the U.S. Of course, it remains to be seen how broadly the case will be read by later opinions.

**B. Potential Solutions to Current Problems**

Cruise Connections touches on two broad issues. The first issue is that given the purpose of the FSIA to balance the convenience of aggrieved private claimants with the “promotion of comity and harmony between the United States and other nations,”165 has Cruise Connections upset the balance by making it too easy for immunity to be destroyed? Possibly, if not probably—but a precise inquiry into this question would require determination of the ideal amount of immunity, a question beyond the scope of this note.

The second issue is the lack of uniformity and consistency in direct effect jurisprudence, as illustrated by this case. A lack of uniformity and consistency can operate as a barrier to efficient commercial transaction between parties because it creates uncertainty. The challenge, of course, is finding a nexus to the United States between § 1602(a)(2)’s “commercial

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activity of the foreign state elsewhere” (i.e., outside the U.S.) and some harm or “effect” inside the United States. If the statutory language of “direct” is kept, it will be necessary for the Supreme Court to provide more clarification, particularly regarding intervening act analysis and place of performance provisions. Another possibility is to firmly insert foreseeability into the analysis. Foreseeability is advantageous in that it is commonly used in causation analysis.166 On the other hand, if foreseeability becomes the main criterion (such as if “direct effect in the United States” is amended to something like “loss in the United States that the foreign state had reason to foresee as a probable result of its activity”), direct effect may be too easily found in breach of contract cases between sophisticated parties, wherein any breach would likely be foreseen to have an adverse effect on the other party. Congress would have to determine if such a relaxation of immunity is appropriate.

Yet another possibility, one that would offer a higher degree of immunity, is to examine the geographical scope of the contract to see if the foreign state bargained for the plaintiff to perform substantial act to take place in the United States. This approach would follow one possible reading of Cruise Connections, based on its emphasis of the negotiation of the third party agreements in the United States as pertinent to direct effect. However, further clarification would be needed as that what counts as sufficient acts to be performed by the plaintiff, and this approach would also alter the current framework (albeit a vague framework) by focusing on the contractual context of the breach rather than the effects of the breach and by treating contract cases as inherently different from tort cases.

Finally, further revision of direct effect jurisprudence should revisit the issue of third-party effects. A simple statutory amendment of “effect” to be “loss to the plaintiff” would resolve this particular ambiguity.

Conclusion

By finding that lost revenue under the plaintiff’s third party agreements constituted direct effect, under a rationale that lacks soundness in legal reasoning as well as basis in established case law, Cruise Connections has decreased the efficacy of immunity under the Foreign Sovereign Immunities Act. More importantly, the case’s departure from

166 See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981) (“Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made”).
established principles regarding intervening act analysis and contractual or customary payment at a U.S. payment location, while setting forth few clear standards, adds more uncertainty to an already disjointed area of the law that is very much in need of legislative or Supreme Court guidance.
When Comprehensive Falls Short:
The Comprehensive Iran Sanctions, Accountability, and Divestment
Act of 2010

Jennifer M. Kline*

Introduction

In mid-1995, Lloyds TSB Bank, plc (“Lloyds”) started manually removing and manipulating the names and addresses of its long-term Iranian banking clients to enable the processing of financial transactions in the United States.1 Lloyds’ “Payment Services Aide Memoire” removes any mention of Iran in wire transfer payments to circumvent the additional time, cost, and difficulty of retrieving assets seized by the United States under the International Emergency Economic Powers Act (“IEEPA”).2 Senior management at Lloyds defended this policy because United States sanctions subjected legitimate Iranian bank transactions to delays and uncertainties.3 Lloyds is not the only foreign financial institution to knowingly evade United States economic sanctions against Iran and promote its commercial interests.4 Today there is a constant tension between generating financial profits and promoting United States foreign policy goals to halt the funding of terrorism and the proliferation of weapons of mass destruction (“WMD”).

The latest addition to the United States’ arsenal of sanctions against Iran is the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010 (“CISADA”).5 CISADA consists of a set of targeted economic

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2 Id.

3 Id.

4 See infra Part II.

sanctions called “smart sanctions.” 6 CISADA prohibits or imposes strict conditions on correspondent banking with foreign financial institutions linked to funding Iran's WMD program. 7

Correspondent banking consists of providing of financial transactions, including deposits and payments, by a United States financial institution for a foreign financial institution 8 that does not have a physical presence in the United States. 9 Correspondent banking runs a high risk of money laundering for illegal activities, including funding Iran's WMD program, because foreign financial institutions can access the United States banking system for a simple fee. 10 Common correspondent banking activities such as wire transfers and payable through accounts (“PTA”) are difficult to track. 11 Wire transfers process transactions quickly without screening for the client's identity or the purpose of the transaction, while PTAs allow unidentified subaccount holders in foreign financial institutions to write checks and make deposits in the United States without transactional oversight. 12

6 See Peter L. Fitzgerald, Managing "Smart Sanctions" Against Terrorism Wisely, 36 New Eng. L. Rev. 957, 960-61 (2002). Traditional sanctions historically placed trade restrictions on entire countries. Smart sanctions, on the other hand, precisely target key individuals and companies to achieve policy goals in a specific geographic area of concern. This reduces the humanitarian costs often associated with blanket country-wide sanctions. Id.


11 Id.

12 Id.
Transactions shrouded in secrecy are conducive to money laundering. As a result, a comprehensive regulatory system is necessary to combat the risk of money laundering.\textsuperscript{13} CISADA limits the ability of foreign financial institutions to assist Iran’s WMD program through correspondent banking in the United States,\textsuperscript{14} cutting Iran off from important access to the United States financial system. Access to this system is critical for Iran due to the high demand for United States dollars\textsuperscript{15} to finance both legitimate and illegitimate\textsuperscript{16} Iranian business.\textsuperscript{17} If the United States is to achieve its security objectives with respect to Iran’s funding of WMD programs, the United States must preclude Iran from using the United States Financial System.

Nonetheless, the effectiveness of CISADA depends on its compliance and enforcement tools. These include auditing, self-reporting, certification,\textsuperscript{18} and due diligence.\textsuperscript{19} It remains unclear whether these tools

\textsuperscript{13} Id. at 22.


\textsuperscript{15} \textit{See} Press Release, U.S. Dep't of the Treasury, Remarks by Treasury Secretary Paulson on Targeted Financial Measures to Protect Our National Security (June 14, 2007), https://ustreas.gov/press/releases/hp457.htm (affirming that the United States is the hub of the global financial system upon which illicit actors rely); \textit{see also} MINORITY STAFF OF THE S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 107TH CONG., REPORT ON CORRESPONDENT BANKING: A GATEWAY FOR MONEY LAUNDERING, at 11-12 (2001), available at http://hsgac.senate.gov/psi_finalreport.pdf (stating that most foreign financial institutions use United States dollars and United States correspondent banking accounts to provide international services).

\textsuperscript{16} \textit{See} S.C. Res. 1929, at 1-4, U.N. Doc. S/RES/1929 (June 9, 2010) (resolving that Iranian efforts to develop a nuclear program are illegitimate because they are violations of international law). In particular, Iran has failed to meet the International Atomic Energy Agency's requirements for information exchange under its safeguard agreement. Iran has further neglected to comply with five United Nations Security Council Resolutions to suspend uranium enrichment activities. \textit{Id}.

\textsuperscript{17} \textit{See} U.S. Dep't of the Treasury, \textit{supra} note 15 (revealing that financing of Iranian business has fallen dramatically and the risk of financing Iranian business with non-United States currencies remains high).

\textsuperscript{18} Certification requires United States financial institutions to verify that foreign financial institutions do not engage in prohibited activities.

will successfully generate compliance with CISADA and achieve United States national security goals, namely to prevent proliferators accessing the United States financial system to pay for WMD components. CISADA’s main enforcement agency, the United States Department of the Treasury’s (“Treasury”) Office of Foreign Assets Control (“OFAC”), relies on institutional self-reporting of violations as its primary compliance mechanism, making CISADA’s effectiveness uncertain.

This comment proposes that self-reporting from the private financial industry creates perverse incentives that CISADA’s current compliance tools cannot overcome, largely due to a lack of regulatory clarity and oversight from OFAC. Creation of new legal enforcement tools and clarification of CISADA compliance conditions are necessary to deny Iranian WMD proliferator access to United States correspondent banking accounts.

Part I of this comment provides relevant background information on the applicable money laundering statutes upon which CISADA is modeled. Part II discusses recent bank settlement cases related to violations of United States financial sanctions against Iran. Part III analyzes the lack of incentive for self-reporting and the lack of regulatory clarity and oversight that will impair CISADA’s effectiveness in preventing illicit actors from accessing the United States financial system. Finally, part IV proposes legal tools and language clarification to improve compliance with and enforcement of CISADA.

Part I: Background

CISADA’s statutory language for restrictions on correspondent banking with foreign financial institutions is modeled closely on existing United States anti-money laundering laws. In particular, CISADA utilizes


22 See 22 U.S.C.A. § 8513 (e)(1)(A)(D) (requiring reporting of transactions or suspicious activity under due diligence procedures relating to Iranian proliferation); Fitzgerald, supra note 6, at 962-64 (arguing that the effectiveness of OFAC’s sanction implementation relies on voluntary compliance, but OFAC and the business community have combative relations).
many of the financial sanctions in Section 311 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), which is recognized as the most effective United States legislation for financial “smart sanctions.” In turn, much of the USA PATRIOT Act's success is derived from the expansion and amendment of the money laundering principles established by the Bank Secrecy Act of 1970 ("BSA"). As a result, it is essential to overview the BSA and USA PATRIOT Act anti-money laundering provisions to understand the implications of CISADA's correspondent banking restrictions more completely.

The BSA was the first federal legislation targeting money laundering. In 1970, Congress enacted the BSA to prevent the use of financial institutions as intermediaries for money laundering and other crimes. The BSA requires financial institutions to keep detailed records of transfers. This paper trail assists United States law enforcement to detect


26 Id.

27 OFFICE OF THE COMPTROLLER OF THE CURRENCY, supra note 10, at 1. The BSA was enacted to prevent the use of banks as intermediaries for criminal activity such as money laundering and drug trafficking. The modern BSA codifications combats gunrunning, fraud, and terrorism. Id.

and prevent money laundering and deters United States financial institutions from engaging in illegal activities.\textsuperscript{29} Since a financial institution’s assets may be subject to forfeiture if traceable to money laundering activities,\textsuperscript{30} the BSA’s provisions encourage financial institutions to obtain information about potential clients in advance to avoid facilitating money laundering.\textsuperscript{31} In addition, the BSA requires financial institutions to make timely reports of suspicious activity related to transactions that might signify money laundering or other illegal activities.\textsuperscript{32} Finally, the BSA requires financial institutions to create internal programs for personnel training, independent testing, and internal controls to ensure compliance with the BSA’s reporting and recordkeeping requirements.\textsuperscript{33} CISADA implements similar recordkeeping and reporting requirements, as well as similar civil and criminal penalty structures for violations.\textsuperscript{34}

Congress has amended the BSA several times to enhance its effectiveness,\textsuperscript{35} including the expansive anti-money laundering regulations

\textsuperscript{29} See §§ 121, 123, 84 Stat. at 1116-17 (codified as amended at 12 U.S.C. §§ 1951, 1953 (2006)) (recognizing the usefulness of recordkeeping for investigations, proceedings, and intelligence and counterintelligence activities); see also OFFICE OF THE COMPTROLLER OF THE CURRENCY, supra note 10, at 1 (outlining the use of reporting and recordkeeping to investigate and deter money laundering and illicit activities).


\textsuperscript{32} Suspicious Activity Report, 12 C.F.R. § 21.11 (2010); Reports by Banks of Suspicious Transactions, 31 C.F.R. § 103.18 (2010); see also OFFICE OF THE COMPTROLLER OF THE CURRENCY, supra note 10, at 11-12 (noting that the BSA requires diligent reporting of suspicious activity).

\textsuperscript{33} Procedures for Monitoring Bank Secrecy Act (BSA), 12 C.F.R. § 21.21 (2010); see also OFFICE OF THE COMPTROLLER OF THE CURRENCY, supra note 10, at 5-7 (stating that internal compliance programs are required to ensure compliance with the BSA).


\textsuperscript{35} OFFICE OF THE COMPTROLLER OF THE CURRENCY, supra note 10, at 1.
enacted in 2001 under Title III, the “International Money Laundering Abatement and Anti-Terrorist Financing Act,” of the USA PATRIOT Act.36 Title III contains additional provisions to increase information gathering, recordkeeping, monitoring, reporting, and penalties to counter illegal activities such as money laundering.37 Subtitle A implements the following international anti-money laundering measures: (1) minimum and enhanced due diligence standards for correspondent accounts; (2) customer identification verification methods; (3) a prohibition on correspondent banking with shell banks;38 (4) forfeiture of assets and additional penalties for violations of the Act; and (5) improved international cooperation and information sharing for financial institutions.39 CISADA has expressly incorporated the enhanced due diligence requirements outlined in Subtitle A.40

Subtitle B establishes additional amendments and improvements to the BSA,41 focusing on reporting, anti-money laundering compliance programs, and civil and criminal penalties for violations.42


38 See MINORITY STAFF OF THE S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 107TH CONG., REPORT ON CORRESPONDENT BANKING: A GATEWAY FOR MONEY LAUNDERING, at 1, 13 (2001), available at http://hsgac.senate.gov/psi_finalreport.pdf (defining a shell bank as a bank with no physical presence, such as an office or staff, in any country). Shell bank transactions are conducted almost entirely through correspondent banking accounts. Id. at 13.


41 See §§ 351-66, 115 Stat. at 320-36 (Subtitle B); Financial Crimes Enforcement Network, supra note 36 (reporting that the USA PATRIOT Act expands liability for reporting).

provides for more stringent reporting and recordkeeping obligations for a broader range of financial transactions, including filing reports on currency transactions over $10,000 and systematic reporting of suspicious activities.\textsuperscript{43} To help law enforcement prevent and prosecute money laundering activities more efficiently,\textsuperscript{44} these requirements apply to banks and non-traditional financial institutions, such as money transmitting businesses, commodity traders, brokers, and dealers.\textsuperscript{45} Furthermore, Subtitle B increases civil and criminal penalties for reporting and compliance program violations, creating stronger deterrence of illegal activities for traditional and non-traditional financial institutions.\textsuperscript{46} CISIDA incorporates subtitle B's penalties, reporting, and recordkeeping requirements.\textsuperscript{47}

Finally, Subtitle C enacts measures to combat currency smuggling and counterfeiting crimes.\textsuperscript{48} The main implementation tools are forfeiture and prosecution using extraterritorial jurisdiction.\textsuperscript{49} The extraterritorial jurisdiction amends the BSA and the Fraud Statute, 18 U.S.C. § 1029, to apply to any person outside of United States jurisdiction that commits or conspires to commit a fraudulent monetary transaction under United States law using a financial institution within United States jurisdiction.\textsuperscript{50} This has particularly important implications for the extraterritorial reach of CISADA.


\textsuperscript{44} Financial Crimes Enforcement Network, \textit{supra} note 36.


OFAC can now prosecute foreign financial institutions using United States correspondent accounts on behalf of actors linked to Iran's WMD program, regardless of how tangential the relationship may be between the foreign institution and the nefarious actors.51

In addition to the above financial regulations under Title III, the USA PATRIOT Act amends IEEPA to enhance OFAC's ability to implement sanctions passed under IEEPA's authority.52 IEEPA provides the President of the United States with the authority to investigate, regulate, or prohibit financial transfers to a foreign country or national upon declaration of a national emergency stemming from an extraordinary threat to national security, foreign policy, or the economy.53 The USA PATRIOT Act expands the role of OFAC in executing the President's national emergency powers by clarifying OFAC's authority to block assets of suspicious actors, thus preventing the flight of assets.54 The USA PATRIOT Act further authorizes OFAC to use classified information to make designations of suspicious actors55 and to enforce economic and trade sanctions.56

CISADA enhances the compliance measures and penalties implemented under the USA PATRIOT Act by extending United States restrictions on foreign financial institution transactions within the United


54 Newcomb, supra note 52.

55 Id.

States banking system. CISADA was implemented in part as a response to the Financial Action Task Force’s (“FATF”) mandate to address new and emerging threats to global financing. FATF imposes strict restrictions on all United States correspondent accounts with foreign financial institutions to prevent money laundering that might facilitate Iranian proliferation efforts. In particular, the statute requires United States financial institutions engaged in correspondent banking with foreign financial institutions to perform audits and report suspicious activities related to Iranian proliferation efforts. Additionally, United States financial institutions must certify that foreign clients are not knowingly engaging in proliferation-related activities and must establish due diligence policies pursuant to the USA PATRIOT Act. Finally, CISADA allows the Secretary of the Treasury to waive restrictions and penalties imposed on foreign financial institutions as necessary for the national interest of the United States.

Ultimately, CISADA is designed to drastically reduce access to the United States financial system by actors intending to finance Iran’s WMD program. CISADA is the cumulative effort by the United States


58 See 22 U.S.C.A. § 8513. The intergovernmental organization FATF develops policies to combat evolving financial system threats, such as money laundering and terrorist and WMD proliferation financing. In February 2010, the FATF appealed to its members to protect their correspondent accounts, which might be used by Iran to circumvent money laundering and terrorism countermeasures. Id.


government to counteract money laundering and illicit financial transactions that undermine national security. As a result, the statute targets correspondent banking transactions using tools enacted by the BSA and the USA Patriot Act: reporting and due diligence requirements; civil and criminal penalties; and extraterritorial jurisdiction.

Part II: Case Studies of United States Sanction Enforcements Against Foreign Banks

Before examining CISADA’s specific implementation issues, it is useful to understand the trend in recent OFAC financial sanction enforcement cases. Since December 2009, OFAC has announced three settlements concerning major international banks that violated IEEPA regulations related to Iran. Brief case studies of OFAC’s settlements with Credit Suisse AG (“Credit Suisse”), Lloyds, and Barclays Bank PLC (“Barclays”) reveal that self-reporting of financial sanction violations remains sporadic. Furthermore, foreign financial institutions intentionally remove or manipulate client identification information to evade financial sanctions.

The first OFAC settlement case in this series of financial sanction enforcements against Iran involved the Swiss bank, Credit Suisse. Credit Suisse contacted OFAC in 2006 concerning a potential sanction violation

64 See 22 U.S.C.A. §§ 8512-31 (West 2010); supra notes 20, 25, 36 and accompanying text.


67 Barclays Bank PLC, supra note 66; Lloyds TSB Bank, plc, supra note 1, at 1-8; Credit Suisse AG, supra note 66.

68 Id.

69 Credit Suisse AG, supra note 66.
involving United States securities.\textsuperscript{70} In its investigation, OFAC discovered that Credit Suisse had also systematically violated United States fund transfer restrictions with Iran since the 1990s.\textsuperscript{71} Specifically, Credit Suisse omitted or removed location and entity information from fund transfer forms to conceal the identity of an Iranian bank as the originator of the fund transfer requests. Credit Suisse then referenced itself as the ordering institution instead.\textsuperscript{72} Credit Suisse even developed an internal operating procedure specifically to evade United States sanctions.\textsuperscript{73} This system utilized code names and limited the personnel who knew the Iranian client’s identification, deliberately excluding Credit Suisse’s compliance department from this knowledge.\textsuperscript{74} In order to avoid criminal prosecutions for these calculated sanction violations, Credit Suisse agreed to pay a $536 million fine, create an electronic database of internal documents related to the fund transfers from 2002 to 2007, and implement and certify sanction compliance training and a written bank-to-bank payment transfer policy.\textsuperscript{75}

Less than a week later, OFAC announced another settlement for Iranian financial sanction violations by the United Kingdom’s Lloyds bank.\textsuperscript{76} Lloyds manipulated and deleted wire transfer information relating to Iranian bank clients from the early 1980s until November 2003.\textsuperscript{77} Lloyds’ senior management continued to remove information to expedite wire transfers and intentionally evade OFAC filters designed to detect identification information for sanctioned actors.\textsuperscript{78} The New York County District Attorney’s Office apprised OFAC of these IEEPA violations in

\textsuperscript{70} Id. at ¶ 3.

\textsuperscript{71} Id. at ¶¶ 3, 4, 7.

\textsuperscript{72} Id. at ¶ 8.

\textsuperscript{73} Id. at ¶ 13.

\textsuperscript{74} Id.

\textsuperscript{75} Credit Suisse AG, Office of Foreign Assets Control, MUL-473923, (Deferred Prosecution) ¶¶ 3, 6 (Dec. 16, 2009), available at http://www.jdsupra.com (search for “MUL-473923”).

\textsuperscript{76} Lloyds TSB Bank, plc, supra note 1.

\textsuperscript{77} Id. at ¶¶ 6, 12, 13.

\textsuperscript{78} Id. at ¶ 8.
2007 and OFAC investigated.\textsuperscript{79} Lloyds ultimately agreed to pay a $217 million settlement, provide all United States payment messages from 2002 to 2007 to OFAC, and implement an annual audit of United States payments with an independent consultant.\textsuperscript{80}

Finally, OFAC settled with the United Kingdom’s Barclays in August 2010 for violations of IEEPA financial sanctions relating to Iran.\textsuperscript{81} Barclays voluntarily disclosed its sanction violations to OFAC in May 2006.\textsuperscript{82} The voluntary disclosure revealed that Barclays systematically obscured and removed identification information of sanctioned Iranian financial institutions, including Iran’s Central Bank, from 1987 until at least 2004.\textsuperscript{83} Barclays also utilized a wire transfer filter to identify and interdict sanctioned party transactions in order to remove offending information or substitute Barclay’s sundry account number prior to processing payments.\textsuperscript{84} Barclays agreed to pay a $176 million fine and annually review its policy and procedures for sanctions compliance with an independent consultant.\textsuperscript{85} The settlement also included employee training to deal with United States financial sanctions and the creation of a database of United States payment messages from 2000 to 2007.\textsuperscript{86}

As illustrated, foreign financial institutions are intentionally and systematically evading Iranian financial sanctions.\textsuperscript{87} These case studies further demonstrate how OFAC’s enforcement of financial sanctions relies heavily upon voluntary disclosures or information provided by other

\textsuperscript{79} Id. at ¶ 3.

\textsuperscript{80} Id. at ¶¶ 5, 17-19.

\textsuperscript{81} Barclays Bank PLC, \textit{supra} note 66.

\textsuperscript{82} Id. at ¶ 3.

\textsuperscript{83} Id. at ¶¶ 4-6.

\textsuperscript{84} Id. at ¶¶ 7, 8.

\textsuperscript{85} Id. at ¶¶ 21, 22.


\textsuperscript{87} Barclays Bank PLC, \textit{supra} note 66; Lloyds TSB Bank, plc, \textit{supra} note 1, at 1-8; Credit Suisse AG, \textit{supra} note 66.
government agencies. Although Barclays voluntarily disclosed its intentional removal and manipulation of identification information to circumvent United States sanctions, Credit Suisse’s institutionalized efforts to evade Iranian financial sanctions were only discovered as part of an investigation of a different violation. This relatively haphazard approach to sanction enforcement is indicative of the potential implementation issues OFAC will face in trying to implement CISADA effectively for correspondent banking functions.

Fortunately, the studies also reveal that OFAC’s enforcement of financial sanctions resulted in high settlement payments, as well as provisions for continued oversight by OFAC for the violating institutions. Credit Suisse, in particular, agreed to a hefty $536 million fine, which may deter correspondent banking violations under CISADA in the first place. In addition, since Barclays paid less than a quarter of Credit Suisse’s settlement fine for virtually identical sanction violations other financial institutions currently in violation of CISADA may choose to disclose their violations rather than wait to be detected. Nonetheless, OFAC’s reliance on sanction enforcement by other agencies and voluntary compliance by

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88 Id.

89 Barclays Bank PLC, supra note 66, ¶ 3-6.

90 Credit Suisse AG, supra note 66.


92 Credit Suisse AG, supra note 75, ¶ 3.

93 Barclays Bank PLC, supra note 66; Credit Suisse AG, supra note 66.
financial institutions\textsuperscript{94} poses serious concerns for the proper implementation and enforcement of CISADA.

**Part III: Implementation Issues – the Lack of Institutional Incentive**

CISADA, like its statutory predecessors, relies on financial institutions to self-report suspicious activities concerning client transactions in order to meet their reporting, compliance program, and certification obligations.\textsuperscript{95} Unfortunately, financial institution incentives to comply with additional monetary transaction restrictions do not inherently coincide with the U.S. foreign policy objectives underlying the promulgation of CISADA. In fact, CISADA’s main foreign policy objective of blocking Iranian WMD proliferation access to the United States financial system\textsuperscript{96} leaves no room for financial institutions to consider profit margins or entrepreneurialism. Although CISADA provides for stringent civil and criminal penalties,\textsuperscript{97} the specter of monetary fines and imprisonment may be insufficient to deter financial institutions from pursuing profitable correspondent banking activities with questionable foreign financial institutions. This would almost certainly undermine self-reporting mechanisms as the primary line of defense against illicit utilization of correspondent bank accounts.

CISADA’s threatened penalties may be insufficient for several reasons. First, financial institutions are private institutions that must remain competitive in order to survive. Much like any private corporation, financial institutions undergo a cost-benefit analysis in determining to what extent they will comply with sanctions.\textsuperscript{98} As a result, financial institutions must balance tangible and intangible costs and benefits when determining whether to pursue transactions potentially linked to Iranian proliferation.

\footnotesize{\textsuperscript{94} Barclays Bank PLC, \textit{supra} note 66; Lloyds TSB Bank, plc, \textit{supra} note 1; Credit Suisse AG, \textit{supra} note 66.}


\footnotesize{\textsuperscript{96} U.S. DEP’T OF THE TREASURY, \textit{supra} note 20.}

\footnotesize{\textsuperscript{97} 22 U.S.C.A. § 8513(e)(2).}

\footnotesize{\textsuperscript{98} See Fitzgerald, \textit{supra} note 6, at 981 (arguing that in a competitive marketplace even legitimate businesses will be disinclined to comply with regulations unless their competitors do the same, especially when the risk of being detected for a violation appears low).}
Second, the incentives to comply with the statute are not apparent given the ambiguity in CISADA’s language and OFAC’s relatively weak implementation capabilities.

A. Tangible and Intangible Cost-Benefit Considerations

Cost-benefit analysis for financial institutions focuses in large part on tangible concerns, such as the potential loss of profits due to the exclusion of transactions with certain foreign clients.\textsuperscript{99} Due to the severe consequences of illicitly assisting Iranian actors,\textsuperscript{100} a high profit margin exists for risky financing of Iranian actors through correspondent banking accounts.\textsuperscript{101} In addition, sanctions put United States companies at a competitive disadvantage with respect to potentially lucrative projects in Iran.\textsuperscript{102} Indeed, the costs of sanctions can be very large for United States financial institutions, especially when a major economic force, such as Iran and its oil market, is prohibited from United States investment or financial transactions.\textsuperscript{103} Based on these incentives, financial institutions are disinclined to perform extensive due diligence that limits their business operations and profitability with foreign financial institutions if they do not think their competitors will do the same.\textsuperscript{104}


\textsuperscript{100} See Orde F. Kittrie, New Sanctions for a New Century: Treasury’s Innovative Use of Financial Sanctions, 30 U. PA. J. INT’L L. 789, 797-98 (2009) (detailing that eighty banks globally have withdrawn from Iran and leading financial institutions have scaled back their business with Iran).

\textsuperscript{101} Cf. Breckinridge, supra note 99, at 2460-62 (illustrating how companies that avoided United States sanctions have obtained lucrative Iranian projects).

\textsuperscript{102} See id. (declaring that United States companies were excluded from valuable Iranian projects because of sanctions).

\textsuperscript{103} See CONGRESSIONAL BUDGET OFFICE, THE DOMESTIC COSTS OF SANCTIONS ON FOREIGN COMMERCE, at IX, 6, 10 (1999), available at http://www.cbo.gov/fp/docs/11xx/doc1133/tradesanc.pdf (reporting that sanctions increase the cost of foreign investment and exporting and importing goods and services to sanctioned companies, particularly in markets with no readily available substitutes).

\textsuperscript{104} See Fitzgerald, supra note 6, at 981 (contending that in a competitive marketplace businesses will be disinclined to screen all transactions in compliance with regulations unless their competitors do the same).
The lack of available information about OFAC sanction enforcement cases further complicates the cost-benefit analysis of lucrative correspondent banking accounts, leading financial institutions to feel insulated from the risk of being detected for violations. In particular, OFAC does not publicize information about the effectiveness of its sanctions implementation efforts, making the risk of prosecution appear minimal. Until the early 1990s, OFAC only directly provided major commercial banks with information about rules implementing sanctions. OFAC also posted notices of licenses and changes in the Treasury Department Annex Building and responded to inquiries from other institutions that had compliance questions. Even today, OFAC uses a variety of distribution methods that contain varying levels of detail, including the Federal Register, press releases, and OFAC’s website.

OFAC also does not enforce economic sanction regulations strictly due to resource constraints and policy considerations of balancing business needs with anti-terrorism and nonproliferation objectives. In the past, the United States’ interest in avoiding conflicts with companies and political allies resulted in erratic enforcement of financial sanctions. More importantly, OFAC has a lack of funding for its ever-enlarging role as the implementation and enforcement branch of economic sanctions.

105 See Fitzgerald, supra note 6, at 981 (maintaining that businesses perceive the risk of OFAC enforcement of a sanction violation as low).

106 Id.


108 Id. at 121.

109 Id.

110 See id. at 123, 128.

111 Fitzgerald, supra note 6, at 963, 980-81.


113 See Breckinridge, supra note 99, at 2452 (citing the Clinton administration’s sporadic enforcement of the Iran and Libya Sanctions Act to avoid upsetting foreign allies).

114 See Fitzgerald, supra note 6, at 962 (outlining the funding issues for OFAC’s vast sanction program duties that impair OFAC’s ability to handle additional sanctions); Office
OFAC’s workforce and budget are distributed among licensing and sanction program responsibilities, in addition to enforcing civil penalties for violations. Furthermore, OFAC oversees nineteen sanction programs. As a result of OFAC’s limited capacity to oversee and enforce its numerous sanction programs, it is likely that financial institutions are going to trivialize the risk of being prosecuted for a violation of CISADA. It may be quite profitable to pursue risky behavior due to this low likelihood of penalties, and, as a result, the incentive to self-report violations is virtually nonexistent.

Despite an increase in suspicious activity reports filed by financial institutions since the enactment of the USA PATRIOT Act in 2001, due diligence has not necessarily improved. Rather, financial institutions may be participating in “defensive filing” to protect themselves from penalties without improving their oversight. As a result, OFAC must now sift of Foreign Assets Control, supra note 56.


117 Fitzgerald, supra note 6, at 962.


119 See Michael Levi & Peter Reuter, Money Laundering, 34 CRIME & JUST. 289, 340-42 (2006) (suggesting that the increase in suspicious activity reporting may be a result of banks filing to protect themselves without improving due diligence).

through an even higher volume of potentially non-credible suspicious activity reports in order to find legitimate threats, further taxing OFAC's capacity.\textsuperscript{121}

The cost-benefit analysis of complying with financial regulations on correspondent banking accounts also includes intangible considerations, such as damage to an institution's reputation should it be prosecuted for violating CISADA.\textsuperscript{122} The damage to reputation could be devastating given the highly emotional United States foreign policy objectives behind CISADA: the prevention of instability and danger that will almost certainly exist if Iran, a sponsor of extraterritorial terrorism, successfully develops a nuclear weapons program.\textsuperscript{123} In addition, foreign financial institution violators could damage the reputation of countries in which they are jurisdictionally domiciled, potentially causing political and financial conflicts for countries that have supported United Nations sanctions against Iran's nuclear program.\textsuperscript{124}

Finally, the cost-benefit analysis for financial institutions includes the actual costs of complying with the strict financial sanctions under CISADA.\textsuperscript{125} OFAC creates a new set of regulations every time new economic sanctions must be implemented.\textsuperscript{126} However, OFAC has not

\textsuperscript{121} Cf. Ganguli, supra note 120 (warning that the increased number of tenuously based suspicious activity reports poses a serious challenge to the Financial Crimes Enforcement Network’s institutional capacity).

\textsuperscript{122} See Benjamin Mojuye, What Banks Need to Know About the Patriot Act, 124 BANKING L.J. 258, 272 (2007) (stating that financial institutions will likely suffer severe reputation damage for anti-money laundering sanction violations).

\textsuperscript{123} See U.S. DEP'T OF THE TREASURY, supra note 20 (emphasizing the threat an Iranian nuclear weapon poses to United States and global security); Andrew Hudson, Not a Great Asset: The UN Security Council’s Counter-Terrorism Regime: Violating Human Rights, 25 BERKELEY J. INT’L L. 203, 206 (2007) (reporting on the stigma attached to being a terrorist supporter); U.S. Department of State, Background Note: Iran, http://www.state.gov/r/pa/ei/bgn/5314.htm (last visited Jan. 13, 2011) (declaring that Iran is known for supporting terrorism abroad).

\textsuperscript{124} See Kittrie, supra note 100, at 816-17 (emphasizing the reputational risk to foreign financial institutions and foreign governments of handling illicit business with Iran that is contrary to international law); U.S. Dep't of the Treasury, supra note 20.

\textsuperscript{125} See Peter L. Fitzgerald, Smarter "Smart" Sanctions, 26 PENN ST. INT’L L. REV. 37, 51 (2007) (arguing that OFAC needs to make the sanction compliance costs for financial institutions more commercially feasible).

\textsuperscript{126} Fitzgerald, supra note 6, at 966.
collaborated with the regulated community to ensure that implementation is commercially practicable for all members. The burden of performing audits, reporting, certification, and due diligence in determining the identification and innocence of all users of a correspondent banking account under CISADA may be prohibitive for smaller financial institutions.

The implementation costs for CISADA are diverse. Compliance program costs include: (1) additional personnel for oversight; (2) personnel training to identify and manage correspondent banking risks; (3) software for automated review of wire transfers; and (4) productive hours spent on performing compliance tasks, including filing forms, certification, coordination between bankers and compliance personnel, and creating effective implementation programs. All of these costs potentially detract from a financial institution's ability to engage in activities that are more profitable. In addition, the virtually limitless amount of public information available about certain foreign financial institutions could make performance of due diligence prohibitively time consuming and expensive. Furthermore, obtaining certification that foreign financial institutions do not provide services to shell banks and obtaining lists of foreign bank customers may be impracticable under foreign bank secrecy laws in certain countries.

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127 Fitzgerald, supra note 6, at 964, 981 (advising OFAC to consult with the regulated community to determine what compliance programs would not be overly burdensome).


132 See Special Due Diligence Programs for Certain Foreign Accounts, 72 Fed. Reg. 44,768, 44,771 (Aug. 9, 2007) (outlining potential issues obtaining lists of foreign bank customers for correspondent banking accounts because of privacy laws in foreign countries); see also MINORITY STAFF OF THE S. PERMANENT SUBCOMM. ON
OFAC has responded to these concerns by emphasizing a risk-based approach to the implementation of CISADA regulations. This approach focuses on the history of the foreign financial institution’s practices, as well as the nature of the correspondent banking account, to determine the probability that the foreign financial institution will engage in illicit correspondent banking activities. Unfortunately, this highly discretionary risk-based approach highlights a major challenge to successful implementation of CISADA. The lack of clear obligations in the regulatory language of CISADA undermines compliance due to general uncertainty concerning requirements and the possibility of abuse of language ambiguities. This is particularly problematic because the success of the reporting, certification, and compliance program requirements under CISADA depends almost exclusively on self-reporting by financial institutions. Financial institutions are faced with a compliance paradigm that provides an incentive to cheat: either over-comply with suspicious activity reporting to avoid violation penalties without improving due diligence procedures or avoid self-reporting entirely since it is statistically unlikely that OFAC will enforce any violations. As a result,


133 See Special Due Diligence Programs for Certain Foreign Accounts, 71 Fed. Reg. at 502 (regulating that United States financial institutions must maintain adequate due diligence policies and procedures to evaluate the money laundering risks posed by correspondent accounts and to detect and report any suspected or known money laundering activity under OFAC’s risk-based approach to implementing CISADA). Factors to consider in the risk-based approach include the nature of: (1) the foreign financial institution’s business and markets; (2) the United States institution’s relationship with the foreign institution; and (3) the correspondent account type. Id.

134 Id. at 502-03.

135 See Fitzgerald, supra note 125, at 38 (positing that greater certainty regarding regulatory obligations would improve compliance).


137 See id. § 8513(e)(1)(B); Fitzgerald, supra note 6, at 964 (stating that the effectiveness of OFAC’s regulations depends more upon voluntary compliance by businesses than OFAC enforcement).

138 Ganguli, supra note 120.

139 Cf. Fitzgerald, supra note 6, at 981 (arguing that businesses will not screen all
financial institutions may become complacent in reviewing their correspondent banking accounts, with potentially dire consequences for United States national security.

B. Mixed Incentives Stemming from Ambiguous Language and Requirements

The lack of clarity in CISADA’s statutory language and subsequent OFAC regulations creates additional uncertainty for financial institutions beyond the confusion caused by OFAC’s ambiguous risk-based approach to implementation. For instance, certification that a foreign financial institution’s customer is not knowingly engaging in activity to assist Iran's WMD program is required to be “to the best of the knowledge of the domestic financial institution.” This gives little guidance about the minimum requirements that qualify as having “knowledge” about illegal correspondent banking activities under CISADA.

OFAC recently attempted to address this problem by promulgating definitions for terms in CISADA. OFAC designated “knowingly” to mean that an actor had “actual knowledge, or should have known, of the conduct, the circumstance, or the result.” Of transactions in compliance with regulations in order to remain competitive, especially when the risk of OFAC enforcement of a sanction violation is perceived as low).

140 Cf. Lawrence A. Cunningham, Evaluation and Response to Risk by Lawyers and Accountants in the U.S. and E.U., 29 J. Corp. L. 267, 305 (2004) (explaining that audit controls under the USA PATRIOT Act provide assurances but also can create complacency).

141 See U.S. DEP’T OF THE TREASURY, supra note 20 (emphasizing the importance of freezing money intended for WMD proliferation).


usually interpreted to mean “direct or clear knowledge,”[^146] the definition for “should have known” in OFAC’s regulations remains discretionary. The term “should have known” could refer to constructive knowledge acquired when “a person exercising due diligence should have discovered the probability” or had “reason to suspect the probability of any manner of wrongdoing.”[^147] However, the term could instead refer to a person acquiring knowledge through actual perception or observation of the event or activity.[^148] These varied standards of knowledge enable financial institutions to determine their compliance with CISADA in a number of different ways, depending on what is most convenient to their purposes, which will likely result in less effective overall implementation of the statute.

CISADA’s statutory language is equally ambiguous when defining due diligence requirements, referring simply to the USA PATRIOT Act's due diligence procedures.[^149] Under the USA PATRIOT Act, there is a requirement of general due diligence to identify actors and report suspicious activities.[^150] The procedures for general due diligence only expressly include the use of “appropriate” policies and procedures to detect money laundering and ascertain the identity of nominal and beneficial owners.[^151] The difficulty in interpreting these due diligence standards under CISADA becomes apparent in the implementation stage. The term “appropriate” gives virtually unlimited discretion to financial institutions to determine how actively they will monitor correspondent banking accounts for statutory compliance.

Fortunately, CISADA also incorporates the enhanced due diligence requirements under the USA Patriot Act, which are more clearly written.


[^148]: See United State v. Sinclair, 109 F. 3d 1527, 1536 (10th Cir. 1997).


[^151]: Id. § 5318(i)(1)(3)(A).
Enhanced due diligence applies if the actor has been specifically designated by OFAC as requiring special measures relating to money laundering concerns. Enhanced due diligence is also required if the actor has an offshore banking license that prohibits conducting banking activities onshore with the country that issued the license.\textsuperscript{152} The enhanced due diligence procedures are more specific than the general due diligence procedures, and it limits application to pre-designated and offshore actors. These procedures require United States financial institutions to determine the identity of all owners of the foreign bank and any additional foreign financial institutions using that bank for correspondent banking activities.\textsuperscript{153} United States financial institutions must also conduct enhanced scrutiny of account activities under these due diligence procedures.\textsuperscript{154}

Importantly, while the enhanced due diligence procedures are relatively straightforward, the majority of due diligence implementation will occur under the regular due diligence requirements. If an actor is not blacklisted by OFAC or operating on an offshore license, the actor is not subject to enhanced due diligence requirements. Financial institutions must determine what constitutes “appropriate” due diligence procedures and to whom those procedures should apply. This makes implementation of CISADA due diligence requirements discretionary and likely inconsistent among financial institutions.

Overall, the perceived costs and benefits of compliance with CISADA for financial institutions make effective implementation and self-reporting of violations unlikely. Difficulties in interpreting how to implement CISADA, lack of OFAC enforcement and oversight, costs of compliance programs, and potential loss of profits weigh heavily against effective implementation and compliance. Greater oversight and enforcement that is more stringent are needed to increase reputational costs and tip the cost-benefit analysis for financial institutions towards full compliance.

\textsuperscript{152} Id. § 5318(i)(2)(A)(i)-(ii).
\textsuperscript{153} Id. § 5318(i)(2)(B)(i)(iii).
\textsuperscript{154} Id. § 5318(i)(2)(B)(ii).
Part IV: Measures to Enhance CISADA Effectiveness Domestically

Implementation of three key enforcement tools and legal standards could enhance CISADA’s effectiveness: (1) an enforcement body in OFAC; (2) a safe harbor clause for innocent mistakes resulting in violations of CISADA; and (3) clarified statutory language.

A. Enforcement Body

OFAC needs an enforcement body to gather intelligence and investigate suspected violations. Currently, OFAC relies upon information from self-reporting financial institutions and coordination with other government agencies, including the Departments of State, Defense, Commerce, Homeland Security, and Justice. An enforcement body would enable OFAC to obtain firsthand information about suspicious activities to supplement potential gaps created by a lack of incentive to self-report or a lack of inter-governmental coordination. This would increase the efficiency and speed of OFAC investigations and enforcement of CISADA. As a result, financial institutions would likely comply more fully with CISADA because of the increased chance in violation detection and punishment. Financial institutions would almost certainly act to avoid civil and criminal penalties and reputational harm that damage their bottom line.

OFAC can use the Department of Commerce’s Office of Export Enforcement ("OEE") under the Bureau of Industry and Security as a useful

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155 Cf. O’Leary, supra note 128, at 574-79 (advocating the creation of a National Security Sanctions Court to oversee OFAC designations so OFAC can focus on building evidence against violators).

156 See supra note 22 and accompanying text.

157 See U.S. DEPT OF THE TREASURY, supra note 20, at 47 (listing collaboration between the U.S. Department of the Treasury and other United States agencies on strategic goals).

158 See Fitzgerald, supra note 6, at 979-981 (arguing that the lack of highly visible enforcement actions creates an incentive to not comply because it seems unlikely that violations will be enforced).

159 Cf. Fitzgerald, supra note 6, at 981 (stating that businesses ignore OFAC’s regulations because they perceive a low risk of enforcement of violations).

160 See Fitzgerald, supra note 125 (revealing that financial institutions are reducing business with Iran to avoid reputational harm and fines).
model of an enforcement body.\textsuperscript{161} OEE operates in nine United States field offices and employs law enforcement officers to conduct investigations of export violations.\textsuperscript{162} In addition, OEE trains agents to conduct site visits to determine the level of risk involved with certain controlled item exports.\textsuperscript{163} Like OFAC, OEE utilizes information from a variety of sources, including voluntary self-disclosures of violations.\textsuperscript{164} However, OEE’s ability to collect its own intelligence and use trained law enforcement officers for compliance makes OEE’s enforcement efforts more agile, more direct, and more likely to catch and deter noncompliance than OFAC’s near-total reliance on self-disclosures.\textsuperscript{165}

An OFAC enforcement body modeled on OEE’s site inspection agents would increase direct oversight on compliance programs and procedures under CISADA.\textsuperscript{166} OFAC would be better able to review suspicious activity and require the performance of independent audits to satisfy any concerns relating to a United States correspondent banking account with a foreign financial institution.\textsuperscript{167} Audits are a critical component of verifying the adequacy of the compliance programs required by CISADA; thus, an enforcement body that could oversee appropriate independent auditing would be extremely useful in advancing CISADA’s policy objective of preventing Iranian proliferation.\textsuperscript{168} Similarly, an enforcement body would be able to verify certifications that foreign financial institutions were not knowingly engaging in proliferation-related

\begin{footnotesize}
\begin{enumerate}
\item[162] Id.
\item[163] Id.
\item[164] Id.
\item[165] See Bureau of Industry and Security, supra note 161; supra note 22 and accompanying text.
\item[167] See Cunningham, supra note 140, at 295 (audits provide assurances of compliance).
\end{enumerate}
\end{footnotesize}
activity. Furthermore, direct oversight of due diligence procedures and internal controls would improve implementation of CISADA while enabling financial institutions to interact more closely with OFAC and enhance the efficacy of their compliance programs.

An OFAC enforcement body that provides effective sanction oversight and enforcement would greatly strengthen CISADA's ability to deter illicit use of correspondent banking in the United States. For instance, the case studies of Barclays, Lloyds, and Credit Suisse suggest that monetary fines and possible damages to corporate reputations are insufficient to deter illicit financial activities with Iranian clients. However, if OFAC would continue to aggressively pursue sanction violations by high profile foreign financial institutions through an enforcement body, it would probably win large civil penalty settlements for these violations. As a result, OFAC enforcements would have an increasingly strong deterrent effect on future violations.

The potential precedent set by future cases similar to Barclays, Lloyds, and Credit Suisse would discourage foreign financial institutions from pursuing correspondent banking with the United States on behalf of individuals linked to Iran's WMD program. First, financial institutions would comply with CISADA to protect their profits, especially if they perceive their competitors as being compelled to comply fully with CISADA as well. Second, if the international community continues to agree on the central importance of curtailing Iran's pursuit of WMD, particularly nuclear weapons, the cost of reputational damage if prosecuted for violating CISADA would continue to increase. An

170 See id. § 8513(e)(1)(D).
171 See supra Part II.
172 See supra notes 91-93 and accompanying text.
173 See supra notes 91-93 and accompanying text.
174 See Fitzgerald, supra note 6, at 981.
175 See supra note 16.
176 See Kittrie, supra note 100, at 816-17 (outlining the reputational risk to United States and foreign financial institutions of handling illegitimate business with Iran).
efficient OFAC enforcement body would increase awareness and concern over sanction enforcement among foreign financial institutions with the result being an increase in CISADA’s deterrent effect.177

Although a more effective implementation of CISADA would likely cause foreign financial institutions to rethink assistance to Iran's WMD program, foreign financial institutions could simply shift from the United States banking system to other major financial systems in the European Union (“EU”) or Asia.178 However, the use of other systems to avoid United States sanction penalties would probably not be particularly profitable or successful at money laundering or otherwise illicitly funding the Iranian WMD program.179 Correspondent banking tends to be a concentrated industry due to economies of scale that can be achieved by large-scale correspondent banking practices.180 In particular, the United States banking system is a large market for correspondent banking accounts due to the United States’ importance to international trade and the high demand for the United States dollar.181

In addition, a growing international consensus that Iran must be prevented from developing nuclear weapons has resulted in autonomous sanctions from the EU, Canada, and Japan prohibiting correspondent banking accounts with Iranian banks.182 While none of these sanctions go as

177 See supra notes 158-159 and accompanying text.

178 See Kitttrie, supra note 100, at 815 (reporting that many foreign financial institutions have responded to United States' sanctions by terminating business with Iran in United States dollars but not other currencies).

179 See id. (stating that most major foreign financial institutions have drastically reduced business with Iran).

180 See R. Alton Gilbert, Economies of Scale in Correspondent Banking, 15 J. Money, Credit & Banking 483 (1983) (explaining that a correspondent bank that services numerous clients experiences economies of scale compared to a smaller correspondent bank because it has greater stability in its balances, which lowers transaction costs when managing its reserve position).

181 See supra note 15 and accompanying text.

far as CISADA in restricting correspondent banking transactions with any
financial institution linked to Iranian proliferation, they represent strong
support for the nonproliferation foreign policy goals of the United States. Furthermore, the EU’s Third Anti-Money Laundering Directive requires all
EU correspondent banking accounts with foreign financial institutions to
exercise stringent due diligence requirements, similar to CISADA’s
enhanced due diligence procedures. This is vital to the success of
CISADA because the EU, Canada, and Japan represent significant financial
actors in the international banking system outside of the United States. The
general support of these countries for financial sanctions to halt Iranian
development of a WMD program will likely reduce the ability of foreign
financial institutions to evade United States restrictions on correspondent
banking by using other major banking systems.

The significant drawback of this proposed enforcement body is its
expense, given OFAC’s financially strained condition. Although funding
is a serious problem, the United States government has repeatedly
demonstrated its commitment to combating money laundering and illicit
financial activities that support proliferation of WMD. Congress has
demonstrated a strong intent to protect United States national security
through the implementation of economic sanctions. Therefore, Congress
should be willing to invest in a tool that would drastically improve the
successful implementation of non-proliferation policies.

(last visited on Jan. 13, 2011).

183 See Comprehensive Iran Sanctions, Accountability, and Divestment Act, 22 U.S.C.A. § 8513(c)(1) (West 2010); supra note 182 and accompanying text.


186 22 U.S.C.A. § 8513(c)(1)-(2).

187 See supra note 182 and accompanying text.

188 Fitzgerald, supra note 6, at 962-65.


In addition, an enforcement body would enjoy some economies of scale from the United States government, which already coordinates with numerous agencies that gather intelligence on terrorism and WMD proliferation. Information sharing would enable the government to reduce costs by synergizing efforts to gather and analyze information. Finally, increased future compliance due to the enhanced capability of the enforcement body to prosecute violations of CISADA would eventually reduce the oversight and prosecution costs of the body.

B. Safe Harbor

OFAC should create a safe harbor clause under CISADA for financial institutions that comply with the statute but make an innocent mistake or technical violation. This clause could be modeled on CISADA’s safe harbor clause for insurance underwriters who are exempt from liability for innocent mistakes if they practiced due diligence procedures and controls. An innocent mistake would not constitute a violation of CISADA where (1) the U.S. financial institution had no knowledge that a foreign financial institution was linked to Iran’s WMD program; (2) the U.S. financial institution had no bad faith intent to circumvent CISADA; and (3) the facts relating to the foreign financial institution could reasonably be interpreted by the U.S. financial institution to not represent a potential violation of CISADA.

Implementation of CISADA can be very complicated, especially for smaller financial institutions with more limited resources for compliance.

191 See supra note 157 and accompanying text.

192 See Fitzgerald, supra note 125, at 46 (advocating for a safe harbor from liability for innocent mistakes).

193 COMMITTEE OF CONFERENCE, H.R. COMM. ON FOREIGN AFFAIRS, 111TH CONG., JOINT EXPLANATORY STATEMENT: H.R. 2194, THE COMPREHENSIVE IRAN SANCTIONS, ACCOUNTABILITY, AND DIVESTMENT ACT OF 2010 REPORT, at 12 (2010), available at http://www.house.gov/111/press_062410d.pdf. The safe harbor sanctions exemption is designed to protect insurance underwriters who use due diligence practices but inadvertently provide insurance for activities that could contribute to Iran's ability to import refined petroleum. Id.


195 See supra note 128 and accompanying text.
personnel and software; thus, the odds that an innocent mistake will occur are reasonably high. The complexity of due diligence screening for customer identification information, performing independent audits and certifications, and reporting suspicious activities related to Iranian proliferation efforts is immense, particularly for smaller institutions. In addition, certification that foreign clients are not knowingly engaging in proliferation-related activities and the establishment of due diligence policies under CISADA can be complex and fraught with potential areas for innocent mistakes.

As a result, financial institutions are unlikely to report unintentional violations if the mere act of reporting the violation will result in penalties. A safe harbor clause would improve self-reporting by financial institutions that made an innocent mistake and want to rectify their compliance programs and efforts. Unfortunately, the innocent mistake test that would be applied to the safe harbor clause is imperfect. Specifically, the presumption in favor of a U.S. financial institution’s reasonable interpretation of the facts surrounding whether a foreign financial institution is in violation of CISADA is subjective. Nonetheless, the knowledge and bad faith elements can be analyzed objectively based on evidence from the recordkeeping, reporting, and due diligence efforts of the United States financial institution.

C. Clarification

OFAC should also clarify certain terms and how to interpret them to enhance compliance with CISADA. First, OFAC should establish minimal requirements for compliance procedures based on financial institution size and risk assessments of potential financial partners. This would


197 See supra note 128 and accompanying text.


199 See 242 U.S. at 194 (stating that innocent mistakes should be excused based on evidence of good faith).

200 See Fitzgerald, supra note 125 (explaining that OFAC needs to make the costs of sanction compliance for smaller financial institutions more commercially feasible); cf. O'Leary, supra note 128 (highlighting that the burden on small charities to ensure the final use of its contributions will not violate sanctions may be too high).
help reduce the burden on small institutions by allowing them to have a more simplified compliance package tailored to their specific needs and limitations.

Second, OFAC should clarify factors that weigh into the materiality of a violation under CISADA and the related penalty scheme. Based on OFAC considerations in previous economic sanction settlements, factors to clarify the materiality of the violation should include: (1) the institutionalization of internal procedures to evade CISADA;202 (2) the extent of efforts to evade compliance, including omission or removal of information relating to a sanctioned entity;203 (3) the use of the ordering institution’s information instead of the sanctioned entity’s name, address, and account; and (4) the use of wire transfer filters to interdict and alter sanctioned entity transactions.204 The level of penalties associated with these varying degrees of material violations should follow a sliding scale similar to OFAC’s settlement determinations. Factors to consider when weighing the penalty to apply should include whether a financial institution voluntarily terminates conduct, cooperates fully with OFAC, and demonstrates good conduct and full compliance in the future.205 As a result, more explicit guidelines pertaining to the materiality of CISADA violations and the corresponding penalties would likely deter flagrant violations.

It is possible that a sliding scale of penalties based largely on the level of cooperation of offending financial institutions during the settlement process will incentivize some financial institutions to evade sanctions and then present themselves as cooperative upon being caught for violations. However, good faith is implied in all of the elements OFAC considered in

201 Special Due Diligence Programs for Certain Foreign Accounts, 72 Fed. Reg. 44,768, 44,769 (Aug. 9, 2007); Special Due Diligence Programs for Certain Foreign Accounts, 71 Fed. Reg. 496, 502 (Jan. 4, 2006); see also Fitzgerald, supra note 125, at 52-53.

202 Credit Suisse AG, supra note 66, at ¶ 13.

203 Id. at ¶ 8.

204 Barclays Bank PLC, supra note 66, at ¶¶ 7, 8.

the prior enforcement settlements.\footnote{Id.} Furthermore, OFAC can expressly make a showing of good faith a prerequisite for reducing penalties along the sliding scale. Clearer guidelines on materiality and penalty schemes would further deter cheating because financial institutions would be on notice of specific enforceable actions and the pursuant costs.

Finally, OFAC should improve the availability and clarity of information about designated entities, especially contact and account information, for financial institutions to confirm whether an actor is designated as being linked to Iran’s WMD program.\footnote{Fitzgerald, supra note 125, at 41, 44.} Increased publication of information about actors linked to Iranian proliferation through designation lists on the OFAC website would help prevent financial institution violations of CISADA and provide an affirmative conveyance of “knowledge” to trigger prosecution of any violations.\footnote{See Fitzgerald, \textit{Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy}, 31 \textit{VAND. J. TRANSNAT’L L.} 1, 33 (1998) (affirming that a government declaration that an actor is linked to Iranian proliferation conveys affirmative knowledge about sanction violations).} A possible model to increase the availability of information about actors linked to Iranian proliferation is the Treasury’s Weekly Bulletin Search in the Office of the Comptroller of the Currency.\footnote{Office of the Comptroller of the Currency, Weekly Bulletin Search, http://www.occ.gov/tools-forms/tools/licensing/weekly-bulletin-corp-apps-search.html (last accessed on Jan. 13, 2011).} Creating a similar “bulletin” with information about mergers, addresses, branches, subsidies, and certifications for foreign financial institutions would substantially improve the ability of United States financial institutions to evaluate the risk of a potential correspondent banking client abroad.\footnote{See id.} This would help financial institutions to comply more accurately with CISADA while also allowing OFAC to share information about new front companies or other means of evasion that certain actors are currently utilizing to access the United States financial system.
Conclusion

CISADA represents a cumulative effort by the United States to prevent money laundering and illicit transactions that endanger United States national security.\(^{211}\) Unfortunately, the overall effectiveness of this statute and its compliance tools remains unclear. CISADA relies heavily on self-reporting, including user certifications based on the best knowledge of United States financial institutions,\(^{212}\) which may be deceived by ever-shifting front companies and evasive measures by Iran. Due diligence and audits for correspondent banking with foreign financial institutions may not be sufficient to protect against industrious Iranian actors.\(^{213}\) Instead, OFAC needs to create an enforcement body to investigate potential violations, expressly include a safe harbor clause for innocent mistakes, and codify factors relating to materiality of violations and corresponding penalty schemes in order to increase compliance with CISADA. By reducing the burden of compliance for financial institutions and increasing the risk of being prosecuted for violations, OFAC can improve compliance with CISADA through clearer regulations and increased information sharing. In doing so, OFAC would protect more strongly the foreign policy objectives of the United States, including the prohibition of proliferator access to the United States banking system to pay for WMD-related components.\(^{214}\)

\(^{211}\) See 22 U.S.C.A. §§ 8512-31 (West 2010); supra notes 20, 25, 36 and accompanying text.


\(^{213}\) Id. § 8513(e)(1)(A)(D).