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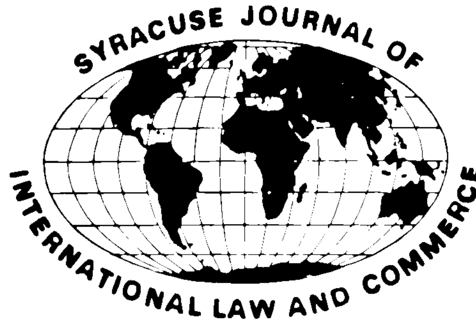

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THE ORIGINS, PURPOSES, AND NEGOTIATIONS OF THE NAFTA INVESTMENT AGREEMENTS: IMPLICATIONS FOR RENEGOTIATIONS AND INTEGRATION WITH CHINA

Jesse Liss*

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ABSTRACT

The NAFTA Investment Agreements are the NAFTA investment and financial services chapters, which function to facilitate and protect regional capital flow. This Article serves to identify the original purposes of the NAFTA Investment Agreements, which is an important reference point for negotiating objectives in NAFTA's modernization. I argue that the NAFTA investment agreements had two original goals: (1) to establish free market governance of capital in North America and in doing so "lock-in" Mexico's domestic investment reforms; and (2) to facilitate economies of scale and integrate regional production to enhance the competitiveness of U.S. firms in the emerging global economy. In the early

1990s, these two objectives were congruent, and Congress adopted the NAFTA on a bipartisan basis. There are two implications for the NAFTA renegotiations: (1) the NAFTA investor rights are no longer congruent with free market principles; and (2) since China has become the NAFTA's "fourth partner," integrated regional production is no longer a viable strategy for dynamic growth and jobs in North America.

I. INTRODUCTION

Donald Trump taunted his opponent, Hillary Clinton, during a prime-time televised debate during the 2016 Presidential race, stating that "NAFTA is the worst trade deal maybe ever signed anywhere, but certainly ever signed in this country."[1] Hillary Clinton's husband, former President Bill Clinton, signed the North American Free Trade Agreement ("NAFTA") into law in 1994.[2] Candidate Trump's claim was based on the subsequent multiplication of the U.S. trade deficit with Mexico, which, by Trump's calculation, was in large measure due to the offshoring of U.S. manufacturing to Mexico (i.e. U.S. manufacturing foreign direct investment ("FDI") to Mexico). However, scores of lawmakers and commentators have hotly contested the notion that U.S. manufacturing FDI to Mexico caused U.S. job losses, at least to the extent that Trump implied.

The NAFTA investment agreements are the NAFTA investment and financial services chapters. These chapters are the legal underpinning to regional FDI and capital flows. The investment chapter covers FDI and capital flows, while the financial services chapter covers trade and investment in financial services, which provide critical infrastructure to FDI.[3] In the context of the NAFTA renegotiations, this Article identifies the original purposes of the NAFTA investment agreements. The original purposes of the agreements serve as signposts for how officials intended the NAFTA to function. These purposes are an important reference point

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1. Patrick Gillespie, *Trump Hammers America's 'Worst Trade Deal'*, CNN BUS. (Sept. 27, 2016), *available at* https://money.cnn.com/2016/09/27/news/economy/donald-trump-nafta-hillary-clinton-debate/ (last visited Mar. 8, 2019).

2. *See id.*

3. KRISTA N. SCHEFER, INTERNATIONAL TRADE IN FINANCIAL SERVICES: THE NAFTA PROVISIONS 271 (1999). Schefer explained,

> Closely connected to movement in investment is trade in financial services. The transfer of funds, necessary for setting up a business and engaging in international transactions, as well as repatriation of profits or income across national borders, requires the interaction of banks, non-bank financial institutions, insurance corporations, and security brokerages, on either side of the border, if not around the world.

Id.

for policymakers and commentators, as they debate new directions for the modernization of the NAFTA.

The NAFTA investment agreements had two original purposes. The first purpose was to establish free market governance of regional FDI, which intended to give permanence to Mexico's domestic investment reforms, therefore turning the page on nationalism and embracing regionalism. The second was a political project to facilitate U.S.-Mexico supply chains and, in doing so, support regional firms and jobs, particularly those in the electronics, textiles, and automobile sectors. U.S. trade officials justified the NAFTA investment chapter in 1992 by stating that "[i]ntegrated production in North America will make United States firms more competitive against European and Japanese producers."[4] However, this purpose became outdated by the emergence of China as a powerful partner and competitor with North America. The original NAFTA negotiations serve as a reminder that regionalism was an industrial strategy for the 1990s. Since China is now the NAFTA's "fourth partner," the NAFTA renegotiations cannot reinvigorate the NAFTA's original industrial strategy to use regional supply chains to stimulate growth and jobs.

The remainder of the Article is organized as follows: (1) the next section of Part I presents the areas that this Article will improve upon existing accounts of the origins and negotiations of the NAFTA investment agreements; (2) Part II documents the origins of the legal content of the NAFTA investment and financial services chapters; (3) Part III details the contexts and objectives of U.S. trade policy in the NAFTA investment and financial services chapters; (4) Part IV documents the negotiations of the agreements; and (5) Part V identifies the original purposes of the NAFTA investment agreements and implications for the NAFTA renegotiations and North American commercial integration with China.

A. Existing Documentations of the NAFTA Investment Agreements

Two publications documenting the negotiations of the NAFTA investment chapter exist. The first, "The Making of NAFTA: How The Deal Was Done," is written by political scientists Maxwell Cameron and Brian Tomlins' which details the entire NAFTA negotiations.[5] Since Cameron and Tomlin focused on the NAFTA agreement in its entirety, they provide only a cursory examination of the NAFTA investment and financial services chapters. Therefore, Cameron and Tomlin did not provide the historical origins of the NAFTA investment agreements, and

4. *See* OFF. OF THE U.S. TRADE REP., INVESTMENT: THE NORTH AMERICAN FREE TRADE AGREEMENT 1 (1992).

5. *See generally* MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE (2000).

their account lacks details regarding the stakes of the investment negotiations.

The second documentation, "Toward a History of NAFTA's Chapter Eleven," an article written by international law expert, Jennifer Heindl, details the negotiations of the NAFTA investment chapter.[6] Heindl used the official negotiating draft texts from the NAFTA investment chapter, which the United States Trade Representative ("USTR") made publicly available after Cameron and Tomlin published their book on the NAFTA. Heindl used the draft texts to piece together a historical narrative about the negotiations of the NAFTA investment chapter. However, Heindl did not include the negotiations of the financial services chapter and she did not situate the investment chapter negotiations within the historical context of U.S. investment policy and trade strategy.

This Article fills in the gaps in these historical accounts of the negotiations of the NAFTA investment agreements. Rather than focusing on the tactical history of the NAFTA negotiations, which has been well-documented elsewhere,[7] this Article has two initiatives: the first, to document origins, motivations, and negotiations of the NAFTA investment agreements; and the second, to identify the original purposes of the agreements. I assume a U.S.-centric approach because, in the NAFTA investment negotiations, the United States acted as the "policy-maker" whereas Mexico and Canada maintained the roles of "policy-takers."

II. HISTORICAL ORIGINS OF THE NAFTA INVESTMENT AGREEMENTS

A. Historical Origins of the NAFTA Investment Chapter

1. The Calvo Doctrine vs. the Hull Doctrine

The legal content of the NAFTA investment chapter took precedent in the Mexican revolution at the turn of the twentieth century. In 1938, the governments of the United States and Mexico were entangled in a conflict over the relationship between international investment law and state sovereignty. The focal point was the rights of foreign investors, specifically whether they were found under domestic or international law. In that year, Mexico nationalized the entire oil industry, which was previously dominated by U.S. and British oil companies.[8] During Mexico's

6. *See generally* Jennifer A. Heindl, *Toward a History of NAFTA's Chapter Eleven*, 24 BERKELEY J. INT'L L. 672 (2006).

7. *See generally* CAMERON & TOMLIN, *supra* note 5.

8. O. Thomas Johnson Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, *in* YEARBOOK ON INTERNATIONAL LAW & POLICY 2010-2011 649, 662 (Karl P. Sauvant ed. 2011).

1917 revolution, Mexico adopted a new Constitution which outlined "strategic areas" of economic activity "in an exclusive manner" to the Mexican State—focusing especially on the oil and energy sector.[9] Concurrent to the oil expropriations, the Mexican and U.S. governments were negotiating a settlement from Mexico's land takings of U.S. nationals during Mexico's sweeping land redistribution policy as a result of Mexico's 1917 revolution.

The 1917 Mexican Constitution adopted the Calvo Doctrine, which stipulates that foreigners must bring property disputes to domestic courts without recourse to their home governments.[10] In other words, in investment and capital disputes with foreign nationals, the Calvo Doctrine emphasizes state sovereignty and rejects international law. Carlos Calvo (1824-1906) was an Argentinian diplomat who wrote a treatise on international law in the context of European military interventions in Latin America in the mid-1800s. Latin America widely adopted the Calvo Doctrine, which asserted that intervention by foreign governments on behalf of foreign investors violated state sovereignty.

After Mexico nationalized the oil industry in 1938, the U.S. government pursued a "good neighbor" policy and decided against military intervention in Mexico. The U.S. and British oil companies brought their claims to the Mexican Federal Courts. The contentious cases were highly politicized, as the Mexican and U.S. governments were sharply divided over two issues: (1) the standard of compensation; and (2) that foreign nationals are entitled to a "minimum standard of treatment."[11]

In the correspondence between the Mexican Minister of Foreign Affairs and U.S. Secretary of State Cordell Hull, the Mexicans denied that there was any consensus on international law that would oblige compensation for expropriation.[12] Mexico acknowledged that compensation was necessary under Mexican Constitutional law, however, it maintained that "the doctrine which [Mexico] maintains of the subject . . . is that the time and manner of such payment must be determined by [Mexico's] own laws."[13] A few weeks later, U.S. Secretary of State Hull responded in what since became known as the "Hull Doctrine." He asserted "a self-evident fact" that international law exists and that "the applicable

9. *See* Constitución Política de los Estados Unidos Mexicanos, CP, art. 27, Diario Oficial de la Federación [DOF] 05-02-1917, ultimas reformas DOF 15-09-2017 (Mex.).

10. *See id.*

11. Edwin Borchard, *Minimum Standard of the Treatment of Aliens*, 38 MICH. L. REV. 445, 445 (1940).

12. Johnson & Gimblett, *supra* note 8, at 664.

13. *Id.*

precedents and recognized authorities on international law [support the U.S. position]."[14] Indeed, there had been a range of international arbitral decisions in the 19th and early 20th century establishing such obligations as a rule of international law.[15]

In the Mexican Minister of Foreign Affairs note to Secretary Hull on September 2, 1938, the Mexican government contended that the Calvo Doctrine served to defend "weak states against the unjustified pretension of foreigners who, alleging supposed international laws, demanded a privileged position."[16] After provocative political exchanges and threats from the U.S. Congress, Mexico agreed to a lump sum payment for compensation for the land and oil expropriations. However, the underlying cause of the investment dispute—a fundamental opposition between claims to sovereignty and claims to international law—was far from resolved.

At that time, the Soviet Union and Romania joined Mexico in implementing far-reaching nationalizations. In the League of Nations in 1930, the United States attempted to codify international investment law to protect against expropriations and denials of justice to foreign nationals. The representative from China responded with a version of the Calvo Doctrine, arguing that a foreigner must be prepared for "all local conditions, political and physical, as he is the weather."[17] The conference fell apart as the 17 "weaker" nations located the rights of foreign investors in domestic law, while the 21 "greater powers" opposed that position as contrary to international law.[18]

2. International Investment Law vs. Sovereignty and Development

After World War II, the fundamental conflict between claims to sovereignty and the jurisdiction of international law evolved alongside growing commerce between the global north and global south. Simultaneously, the politics of FDI assumed a qualitatively new dimension because many developing countries gained national independence and their leaders sought to repurpose the world trade regime to reflect development objectives.[19] The U.S. Model Bilateral Investment Treaty ("BIT") program was qualitatively shaped by the political challenges from the global

14. *Id.*
15. *See generally* Borchard, *supra* note 11.
16. *Id.* at 450.
17. *Id.* at 450–51.
18. *See id.* at 450.
19. *See generally* VIJAY PRASHAD, THE DARKER NATIONS: A PEOPLE'S HISTORY OF THE THIRD WORLD (2007); Nicolas Lamp, *The 'Development' Discourse in Multilateral Trade Lawmaking*, 16 WORLD TRADE REV. 475 (2017).

south for the inclusion of sovereignty and development discourse in the world trade regime.

Developing countries outlined their position on foreign capital and investment in the United Nations Charter of Economic Rights and Duties of States, adopted by the U.N. General Assembly in 1974.[20] Article Two addresses FDI, and provides that each State has the right: "to regulate and exercise authority over foreign investment within its national jurisdiction";[21] "to regulate and supervise the activities of transnational corporations within its national jurisdiction";[22] and "to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures."[23] In doing so, the 1974 Charter adopted the Calvo Doctrine. The Mexican delegation to the U.N. played a leading role in drafting the 1974 Charter.[24]

As countries in the global south gained their independence from colonial rule, the rate of expropriations increased markedly. From 1960-1969 there were 136 expropriations in developing countries, but from 1970-1979 there were 423, and during 1980-1992 there were 16.[25] Since the 19th century, the United States, British, and other European powers tended to respond to expropriations with "gunboat diplomacy," or military intervention in a foreign country to protect commercial interests in that country. The United States has a long history of gunboat diplomacy in Latin America and Asia. Specifically, at the turn of the 20th century, the United States had a particularly active military intervention policy on behalf of private commercial interests in Latin America and the Caribbean.[26] A State Department official commented in 1937:

> It was in large part the influence of pressure groups bent upon selfish gain and immediate material profit that led more than once to our interference in the internal affairs of our Central and South American sister republics, finally resulting in armed intervention and the sowing of fears and deep-seated resentment.[27]

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20. *See generally* G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States (Dec. 12, 1974).

21. *Id.* art. 2(a).

22. *Id.* art. 2(b).

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

24. Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. – FOR. INV. L. J. 1, 2-3 (1986).

25. *See* Michael Minor, *The Demise of Expropriation as an Instrument of LDC Policy, 1980–1992*, 25 J. OF INT'L BUS. STUD. 177, 180 (1994).

26. *See generally* LESTER D. LANGLEY, THE BANANA WARS: UNITED STATES INTERVENTION IN THE CARIBBEAN, 1898-1934 (2001).

27. MERRILL RIPPY, OIL AND THE MEXICAN REVOLUTION 86 (1972).

Further, throughout the Cold War, the United States continued military and covert operations in the developing world in response to nationalizations and other commercial conflicts. Among the most famous instances of such intervention were the U.S. military ouster of President Jacobo Arbenz in Guatemala in 1954 at the behest of United Fruit Company,[28] and the CIA and International Telephone and Telegraph's successful efforts to overthrow President Salvador Allende in Chile in the early 1970s.[29]

Beyond notions of sovereignty, nationalist and socialist leaders in the global south were calling for the establishment of a New International Economic Order. In 1974, the UN General Assembly adopted the New International Economic Order, a document prepared by the "Third World," a geopolitical bloc that included most of the global south. The "Third World" argued from the perspective of dependency theory that the Cold War international economic order not only failed to develop post-colonial countries but facilitated their underdevelopment. In so doing, they were opposed to the U.S. and Soviet spheres of influence. The "Third World" challenged the United States and Europe to retool the world trade regime to meet wide-ranging development goals.[30] In those contexts, nationalist and socialist developing countries treated foreign firms and capital arbitrarily, and, in some instances, nationalized them. In addition, developing countries imposed "performance requirements" on multinational national corporations ("MNCs") to ensure that MNCs operated in accordance with the national policy objectives of the host state. Performance requirements include regulatory obligations of: (1) regional development; (2) training and employing local workers; (3) local research and development; (4) technology transfers; (5) mandatory exports quantities; and (6) mandatory local content inputs in which a certain percentage of the value of the final output is sourced locally.

3. *The Rise and Fall of the U.S. "Friendship, Commerce, and Navigation" Treaties*

In response to nationalist and socialist policies towards FDI in the global south, the United States and Europe codified international investment law (i.e. the Hull doctrine) in 1961 in the Organisation for Economic Co-operation and Development ("OECD") adoption of the binding Code of Liberalization of Capital Movements. The U.S. Treasury Secretary,

28. *See generally* STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT: THE STORY OF THE AMERICAN COUP IN GUATEMALA (2005).

29. *See generally* LUBNA Z. QURESHI, NIXON, KISSINGER, & ALLENDE: U.S. INVOLVEMENT IN THE 1973 COUP IN CHILE (2009).

30. *See generally* PRASHAD, *supra* note 19.

Henry Fowler, explained in 1965 that the experience of U.S. MNCs abroad showed that "a vast area of potential conflict" could be minimized provided that host states applied "equal treatment under the law for foreign and domestic enterprises" and exorcised "the specter of state confiscation and state operation of competitive units."[31] This goal prompted the United States to initiate a series of bilateral Friendship, Commerce and Navigation ("FCN") treaties with investment provisions.

FCN treaties were a long-standing diplomatic instrument of the United States dating back to its founding, when an FCN was negotiated with France after the signing of the Declaration of Independence.[32] The content of the earliest FCNs related to commerce and navigation with few investment protections. By the 1920s and 1930s, the U.S. FCNs contained primitive investment protections.[33] After World War II, the United States attempted to establish a multilateral investment regime in the International Trade Organization ("ITO"), which was intended to be a Bretton Woods Institution.[34] However, the U.S. Senate refused to ratify the ITO because the U.S. business community disapproved, and it was replaced by the General Agreement on Tariffs and Trade ("GATT"), which had no mandate to cover investment issues.[35] Following the collapse of the ITO, the United Sates revised FCNs to prioritize investment protections. U.S. investment lawyer Kenneth Vandevelde, who helped to draft the first U.S. Model BIT, described the modern FCNs as the base of the BIT program, stating, "[t]he modern FCNs contained antecedents to three of the four BIT core provisions."[36]

The modern U.S. FCNs had two significant geopolitical shortcomings. First, the U.S. business community argued that the investment protections were vague and insufficient. Secondly, the United States had "difficulty" concluding them with developing countries, which were not only important growth markets, but investment protection was most

31. LEO PANITCH & SAM GINDON, THE MAKING OF GLOBAL CAPITALISM: THE POLITICAL ECONOMY OF AMERICAN EMPIRE 116 (2012).

32. Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L. J. 201, 203 (1988).

33. *Id.* at 205.

34. Bretton Woods was the post-WWII agreement between the United States. and allied powers to establish multilateral institutions to promote and manage international economic affairs, including the General Agreement on Tariffs and Trade, the International Monetary Fund, and the World Bank.

35. Jürgen Kurtz, *A General Investment Agreement in the WTO—Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*, 23 U. PA. J. INT'L ECON. L. 713, 719 (2002).

36. Vandevelde, *supra* note 32, at 207.

needed in the global south.[37] Concurrent to the United States' unsuccessful FCN program, European countries had successfully negotiated BITs with developing countries.

Unlike the U.S. FCNs, the European BITs only concerned investment protection. From 1962 to 1972, West Germany entered into 46 BITs while the United States negotiated only two FCNs.[38] Simultaneously, U.S. FDI to developing countries was growing, and from 1975 to 1985 increased from $19 billion to almost $75 billion.[39] Vandevelde observed, "[i]ncreasingly, the U.S. business community and Congress agitated for an investment protection treaty program comparable to that of the Europeans."[40] This motivated the State Department to develop the U.S. BIT program.

4. Drafting the U.S. Model BIT

The drafting of the U.S. Model BIT came on the heels of the failed GATT Tokyo Round of negotiations (1973-1979) in which the USTR attempted to include investment issues but was rebuked by developing countries.[41] Absent a multilateral framework for foreign investment regulations, the United States preferred bilateral action rather than unilateral action.[42] To that end, State Department officials set to work on drafting of the first U.S. Model BIT. The officials took the U.S. FCN and stripped it of all provisions unrelated to investment and then they drew upon successful European BITs.[43] The U.S. Model BIT had four core provisions: (1) treatment; (2) expropriation; (3) transfers; and (4) disputes (summarized in Table 1).

The U.S. BITs were the first U.S. treaties to provide for arbitration of investment disputes between investors and host states. The provisions are called investor-state dispute settlement (hereinafter "ISDS") and they oblige that investment and capital disputes between an investor and a host state be arbitrated at the World Bank,[44] not in the host country's domestic courts. The United States explained the historical justification for ISDS:

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37. *Id.*
38. *Id.* at 208.
39. *Id.* at 209, note72.
40. *Id.* at 208.
41. Kurtz, *supra* note 35, at 722.
42. Vandevelde, *supra* note 32, at 210.
43. *Id.*
44. The forum was the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank, which was established in 1965 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. *See generally* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 3, 1965, 575 U.N.T.S. 159.

> Military interventions in the early years of U.S. history – gunboat diplomacy – were often in defense of private American commercial interests. As recently as 1974, a United Nations report found that in the previous decade and a half there had been 875 takings of the private property of foreigners by governments in 62 countries for which there was no international legal remedy. Though diplomatic solutions were possible, they were often ineffective and political in character, rather than judicial. ISDS represented a better way.[45]

Developing the Model BIT was a protracted process as "significant interagency differences" immediately emerged "over the scope and content" and many of these conflicts were not resolved until 1981 after failed negotiations with Singapore.[46] The completed 1981 Model BIT was used in successful negotiations with Egypt and Panama, and these negotiations catalyzed further revisions to the text, resulting in the 1984 Model BIT. The 1984 Model BIT was slightly revised throughout the 1980s, but it served as the "gold standard" until the NAFTA Investment Chapter.

Table 1: Core Provisions of the U.S. Model Bilateral Investment Treaty (BIT)	
Investment Definition	Broad definition, including: an enterprise, equity and debt securities, loans, interest, real estate and property, profits and returns from enterprise
National Treatment	Investments and investors of another Party must be treated "no less favorably" than nationals
Most-Favored-Nation	Investments and investors of another Party must be treated "no less favorably" than investments and investors of another Party or non-Party
Minimum Standard of Treatment	Investments and investors must be treated with "full protection and security" and "non-discriminatory treatment"
Performance Requirements	No Party shall impose or enforce requirements upon an investment or investor of another Party, with an expansive list detailing prohibited performance requirements
Transfers	Each Party permits all transfers relating to an investment of an investor of another Party "to be made freely and without delay"

45. *ISDS: Important Questions and Answers*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Mar. 2015), *available at* https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds (last visited Mar. 4, 2019).

46. Vandevelde, *supra* note 32, at 210.

Expropriation	No Party may nationalize or expropriate an investment of an investor of another Party, except for public purpose and on a non-discriminatory basis, in which case compensation be "fair market value"
Investor-State Dispute Settlement (ISDS)	Foreign investors may bring claims of violations of investor rights against a host state to the World Bank, arbitrators can make monetary awards but not change laws in the state.

5. The Purpose of the U.S. BIT Program: Free Market Governance and Not Promotion of FDI

The original purpose of the U.S. Model BIT was to establish free market governance of international capital, not to promote capital flows. International investment law regulates the boundaries between state and market, specifically the relationship between multinational investors and host states. According to Vandevelde, the U.S. BIT imposes a relationship between the state and market according to three free market principles: (1) states must intervene to protect property rights and contracts; (2) the market should allocate resources and the state should not "chose winners or losers"; and (3) the state may intervene to correct market failures, such as suppling public goods or protecting against anticompetitive behavior (i.e. monopoly).[47] The United States justified free market governance of cross-border capital as a prerequisite to market efficiency and thereby productivity and growth. Jose Alvarez, a U.S. BIT negotiator in the late 1980s, affirmed that the United States' objective was to prevent developing countries from intervening in FDI and to "resist the forces of change often demanded by the political and economic life of host countries."[48]

The United States championed free market governance because U.S. economists demonstrated that it was mutually beneficial (i.e. "a rising tide lifts all boats"). President Reagan explained while announcing the U.S. BIT program in 1983:

> A world with strong foreign investment flows is the opposite of a zero-sum game. We believe there are only winners, no losers and all participants gain from it [. . .] foreign investment flows which respond to

47. Jose Alvarez, *The Evolving BIT*, *in* 3 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 5 (Ian Laird & Todd Weiler eds., 2010).
48. *Id.* at 4.

> private market forces will lead to more efficient international production and thereby benefit both home and host countries.[49]

The ten developing countries that signed U.S. BITs in the 1980s did so to attract U.S. FDI and capital, although circumstances differed by country.[50] However, U.S. BIT negotiators frankly admitted to their counterparties that there was no correlation between BITs and FDI and capital flows.[51] Similarly, President Clinton wrote in two different letters to the Senate for the ratification of BITs with Ecuador and Mozambique: "[i]t is the U.S. policy [. . .] to advise potential treaty partners during BIT negotiations that conclusion of such a treaty does not necessarily result in increase in private U.S. investment flows."[52] The State Department maintains three "basic aims" of the BIT program: "[p]rotect investment abroad; [e]ncourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and [s]upport the development of international law standards consistent with these objectives."[53]

That is, promoting U.S. FDI is not one of the official "basic aims" of the U.S. BIT program. The purpose of the U.S. BIT Program was to protect existing capital stocks in developing countries and establish a free market regulatory regime. The United States never intended nor pretended that U.S. BITs promote U.S. FDI flows. The U.S. Model BIT became the NAFTA Investment Chapter. Therefore, the NAFTA Investment Chapter shares the same purpose as the U.S. Model BIT—to establish free market governance for cross-border capital flows.

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49. *Statement on International Investment Policy, September 9, 1983*, RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM, *available at* https://www.reaganlibrary.gov/research/speeches/90983b (last visited Mar. 4, 2019).

50. Valerie H. Ruttenberg, *The United States Bilateral Investment Treaty Program: Variations on the Model*, 9 U. PA. J. INT'L L. 121, 135-37 (1987).

51. *See* Vandevelde, *supra* note 32, at 212.

52. William J. Clinton, *Letter of Submittal from U.S. President Clinton to U.S. Senate Regarding Treaty Between the United States of America and the Republic of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment*, U.S. DEP'T. OF ST. (May 1, 2000), *available at* https://tcc.export.gov/Trade_Agreements/Exporters_Guides/List_All_Guides/exp_002667.asp (last visited Mar. 4, 2019).

53. *Bilateral Investment Treaties and Related Agreements*, U.S. DEP'T. OF ST., *available at* https://www.state.gov/e/eb/ifd/bit/ (last visited Mar. 4, 2019).

B. Historical Origins of the NAFTA Financial Services Chapter

1. Corporate Lobbies Motivate the U.S. Trade in Services Campaign in the GATT Tokyo Round

The foundational text of the NAFTA Financial Services Chapter is the same chapter of the U.S.-Canada Free Trade Agreement ("FTA") (1988), and services were specifically negotiated in the U.S.-Canada FTA to prepare the USTR for multilateral services negotiations in the GATT Uruguay Round (1986-1994). This section identifies the United States' motivations for its financial services proposals in the GATT, which motivated the drafting of the financial services agreements in the U.S.-Canada FTA.[54] The U.S. financial services initiative was a central component of the United States' larger trade in services agenda.

There is a large body of literature documenting and explaining the internationalization of service industries as a function of technological advance and reorganizations to the geography of production beginning in the late 1960s.[55] Emerging information technology in the 1970s and 80s not only led to the creation of entirely new services industries, but it enabled fundamental changes to the geography of production. In these contexts, U.S. MNCs needed a permissive international regulatory regime so that they could expand operations into new services markets, and this was the source of corporate activism in bringing trade in trade in services to the U.S. trade policy agenda.

U.S. corporate sector lobbying, led by financial services firms,[56] motivated the USTR to include services in the GATT Tokyo Round (1973-1979).[57] The USTR's proposals at the Tokyo Round were rebuked by the vast majority of developing countries, who insisted that the United States address its concerns about development before trade in services. Following the Tokyo Round, U.S. services lobbies institutionalized, multiplied, built strategic alliances, and became advisors to U.S. trade policymakers. The principle corporate services lobby was the U.S. Coalition of Service Industries ("CSI"), which was formed in 1982 with the overall goal of

54. The history of the U.S. trade in services campaign is well-documented. *See generally*, GEZA FEKETEKUTY, INTERNATIONAL TRADE IN SERVICES: AN OVERVIEW AND BLUEPRINT FOR NEGOTIATIONS (1988); JANE KELSEY, SERVING WHOSE INTERESTS? THE POLITICAL ECONOMY OF TRADE IN SERVICES AGREEMENTS (2008).

55. *See generally* MANUEL CASTELLS, THE RISE OF NETWORK SOCIETY (2000); MICHAEL PIORE & CHARLES SABEL, THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY (1986).

56. The lobbying campaign was led by AIG and AMEX. *See* KELSEY, *supra* note 54, at 78.

57. FEKETEKUTY, *supra* note 54, at 300.

ensuring that services would be central to U.S. trade policy, and financial services firms assumed the pivotal leadership roles.[58]

According to Geza Feketekuty, who was Assistant USTR and responsible for services, the services lobbies had two commercial interests in bringing trade in services to the GATT. First, as new technologies revolutionized the cross-border movement of information, data, and capital, U.S. MNCs sought deregulations of any new markets based on information technology,[59] particularly within developing countries. Second, services lobbies sought to secure a multilateral agreement on investment that included major developing countries. According to USTR William Brock, the U.S. had several political interests in supporting the corporate services lobbies. The first was to "[develop] a stable institutional environment for trade in services, [and provide] 'predictability' in governmental actions and an orderly way for dealing with problems that arise."[60] The second objective was to address state regulations that discriminate between domestic and foreign suppliers or services.[61] Each of these U.S. objectives for establishing a multilateral agreement on trade in services broadly applied to financial services.

The most influential financial services lobby was the Financial Services Group ("FSG") formed as part of the CSI, and it consisted of banks, insurance companies, securities firms, and other financial service providers. Throughout the 1980s, the FSG was "the most powerful group in U.S. policy making" as the group conducted regular meetings with the USTR, Treasury, and regulatory agencies.[62] Feketuky worked closely with the FSG to prepare the USTR for multilateral negotiations in financial services at the GATT. Feketuky observed, "[m]ost national governments consider the regulation of banking a legitimate and essential function—for the achievement of fiduciary objectives (protection of

58. Those firms included Merrill Lynch, AIG, AMEX, and Citicorp. *See id.* at 78.

59. Feketekuty recalled that telecommunications and financial services were the industries most motivated to bring services to the GATT:

> The key people from the industry came to me and said: 'look, what we really want out of this, bottom line, is to stop any pressure within governments to establish restrictive regulations . . . on the 'new services,' from consulting to data processing to information services' . . . We want you to come up with a regime that stops governments from just willy-nilly coming in and regulating things and building up new restrictions in what is potentially a tremendous growth area.'

See id. at 158.

60. William E. Brock, *A Simple Plan for Negotiating on Trade in Services,* 5 THE WORLD ECON. 229, 235 (1982).

61. *Id.*

62. Vinod K. Aggarwal, *The Political Economy of Service Sector Negotiations in the Uruguay Round*, 1 THE FLETCHER F. OF WORLD AFF. 35, 41 (1992).

depositors), for the achievement of monetary control objectives, and in some cases, for the allocation of credit."[63] However, U.S. financial firms found a range of regulations to "hamper" their operations in other countries. The FSG wanted to secure deregulations in: (1) new markets based on transfers of information, data, and capital, which depended upon emerging information technology; and (2) on the free movement of capital to provide cash management services for MNCs and money managers.[64]

Feketuky's task was to reconcile the regulatory concerns of developing countries with the FSG's goals of market access and deregulations.[65] Feketuky proposed a negotiating agenda in financial services based on the "free trade" principle of national treatment, in which governments are obliged to treat foreign producers on the same basis as domestic producers, specifically with respect to entry and equivalent treatment after entry.[66] The FSG advised the USTR, "[a]ny agreement that does not include the more advanced developing countries and the newly industrializing countries will not be of great interest."[67] The financial services negotiating agenda was integrated into the USTR's broader proposal for multilateral services negotiations in the GATT Uruguay Round.

2. The USTR Fights to Bring Services to the GATT Uruguay Round

The USTR took its services proposals to the 1982 GATT ministerial meetings, which were to determine the scope of the GATT Uruguay Round (1986-1994), which produced the WTO. At the 1982 GATT ministerial meetings, developing countries refused the U.S.' services proposals and conflicts quickly escalated.[68] The meetings ended in adversarial impasse between the United States as the leader of developed countries and India and Brazil as the leaders of developing countries. However, both camps agreed to conduct surveys on issues in trade in services for the next ministerial meeting. The position of developing countries on the agenda for multilateral services negotiations is summarized

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63. FEKETEKUTY, *supra* note 54, at 283.
64. KELSEY, *supra* note 54, at 158.
65. FEKETEKUTY, *supra* note 54, at 286.
66. *Id.*
67. Aggarwal, *supra* note 62, at 42.
68. In one instance, India refused to permit services on the negotiating agenda without the implementation of the development objectives set out in the Tokyo Round. USTR William Brock claimed to respond, "Hell would be dappled with little icebergs before India got anything out of the U.S. if they continued to act that way," and talks resumed the next day. KELSEY, *supra* note 54, at 65.

in a report published by the United Nations Conference on Trade and Development (UNCTAD) titled "Services and the Development Process."[69]

The report was an interdisciplinary study concerning the role of services in national development. The report argued that services had large non-economic components and that they were central for "the attainment of a variety of cultural, strategic and social goals."[70] For this reason, the study argued that attempts to apply the theory of comparative advantage to trade in services had been "statistically meaningless" and that comparative advantage does not apply to trade in services.[71] In terms of financial services, banking regulations were considered necessary because of the close links between banking and a country's monetary policy. Therefore, the report argued that financial services liberalization "raises questions about dependency and hence national sovereignty."[72] In doing so, the report put banking at the heart of national identity and categorically refused the application of "free trade" principles to banking.

Developing countries argued that the U.S. services proposal was also an investment containing deregulations of services FDI. In a range of services industries, FDI is necessary for a firm to provide a service abroad, such as the opening of a subsidiary. The UNCTAD report argued, "[t]o [MNCs] the issues of trade and investment ("access" and "establishment") are elements of their global strategy. To governments, trade and investment are two distinct issues."[73] The core of the distinction was the "policy space" needed to implement regulations on FDI to meet development goals.[74] Moreover, the report stipulated that the U.S. services proposal paid no attention to development.[75] The report argued that any agreement in services "will have to also include, among others, specific goals in the areas of training and research, external financing, the

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69. *See generally* U.N. Conf. on Trade and Development Secretariat, *Services and the Development Process*, U.N. Doc. TD/B/1008/Rev.1 (1984) [hereinafter *Services and the Development Process*].

70. *Id.* at 22.

71. *Id.* at 35.

72. *Id.* at 22.

73. *Id.* at 80.

74. India's finance minister rejected the U.S. services proposal, stating:

> When I say so I express the will of 700 million people of my country who constitute one of the largest potential markets in the world economy. They rightfully ask that after their long struggle against colonial rule towards freedom, after having built bit-by-bit a strong and sound economy on the strength of their own toil and talent, whether their national aspirations are now to be condemned as 'obstacles' to trade?

The U.S. denounced the statement as a "door-slammer" and threatened to leave negotiations. KELSEY, *supra* note 54, at 71.

75. *Services and the Development Process*, *supra* note 69.

transfer of adequate technology, technical assistance . . . ."[76] The 1984 GATT ministerial meeting was concluded as developing countries framed their opposition to the U.S. services proposal on technical grounds that the GATT mandate was only limited to goods.

The debate on trade in services entered the larger policy debates in the GATT ministerial meetings with Trade Ministers pointing to the unfolding international debt crisis across the developing world. Arthur Dunkel, GATT Director-General, proposed in the 1982 meeting, "[the] basic objective of the [GATT Uruguay Round] should be to promote worldwide the structural adjustment needed for growth."[77] The USTR insisted that the services and investment proposals would facilitate the necessary "structural adjustment" in developed countries, "which would foster more efficient economic development."[78] Essentially, the United States and Europe argued that "[a]s the geography of production shifted to the global south, the global north needed robust services economies to increase demand for goods from the global south." Creating these services, economies would facilitate growth in the debt-burdened developing countries.

The delegate from the European Economic Community maintained, "there was increasingly a need to turn to the services sector to create jobs that had been lost in more traditional industries."[79] To this end, the U.S. services lobbies aggressively advocated the U.S. services proposals as the basis for the services economy in the United States. Joan Spero, Executive Vice President of American Express, advised the USTR that the "U.S. financial service sector is one of our most competitive internationally . . . that sector will have to be included in the final [GATT] agreement."[80] By the mid-1980s, solidarity among developing countries was beginning to wane as the ongoing debt crisis in developing countries and concomitant International Monetary Fund ("IMF") structural adjustment loan conditions left developing countries in dire need of foreign capital.[81] Eventually, domestic and international pressure on the Brazilian and Indian delegations forced them into isolation and eventual capitulation to include services, investment, and intellectual property rights in the GATT Uruguay Round.

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76. *Id.*

77. Prepatory Comm., *Record of Discussions: Discussions of 17-20 March*, GATT Doc. PREP.COM (86), ¶ 156, SR/3, (Apr. 11, 1986).

78. *Id.* at ¶ 126.

79. *Id.* at ¶ 135.

80. Aggarwal, *supra* note 62, at 41.

81. *See generally* PRASHAD, *supra* note 19.

3. Drafting the NAFTA Financial Services Chapter

While the USTR was negotiating the GATT Uruguay Round to establish the WTO (1986-1994), the USTR also negotiated the U.S.-Canada FTA (1988) and the NAFTA (1991-1992). The United States included services in the U.S.-Canada FTA and the NAFTA, not only to support U.S. MNCs in North America, but also to set legal precedents for the services negotiations in the WTO.[82] Olin Wethington, the principle U.S. negotiator of the NAFTA financial services chapter, explained that the U.S. financial services negotiators were "extremely cognizant of the precedential effect" of the agreement.[83] To that end, the financial services chapters of the U.S.-Canada FTA and the NAFTA were the first international agreements to merge "free trade" theory with banking law, although the NAFTA chapter was far more substantive than the U.S.-Canada FTA.

The U.S. negotiators opted for this "principled" approach to the NAFTA financial services chapter because it could easily serve as a negotiating template for future agreements. According to Wethington, the U.S. financial services negotiators entered negotiations "having formulated certain core, substantive negotiating objectives."[84] The right to pre-establishment[85] and national treatment were essential and there would be "no NAFTA" without these provisions in financial services. The right of pre-establishment was necessary to give U.S. companies "unimpeded access" to the Mexican and Canadian markets. National treatment was the guiding "free trade" principle of U.S. services proposals because it guaranteed U.S. firms non-discriminatory treatment. In drafting the NAFTA financial services agreement, U.S. negotiators added "equal competitive opportunity" to the national treatment article, which was to address situations in which law may read in neutral fashion but in practice it leaves U.S. firms at "competitive disadvantage."[86] U.S. negotiators also explicitly added the article allowing for the entry of new financial services,

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82. FEKETEKUTY, *supra* note 54, at 175.

83. OLIN L. WETHINGTON, FINANCIAL MARKET LIBERALIZATION: THE NAFTA FRAMEWORK (NAFTA SERIES) 10 (1994).

84. *Id.* at 11.

85. Right to pre-establishment is a clause in the national treatment provision that extends the national treatment provision to the pre-investment stage (ex-ante) not simply the investment stage (ex-post). The pre-investment phase refers to the entry of investments and investors of a Party such that they have the right to establish an investment in the host state on terms no less favorable than those that apply to domestic investors in the host state (national treatment). The post-investment phase refers to the operations of the investment.

86. WETHINGTON, *supra* note 83, at 11.

products, and data processing.[87] This provision reflected the fundamental objective of U.S. financial services industries to secure deregulations on new financial products based on the use of information technology.

As in the beginning of the GATT Uruguay Round, investment and financial services were negotiated by the U.S. Treasury Department while the other areas were negotiated by the USTR. At the GATT Uruguay Round, the Treasury insisted that financial services be negotiated apart from other services.[88] The Treasury argued that regulations on financial institutions were "substantially different from those governing other services because, among other things, special controls were necessary to prevent bank failures."[89] To that end, the U.S.-Canada FTA had a separate chapter for financial services and the NAFTA would significantly build upon that foundation.

However, U.S. financial services negotiators placed little emphasis on regulation. Wethington published the U.S.' financial services negotiating objectives, and none addressed regulation except a singular reference to specific exceptions to national treatment in accordance with "internationally recognized [regulatory] principles."[90] In other words, the U.S. financial services negotiators addressed regulation up to the standards of "internationally recognized" regulations, which were codified by the IMF and followed free market orthodoxy.[91] International investment law expert Krista Schefer observed that,

> [a]s most of the negotiators came from a trade or free-market economic background, the main [financial services] provisions demonstrate a firm commitment to the principles of free trade (market access, non-discriminatory treatment, arbitration-based dispute settlement procedures) and a lesser consideration of the interests of financial service regulators and practitioners.[92]

In financial services FDI, the Treasury only sought to apply the "transfers" and "expropriation" articles from the investment chapter to financial services.[93] That is, investors in financial services would not have the same investor protections as investors in any other industry—financial services would *not* have access to the investor protections on national treatment, most-favored-nation, minimum standard of treatment,

87. North American Free Trade Agreement art. 1407, Can.-Mex.-U.S., Dec. 8, 1993, 32 I.L.M. 605.

88. *See* DAVID P. STEWART, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1994) 2365 (Terence P. Stewart ed., 1999).

89. *Id.*

90. WETHINGTON, *supra* note 83, at 11.

91. North American Free Trade Agreement, *supra* note 87, art. 2104.

92. SCHEFER, *supra* note 3, at 120.

93. North American Free Trade Agreement, *supra* note 87, art. 1401.

or performance requirements. The Treasury made this decision based upon reflection of a consensus among regulators at the Treasury, Federal Reserve, and the Securities and Exchange Commission who had sought to shield themselves from ISDS challenges to emergency financial measures during crises.[94]

Table Two: Core Provisions of the NAFTA Financial Services Chapter	
Scope and Coverage	Applies to financial institutions of another Party, financial services FDI, cross-border trade in financial services
Establishment	Investors have the right to establish and operate on basis of non-discrimination
Cross-border Trade	No Party may adopt any measure restricting cross-border trade in financial services, including purchase of services in another Party
National Treatment	Guarantees non-discrimination and requires that Parties provide "equal competitive" opportunities (rather than outcomes)
Most-Favored-Nation	Guarantees treatment equal to other countries, emphasis is placed on ensuring that prudential measures are non-discriminatory
New Financial Services and Data Processing	Parties shall permit a financial institution of another Party to provide "any new financial service" and shall permit the free transfer of data across borders
"Balance of Payments" Exceptions	Parties may violate obligations in the event of a balance of payments crisis, although under highly specific conditions and supervised by the IMF
Dispute Settlement	Disputes are done on a state-to-state basis; the financial services chapter incorporated the "transfers" and "expropriation" provisions from the investment chapter and subjected each to ISDS

94. *U.S. Faces Opposition in TPP On Demands for Broad Investor-State Clause*, INSIDE US TRADE (Oct. 4, 2013), *available at* https://insidetrade.com/inside-us-trade/us-faces-opposition-tpp-demands-broad-investor-state-clause (last visited Mar. 11, 2019).

III. MOTIVATIONS OF THE NAFTA INVESTMENT AGREEMENTS

A. International Context

1. Emerging "Regionalism" in a World Economy

The United States negotiated the NAFTA to: (1) catalyze the stalled Uruguay Round of GATT negotiations which eventually produced the WTO; and (2) set precedent for future U.S. FTAs that would follow the NAFTA. During NAFTA negotiations, the United States would extend, expand, and modify these objectives. Between Mexico's formal request (1990) for an FTA with the U.S. Congress' ratification of the NAFTA (1993), Congress and the USTR repeatedly justified the agreement as an exigent response to the emergence of regionalism and regional trading blocs as the Cold War closed.

Parallel to the NAFTA talks, U.S. competitors were expanding their markets in Europe and Asia while barriers to U.S. exports were becoming increasingly problematic. The European Community was pursuing political and economic integration that culminated with the founding of the European Union in 1992. In 1993, USTR Michael Kantor argued that European integration policies created new barriers to U.S. exports and investment.[95] Simultaneously, Japan, then the second-largest economy in the world, was leading an inward-looking integration in East Asia. USTR Kantor warned, "allowing other nations to promote and protect their industries, building profits from secure home markets, while targeting our open market, is a formula for competitive suicide."[96] The USTR and a chorus of congressmen called for an "American regionalism." An early NAFTA proponent, Rep. Bill Richardson, pleaded to Congress: "If we are to avoid being 'frozen out' of the world market it is imperative that we look to the future with the same [regional] strategy."[97]

To that end, in 1990 President George H.W. Bush announced the goal of a FTA for the Western Hemisphere called the Free Trade Area of the Americas ("FTAA"). The proposed U.S.-Mexico FTA was to be the stepping-stone to the FTAA, a plan that was subsequently adopted by President. Canada joined the U.S.-Mexico negotiations and the U.S.-

95. *See generally U.S. Trade Policy and NAFTA: Hearing Before the Comm. on Finance*, 103rd Cong. (1993) (statement of Mickey Kantor, U.S. Trade Rep.) [hereinafter *U.S. Trade Policy and NAFTA*].

96. *Id.* at 10.

97. *See United States—Mexico Economic Relations: Hearing on H.R. Before the Subcomm. On Trade of the Comm. On Ways and Means*, 101st Cong. 30 (1990) (statement of Bill Richardson, Representative) [hereinafter *United States—Mexico Economic Relations*].

Mexico FTA became the NAFTA. The proposed NAFTA would create an integrated North American market which would boost the global competitiveness of the region. In so doing, North American economic integration would increase the region's geopolitical influence to keep markets open in other parts of the world, which became particularly significant as conflicts escalated in the GATT Uruguay Round negotiations.[98]

2. U.S. Trade Strategy in the GATT Uruguay Round

The NAFTA emerged on North America's trade relations agenda during the GATT Uruguay Round, which were the contentious and prolonged multilateral negotiations that established the WTO. Since the inception of the NAFTA, the overriding goal of both the United States and Mexico's trade strategy was to conclude the Uruguay Round.[99] However, by 1991 the Uruguay Round collapsed over seemingly irreconcilable differences in agricultural disputes between the United States and the European Community. During this stalemate, the United States turned its attention to the NAFTA. The proposed NAFTA assumed new significance in U.S. trade policy debates, aptly summarized in Senator Clark Reynold's address to Senate, "[t]he breakdown in the GATT Uruguay Round negotiations makes it all the more important to rely on regional agreements as a 'second best' approach in the direction of ultimate global liberalization."[100]

According to U.S. trade policy advisors Fred Bergsten and Jeffrey Schott, the NAFTA "reminded" the European Community "that the United States could pursue alternative trade strategies."[101] Indeed, the European Community released a study on potential effects of the NAFTA and concluded that the NAFTA is not a threat to the European Community, but that "an expanded NAFTA would not necessarily be in the Community's best interest."[102] Considering the United States' ambitions for hemispheric trade and investment integration in the Americas, the

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98. *Id.*

99. *Id.* at 19 (statement of Carla Hills, U.S. Trade Rep.).

100. *United States—Mexico Free Trade Agreement: Hearings Before Comm. On Finance,* 102nd Cong. 413 (1991) (statement of Clark Reynolds, Senator) [hereinafter *United States—Mexico Free Trade Agreement*].

101. *See* Fred Bergsten & Jeffrey Schott, *A Preliminary Evaluation of NAFTA*, PETERSON INST. FOR INT'L ECON., (Sept. 11, 1997), *available at* https://piie.com/commentary/testimonies/preliminary-evaluation-nafta (last visited Mar. 3, 2019).

102. *Report of the European Parliament Committee on External Economic Relations on the Free Trade Agreement Between the United States of America, Canada, and Mexico*, A3-0378/92 (Nov. 18, 1992) [hereinafter *EC Parliament Report*].

European Community report "strongly" urged the conclusion of the Uruguay Round and suggested that free trade areas "can be useful building blocks of the world trade regime."[103] Subsequently, the European Community found a new resolve to conclude the faltering GATT Uruguay Round. In so doing, the politics of the NAFTA became inseparable from the founding of the WTO.

B. Domestic Context

1. Renewing "Fast-Track" Authority

Beginning in the 1970s, Congress and the Executive branch agreed that to make politically expedient deals with trading partners the Executive branch would need the power to negotiate an agreement without interference from Congress. Therefore, the 1974 Trade Act established fast-track negotiating authority (hereinafter "fast-track") which required Congress to suspend its ordinary legislative procedures and vote a trade agreement up or down with limited debate and no amendments.[104] In addition, fast-track legislation contained Congress' negotiating objectives for the President, among other checks on the Executive including consultations with relevant Congressional committees. In a 1990 Congressional testimony, USTR Carla Hills explained the political importance of fast-track: "Although the Congress cannot preclude negotiations as a legal matter, without the procedural advantages of fast-track authority, the practical impediments to negotiating an agreement would be all but insurmountable."[105] Therefore, as the Bush administration pursued the U.S.-Mexico FTA, it immediately had to consult with Congress over negotiating objectives and general approval of the deal.

President Bush entered office with fast-track negotiating authority provided by the Omnibus Trade and Competitiveness Act of 1988 ("1988 Omnibus Act"), designed for the GATT Uruguay Round but legally applied to all trade and investment agreements under negotiation. However, when the legislation was drafted, Congress expected the Uruguay Round to be completed by 1991. As such, Congress set fast-track to expire in June 1991 with an automatic two-year extension that could be vetoed by a simple majority vote in either the House or the Senate. By early 1991, the Uruguay Round was on the verge of collapse and the Bush administration would need the two-year extension on fast-track, including for negotiating the NAFTA. On March 1, 1991, President Bush formally

103. *Id.*
104. *See* Trade Act of 1974, Public Law 93-618, 3rd Cong. 37-40 (2018).
105. *United States—Mexico Free Trade Agreement*, *supra* note 100, at 135.

requested the two-year extension, and five days later both houses introduced disapproval resolutions.[106]

2. Congressional Resistance

The March-May 1991 political battle for the renewal of fast-track is well documented.[107] However, at issue in this Article is the extent to which the fast-track renewal process either contested or amended the Bush administration's negotiating objectives in the NAFTA. The 1988 Omnibus Act enjoyed broad bipartisan support and it passed the Senate by a vote of 85 to 11 and the House by a vote of 376 to 45. However, the Bush administration's plan to extend this fast-track legislation to the Mexico FTA inspired unprecedented domestic resistance. During the March-May debates in Congress over the renewal of fast-track, the time debating the U.S-Mexico FTA exceeded Uruguay Round debates by almost ten to one, even though the Uruguay Round was of far greater significance.[108]

The Bush administration engaged in a major outreach effort to win Congressional votes as Bush personally contacted "scores" of lawmakers.[109] Major U.S. business groups organized a massive lobbying campaign to defeat the fast-track disapproval bills. "It's a pan-business effort, I've never seen a larger grouping from the private sector," remarked a top lobbyist from the Emergency Committee for American Trade.[110] On May 1, 1991, the Bush administration made political concessions to Democrats that included a trade-displaced worker adjustment program, future cooperation with Mexico on health and safety issues, a joint border environmental plan, and appointment of environmental experts to the USTR's trade advisory committees.[111] These new labor and environmental commitments were legally non-binding and they did not affect any of the USTR's negotiating objectives. On May 9, House Majority Leader Gephardt introduced a resolution to tie fast-track to these new

106. H.R. 101, 102nd Cong. (1991); S.R. 102nd Cong. (1991).

107. FREDERICK MAYER, INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS 98 (1998); *see also* CAMERON & TOMLIN, *supra* note 5.

108. Lenore Sek, Cong. Research Serv., RL97-885, *Fast-Track Legislative Procedures for Trade Agreements: The Great Debate of 1991* (1999).

109. Gary Lee, *"Fast Track" Sprint: Frenzied Lobbying on a Treaty Not Yet Written*, WASH. POST (May 23, 1991), *available at* https://www.washingtonpost.com/archive/politics/1991/05/23/fast-track-sprint-frenzied-lobbying-on-a-treaty-not-yet-written/507ec79a-4ea4-41df-9bbc-5c9e50dc2065/?noredirect=on&utm_term=.7891581aa3f1 (last visited Mar. 11, 2019).

110. CHARAN DEVEREAUX, ROBERT Z. LAWRENCE, & MICHAEL D. WATKINS, CASE STUDIES IN US TRADE NEGOTIATION, VOLUME 1: MAKING THE RULES 196 (2006).

111. Sek, *supra* note 108, at 2.

commitments.[112] At the end of May 1991, the House and Senate voted down the fast-track disapproval resolutions (House: 192 to 231; Senate: 36 to 59) and fast-track was renewed.[113] The Bush administration was forced to make relatively small (non-binding) concessions to environmental critics to win fast-track. The negotiating objectives from the 1988 Omnibus Act remain unchanged.

C. U.S. Objectives in NAFTA

The official U.S. negotiating objectives in both the Uruguay Round and the NAFTA were detailed by Congress in the 1988 Omnibus Act. The bill was designed to "enhance the competitiveness of American industry," signifying that for U.S. policymakers, trade policy was an industrial strategy.[114] However, the NAFTA also represented the Bush administration's trade strategy in the Uruguay Round and broader foreign policy goals. Therefore, the U.S. objectives in the NAFTA had evolved as a careful combination of industrial strategy, trade strategy, and foreign policy.

Table Three: Synthesis of U.S. Objectives in the NAFTA		
Industrial Strategy	Trade Strategy	Foreign Policy
Establish WTO-plus standards in North America Competitive liberalization: leverage negotiations in the Uruguay Round; encourage other developing countries to negotiate U.S. FTAs	Reposition key U.S. industries by integrating production with Mexico NAFTA was the cornerstone of the Free Trade Area of the Americas (FTAA) "Asymmetrical trade liberalization" to reduce the trade deficit	Support democracy in Mexico and promote reforms in Latin America and the Caribbean Support and compliment bilateral initiatives on border safety and security (narcotics trafficking, undocumented migration, environmental issues)

1. The NAFTA as U.S. Industrial Strategy

The 1988 Omnibus Act directed three overall negotiating objectives to the USTR to obtain: (1) open markets; (2) reductions to barriers to trade; and (3) a more effective system of international trading disciplines

112. H.R. 146, 102nd Cong. (1991).
113. Sek, *supra* note 108, at 6.
114. The Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, 100th Cong. (1988) [hereinafter Omnibus Trade and Competitiveness Act].

and procedures.[115] At the Uruguay Round, the United States faced fierce resistance from developing countries in negotiations over the USTR's proposals in the "new issues" of investment, services, and intellectual property.[116] The purpose of the U.S. proposals on "new issues" was to establish and protect U.S. comparative advantages in advanced manufacturing, advanced services, and high intellectual property content commodities.[117] By extension, the U.S. proposals on the "new issues" would support U.S. exports, and therefore U.S. jobs. In fact, the USTR found that jobs supported by exports paid higher wages in both manufacturing and services.[118] However, due to geopolitical resistance at the Uruguay Round, the USTR was unable to negotiate "high standard" agreements in investment, services, and intellectual property ("high standard" trade agreements are referred to as "WTO-plus" because they go beyond WTO commitments). The NAFTA was an opportunity for the United States to reach a WTO-plus agreement with Mexico, a geopolitically important developing country, thereby setting precedent for future trade agreements with developing countries.

The NAFTA marked the beginning of the U.S. trade strategy of "competitive liberalization," which employs bilateral or regional FTAs with "ready and willing" countries to overcome resistance to U.S. trade policy elsewhere. This trade strategy had its roots in the U.S.-Canada FTA (1988). James Baker, then U.S. Treasury Secretary, described the geopolitical significance of the FTA as "a lever to achieve more open trade."[119] Baker explained, "[o]ther nations are forced to recognize that the U.S. will devise ways to expand trade—with or without them. If they chose not to open markets, they will not reap the benefits."[120] The NAFTA would develop that strategy, and President Clinton announced, "[bilateral and regional] agreements, once concluded, can act as a magnet including other countries to drop barriers and to open their trading systems. The [NAFTA] is a good example."[121] That is, the NAFTA would

115. *Id.*

116. *See generally* STEWART, *supra* note 88.

117. *Id.*

118. *North American Free Trade Agreement*, *Comm. On Ways and Means, Subcomm. on Trade,* 102nd Cong. (1992) (statement of Carla Hills, U.S. Trade Rep.) [hereinafter *North American Free Trade Agreement*].

119. James A. Baker, *The Geopolitical Implications of the U.S.-Canada Trade Pact*, 2 INT'L ECON. 34, 41 (1988).

120. *Id.*

121. *Remarks by the President at American University Centennial Celebration*, CLINTON WHITE HOUSE ARCHIVES (Feb. 26, 1993), *available at* https://clintonwhitehouse6.archives.gov/1993/02/1993-02-26-corrected-remarks-by-the-

make Mexico and Canada a "magnet" for international capital which would apply competitive pressure on other countries seeking to attract international capital, thereby encouraging them to negotiate FTAs with the United States. The competitive liberalization strategy is a part of U.S. industrial strategy since it facilitates the opening of new markets to U.S. FDI and exports.

2. The NAFTA as U.S. Trade Strategy

a. Vertically Integrated Production with Mexico

The NAFTA was a bipartisan political project to cultivate "regionalism" in North America, which was an important goal to U.S. lawmakers to facilitate the United States' ability to be a global economic leader. The emergence of Asian manufacturing exporters in the 1970s turned some U.S. producers into importers, especially for goods such as shoes, luggage, toys, games, sporting goods, and bicycles.[122] However, other industries shifted assembly operations to Mexico to preserve the market shares and competitiveness of U.S. suppliers, notably in autos, textiles, and electronics. Essentially, the trade strategy was to increase the U.S. content in imports from Mexico to maintain production in the United States. By the time the NAFTA came into force, North American supply chains had already emerged in autos, textiles, and electronics.[123]

By vertically integrating production with Mexico, the United States could sustain and grow manufacturing industries. Those industries, in addition to U.S. financial services and agricultural exporters, were the main business lobbies promoting the NAFTA.[124] By the early 1990s, even politically liberal politicians embraced this realist perspective. New York Senator Bill Bradley argued in favor of the NAFTA in 1993, stating that "*[e]conomic competition in the year 2020* won't consist of *scattered countries nibbling* at each other, but major regions operating as economic units on the global playing field" (emphasis added).[125]

b. "Asymmetric Trade Liberalization"

The Bush administration's vision for the FTAAs was not simply about expanding U.S. market shares in Latin America and the Caribbean;

president-at-american-university.html (last visited Mar. 3, 2019) [hereinafter *Remarks by the President*].

122. Ralph Watkins, *Meeting the China Challenge to Manufacturing in Mexico*, *in* CHINA AND THE NEW TRIANGULAR RELATIONSHIPS IN THE AMERICAS 37, 43 (Enrique Peters et al. eds., 2013).

123. *See id.*

124. *Id.*

125. Sen. Bill Bradley, *NAFTA Opens More Than a Trade Door*, WALL ST. J., Sept. 16, 1993, at A20.

another central motivation in the FTAA was to gain leverage over European and Asian negotiators. Joan Spero, an executive at American Express and a leading corporate lobbyist, reasoned to Congress that:

> U.S. exporters and investors must have access to rapidly growing and increasingly sophisticated Asian markets in order to meet and beat our competitors. Our positive decision on the NAFTA will confirm to the world that the U.S. is ready to lead and compete in a changing global economy.[126]

The 1988 Omnibus Act was a response to the unprecedented yet structural expansion of the U.S. trade deficit in the 1980s with Japan and, to a lesser extent, Europe. Moreover, U.S. exporters were increasingly frustrated by protectionism in Europe and Japan. USTR Michael Kantor summed up the dilemma: "We will not stand by and pretend that other nations share our commitment to expanded trade and open markets if the real-world evidence suggests that they do not."[127] The NAFTA and the Bush administration's plans for the FTAA would leverage negotiations with Europe, Japan, and the rest of East Asia. To that end, in the 1988 Omnibus Act Congress laid out specific negotiating objectives for developing countries[128] and for countries with persistent trade surpluses.[129]

Since the United States was the country most open to trade, negotiating partners had relatively higher barriers to trade, especially developing countries. In the Uruguay Round, the USTR sought to lower barriers to trade in areas where the United States already maintained low barriers, and policymakers described this dilemma as achieving "reciprocity" in the exchange of trade obligations, or "asymmetrical trade liberalization." Therefore, in the 1988 Omnibus Act, the principal negotiating objectives of the United States towards developing countries were two-fold: (1) to "ensure" that developing countries commit to "reciprocal" trade obligations; and (2) to reduce the "nonreciprocal trade benefits" for the more advanced developing countries.[130] In the Uruguay Round, solidarity among developing countries prevented the USTR from realizing "asymmetrical trade liberalization."[131] However, in the NAFTA negotiations

126. *Asia Pacific Economic Cooperation (APEC) and U.S. Policy Toward Asia: Hearing Before the H. Comm. on Foreign Affairs*, 103rd Cong. 5 (1993) (testimony of Joan E. Spero, Vice President American Express).

127. *U.S. Trade Policy and NAFTA*, *supra* note 95, at 51 (statement of Mickey Kantor, U.S. Trade Rep.).

128. *See* Omnibus Trade and Competitiveness Act *supra* note 114, § 1107.

129. *See id.*

130. *Id.* § 1121.

131. *See generally* STEWART, *supra* note 88.

the United States was able to implement these objectives with an important developing country—Mexico.[132]

Achieving "asymmetrical trade liberalization" was a means to the next negotiating objective, "restoring current account equilibrium" (i.e. balancing total imports and exports).[133] In outlining the premise of the 1988 Omnibus Act, Congress found that, "[t]he United States is confronted with a fundamental disequilibrium in its trade and current account balances and a rapid increase in its net external debt."[134] Therefore, Congress mandated a principle negotiating objective to address "persistent" trade imbalances and countries with structural trade surpluses "by imposing greater responsibility on such countries to undertake policy changes . . . including expedited implementation of trade agreements where feasible and appropriate."[135] In so doing, Congress sought to reduce the trade deficit not with protectionism on imports but with an aggressive trade policy on exports.

3. The NAFTA as U.S. Foreign Policy

a. Support Democracy in Mexico and Promote Reforms in Latin America and the Caribbean

In 1991, USTR Carla Hills explained to Congress the origins of the proposed FTA with Mexico stating, "[c]onsideration of the FTA initiative is possible because of a reorientation in Mexico away from statist, interventionist policies toward a market-oriented system."[136] The "statist, interventionist policies" that Hills referenced were parts of Mexico's restrictive trade and investment regime during the Cold War. These policies reflected the articles enumerated in the 1974 United Nations Charter of Economic Rights and Duties of States (discussed in Part I). Mexico imposed high tariffs and far-reaching investment restrictions, championed the Calvo Doctrine, pursued import substitution industrialization, and maintained a high degree of state ownership and operation of business.

Mexico's sovereign debt crisis in 1982 triggered the "sea change" in Mexican domestic politics, shifting from inward-looking to outward-looking economic policies. Following a banking crisis and facing sovereign default in 1982, Mexico began to gradually respond to low-growth

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132. *See* Bergsten & Schott, *supra* note 101.

133. Omnibus Trade and Competitiveness Act, *supra* note 114, § 1122.

134. *Id.* at § 1120.

135. *Id.*

136. *Proposed Negotiation of a Free Trade Agreement with Mexico: Hearings before the Subcomm. On Trade of the H. Comm. On Ways and Means*, 102nd Cong. 21 (1991) (statement of Carla Hills, U.S. Trade Rep.).

and high-debt with unilateral, bilateral, and multilateral trade and investment liberalizations, notably with Mexico's accession to the GATT in 1986. In the context of expanding foreign debt—which increased ten-fold between 1984 and 1988 (up to USD $200 billion)—Mexico's President de la Madrid insisted that Mexico accede to the GATT to attract FDI and grow foreign currency reserves.[137] In so doing, de la Madrid began Mexico's liberalization process by overriding domestic political pressure against joining the GATT. The Salinas Administration took office in 1988 and pursued unprecedented unilateral liberalizations to make Mexico one of the most open developing countries, often going beyond its formal GATT obligations.[138]

While Mexico's domestic political reforms were the "impetus" for the NAFTA, according to USTR Carla Hills the United States "encouraged and supported Mexico in its process of reform."[139] In 1989, Mexico became the first country to reach a new debt accord under the Brady Plan, named after then U.S. Treasury Secretary Brady, designed to rearrange the terms of debt service for developing countries. The debt agreement exchanged substantial debt service relief for Mexico with greater assurance of future collectability and further market-oriented reforms. In the GATT Uruguay Round (1986-1994), together USTR Carla Hills and her Mexican counterpart Minister Jaime Serra became a dynamic lever in the conflicts at the bargaining table between developed and developing countries.[140] The emerging political partnership between the United States and Mexico at the end of the Cold War became the origins of the NAFTA.

The U.S.-Mexico political partnership became a symbol of the 21st century as U.S. politicians elevated Mexico to a signpost for the rest of Latin America's "fragile democracies."[141] The U.S.-Mexico partnership quickly became necessary to the U.S. foreign policy goal to promote democracy and free market reforms in Latin America and the Caribbean.

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137. *See* CAMERON & TOMLIN, *supra* note 5, at 58.

138. Notably, the Salinas administration slashed tariffs and licensing restrictions, reduced the role of government as an owner/operator of businesses, and implemented major unilateral reforms in the "new issues" of investment and intellectual property, near and dear to the heart of U.S. trade policy. *See id.* at 60.

139. *United States—Mexico Economic Relations*, *supra* note 97, at 50 (statement of Carla Hills, U.S. Trade Rep.). As Mexico was acceding to the GATT they concurrently established with the U.S. a consultative mechanism to discuss trade issues and bilateral sectoral negotiations in agriculture, investment, intellectual property, services, and tariffs. *See* CAMERON & TOMLIN, *supra* note 5, at 60.

140. *United States—Mexico Free Trade Agreement*, *supra* note 100, at 14 (statement of Carla Hills, U.S. Trade Rep.).

141. *US—Mexico Economic Relations*, *supra* note 97, at 38 (statement of Jim Kolbe, Senator).

Concurrent to the NAFTA, other regional trade agreements in Latin America were emerging, notably the Southern Common Market, and President Bush had made a political commitment to Chile for an FTA after completion of the NAFTA. In addition, many Latin American countries began to undertake their own unilateral market-oriented economic and political reforms, often as part of IMF structural adjustment programs. The Bush administration and Congress sought to "lock-in" these reforms in Latin America and prevent any policy reversion that harkened back to Latin American nationalism and socialism during the Cold War. In Congress, lawmakers argued that Latin American leaders needed Mexico to be "an example of success with a market-oriented economy."[142] In 1993, President Salinas met with leaders from 12 Latin American nations in Chile and described the regional importance of the NAFTA:

> [NAFTA is] . . . a fundamental test of American relations not only with Mexico but also throughout the hemisphere. 'When negotiations for the treaty began, many people thought Mexico was turning its back on Latin America, and events have shown the opposite to be true. For Latin America, the free trade agreement has come to mean a different policy of the U.S. toward the region.'[143]

b. Strengthen U.S.-Mexico Border Initiatives

As outlined by President Clinton in a foreign policy speech in 1993, "it is time for us to make trade a priority element of American security," signifying that the Clinton administration developed a "comprehensive trade policy" that also reflected foreign policy objectives.[144] U.S. lawmakers intended for the NAFTA to advance border security. In early congressional debates on U.S. trade policy in the NAFTA, various congressmen from border states argued in favor of the deal because it would ameliorate social and political problems along the U.S.-Mexico border, which extends more than 2000 miles over four states. In 1990, Congressman Bill Richardson of New Mexico catalogued these border problems to Congress citing, "high unemployment, substandard living and health conditions, drug trafficking, and a continued influx of illegal immigration."[145] Other members of Congress touted the NAFTA because a strong commercial relationship with Mexico would be the basis of a political partnership that would be necessary to address common bilateral

142. *Id.*

143. Tim Golden, *Salinas Call NAFTA a Test of U.S. Relations With All Latin America*, N.Y. TIMES (Oct. 19, 1993), *available at* https://www.nytimes.com/1993/10/19/world/salinas-calls-nafta-a-test-of-us-relations-with-all-latin-america.html (last visited Mar. 4, 2019).

144. *Remarks by the President*, *supra* note 121.

145. *U.S. —Mexico Economic Relations*, *supra* note 97, at 30.

problems along the border, including migration, narcotics trafficking, and environmental issues. The NAFTA proponents in Congress repeatedly cited reports that the agreement would bring prosperity to Mexico, which they argued would reduce instances of undocumented immigration and narcotics trafficking.

IV. NEGOTIATIONS OF THE NAFTA INVESTMENT AGREEMENTS

A. The NAFTA Opening Rounds (June to September 1991)

As NAFTA negotiations began, trade ministers from the United States, Mexico, and Canada divided the negotiations into 19 working groups within six broad areas: (1) market access for goods; (2) services; (3) investment; (4) intellectual property; (5) dispute settlement; and (6) trade rules on subsidies, dumping, and rules of origin.[146] Carla Hills, from the Office of the USTR, appointed officials from the U.S. Treasury to head the investment and financial services working groups, consistent with the negotiating format from the Uruguay Round.

Table Four: The NAFTA Opening Rounds (June to September, 1991)

Negotiating issues in investment and financial services	U.S. Lawmakers and Stakeholders			Mexico	Canada
	Congress	Corporate lobbies, private sector advisors	Labor and environmental groups		
Investor rights and investor-state dispute settlement (ISDS)	Majority support NAFTA objectives; minority wary of offshoring and Mexico as "pollution haven"	U.S. BIT; labor and environment concerns do not belong in the NAFTA	NAFTA will not boost exports but will depress labor and environmental conditions in all three countries	Rejects expropriation and ISDS	Unsuccessfully counters U.S. Model BIT with U.S.-Canada FTA

146. CAMERON & TOMLIN, *supra* note 5, at 82.

Market access for FDI		Demands high value deal		Energy sector not open to negotiations	Demands right to screen FDI
Investor rights and FDI in financial services	Apply free trade principles to banking	U.S. banks "framed parameters of domestic political acceptability"	-	No national treatment, cap on foreign market share, long transition period	U.S. wants branching, Canada wants changes to U.S. banking law

1. USTR Tables the Model BIT

According to political scientists Maxwell Cameron and Brian Tomlin, at the beginning of the investment negotiations the USTR tabled the U.S. Model BIT while Canada proposed to use the U.S.-Canada FTA as the point of departure, while both the United States and Canada attempted to persuade Mexico to join their side.[147] There were two fundamental differences between the U.S. BIT and the U.S.-Canada FTA. First, the U.S. Model BIT assumes a "negative list" approach to sectoral liberalization while the U.S.-Canada FTA had a "positive list" like the WTO. A "negative list" agreement assumes complete liberalization of all economic sectors and with sectoral exceptions that are negotiated, whereas the "positive list" only liberalizes certain negotiated sectors. The second difference between the U.S. BIT and the U.S.-Canada FTA was the dispute settlement provisions. The U.S. Model BIT obliged ISDS, a set of procedures for investors to bring claims against states to the International Centre for Settlement of Investment Dispute at the World Bank. Conversely, the U.S.-Canada FTA directed investment disputes to a state-to-state dispute settlement mechanism or the GATT. However, concurrent to the NAFTA, Canada was negotiating a BIT with Argentina that utilized ISDS procedures.[148] Moreover, in all of the official draft texts of the NAFTA investment chapter, Canada had never bracketed the dispute

147. *Id.* at 100-01

148. Agreement Between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investment, May 11, 1991, 2467 U.N.T.S. 243.

settlement clauses. Therefore, since the beginning of negotiations, Canada was not opposed to ISDS.[149]

Despite Canada's movement towards the United States on the negative list approach and ISDS, there were fundamental differences between the two sides. Canada sought to narrow the definition of "investment" in the U.S. BIT, thereby narrowing the scope of the entire chapter. In addition, Canada insisted on maintaining the right to screen foreign investments which the U.S.-Canada FTA had allowed, and the United States sought to eliminate this carve-out. The FTA permitted a Canadian law which sanctioned government review of direct acquisitions valued over $150 million CAD, and Canada resisted the United States until the end of negotiations.

The U.S. BIT provisions posed three significant problems for Mexico. First, the U.S. BIT expropriation clause provides that compensation must be "prompt, adequate, and effective." This language was unacceptable to Mexico, as it was the language used by the United States when Mexico expropriated U.S. oil companies, banks, and agricultural investments in 1938. Second, Mexico did not accept ISDS due to Calvo Clause in the Mexican constitution. The Calvo Clause was adopted from the Calvo Doctrine, which directed capital disputes with foreigners to domestic courts in Mexico with no recourse to the foreigner's home state. Lastly, from the beginning of negotiations, Mexico drew a red line around the energy sector as off-limits to FDI. Consistent with Mexico's Constitution, Mexico insisted that the energy sector was vital to national security and it was operated by Mexico's large state-owned enterprises.

2. *Investment-Related Labor and Environmental Concerns*

The most well-known "nationalist" politician was Ross Perot, who ran a relatively successful third-party campaign in the 1992 Presidential elections. During a Presidential debate, Perot famously derided the NAFTA stating:

> We have got to stop sending jobs overseas . . . [it's] pretty simple: If you're paying $12, $13, $14 an hour for factory workers and you can move your factory South of the border, pay a dollar an hour for labor . . .

149. Contrary to Cameron and Tomlin's account, it appears that only Mexico was opposed to dispute settlement from the beginning of negotiations. In Cameron and Tomlin's account of the negotiations, both Mexico and Canada initially rejected the U.S. BIT dispute settlement provisions. However, Cameron and Tomlin make no indication that Canada eventually accepting dispute settlement. Further, in all of the official draft texts of the NAFTA investment chapter (published after Cameron and Tomlin's research), Canada had never bracketed the dispute settlement clauses while Mexico did. Therefore, there is no indication that Canada was opposed to dispute settlement. *See generally* CAMERON & TOMLIN, *supra* note 5.

–that's the most expensive single element in making a car–have no environmental controls, no pollution controls and no retirement, and you don't care about anything but making money, there will be a giant sucking sound going south.[150]

Perot's argument was that NAFTA would enable Mexico to "suck" manufacturing investment away from the United States, thereby putting downward pressure on employment and wages in the United States. Perot's sentiments were shared by some U.S. labor unions who did not support the NAFTA along nationalistic lines and preferred protectionist policies. In contrast, other labor unions advocated for institutional mechanisms to improve labor standards in all three countries.[151] U.S. labor union representatives testified to Congress that an FTA with Mexico would not boost U.S. exports because Mexico lacked consumption power to buy U.S. goods. The labor union representatives argued, rather, that the NAFTA would worsen labor conditions in all countries. This argument had currency with a growing number of House Democrats who were wary of offshoring to Mexico, some citing a general lack of enforcement of labor and environmental standards in Mexico as an "unfair trade subsidy" that would distort investment towards Mexico.[152] They warned that offshoring to Mexico would put downward pressure on wages, working conditions, and employment. Former U.S. Treasury Secretary James Baker testified to the Senate, "[t]he argument that Mexican wage levels will be kept artificially low to attract U.S. investment and thus depress wage levels, U.S. wage levels, is not valid."[153]

Environmental groups argued that Mexico would become a "pollution haven" for dirty industry because plants would relocate to Mexico in search of fewer environmental regulations and costs, causing environmental deterioration. During the early rounds of negotiations, the coalition of labor, environmental, and other citizen's groups protested their exclusion from negotiations and began to "shadow the negotiators wherever they went."[154] Environmental groups filed a law suit against the USTR on the grounds that the NAFTA and the GATT Uruguay Round required environmental impact assessments.

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150. *The 1992 Campaign: Transcript of the Second TV Debate Between Bush, Clinton and Perot*, N.Y. TIMES (Oct. 16, 1992), *available at* https://www.nytimes.com/1992/10/16/us/the-1992-campaign-transcript-of-2d-tv-debate-between-bush-clinton-and-perot.html (last visited Mar. 4, 2019).

151. *See generally* Tamara Kay, *Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America*, 111 AM. J. OF SOC. 715 (2005).

152. *United States—Mexico Free Trade Agreement*, *supra* note 100, at 7.

153. *Id.* at 48.

154. MAYER, *supra* note 107, at 126.

3. Investor Rights and FDI in Financial Services

Each country had a consultation process with representatives of financial services industries. After negotiations, Olin Wethington reflected that the U.S. consultation process with U.S. banks "framed, early in the process, the parameters of domestic political acceptability and became a two-way education process on specific issues, with both government and the private sector learning and exploring the limits of negotiating feasibility."[155] To this end, from the beginning of the negotiations there was a "high degree of convergence" on core principles between the USTR and the private sector, particularly in establishment, national treatment, and Mexico's transition period.[156] In negotiations, the majority of sticking points concerned how much liberalization and how soon. Wethington observed:

> Much of the NAFTA negotiations in the financial services sector concerned the elements of the transition period - its length, the speed of the liberalization during the transition, the extent of market share for the U.S. and Canadian firms . . . and certain special rules that would apply only to the transition period.[157]

Negotiations were slow to begin as Mexico initially did not agree to negotiate financial services on the grounds that they had just reprivatized their banks and they feared U.S. competition. The United States responded that without a financial services agreement there would be "no NAFTA."[158] Mexico conceded and then called for a permanent five percent cap on foreign ownership of financial institutions, and when the Mexicans did not accept the core issue of national treatment, the United States responded that this was "not serious."[159] The United States and Mexico were "nowhere" near an agreement.[160] Both the United States and Canada wanted to build upon the FTA and establish the right to open retail and commercial bank branches. However, the United States claimed it was unable to permit branching due to interstate banking laws and the Glass-Steagall Act. In turn, Canada would not give anything up on the issue.

155. WETHINGTON, *supra* note 83, at 21.

156. *Id.*

157. *Id.* at 55.

158. CAMERON & TOMLIN, *supra* note 5, at 84.

159. *Id.* at 98-99.

160. *Negotiators Remain Far Apart in NAFTA Talks on Financial Services*, 10 INSIDE U.S. TRADE 1, 19-20 (Jan. 31, 1992).

B. Drafting the Investment Agreements (October 1991 to January 1992)

<table>
<tr><th colspan="6">Table Five: Drafting the Investment Agreements (October 1991 to January 1992)</th></tr>
<tr><th rowspan="2">Negotiating issues in investment and financial services</th><th colspan="3">U.S. Lawmakers and Stakeholders</th><th rowspan="2">Mexico</th><th rowspan="2">Canada</th></tr>
<tr><th>Congress</th><th>Corporate lobbies, private sector advisors</th><th>Labor, environmental groups</th></tr>
<tr><td>Investor rights and investor-state dispute settlement (ISDS)</td><td rowspan="2">Majority favor U.S. BIT but offshoring concerns leads some Congress members to oppose it</td><td rowspan="2">Maintains that NAFTA is not forum for labor and environmental concerns; all BIT provisions necessary</td><td rowspan="2">Successfully motivate USTR to address investment-related environmental concerns, although unclear to what extent</td><td rowspan="2">Concedes to U.S. BIT provisions; unsuccessfully tables performance requirements</td><td>Continues to push for narrower definition of investment</td></tr>
<tr><td>Market access for FDI</td><td>Maintains right to screen FDI</td></tr>
<tr><td>Investor rights and FDI in financial services</td><td>Treasury drafts balance of payments safeguard provision</td><td>Mexico has political motivations for maintaining control of banking system</td><td>-</td><td>Accepts establishment; rejects national treatment; demands caps to market share</td><td>Pushes for repeal of Glass-Steagall</td></tr>
</table>

1. Investor Rights and Investor-State Dispute Settlement (ISDS)

By the meetings of January 7-10, 1992, each side had "cut and pasted" its wish list into a draft text.[161] Mexico continued to reject the U.S. BIT's articles of expropriation and ISDS through the initial January 16, 1992 draft.[162] Mexico was stubborn to give up its commitment to the Calvo Doctrine. Mexico had not proposed an expropriation text, although it had agreed that the subject should be covered in "a manner consistent with its Constitution, which does not preclude fair market value."[163] The United States continued to push for a broad definition of investment and "national treatment," over the objections of Canada and Mexico.[164]

During the investment negotiations of the Uruguay Round, developing countries, led principally by India, argued that U.S. investment proposals would compromise national sovereignty.[165] India made a particularly strong case against performance requirements, arguing that they have development dimensions that "far outweigh their trade effects in the case of developing countries."[166] In 1989, Mexico was among the countries who concurred with India. The United States responded that "capital should flow according to market forces with a minimum of government intervention."[167] During NAFTA negotiations in January 1992, Mexico had proposed voluntary performance requirements in which "a company could voluntarily agree to meet a certain content requirement in exchange for a subsidy payment."[168] The United States and Canada rejected this proposal, and in official statements the USTR maintained the same talking points that investment should respond to "private market forces."

2. Investment-Related Labor and Environmental Concerns

A GATT dispute panel ruled that a U.S. environmental law that protected wild dolphins was in violation of GATT obligations because it prohibited imports of Mexican tuna. Public Citizen spokeswoman Lori

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161. *NAFTA Working Group on Investment Still in Early Stages of Negotiations*, 10 INSIDE U.S. TRADE 1, 10-11 (Jan. 31, 1992).

162. *See generally NAFTA Investment Chapter 11 Draft*, OFF. OF U.S. TRADE REP. (Jan. 16, 1992), *available at* https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file57_5923.pdf (last visited Mar. 4, 2019).

163. *Id.* at 16.

164. *NAFTA Working Group on Investment Still in Early Stages of Negotiations*, *supra* note 161, at 10-11.

165. STEWART, *supra* note 88, at 2100.

166. *Id.*

167. *Id.* at 2107.

168. *Id.*

Wallach explained, "[t]his case is the smoking gun, we have seen GATT actually declaring that a U.S. environmental law must go."[169] In Congress, 63 members joined environmentalists in protesting the ruling with concerns of the implications of the ruling for other U.S. environmental laws.[170] The lawmakers had easily made connections to the NAFTA negotiations and denounced Mexico as a partner in protecting the environment. Environmental groups and Democrats in Congress continued to advance the "pollution haven" argument, in which Mexico would attract FDI due to its lax environmental standards and enforcement. Mexican President Salinas responded to the concerns of U.S. Congress that Mexico would not seek to enforce the GATT ruling and Mexico would implement a new law to prevent the killing of dolphins.[171] In response, U.S. negotiators inserted into the investment chapter draft, "[l]anguage on the environment may be provided for this chapter and/or generically."[172]

3. Investor Rights and FDI in Financial Services

In January 1992, the Mexican financial services negotiators prepared a document for their counterparts in the U.S. Treasury. In the document, the Mexicans were in broad agreement with U.S. liberalization objectives stating that "[b]ehind the program for opening the domestic financial system under NAFTA is the assumption that allowing foreign intermediaries to operate in Mexico could contribute to economic efficiency and facilitate the globalization of the financial sector."[173] However, the Mexican financial services negotiators retained the objective of minimizing risks of instability that might result from "too sudden and too significant infusion of foreign competition."[174] Therefore, by January of 1992 Mexico agreed to the right of establishment of foreign firms but was demanding a transition period until roughly 2010, with permanent limitations on foreign ownership and foreign market share afterwards.

Many U.S. negotiators believed that politics were the Mexican government's core motivation for insisting on permanent caps to foreign ownership and market share, and not financial instability. Olin Wethington reflected that "the political element stemmed from a strongly held view in certain Mexican political circles that the financial system must be

169. MAYER, *supra* note 107, at 128.

170. *Id.*

171. *See* Juanita Darling, *Tuna Turnabout: Mexico Announces a Dolphin Protection Plan*, L.A. TIMES (Sept. 25, 1991), *available at* http://articles.latimes.com/1991-09-25/business/fi-2764_1_dolphin-protection (last visited Mar. 12, 2019).

172. *NAFTA Investment Chapter 11 Draft*, *supra* note 162, at 4.

173. WETHINGTON, *supra* note 83, at 13.

174. *Id.*

maintained under the control of Mexican nationals."[175] Wethington believed that these were the reasons for the Mexican negotiating documents characterizing the Mexican banking system as a "national asset" and "essential to the country's economic security."[176] The Mexican negotiating documents asserted the necessity of permanent ceilings on foreign ownership of banks: "a ceiling is needed to assure adequate domestic control of the banking system so vital to the national economy."[177] However, the United States rejected any permanent limitations on the principle of national treatment.[178]

As negotiators prepared the first draft of the financial services agreement, they remained "far apart" in seven areas: (1) national treatment; (2) coverage of agreement; (3) administration of trade laws and regulations; (4) commercial presence; (5) which services to include and exclude; (6) transparency of rules and regulations; and (7) the extraterritorial application of U.S. laws.[179] Mexico was unwilling to accept the principle of "national treatment," which the United States and Canada outlined as an "essential condition" to the agreement.[180] Mexico introduced a "sweeping proposal" that would ban financial service providers from many programs that included government involvement, such as student loans, pension funds, and export/import financing, and the United States rejected these exclusions.

Canada insisted upon the removal of Glass-Steagall restrictions on foreign banks and securities affiliates in U.S. markets.[181] Moreover, Canada sought to enlarge the ability of its securities firms to provide cross-border securities services into the United States. Canada was generally in line with U.S. objectives towards Mexico, but the Canadians did not make demands of Mexico. Simultaneously, the U.S. Treasury indicated that it would provide an emergency "safeguard" provision for balance of payment crises, although the language was not yet drafted.[182]

C. "The Dallas Jamboree" and Aftermath (February to April 1992)

There was a conclusion of the main draft text at the Uruguay Round in early 1992, although the United States and European Union were still

175. *Id.*

176. *Id.*

177. *Id.* at 13-14.

178. *Negotiators Remain Far Apart in NAFTA Talks on Financial Services*, *supra* note 160.

179. *Id.*

180. *Id.*

181. WETHINGTON, *supra* note 83, at 16.

182. *NAFTA Investment Chapter 11 Draft*, *supra* note 162, at 8.

engaged in a standoff over agriculture. The negotiations in Dallas on February 17, 1992 assumed greater significance because concluding the NAFTA would demonstrate to the European Union that the United States had an attractive non-agreement alternative to the Uruguay Round. Presidents Bush and Salinas ratcheted up the pressure on their negotiators to complete the NAFTA as soon as possible. The Dallas meeting was dubbed the "jamboree" (or large gathering), where all the working groups met with chief negotiators for outstanding issues to be decided at a higher political level.

<table>
<tr><th colspan="6">Table Six: "The Dallas Jamboree" and Aftermath
(February to April 1992)</th></tr>
<tr><th rowspan="2">Negotiating issues in investment and financial services</th><th colspan="3">U.S. Lawmakers and Stakeholders</th><th rowspan="2">Mexico</th><th rowspan="2">Canada</th></tr>
<tr><th>Congress</th><th>Corporate lobbies, private sector advisors</th><th>Labor, environmental groups</th></tr>
<tr><td>Investor rights and investor-state dispute settlement (ISDS)</td><td rowspan="3">NAFTA is embraced as alternative to Uruguay Round; debate over labor and environmental concerns</td><td rowspan="2">NAFTA should not address labor and environment;</td><td rowspan="3">Leaked copy of negotiating text confirms labor and environmental concerns</td><td>Expropriation language had to avoid Calvo doctrine</td><td>Concedes to U.S. investment definition</td></tr>
<tr><td>Market access for FDI</td><td>Energy sector not open to negotiations</td><td>U.S. concedes to Canada's FDI screen</td></tr>
<tr><td>Investor rights and FDI in financial services</td><td>Scope needs to be financial services and not just firms; pressures Mex.</td><td>Unsuccessfully defends "national treatment" exception</td><td>Sides with U.S. vis-à-vis Mex.; still pushes for reforms to Glass-Steagall</td></tr>
</table>

1. Investor Rights and ISDS

The Dallas Jamboree lead to Mexico finally conceding to "expropriation" and ISDS due to the pressure it faced to conclude the NAFTA. In drafting the "expropriation" provision, negotiators had to figure out how to word the obligation without violating the Mexican constitution, which permitted expropriation on the grounds of national interest.[183] When explaining the tradeoff, an anonymous negotiator said: "[w]e had to craft the expropriation language not using the words 'prompt, adequate, and effective.' There are three paragraphs, and if you read them, you find that what they say is exactly those three words, but in substitute language."[184] The United States argued that it was essential for Mexico to accept the U.S. definition of expropriation and ISDS in order for Mexico to attract U.S. FDI and capital.[185] In market access talks, the United States conceded to Canada's demand to maintain its foreign investment screen, but the USTR sought to reduce its scope.

A leaked copy of the draft text from the Dallas Jamboree was published in March by the Washington DC journal *Inside U.S. Trade*, and it confirmed all the fears of NAFTA critics. A spokesperson from an environmental group called the Sierra Club addressed the NAFTA draft text: "[i]t's pure and simple, the document does not pay attention to anything but expanding trade . . . The best you get is meaningless language or no mention of the environment."[186] This draft text was the final evidence to labor and environmental groups that they would be marginalized from determining the NAFTA's core content.

2. Investor Rights and FDI in Financial Services

Similar to the investment negotiations, the Mexican financial services negotiating team closely followed its directive to finish negotiations as soon as possible. At Dallas, the Mexicans accepted the principle of national treatment in financial services.[187] In addition, while they maintained demands for a permanent cap on foreign market share, they abandoned their fight for permanent caps on foreign ownership in banking. However, the Mexican negotiators immediately regretted this concession because they made it without receiving anything in return from the United States or Canada, to the delight of those parties. As a result, U.S. negotiators became "hungry for more."[188] An anonymous negotiator recalled,

183. CAMERON & TOMLIN, *supra* note 5, at 112.
184. *Id.*
185. *Id.* at 100-01.
186. MAYER, *supra* note 107, at 133.
187. CAMERON & TOMLIN, *supra* note 5, at 114.
188. *Id.*

"[t]hey were giving things away; so I am going to keep asking until they stop giving."[189] As the United States continued to push for the agreement to cover financial services rather than financial firms, its negotiators upped the ante, insisting there would be "no NAFTA" unless every financial intermediary who wanted access to the Mexican market got it.[190]

Mexican financial markets had come to expect a NAFTA agreement, and the success of the NAFTA negotiations were already "factored into the market."[191] Therefore, any indication of failure to reach an agreement would make Mexican markets highly volatile. So, the U.S. negotiating strategy was to "keep demanding, and be patient."[192] The U.S. negotiators knew that Mexico was anxious for a deal as the country was in dire need of foreign capital. Therefore, U.S. negotiators were patient, and when the Mexican markets became impatient, the United States would push Mexican negotiators for concessions in financial services. The Mexican negotiators felt pressure from their superiors to conclude the agreement as soon as possible, which resulted in tremendous concessions from the Mexican negotiators in several working groups, especially investment and financial services.

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189. *Id.*
190. *Id.*
191. WETHINGTON, *supra* note 83, at 19.
192. CAMERON & TOMLIN, *supra* note 5, at 114.

D. Reaching an Agreement (May to August 1992)

<table>
<tr><th colspan="6">Table Seven: Reaching an Agreement (May to August 1992)</th></tr>
<tr><th rowspan="2">Negotiating issues in investment and financial services</th><th colspan="3">U.S. Lawmakers and Stakeholders</th><th rowspan="2">Mexico</th><th rowspan="2">Canada</th></tr>
<tr><th>Congress</th><th>Corporate lobbies, private sector advisors</th><th>Labor, environmental groups</th></tr>
<tr><td>Investor rights and investor-state dispute settlement (ISDS)</td><td rowspan="2">Official study shows investment will be boon to all NAFTA; Congress warns environmental concerns must be addressed</td><td>Concerns over Canada and Mexico's FDI screens</td><td rowspan="3">Unsuccessfully argued that the NAFTA would increase offshoring and decrease employment; unsuccessfully lobbied for labor and environmental provisions; presented studies contesting official studies</td><td colspan="2">By May brackets were removed around investor rights and ISDS, indicating Mexico and Canada were unsuccessful in reforming U.S. BIT provisions</td></tr>
<tr><td>Market access for FDI</td><td>Limit sectoral exceptions to investment obligations</td><td colspan="2">Talks are contentious; U.S. bargains for high threshold for Canada's FDI screen while Mexico demands FDI screen also</td></tr>
<tr><td>Investor rights and FDI in financial services</td><td>USTR and Treasury hold meetings with financial services lobby and must placate the lobby's demands</td><td>Financial services lobby threatens to erode Congressional support for NAFTA without Mexican concessions</td><td>No permanent caps acceptable to U.S. industry; Mexico joins Canada insisting reforms to U.S. banking laws</td><td>Reforms to Glass-Steagall not possible under NAFTA framework</td></tr>
</table>

1. Investor Rights and ISDS

By the end of May, Mexico and Canada conceded to all U.S. BIT provisions and talks had progressed to negotiating which sectors would be exempt from the obligations. Mexico secured the most exceptions (89)—although many were transitional and to be phased out over time—followed by the United States (50) and lastly Canada (48). Notably, all three parties exempted government provided social services, telecommunications services, and maritime and transportation sectors. Canada fought to protect its culture industries from FDI, while Mexico barred FDI in energy. In addition, Canada was persistent in maintaining investment screening of takeovers valued above $150 million CAD, and Mexico responded by also calling for an equivalent mechanism. The United States rejected both, except for national security reasons, as in U.S. legislation. However, by August the United States conceded to both Canada and Mexico on permitting investment screening to conclude the NAFTA, and the right to review investment acquisitions was carved out of ISDS.[193]

2. Investment-Related Labor and Environmental Concerns

The leaked draft text from the Dallas Jamboree was fuel to fire for opposition to the NAFTA. A coalition of environmental groups, which included some fast-track supporters, presented the USTR with a list of demands. USTR Carla Hills "appeared uninterested" until many Congressmen testified that the NAFTA would not make it past Congress unless environmental concerns were met.[194] Hills responded to Congress in September 1992:

> Mexico will not become a pollution haven because it costs more for our companies to move to Mexico than it does to comply with our U.S. environmental standards. We did not negotiate this agreement to permit Mexico to enforce our environmental laws or any of our other laws any more than we are going to enforce theirs.[195]

The USTR concluded that the NAFTA would not turn Mexico into a "pollution haven" because "environmental compliance costs play a minimal role in relocation decisions because they represent a small share of total costs for most industries."[196] The USTR even claimed the

193. *NAFTA Chapter 11 Trilateral Negotiating Draft Texts*, OFF. OF U.S. TRADE REP. (Aug. 11, 1992), *available at* https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file865_5907.pdf (last visited Mar. 1, 2019).

194. MAYER, *supra* note 107, at 134.

195. *North American Free Trade Agreement*, *supra* note 118.

196. *See generally* OFF. OF THE U.S. TRADE REP., MYTHS & REALITIES: THE NORTH AMERICAN FREE TRADE AGREEMENT (1992).

contrary: "[the] NAFTA encourages environmentally sound investments" and "will enhance environmental protection."[197] To placate Democrats in Congress, the USTR would "green the text,"[198] but the investment chapters' environmental provisions were framed as moral obligations and not legally enforceable provisions.[199]

Similarly, the USTR concluded that neither Mexico's low wages nor poor labor conditions would attract U.S. FDI because "[t]he total cost of production is what matters in relocation decisions, not wages alone."[200] On the contrary, the USTR sold the investment provisions to Congress as a "win-win" agreement for all parties because "U.S investments generate increased U.S. exports."[201] In August 1992, the USTR Press Release on the investment chapter explained, "[i]ntegrated production in North America will make U.S. firms more competitive against European and Japanese producers," and the elimination of performance requirements in Mexico "will increase the demand for inputs sourced from the United States."[202] Therefore, the USTR argued, the investment provisions will encourage job growth.

In May 1992, at the request of the USTR, the U.S. International Trade Commission surveyed and evaluated the various economic analyses of NAFTA. The subsequent report found that:

> [T]here is a surprising degree of unanimity in the results regarding the aggregate effects of NAFTA. All three countries are expected to gain from a NAFTA. These independent studies found that NAFTA would increase U.S. growth, jobs, and wages. They found that NAFTA would increase U.S. real GDP by up to 0.5 percent per year once it is fully implemented. They projected aggregate U.S. employment increases ranging from under 0.1 percent to 2.5 percent. The studies further project aggregate increases in U.S. real wages of between 0.1 percent to 0.3 percent.[203]

The President and the USTR announced these findings to Congress and the public. In doing so, the USTR rejected the concerns of labor and environmental countries. Simultaneously, the USTR's negotiation of the

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197. *See generally* OFF. OF THE U.S. TRADE REP., *supra* note 4.

198. *See generally* Rhonda Evans & Tamara Kay, *How Environmentalists 'Greened' Trade Policy: Strategic Action and the Architecture of Field Overlap*, 73 AM. SOC. REV. 970 (2008).

199. North American Free Trade Agreement, *supra* note 87, art. 1114.

200. OFF. OF THE U.S. TRADE REP., *supra* note 4.

201. *Id.*

202. *Id.*

203. *White House Fact Sheet: The North American Free Trade Agreement*, *in* 2 PUBLIC PAPERS OF THE PRESIDENTS: BUSH, GEORGE H.W. 1342-45 (1993), *available at* https://www.govinfo.gov/content/pkg/PPP-1992-book2/pdf/PPP-1992-book2-doc-pg1342.pdf (last visited Mar. 6, 2019).

investment chapter was "strongly endorsed" by the Investment Policy Advisory Committee for Trade, the advisory committee that interfaces the USTR with private sector perspectives.[204]

3. Investor Rights and FDI in Financial Services

In May, there was a deadlock in the financial services working group. At the Dallas Jamboree, Mexico abandoned its fight for permanent caps on foreign ownership but insisted on permanent caps for foreign market shares in financial services and they refused to give more market access. Representatives from U.S. banks were "furious."[205] The U.S. financial services industry feared that such an agreement would set "dangerous precedent" for future negotiations. The major financial services lobbies wrote to USTR, stating that,

> [t]he extent of liberalization in financial services will determine our ability to support the final NAFTA agreement . . . Financial industry commitment to the Mexican market will be undermined by any form of permanent cap even if used for 'safeguard purposes.' These proposed restrictions are unacceptable in terms of U.S. liberalization goals.[206]

The Treasury responded to Mexico that the U.S. financial services industry rejected the Mexican proposal as "inadequate" and countered with a proposal that featured no permanent caps within "some reasonable transition period."[207] The standoff continued through June as Mexico was seeking tradeoff concessions with the United States and Canada. Mexico argued that the United States cannot truly offer national treatment due to interstate banking laws. Mexico joined Canada in demanding changes to Glass Steagall. However, Mexico indicated that it was willing to modify its demand of a permanent 12 percent cap on foreign share of the financial services market, for safeguards blocking further expansion.[208]

USTR Carla Hills and Treasury Secretary Nick Brady met with the financial services lobby, where the coalition of U.S. banks threatened to sink the NAFTA in Congress.[209] Hills and Brady returned to the Mexican negotiators with the ultimatum and the Mexicans understood that they

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204. *See generally* OFF. OF THE U.S. TRADE REP., NORTH AMERICAN FREE TRADE AGREEMENT: REPORT OF THE INVESTMENT POLICY ADVISORY COMMITTEE (INPAC) (1992).

205. MAYER, *supra* note 107, at 136.

206. *U.S., Mexico Still Unable to Resolve NAFTA Financial Services Dispute*, 10 INSIDE U.S. TRADE 17, 17 (May 22, 1992).

207. *Id.*

208. *NAFTA Talks Stall in Financial Services Market Access Working Group*, 10 INSIDE U.S. TRADE 10, 10-11 (June 5, 1992).

209. MAYER, *supra* note 107, at 136.

could not get the NAFTA without the five largest U.S. banks.[210] Mexico issued a new proposal with no permanent caps, but with a lengthy transition period and safeguards that would prevent rapid increases of foreign ownership.[211] This new proposal was the basis of the final agreement, and in July the United States and Mexico had reached a deal. The USTR presented the agreement to the public and Congress as unprecedented support to U.S. comparative advantages in financial services.[212]

Canada continued its demand for changes to U.S. interstate banking laws and Glass-Steagall.[213] The United States responded that repealing Glass-Steagall would require permission from the Federal Reserve and it would not consider the demand, but foreign firms will be afforded same rights as domestic firms. By the conclusion of negotiations, the following issues between United States and Canada remained unresolved: (1) U.S. restrictions on interstate banking; and (2) Glass-Steagall restrictions on affiliations between banks and securities firms.[214]

4. Financial Regulation and the "Balance of Payments" Exception

The final agreement ventured into uncharted legal territory by seeking a tradeoff between the free movement of capital and financial stability. To this end, the liberalization of financial services could only become viable by relying on exceptions to free trade principles. The U.S. Treasury inserted an emergency provision in the case of balance of payments crises.[215] The balance of payments exception can be broadly characterized as language on capital controls, which allow exceptions to the free movement of capital under the transfers article.[216] However, for a country to implement the balance of payments exception, capital controls can only take specific forms under specific conditions and they must be implemented under the supervision of the IMF.[217] Moreover, any capital controls must be temporary, non-discriminatory, and meet an ambiguous standard "to not be more burdensome than necessary."[218] The USTR's private sector advisory committee strongly endorsed the provision

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210. *Id.*

211. *Id.*

212. *See generally* OFF. OF THE U.S. TRADE REP., SERVICES: THE NORTH AMERICAN FREE TRADE AGREEMENT (1992).

213. *U.S. Mexico Reach Deal in NAFTA Financial Services, Canada Balks*, 10 INSIDE U.S. TRADE 1, 11-12 (July 3, 1992).

214. WETHINGTON, *supra* note 83, at 22.

215. North American Free Trade Agreement art. 2104, Dec. 17, 1992, 32 I.L.M. 289.

216. *Id.* art. 1109.

217. *Id.* art. 2104.

218. *Id.*

saying, "The provisions on transfers substantially meet the ACTPN's [Advisory Committee for Trade Policy and Negotiations] objective to allow such transfers to be completely without restriction. The qualification provided to address any possible balance of payments problem is reasonable, and the conditions under which it may be invoked are clearly defined and limited."[219]

That the balance of payments exception is ambiguous, vague, and highly conditional, indicating that the NAFTA safeguards to financial stability are weak. Simultaneously, by applying free trade principles to financial services, the agreement was intended to increase the mobility of capital, which, according to free market principles, would increase economic growth.

V. THE ORIGINAL PURPOSES OF THE NAFTA INVESTMENT AGREEMENTS

A. The NAFTA Investment Agreements are U.S.' Documents

1. The U.S.' Negotiating Success in the NAFTA Investment Chapter

The U.S.' proposal for the NAFTA investment chapter was a direct import of the U.S. Model BIT. Domestically, the USTR faced resistance on the content of the NAFTA investor rights from labor unions, environmental groups, and "economic nationalist" politicians like Ross Perot. The USTR simply marginalized these opposing stakeholders; however, the USTR could not ignore resistance in Congress concerning the NAFTA's environmental impacts. This forced the USTR to insert language on the environment in the investment chapter, although it is a non-binding commitment.[220]

In international negotiations, Mexico rejected expropriation and ISDS because of the Calvo Clause in the Mexican Constitution, which referenced the Calvo Doctrine by directing investment disputes with foreigners to Mexican courts. However, the USTR and the U.S. MNCs insisted that ISDS was necessary for Mexico to attract U.S. capital. Eventually, the Mexican negotiators conceded to ISDS, signifying Mexico's historic break from the Calvo Doctrine. The United States and Canada were broadly aligned on negotiating objectives, apart from Canada's suspicion of the United States' broad definition of investment and Canada's refusal to grant the U.S. market access in culture industries.[221]

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219. OFF. OF THE U.S. TRADE REP., *supra* note 204, at 51.
220. North American Free Trade Agreement, *supra* note 215, at art. 1114.
221. *See* Part IV, *supra*, for an extended discussion of this topic.

Despite the domestic and international resistance, U.S. negotiators successfully maintained all core investor rights from the U.S. Model BIT in the NAFTA investment chapter and achieved widespread market access in Mexico in Canada, with limited sectoral exceptions. The USTR's Investment Policy Advisory Committee offered a strong endorsement:

> The [NAFTA investment chapter] will encourage and promote free flows of investment among the three countries by ending many current restrictions in Mexican law on foreign investment and by going beyond the terms of the recent United States-Canada Free Trade Agreement (CFTA) in liberalizing investment requirements.[222]

The USTR's Investment Policy Advisory Committee justified strong investor rights because they would "encourage and promote" regional FDI while ISDS would remove Mexico's Calvo Doctrine, "a major impediment to investment."[223] In so doing, the USTR used the NAFTA investment chapter to reregulate Mexico's FDI policies. To that end, the Committee's report also asserted that ISDS would promote FDI to Mexico,

> [p]ermitting an investor to choose impartial international arbitration and thus bypass national courts is a significant change from long-standing Mexican views under the Calvo Doctrine. [The Investment Policy Advisory Committee] believes the dispute resolution section removes a major impediment to investment and that it meets all . . . objectives. [The Investment Policy Advisory Committee] strongly endorses it.[224]

2. The U.S.' Negotiating Success in the NAFTA Financial Services Chapter

The impetus for the NAFTA financial services chapter came from the U.S.' initiatives in the late 1970s to establish to establish a trade in services regime in the GATT. U.S. lawmakers came to an overwhelming consensus that the GATT had to include services, investment, and intellectual property to ensure the global competitiveness of U.S. industries. The Omnibus Trade and Competitiveness Act of 1988, in which Congress mandated specific negotiating objectives for the USTR in the GATT Uruguay Round, passed the Senate by 85 to 11 votes and the House by 376 to 45 votes. In financial services, negotiations were led by the U.S. Treasury, which insisted that trade and investment in financial services must be separated from other service sectors due to the unique regulatory concerns in financial services.[225]

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222. OFF. OF THE U.S. TRADE REP., *supra* note 204, at 3.
223. *Id.* at 11.
224. *Id.*
225. STEWART, *supra* note 88.

U.S. firms prioritized trade agreements with developing countries, which not only had the most restrictive regulatory environments for foreign firms but also had the largest growth potential. During multilateral negotiations in the 1970s and 80s, U.S. firms refused any U.S. negotiating objective that did not advance market access in developing countries. Conversely, developing countries argued for the right to retain the necessary policy space to regulate FDI in financial services to meet development objectives, which the United States categorized as protectionist "non-tariff barriers" to trade in services. A U.N. report rebuked the U.S. financial services proposals, arguing that "[b]anking, because of its close links with a country's monetary policy, raises questions of dependency and hence national sovereignty."[226] Since the U.S.' proposals for services and financial services agreements were politically impossible in the GATT Uruguay Round, the United States used the Canada-FTA and the NAFTA to establish legal precedents for future agreements. As the United States was the policymaker in the NAFTA negotiations, the NAFTA financial services chapter did not include any of the development discourse from the GATT Uruguay Round negotiations.[227]

Mexico originally refused to negotiate a NAFTA financial services agreement, to which the United States responded that there would be no NAFTA without financial services. Given the U.S.' goals to establish a services regime in the GATT that would address the discriminatory treatment of foreign firms, the principle of non-discrimination was the intellectual lynchpin of the U.S.' financial services proposals for the NAFTA. Mexico was slow to move from its original stances in refusing U.S. financial firms' national treatment and broad market access, citing regulatory concerns over liberalization. Eventually, U.S. banks threatened to torpedo the NAFTA in Congress without national treatment and complete liberalization of Mexico's financial markets. Mexico's concessions on financial services essentially became the price that it paid for the entire NAFTA. Canada was broadly aligned with the U.S. position vis-à-vis Mexico, but sought greater market access in the United States, which was left for future negotiations. In so doing, the United States was highly successful in achieving its goals in the NAFTA financial services chapter.[228]

The NAFTA financial services chapter reflects distinct U.S. objectives for three reasons: (1) the principled approach to trade in financial services; (2) deregulations on information technology; and (3) little

226. *Services and the Development Process*, *supra* note 69, at 22.
227. *See generally* Part IV, *supra*.
228. *See* Part IV, *supra*.

concern for macroeconomic risk. First, using free trade principles of national treatment and non-discrimination, the United States sought a principled approach to the NAFTA financial services chapter, which would be the first international agreement to merge free trade law with banking law. Second, U.S. financial firms sought to secure deregulations on new markets based on information technology and data processing, and to secure the absolute free movement of capital to provide cash management services. Third, since the U.S.' primary objective was to establish a free trade model of governance of trade in financial services, U.S. negotiators placed little emphasis on regulation. The NAFTA's most significant regulatory provision is an obscure exception to treaty obligations to maintain macroeconomic stability, the balance of payments exception, which has never been implemented. Ironically, financial services could not be liberalized without this exception to liberalization commitments.[229]

B. The Original Purposes of the NAFTA Investment and Financial Services Chapters

1. Purpose One: Establish "Free Market Governance" in North America

In negotiating the NAFTA investment agreements, the United States was guided by two overarching political and economic objectives: (1) establish and support free market governance in North America; and (2) facilitate economies of scale for U.S. MNCs (i.e., integrated production in North America). The NAFTA investment chapter originated from the U.S. Model BIT. The U.S. BIT program was designed to reregulate developing countries with histories of nationalism and socialism and functioned to establish free market governance of international capital. To that end, the NAFTA investment chapter institutionalized free-market governance of capital in North America.[230] According to Olin Wethington, a lead U.S. negotiator for the NAFTA investment agreements,

> [i]n the view of the U.S. negotiators, the NAFTA was an opportunity to lock in and to enlarge economic reform in Mexico. The NAFTA would give permanence to the market-based orientation of Mexican economic policy at the turn of the decade and would prevent a retreat to more statist forms of economic policy.[231]

The NAFTA investment chapter marked Mexico's historic break with the Calvo Doctrine and embrace of customary international investment law. The NAFTA investment chapter established a regulatory

229. *See* Parts III & IV, *supra*.
230. *See* Part IV, *supra*.
231. WETHINGTON, *supra* note 83, at 8.

freeze on Mexico's domestic investment reforms from the late 1980s, especially in dismantling Mexico's import-substitution industrialization programs, restrictions on FDI, and a long history of nationalizations and expropriations.[232] The NAFTA's core investor protections reflected free market principles in that they forbid state intervention in capital flows and FDI, unless under specific circumstances. This "non-interference" was enforced by ISDS, which extricated the U.S. government from private investment disputes between U.S. investors and host states, which U.S. officials claimed would "de-politicize" investment disputes.

The other NAFTA investment agreement, the financial services chapter, was an investment agreement specifically for the financial services sector. The NAFTA financial services chapter reflected the historical convergence of the U.S. financial services lobbies and the U.S. Treasury's aim to establish a multilateral trade and investment agreement in financial services.[233] Financial services provide critical infrastructure to capital flows and FDI. Therefore, U.S. officials argued that the liberalization of financial services would reduce the transaction costs and enlarge the gains from international trade and investment.[234] To that end, one function of the NAFTA financial services chapter was to facilitate regional manufacturing supply chains.

2. Purpose Two: Facilitate "Integrated Regional Production"

The 1988 Omnibus Act, which was applied to the NAFTA in the 1991 Fast Track bill, mandated that the USTR negotiate trade and investment agreements to reduce the trade deficit with an aggressive export strategy.[235] Since manufacturing imports from Mexico contained greater U.S. content than imports from Asia, manufacturing industries were competitively restructuring into Mexico as a low-wage export platform—notably, the auto, textiles, and information technology industries. By integrating production with Mexico, U.S. producers not only maintained market position in North America, but they co-produced with Mexico for export to the world.

According to the USTR's private sector advisors, the NAFTA investment chapter would encourage the U.S.' outward FDI in manufacturing and services and in so doing facilitate firm-level economies of scale

232. *See* Luis J. Jr. Creel, *Mexicanization: A Case of Creeping Expropriation*, 22 SMU L. J. 281, 282 (1968); *see generally* Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 UCLA L. REV. 35 (2003).

233. *See* KELSEY, *supra* note 54.

234. SCHEFER, *supra* note 3, at 271.

235. Omnibus Trade and Competitiveness Act, *supra* note 114, §1101(b)(5).

to compete more effectively in world markets.[236] Despite unprecedented resistance from labor and environmental groups, the NAFTA enjoyed bipartisan political support in Congress. The Bush administration sold the plan to the public as an engine of job growth because more globally competitive industries implied more exports and jobs: "U.S investments generate increased U.S. exports."[237] The Bush administration proudly displayed the 1992 International Trade Commission report surveying all relevant studies, and predicted that the NAFTA would increase GDP, employment, and wages in all three countries.[238]

3. *Congruence of "Free Market Governance" and "Integrated Regional Production"*

The texts of the NAFTA investment and financial services chapters were not only intended for the NAFTA, but for other trade and investment agreements. Therefore, their original purposes were to establish a rules-based approach to international trade, and specifically, to establish a "free market governance" of international capital. However, the NAFTA had a political project to integrate regional production, which was distinct from other U.S. trade and investment agreements. Therefore, the two U.S. objectives in the NAFTA investment agreements of "free market governance" and "integrated regional production" were mutually exclusive.

In the early 1990s, the two goals were entirely congruent. This was explained by the USTR's main private sector advisory committee in 1992:

> [w]ith a NAFTA that allows companies to plan long term investments based on economic efficiencies rather than government imposed barriers, costs can be reduced and economies of scale achieved, allowing North American products to compete more effectively in world markets.[239]

That is, U.S. policymakers argued that free market governance in North America would facilitate economies of scale for U.S. firms, particularly the use of Mexico as a low-cost manufacturing export platform. A central purpose of the NAFTA financial services chapter was to lower the costs of regional commerce, thereby encouraging regional supply chains.[240] Indeed, a main reason Canada joined the NAFTA was to

236. *See generally* OFF. OF THE U.S. TRADE REP., *supra* note 4.

237. *Id.*

238. *White House Fact Sheet: The North American Free Trade Agreement*, *supra* note 203.

239. OFF. OF THE U.S. TRADE REP., *supra* note 204.

240. SCHEFER, *supra* note 3, at 271.

prevent investment diversion away from Canada and to the United States and Mexico.[241]

Similarly, several East Asian countries declared the NAFTA as "sneaky protectionism" because they argued that the NAFTA would lower regional transaction costs and divert FDI away from East Asia and to North America.[242]

C. Implications for the Twenty-First Century

The new Trump administration requested Mexico and Canada to renegotiate the NAFTA in April 2017. Currently, no trilateral institutions exist that evaluate the NAFTA's performance, not to mention the NAFTA's performance in relation to its original purposes. This study identified the original purposes of the NAFTA investment agreements, which can be used as reference points in discussions on the modernization of the agreements.

The NAFTA investment agreements had two original purposes: (1) establish free market governance of capital in North America; and (2) facilitate economies of scale and integrate regional production to enhance the competitiveness of U.S. firms in the emerging global economy.[243] In the early 1990s, these two objectives were consistent; however, literature on these topics shows that these two goals have been lost. Legal scholars demonstrated that the NAFTA's investor protections provide greater substantive rights for multinational investors than domestic ones, which is inconsistent with the free trade principles of equal treatment and equal competitive opportunity. Simultaneously, economists have shown that there been trends towards disintegration of regional production due to "the rise of China."[244] If NAFTA renegotiations do not address these issues, then the original purposes of the NAFTA investment agreements will continue to be outdated and forgotten.

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241. *Id.*

242. *Id.*

243. *See* Parts III & IV, *supra.*

244. *See* LA NUEVA RELACION COMERCIAL DE AMERICA LATINE Y EL CARIBE CON CHINA ¿INTEGRACION O DESINTEGRACION REGIONAL? (Enrique Dussel Peters et al., 2016) [hereinafter LA NUEVA RELACION COMERCIAL DE AMERICA LATINE Y EL CARIBE CON CHINA]; Enrique Dussel Peters & Kevin P. Gallagher, *NAFTA's Uninvited Guest: China and the Disintegration of North American Trade*, 110 CEPAL REV. 83, 86 (2013); Michele Rioux, Mathieu Ares, & Ping Huang, *Beyond NAFTA with Three Countries: The Impact of Global Value Chains on an Outdated Trade Agreement*, 5 OPEN J. OF POL. SCI. 264, 264-65 (2015).

1. Implications for the NAFTA Renegotiations

In the original NAFTA negotiations, the U.S. investment negotiators were generally unconcerned that the United States would be a defendant in ISDS cases, which accounts for the NAFTA's vaguely worded minimum standard of treatment[245] and indirect expropriation[246] articles. By 2001, all three NAFTA countries faced ISDS claims citing these articles. In response, the three governments issued an official Interpretative Note in 2001 that tied the legal meaning of two articles to customary international law, norms that have been "crystallized" in international law through repeated decisions over centuries. In so doing, the Interpretative Note had curtailed the absolute strength of the NAFTA's minimum standard of treatment and indirect expropriations by limiting their interpretation to customary international law.

However, there is little consensus on the scope of minimum standard of treatment and indirect expropriation in customary international law. For this, ISDS tribunals have made judgements on these articles based on the precedents set by other ISDS tribunals, creating "evolving" standards of investor protection.[247] Indeed, ISDS tribunals have made both narrow and broad interpretations of minimum standard of treatment and indirect expropriation.[248] In this context, the NAFTA investor protections confer greater substantive rights to multinational firms than domestic firms, such as the potential for regulatory chill.[249] Free trade principles depend on equal competitive opportunity (i.e. the notion of a "level playing field" and that the state should not pick "winners and losers"). To the extent that the NAFTA's investor protections confer regulatory advantages to multinational firms, the NAFTA investment agreements are inconsistent with the NAFTA's original goal of free market governance. The implication for renegotiations is that if the new NAFTA does not include language constraining the rights of multinational investors to the same substantive rights as domestic investors, then the NAFTA's original purpose of free market governance will continue to be lost.

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245. North American Free Trade Agreement, *supra* note 114, art. 1105.

246. *Id.* art. 1110.

247. Matthew Porterfield, *An International Common Law of Investor Rights*, 27 U. PA. J. INT'L ECON. L. 79, 103-05 (2006).

248. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1581 (2005).

249. *See generally* Gus Van Harten & Scott Dayna Nadine, *Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada*, 12 OSGOODE HALL L. SCH. 1 (2016).

2. *Implications for North American Regionalism and Integration with China*

The NAFTA investment agreements functioned to "lock-in" Mexico's domestic reforms that reoriented Mexico's investment policies away from nationalism and towards regionalism. For this, NAFTA negotiators argued that the NAFTA investment chapter would remove impediments to FDI and grow regional supply chains.[250] The strategy was successful in the 1990s as supply chains flourished and manufacturing GDP, employment, and wages grew in all three countries.[251] U.S. trade officials justified the NAFTA investment chapter in 1992, stating that "[i]ntegrated production in North America will make U.S. firms more competitive against European and Japanese producers."[252]

However, the document did not refer to China. No policymaker or commentator in North America foresaw that China would join the WTO in 2001 and then become the NAFTA's "fourth partner," as trade flows between North America and China are the largest in the world. In 2015, China became the United States' largest trade partner, dislodging Canada and Mexico. Since China joined the WTO in 2001, China's exports to North America have steadily increased in value added content and have displaced intra-NAFTA trade in key manufacturing sectors, notably electronics, textiles, and potentially soon autos.[253] Since commerce between North America and China is governed by WTO rules, the NAFTA renegotiations will not prevent continued North American integration with China. Beyond trade integration and industrial competition, China quickly emerged as the developing world's leading recipient of FDI. In this context, China has become one of the principle destinations for U.S. FDI, some of which diverted away from Mexico, such as in the electronics sector after the "dot-com" bubble burst.[254] U.S. companies are not simply investing in China as a lower-cost export platform, but to access China's internal markets—which are the most dynamic in the world—and for China's robust infrastructure, educated workers, and human

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250. *See* Part IV, *supra*.

251. *See* LA NUEVA RELACION COMERCIAL DE AMERICA LATINE Y EL CARIBE CON CHINA, *supra* note 244; Peters & Gallagher, *supra* note 244; Rioux, Ares, & Huang, *supra* note 244.

252. OFF. OF THE U.S. TRADE REP., *supra* note 4.

253. *See* LA NUEVA RELACION COMERCIAL DE AMERICA LATINE Y EL CARIBE CON CHINA, *supra* note 244; Peters & Gallagher, *supra* note 244; Rioux, Ares, & Huang, *supra* note 244.

254. KEVIN P. GALLAGHER & LUBYA ZARSKY, THE ENCLAVE ECONOMY: FOREIGN INVESTMENT AND SUSTAINABLE DEVELOPMENT IN MEXICO'S SILICON VALLEY 10 (2007).

capital. For these reasons and others, there are thousands of companies investing and operating in the U.S.-Mexico-China triangle. As the United States and China negotiate a BIT and China continues to liberalize inward FDI policies, U.S.-China investment will only deepen, particularly since China has become the world's second largest source of FDI (the United States is first).

Increasing North America-China integration means that the NAFTA's original purpose of integrated regional production is increasingly obsolete. The North American regionalism of the 1990s will be impossible to achieve in the twenty-first century. The NAFTA renegotiations can influence the pace of North American integration with China. Notably, "rules of origin" (regional content requirements) can be raised to protect against Chinese imports, particularly in the auto sector. However, there is no consensus on the effects of rules of origin on investment. The U.S. Model BIT was not intended to promote U.S. FDI but to establish free market governance of FDI, which insisted that investment decisions are private matters and are best left to the market. Therefore, the original NAFTA investment agreements reflected this same free market approach to FDI, and for this reason many footloose U.S. MNCs abandoned production in Mexico for China, such as in electronics, textiles, and autos. The original NAFTA negotiations serve as a reminder that regionalism peaked in the 1990s. The NAFTA renegotiations grapple with a multipolar world in which regionalism is no longer a strategy for economic growth.

INTERNATIONAL CRIMINAL COURTS PRIOR TO THE SECOND WORLD WAR: AN HISTORICAL ANALYSIS OF INTERNATIONAL AND MULTINATIONAL CRIMINAL COURTS PRECEDING NUREMBERG

Harry M. Rhea[*]

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ABSTRACT

The International Criminal Court (ICC) is arguably the international community's greatest achievement of the 20th Century. The Rome Statute of the ICC was adopted by an overwhelming majority of States on July 17, 1998 and entered into force on July 1, 2002. The ICC maintains jurisdiction over the worst international crimes, including genocide, crimes against humanity, war crimes, and the crime of aggression. While the Rome Statute is only twenty years old, its evolution dates back over a century. Much literature on international criminal tribunals begins with the Nuremberg Trial after the Second World War. This paper analyzes the evolution of international criminal courts prior to the Second World War to gain a deeper understanding of the evolution of the International Criminal Court.

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INTRODUCTION

The Intentional Criminal Court ("ICC") adopted the Rome Statute by an unrecorded vote on July 17, 1998.[1] Excluding abstentions, 120 States voted in favor while seven States voted against the adoption of the Rome Statute.[2] The Rome Statute entered into force on July 1, 2002, after the ratification of 60 States as required under Article 126.[3] The ICC has jurisdiction over "the most serious crimes of concern to the international community as a whole,"[4] which include genocide, crimes against humanity, war crimes, and the crime of aggression.[5] The purpose of the ICC is "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of these crimes."[6] The Rome Statute applies to all persons without distinction based on official capacity, including heads of State.[7]

Establishment of the ICC spanned over 150 years. More immediately influencing the ICC's creation were the International Criminal Tribunal for the former Yugoslavia ("ICTY")[8] and the International Criminal Tribunal for Rwanda ("ICTR"),[9] both founded by the United Nations Security Council in the 1990s. However, these tribunals are generally not considered the first international criminal tribunals. The International Military Tribunal and the International Military Tribunal for the Far East were created to prosecute Nazi and Japanese war criminals after the Second World War and are traditionally considered the first international criminal tribunals.

To many international legal scholars, it is common practice to link the beginning of international criminal justice to the International Military Tribunal (often referred to as the Nuremberg Tribunal). The Nuremburg Tribunal was founded to prosecute major war criminals of the Nazi regime after the Second World War. Over the past 75 years, scholars and

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1. Votes were counted but not recorded. There is no dispute that China, Israel, and the United States were among the seven that voted against the Rome Statute; however, there is some dispute as to who the other four states were.
2. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *9th Plenary Meeting*, ¶ 10, U.N. Doc. A/CONF.183/SR.9 (July 17, 1998).
3. *See generally* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].
4. *Id.* at pmbl., art. 5.
5. *Id.* art. 5.
6. *Id.* at pmbl.
7. *Id.* art. 27(1).
8. S.C. Res. 827, ¶ 2 (May 25, 1993).
9. S.C. Res. 955, ¶ 1 (Nov. 8, 1994).

government officials have continuously praised the Tribunal. Henry Stimson, former Secretary of War who was partially responsible for establishing the International Military Tribunal, called it a "landmark in law."[10] Indeed, one member of the Nuremberg Tribunal described the judgments as "a landmark in law, a turning point."[11] William Schabas, a leading international criminal law and human rights expert, correctly asserts that centuries from now the Nuremberg Tribunal will be considered one of the "signposts of the progress of humanity."[12]

In the same breath, Schabas and others acknowledge that the ICC traces its roots to as early as the aftermath of the First World War.[13] This is often accredited with brief discussion and a footnote on the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.[14] To date, few publications critically analyze the debates at the Paris Peace Conference on establishing an ICC through archival research of the original minutes of the meetings of the Commission.[15]

This paper analyzes the evolution of ICCs prior to the Second World War and demonstrates that the International Military Tribunal should not be considered the beginning of international criminal justice, although the Tribunal was highly significant. In fact, the Tribunal was preceded by decades of policy debates for establishing ICCs. This research is the result of qualitative analysis of the archives, including official government documents, personal collections, and minutes of the meetings of war

10. *See generally* Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, 25 FOR. AFF. 179 (1947).

11. B.V.A. Röling, *The Law of War and the National Jurisdiction Since 1945*, 100 RECUEIL DES COURS 323, 355 (1960).

12. WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIALS 1 (2012).

13. *Id.* at 6.

14. *See generally* VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR: REPORTS OF MAJORITY AND DISSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION OF RESPONSIBILITIES (1919), *reprinted in* PEACE PAMPHLET NO. 32, DIVISION OF INTERNATIONAL LAW, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (1919); *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. OF INT'L L. 95 (1920).

15. JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR ch. 5 (1982); *see generally* Harry M. Rhea, *The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and its Contribution to International Criminal Justice After World War II*, 25 CRIM. L. F. 147 (2014). It should be noted that other scholars have written on the *realpolitik* and international criminal justice at the Paris Peace Conference. *See* GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS ch. 3 (2000).

crimes commissions. This paper also analyzes written records of government debates over international criminal tribunals.

I. BRIEF HISTORY OF INTERNATIONAL CRIMINAL COURTS PRIOR TO WWI[16]

With few exceptions, scholars reached the consensus that the first international criminal trial occurred in 1474 when the Archduke of Austria ordered the trial of Sir Peter von Hagenbach for "trampl[ing] under foot the laws of God and man."[17] On May 4, 1474, 28 justices representing the Holy Roman Empire tried Hagenbach for allowing his troops to rape, kill, and destroy the properties of innocent civilians, including women and children.[18] One author describes Hagenbach's crimes as "unique in their ferocity even in those rough and dangerous times."[19] Consequently, the Holy Roman Empire convicted and executed Hagenbach for his crimes.

Scholars question the international nature of Hagenbach's prosecution.[20] Although the Holy Roman Empire was dissolving, it continued as one entity while its subjects remained under one imperial power. For example, Switzerland had not disassociated herself from the Empire until the Peace of Basel in 1499, 25 years after the trial.[21] Moreover, neither Switzerland nor any other State was recognized as independent until the

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16. *See generally* THE HIDDEN HISTORIES OF WAR CRIMES TRIALS (Kevin Jon Heller & Gerry Simpson eds., 2013) (providing the history of war crimes trials, including national and mixed tribunals).

17. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 1 (4th ed. 2011); *see also* GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 465 (1968); Timothy L.H. McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of the International Criminal Law Regime*, *in* THE LAW OR WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 31, 38 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997); Georg Schwarzenberger, *A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474*, MANCHESTER GUARDIAN (LONDON), Sept. 28, 1946, at 4; *see generally* M. Cherif Bassiouni & C. L. Blakesley, *The Need for an International Criminal Court in the New World Order*, 25 VAND. J. OF TRANSNAT'L L. 151 (1992); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991).

18. SCHWARZENBERGER, *supra* note 17, at 465

19. ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 19 (1962).

20. *See* SCHWARZENBERGER, *supra* note 17, at 465; *see also* McCormack, *supra* note 17, at 38; *see generally* SCHABAS, *supra* note 17; Bassiouni & Blakesley, *supra* note 17; Bassiouni, *supra* note 17; Schwarzenberger, *supra* note 17.

21. ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 61 (1954).

Peace of Westphalia was signed on October 24, 1648, after the 30-Year War.[22]

International legal scholar Georg Schwarzenberger, on the other hand, argued that the Hagenbach trial was "the first international war crime trial" and should be considered the forerunner of the International Military Tribunal.[23] Schwarzenberger, recognizing the Holy Roman Empire remained one entity until 1648, argued it "had degenerated to such an extent that relations between its members were conducted on a footing hard to distinguish from international relations," and that the relations between territories within the Empire were "more comparable and akin to those of international law than municipal law."[24]

If the Holy Roman Empire degenerated to the extent that its units were independent, then Schwarzenberger accurately argued that Hagenbach's trial should be considered a forerunner to the International Military Tribunal. However, Schwarzenberger inaccurately called the Hagenbach trial an "international war crimes trial." An "international" tribunal did not conduct the trial, as the Archduke of Austria—who can hardly be considered an international authority—established the tribunal. With limitations on the court's participants, the tribunal only rises to the level of a multinational tribunal. Yet, the tribunal remains a forerunner to the International Military Tribunal, which, too, was an ad hoc tribunal with limitations on the court's participants—the United States, United Kingdom, Soviet Union, and France—making it a multinational tribunal, not an international one.

Little known literature remains considering international prosecutions over the four centuries following Hagenbach's trial. One reason for the lack of international criminal tribunals was the Peace of Westphalia that established a policy of sovereignty between States, which meant that States would not interfere with each other's affairs. Therefore, it was up to each State to police its own affairs, including prosecuting violators of the law of nations through national courts.

More than two centuries after the Peace of Westphalia, the Geneva International Conference of 1863 established the International Committee of the Red Cross ("ICRC").[25] The following year, States adopted the Geneva Convention for the Amelioration of the Condition of the

22. *Id.* at 62.

23. Schwarzenberger, *supra* note 17, at 4.

24. SCHWARZENBERGER, *supra* note 17, at 464.

25. *Resolutions of the Geneva International Conference*, INT'L COMMITTEE RED CROSS, *available at* https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/115?OpenDocument (last visited Mar. 7, 2019).

Wounded on the Field of Battle. In 1865 an Italian jurist, Pasquale Fiore, wrote a book urging the creation of an ICC to determine States' rights during armed conflict, and suggesting that an international army be established to enforce the court's decisions.[26] However, Fiore's views were considered extreme and were therefore unheeded.[27]

One of the founding members of the ICRC, Gustave Moynier, originally thought that public criticism of Geneva Convention violations would be strong enough to deter future violators. Moynier believed that an ICC was unnecessary and perhaps problematic since, in his opinion, "a treaty is not a law imposed by a superior authority on its subordinates," but "it is only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them."[28] Moynier's position rested on the belief that "public opinion is ultimately the best guardian of the limits it has itself imposed. The Geneva Convention, in particular, is due to the influence of public opinion on which we can rely to carry out the orders it has laid down."[29]

Moynier later became concerned that there was no practical enforcement of the Geneva Convention. He changed his prior opinion that punishment could not be implemented for violations of the Geneva Convention.[30] He also realized that punishment,

> could not be exercised by 'the belligerents' ordinary tribunals because, however respectable their magistrates might be, they could at any time unknowingly be influenced by their social environment. Such cases, therefore, would have to be handled by an international tribunal, appointed by another convention.[31]

Consequently, at a meeting of the ICRC on January 3, 1872, Moynier presented a proposal for an international criminal tribunal to punish violators of the Geneva Convention of 1864.[32] This was the first proposal for a permanent ICC.[33] No State, however, publicly considered Moynier's draft.[34] At this time, an ICC was not welcome.

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26. 1 BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS 5 (1980).

27. *Id.*

28. PIERRE BOISSIER, FROM SOLFERINO TO TSUSHIMA: HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS 282 (1985).

29. *Id.*

30. *Id.*

31. *Id.* at 282-83.

32. *See* Christopher Keith Hall, *The First Proposal for a Permanent International Criminal Court*, 322 INT'L REV. OF RED CROSS 57, 72-74 (1998) (reproducing Moynier's draft convention for an international criminal court).

33. *See generally id.* at 57-74.

34. *Id.* at 65.

Nearly 30 years later in 1899, Russia's Czar Nicholas II called for an international conference for the purpose of limiting armaments.[35] From May 18 to July 29, 1899, 26 States sent a total of 100 representative delegates to The Hague for the first Hague Peace Conference.[36] The Czar believed the conference would establish "the principles of justice and right, upon which repose the security of states and the welfare of peoples."[37] At the conclusion of the conference, four conventions were adopted: (1) Convention for the Pacific Settlement of International Disputes;[38] (2) Convention Respecting the Laws and Customs of War on Land;[39] (3) Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864;[40] and (4) Convention for Prohibiting Launching of Projectiles and Explosives From Balloons.[41] The most notable convention was the Convention Respecting the Laws and Customs of War on Land, which codified many general principles of customary international humanitarian law. However, there was no mention in the convention that violations were crimes and should result in prosecution. The Convention for the Pacific Settlement of International Disputes established the Permanent Court of Arbitration, which does not have criminal jurisdiction. Establishing the court, however, symbolized that the international community was yearning for international justice through law. As Tryon explains of adopting the convention:

> [t]his is sometimes called the Magna Carta of the coming World State. It contains a declaratory preamble recognizing the "solidarity uniting the members of the society of civilized nations," and expressing the desire of the signatory powers to extend the "empire of law" and strengthen "the appreciation of international justice." The belief is expressed that "the permanent institution of a Tribunal of Arbitration accessible to all in the midst of independent powers, will contribute effectively to this

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35. U.S. DEP'T OF STATE, *Translation of a Document Delivered by Count Mouravieff, Russia Imperial Minister of Foreign Affairs, to Ethan Allen Hitchock, Ambassador of the United States, on Wednesday, August 12 (24), 1898, reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 541-42 (1901).

36. FERENCZ, *supra* note 26, at 7-15.

37. J. L. Tryon, *The Hague Conferences*, 20 YALE L. J. 470, 472 (1911).

38. *Pacific Settlement of International Disputes (Hague I), in* 1 CHARLES I. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 230 (1899).

39. *Laws and Customs of War on Land (Hague II), in* BEVANS, *supra* note 38, at 247.

40. *Adaptation to Maritime Warfare of Principles of Geneva Convention of 1864 (Hague III), in* BEVANS, *supra* note 38, at 263.

41. *Prohibiting Launching of Projectiles and Explosives from Balloons (Hague IV), in* BEVANS, *supra* note 38, at 270.

result." By the first article of the convention, "the contracting powers agree to use their best efforts to insure the pacific settlement of international differences."[42]

A second Hague peace conference commenced on June 15, 1907, when 44 States sent 256 delegates to the Knights Hall located in the center of The Hague for the second time in ten years. The second conference ended on October 18, 1907, but not before adopting another Convention on Laws and Customs of War on Land.[43] This convention, like its predecessor, did not indicate that violations were crimes and that violators should be prosecuted. It was agreed after the second conference that a third conference would take place within no more than the eight years that had separated the first two conferences.[44] However, the First World War commenced in 1914, preventing the anticipated third conference.

II. POST WORLD WAR I

A. International High Tribunal

After signature of the armistice with Germany on November 11, 1918, the Allied powers of the First World War convened a Preliminary Peace Conference in Paris ("Paris Peace Conference") to discuss post-war policies that would be adopted as a permanent peace treaty. During negotiations, the Allied powers faced a major dilemma of whether to create an ICC to prosecute war criminals, particularly Germany's former Emperor Wilhelm II. On January 18, 1919, State delegates at the Paris Peace Conference were invited to submit memoranda on the responsibilities of the authors of the war and punishment of war criminals.[45] A commission was established the following week to examine the "Responsibility of the Authors of the War and the Enforcement of Penalties."[46] The resolution establishing the commission read as follows:

> [t]hat a Commission, composed of two representatives apiece from the five Great Powers and five representatives to be elected by the other Powers, be appointed to inquire into and report upon the following:

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42. *Id.* at 474.

43. *Id.* at 631.

44. *Final Act of the Second International Peace Conference* (Oct. 18, 1907), in JAMES B. SCOTT, THE REPORTS OF THE HAGUE CONFERENCES OF 1899 AND 1907 207-17 (1917).

45. *Preliminary Peace Conference, Protocol No. 1, Session of January 18, 1919*, U.S. DEP'T OF ST.: OFF. OF THE HISTORIAN, *available at* https://history.state.gov/historicaldocuments/frus1919Parisv03/d3 (last visited Mar. 5, 2019).

46. *Preliminary Peace Conference, Protocol No. 2, Plenary Session of January 25, 1919*, U.S. DEP'T OF ST.: OFF. OF THE HISTORIAN, *available at* https://history.state.gov/historicaldocuments/frus1919Parisv03/d4 (last visited Mar. 7, 2019).

1. The responsibility of the authors of war.
2. The facts as to the breaches of the customs of law committed by the forces of the German Empire and their Allies on land, on sea and in the air during the present war.
3. The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs and other individuals, however highly placed.
4. The Constitution and procedure of a tribunal appropriate to the trial of these offenses.
5. Any other matters cognate or ancillary to the above which may arise in the course of the inquiry and which the Commission finds it useful and relevant to take into consideration.[47]

The Commission was officially titled the "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties." Ten States sat on the Commission: the United States, the British Empire, France, Italy, and Japan represented the five "Great Powers," while five smaller States were represented by Belgium, Greece, Poland, Rumania, and Serbia. Robert Lansing, from the United States, was elected Chair of the Commission at the first meeting.[48] He proposed establishing three sub-commissions to answer important questions.[49] Gordon Hewart, from the British Empire, stated that two sub-commissions should consider the question of an appropriate tribunal to prosecute war criminals, including Wilhelm II.[50] Lansing "emphasized the fact that the Commission was sitting to some extent as a 'Grand Jury' charged not to determine guilt, but to decide whether there was a case."[51] Lansing later wrote:

> [i]t was apparent at the very beginning of our sessions that certain members of the Commission were determined before everything else to bring the Kaiser to trial for a criminal offense before an international high tribunal of justice to be constituted for the purpose primarily of determining his guilt and imposing upon him a suitable penalty for his crimes.[52]

A memorandum, previously sent on January 18, 1919 to all delegates at the Paris Peace Conference at the first meeting, was annexed to

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47. *Id.*

48. *See Frank L. Polk Papers, Group No. 656, Series No. III, Box No. 30*, YALE UNIV. ARCHIVES, *available at* https://archives.yale.edu/repositories/12/top_containers/153825 (last visited Mar. 7, 2019) (specifically, Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties: Minutes of the First Meeting (Feb. 3, 1919)) [hereinafter *Polk Papers*].

49. *Id.*

50. *Id.* at 2-3.

51. *Id.* at 2.

52. Robert Lansing, *The Trial of the Kaiser: Five Great Powers to be Judges, in* 62 THE FORUM 530-31 (1919).

the Commission's minutes of its first meeting. The memorandum describes the penal liabilities of Wilhelm II, noting that he should be prosecuted in an international criminal tribunal.[53] The majority of States on the Commission, in particular the British Empire and France, favored creating an ICC to prosecute crimes that did not fall within the national jurisdiction of one of the Allied or Associated powers, as well as crimes that affected more than one State.[54] The United States was vehemently against creating an ICC and thought that where States did not have jurisdiction over crimes, there was simply no jurisdiction to prosecute.[55] The Commission encouraged States to prosecute war criminals in military courts or commissions within national jurisdictions, as these courts were already established with legal jurisdictions over war crimes.[56] The United States also favored two or more States establishing special tribunals, which would enable multiple States to prosecute war criminals.[57]

States that favored creating an ICC did so mainly for the prosecution of Germany's former Emperor Wilhelm II. Members of the Commission were confused over whether jurisdiction of the former Emperor and other high officials were within the jurisdiction of enemy national courts. Larnaude had asked "to whom the culprits would be handed over when once they had been arrested[,]" which Ernest Pollock, from the British Empire, answered, "they would have to appear before an international court."[58]

The United States stood against establishing an ICC in its entirety. Lansing was not alone; President Woodrow Wilson was also against creating an ICC. Lansing once wrote to a colleague that the President "approved entirely of my attitude in regard to an international tribunal for trial of the Kaiser and others, only he is even more radically opposed than I am of that folly."[59]

A sub-commission listed violations of the laws and customs of war prohibited by the 1907 Hague Conventions, and recommended

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53. *Polk Papers*, *supra* note 48, at 4-18.

54. *See* Preliminary Peace Conference, *Memorandum by the Representatives of the United States: Reservations to the Report of the Commission on Responsibilities* (April 4, 1919), appended to *Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* (Mar. 29, 1919), *reprinted in* THE AM. J. OF INT'L. LAW (Jan. – April 1920) [hereinafter Memorandum of Reservations].

55. *Id.*

56. *Id.*

57. *Id.*

58. *Polk Papers*, *supra* note 48, at 23 (specifically, Minutes of the Second Meeting (Feb. 7, 1919)).

59. Letter from Robert Lansing to Frank L. Polk, (March 17, 1919) (on file with Seeley G. Mudd Manuscript Library, Princeton Univ.).

establishing a "High Tribunal" for the prosecution of all persons alleged to have been guilty of offenses against the laws and customs of war and the laws of humanity.[60] The High Tribunal included only members of the Allied and Associated Powers—three persons appointed by the United States, the British Empire, France, Italy, and Japan, and one person appointed by Belgium, Greece, Poland, Portugal, Romania, Serbia, and Czecho-Slovakia.[61] The High Tribunal would apply "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience."[62]

A super-majority of States on the Commission strongly supported establishing the High Tribunal. The blueprint of the High Tribunal was multinational rather than international, as it remained limited to 12 States, and the majority of the international community was not invited to participate, indicating it would be a tribunal for the victors to prosecute the vanquished. The sub-commission recommended that the high tribunal be provided by the Treaty of Peace, and most members of the Commission agreed.[63] Its recommendation further stipulated:

> That the enemy Governments shall, notwithstanding that Peace may have been declared, recognize the jurisdiction of the National Tribunals and the High Tribunal, that all enemy persons alleged to have been guilty of offenses against the laws and customs of war and the laws of humanity shall be excluded from any amnesty to which the belligerents may agree, and that the Governments of such persons shall undertake to surrender them to be tried.[64]

The United States, which was against establishing an ICC and argued for prosecuting war criminals in national and multinational military tribunals, submitted two memoranda that were attached to the sub-commission's report. The first described the principles that should determine violations of the laws and customs of war.[65] The second considered the

60. *Polk Papers*, *supra* note 48, at 50-54 (specifically, Report of Sub-Commission III on the Violation of the Laws and Customs of War: Minutes of the Third Meeting (Mar. 12, 1919)).

61. *Id.* at 53.

62. *Id.* at 53, ¶ 4.

63. *Id.* at 54.

64. *Id.* at 54, ¶ 2(a).

65. *Polk Papers*, *supra* note 48, at 55 (specifically, Annex A of the Report of Sub-Commission III on the Violation of the Laws and Customs of War: Minutes of the Third Meeting, Memorandum on the Principles Which Should Determine Inhuman and Improper Acts of War (Mar. 12, 1919)).

jurisdiction over such violations.[66] It included five rules that should apply when considering jurisdiction:

1. That the military authorities, being charged with the interpretation of the laws and customs of war, possess jurisdiction to determine and punish violation thereof;
2. That the military jurisdiction for the trial of persons accused of violations of the laws and customs of war and for the punishment of persons found guilty of such offenses is exercised by military tribunals;
3. That the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offense was committed on the territory of the nation creating the military tribunal or when the person or property injured by the offense is of the same nationality as the military tribunal;
4. That the law and procedure to be applied and followed in determining and punishing violations of the laws and customs of war are the law and procedure or determining and punishing such violations established by the military law of the country against which the offense is committed; and
5. That in case of acts violating the laws and customs of war involving more than one country, the military tribunals of the countries affected may be united, thus forming an international tribunal for the trial and punishment of persons charged with the commission of such offenses.[67]

The United States and Japan submitted their memoranda on April 4, 1919.[68]

The Paris Peace Conference submitted its report to the Commission recommending the creation of an "International High Tribunal" for the prosecution of Wilhelm II.[69] Ultimately, the Paris Peace Conference decided to establish a "Special Tribunal" to arraign the former Kaiser for immoral offenses rather than war crimes.[70]

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66. Memorandum of Reservations, *supra* note 54.

67. *Polk Papers*, *supra* note 48, at 55-56 (specifically, Annex B of the Report of Sub-Commission III on the Violation of the Laws and Customs of War: Minutes of the Third Meeting, Proposition of the United States Delegations (March 12, 1919)).

68. Memorandum of Reservations, *supra* note 54 (specifically, Annex II); *see also* Reservations by the Japanese Delegation, Annex III, *reprinted in Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, *supra* note 54.

69. *Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, *supra* note 54, at 122.

70. Lansing, *supra* note 52, at 531.

Article 227 of the Treaty of Peace between the Allied and Associated Powers and Germany read as follows:

> The Allied and Associated Powers publicly arraign Wilhelm II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
>
> A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defense. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
>
> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.[71]

The "special tribunal" referenced in Article 227 never came to fruition, as Wilhelm II had fled to the Netherlands, which refused to extradite him for prosecution. It may look like the special tribunal would have been an ICC; however, if created, it would have been a multinational tribunal, as it would have been limited to the United States, British Empire, France, Italy, and Japan. The five "Great Powers" together would have prosecuted Wilhelm II. As a multinational tribunal rather than an international tribunal, the special tribunal in Article 227 would have been similar to the tribunal that prosecuted Hagenbach in 1474, as well as the International Military Tribunal later established in 1945. Nevertheless, the first serious international debate concerning the legality of establishing an ICC took place.

B. High Court of International Justice

The Paris Peace Conference established the League of Nations, whose charter (often referred to as the Covenant) included the first 26 articles of the Treaty of Peace.[72] Shortly after the Treaty of Peace entered into force, the League of Nations established an Advisory Committee of Jurists to prepare a scheme for the establishment of the Permanent Court of International Justice provided for in Article 14.[73] The Committee was established in February 1920 and held meetings that same year from June 16 to July 24. At the Committee's fifth meeting, Baron Descamps from Belgium and President of the Committee, explained his "Project for the

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71. Treaty of Versailles art. 227, Jan. 28, 1919.

72. *Covenant of the League of Nations Adopted by the Peace Conference at Plenary Session, April 28, 1919,* 13 AM. J. OF INT'L LAW SUPP. 128, 128-40 (1919).

73. *Id.* at 133 (quoting art. 14: "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice.").

organization of international justice."[74] He proposed that the organization of international justice include three tribunals: (1) the existing Permanent Court of Arbitration established at the Hague Peace Conference of 1899; (2) the High Court of International Justice; and (3) the Permanent Court of International Justice.[75] Descamps suggested that the High Court of International Justice would have jurisdiction to hear cases "which concern international public order, for instance: crimes against the universal Law of Nations."[76]

Descamps later submitted a proposal to the Committee for the establishment of the High Court of International Justice. He supported his proposal by arguing that there was consensus about the existence of crimes of an international character that victimize the international community. Descamps further argued that an international tribunal with jurisdiction to try crimes of an international character should not be established *ex post facto* when such crimes are committed in the future.[77] He went on to say that it would be wiser to establish a tribunal that could not later be criticized for being used for "revenge" and that such a court could possibly have a deterrent effect, preventing such crimes from being committed again.[78]

The Committee unanimously adopted two proposals as resolutions in its final report. The first resolution stated, "[a] new interstate Conference, to carry on the work of the two first Conferences at The Hague, should be called as soon as possible"[79] and the title of "the new Conference should be called the Conference for the Advancement of International Law."[80] The second paragraph of the final report made the following statement:

> [T]he Institute of International Law, the American Institute of International Law, the Union Juridique Internationale, the International Law Association and the Iberian Institute of Comparative Law should be invited to adopt any method, or use any system of collaboration that they may think fit, with a view to the preparation of draft plans to be submitted, first to the various Governments, and then to the Conference, for the realization of this work.[81]

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74. Procès-Verbaux of the Proceedings of the Committee June 16th – July 24th, 1920 with Annexes, 1920 P.C.I.J. Advisory Committee of Jurists 142-43 [hereinafter Procès-Verbaux Proceedings of the Committee].

75. *Id.*

76. *Id.* at 142.

77. *Id.* at 498.

78. *Id.*

79. Procès-Verbaux Proceedings of the Committee, *supra* note 74, at 747.

80. *Id.* at 748.

81. *Id.* at 747-48.

Article 3 of the second resolution proposed creating the High International Court of Justice that would "be competent to try crimes constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or by the Council of the League of Nations."[82] After much debate in the League of Nations over the resolutions adopted by the Advisory Committee of Jurists, the League did not support creating an international criminal court embodied in the High International Court of Justice. M. Henry Lafontaine, representing Belgium, thought that it was impossible to create an international criminal court "since there was no defined notion of international crimes and no international penal law."[83] Other members of the League agreed. Yet, this was not the end of the discussion on an international criminal court in the League of Nations.[84]

C. International Criminal Court

Approximately 15 years later, on December 10, 1934, the League of Nations established the Committee for the International Repression of Terrorism.[85] A number of States sent proposals and suggestions for the Committee to consider when creating a draft convention on the repression of terrorism.[86] Among France's suggestions was a proposal to create an ICC competent to prosecute certain acts of terrorism.[87] Members of the Committee held differences of opinion as to the principle and utility of establishing an ICC, and it was agreed that it should be a separate instrument that parties to the terrorism convention could elect to freely accept.[88] On January 15, 1936, the Committee for the International Repression of Terrorism adopted its report to the Council.[89] Annexed to the report were

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82. *Id.* at 748.

83. LEAGUE OF NATIONS: THE RECORDS OF THE FIRST ASSEMBLY; MEETINGS OF THE COMMITTEES 329 (1920).

84. It should be noted the League of Nations established the Permanent Court of Justice under Article 14 of the Covenant. The PCIJ dissolved with the League of Nations during the Second World War. The PCIJ is considered the predecessor to the current International Court of Justice. The Permanent Court of Arbitration established by the 1899 Hague Peace Conference continues today.

85. *See generally Report to the Council on the Second Session of the Committee*, League of Nations Doc. C.36(I).1936.V (1936) [hereinafter *Report to the Council*].

86. *Id.* at 2, 3.

87. *See Request by the Yugoslav Government Under Article 11, Paragraph 2, of the Covenant Communication From the French Government Note by the Secretary-General*, League of Nations Doc. C.542.M.249 1934 VII (1934).

88. *See generally Report to the Council, supra* note 73.

89. *Id.*

two draft conventions: (1) a Draft Convention for the Prevention and Punishment of Terrorism;[90] and (2) a Draft Convention for the Creation of an International Criminal Court.[91]

On January 23, 1936, the Council of the League of Nations adopted its report and directed the Secretary-General to transmit the committee's report to governments with a request that they submit any observations they wished to make by July 15, 1936.[92] Most governments favored an international machinery to enforce violations of the Terrorism Convention. On May 27, 1937, the League of Nations passed a resolution scheduling the Conference on the International Repression of Terrorism to commence on November 1 of that year.[93] The conference included delegates from 34 States.[94] The two draft conventions were adopted on November 16, 1937, the last day of the conference.

The 1937 Convention for the Creation of an International Criminal Court (hereinafter "1937 ICC") never entered into force, since it failed to receive the sufficient number of ratifications.[95] If established, the 1937 ICC would have sat at the Hague[96] and acted as a "permanent" court in theory, since it would sit only when it seized proceedings for a violation of the Terrorism Convention.[97] The International Criminal Court would consist of judges representing State Parties to the Convention,[98] and, after their nominations, would be chosen by the Permanent Court of

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90. *Draft Convention for Prevention and Punishment of Terrorism, in Report to the Council Adopted by the Committee on January 15, 1936*, League of Nations Doc. C.36(I).1936.V, Annex 1 (1936).

91. *Id.*

92. *See generally Report Adopted by the Council on January 23, 1936*, League of Nations Doc. C.60.1936.V (1936).

93. *Convocation of the Conference on the International Repression of Terrorism*, 18 LEAGUE OF NATIONS OFFICIAL J. 308, 308 (1937).

94. They included: Afghanistan; Albania; Argentina; Belgium; Bulgaria; Czechoslovakia; Denmark; the Dominican Republic; Ecuador; Estonia; Egypt; Finland; France; Greece; Haiti; Hungary; India; Latvia; Lithuania; Mexico; Monaco; the Netherlands; Norway; Peru; Poland; Romania; San Marino; the Soviet Union; Spain; Switzerland; Turkey; the United Kingdom; Uruguay; Venezuela; and Yugoslavia. *See Convention for the Creation of an International Criminal Court*, League of Nations Doc. C.547.M.384.1937.V. (1936).

95. SCHABAS, *supra* note 17, at 5.

96. *Convention for the Creation of an International Criminal Court*, *supra* note 94, art. 4.

97. *Id.* art. 3. There would be nothing preventing the Court from gaining jurisdiction of future crimes, such as genocide and war crimes, thus becoming a permanent court in practice.

98. *Id.* art. 6.

International Justice.[99] The Convention did not define its criminal law; therefore, in determining the substantive criminal law, the judges would consider the law of the territory where the offense was committed and the law of the State of which the accused was a national.[100]

The High Contracting Parties, acting as an Assembly of State Parties, would have financed the Court and held meetings regularly to decide necessary modifications in order to attain the objects of the Convention.[101] All decisions needed to be adopted by two-thirds of the High Contracting Parties present at that meeting.[102] Member States of the League of Nations and non-Member States were able to ratify the Convention and become a member to the Court. Rather than a permanent prosecutor representing all States Parties, the State that charged the accused would prosecute the offender in the Court, unless the State on whose territory the offense was committed expressed a wish to prosecute.[103]

If the 1937 ICC had entered into force, it would have been truly an international court as its statute was adopted by a League of Nations conference of plenipotentiaries. Therefore, the Rome Statute is not to be considered the first statute adopted for a permanent international criminal court. Indeed, it was preceded by the 1937 ICC, adopted by the League of Nations by nearly 60 years.[104] Although adopted by a League of Nations conference, the 1937 Court was not a League of Nations court to the extent that the ICTY and ICTR were United Nations courts. Rather than establishing the court through resolution and coercively applying the court to its State Members, the 1937 ICC depended on States ratifying it. Excluding much legal specificity in the Rome Statute, the 1937 ICC indeed would have been similar to the current ICC.

CONCLUSION

There is a long history of prosecuting political figures through national courts.[105] The evolution of ICCs took its path through the establishment of multinational criminal courts. These courts include those

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99. *Id.* art. 7(2).
100. *Id.* art. 21.
101. *Convention for the Creation of an International Criminal Court*, *supra* note 94, art. 46(1).
102. *Id.* art. 46(4).
103. *Id.* art. 25(3).
104. *See generally id.*
105. *See generally* JOHN LAUGHLAND, A HISTORY OF POLITICAL TRIALS: FROM CHARLES I TO SADDAM HUSSEIN (2nd ed. 2008).

used for the trial of Peter von Hagenbach and the trial of Wilhelm II, inserted in Article 227 of the Treaty of Peace between Germany and the Allied and Associate Powers. The International Military Tribunal represents the epitome of a multinational criminal tribunal. The Tribunal stated in its judgment that,

> the making of the Charter was an exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered . . . The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any of one of them might have done singly.[106]

An authoritative scholar of the International Military Tribunal once wrote, "Nuremberg and Tokyo were multi-national tribunals, but not international tribunals in the strict sense . . . For the time being national or multi-national tribunals fulfill the function that belongs to an international criminal court." [107]

The Security Council created the first international criminal tribunal nearly a half century after the judgments of the Nuremberg Tribunal with the creation of the ICTY on May 25, 1993.[108] International criminal law scholar Robert Cryer asserts, "[a]s the ICTY was set up by an organ of an international organization under the powers delegated to it by States under a treaty, its basis is international."[109] The Security Council established the ICTR the following year.[110] The establishment of these tribunals influenced the adoption of the Rome Statute of the International Criminal Court on July 17, 1998 and entered into force on July 1, 2002, and, in many ways, resembles the 1937 ICC.

This is not to say the two courts are similar; there are many differences. For example, the 1937 ICC had criminal jurisdiction only over acts of terrorism as defined by the Convention on the Prevention and

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106. 1 TRIAL OF THE MAJOR WAR CRIMINALS, THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 NOVEMBER 1945-1 OCTOBER 1946 218 (1947); *see also* OFF. OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 48 (1947).

107. Röling, *supra* note 11, at 355 n. 1.

108. *See generally* S.C. Res. 827, *supra* note 8.

109. ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 54 (2005); *see generally* M. CHERIF BASSIOINI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1996); VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS (1995); WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE (2006).

110. S.C. Res. 955, *supra* note 9.

Punishment of Terrorism. The current ICC, on the other hand, has jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and aggression.[111] Yet, the current ICC resembles the 1937 ICC, as their statutes were both adopted by conference and required a sufficient number of States Parties to enter into force. There are other resemblances as well, such as jurisdiction over territories and nationals of States Parties. The promises of the 1937 ICC were fulfilled in 2002, when the Rome Statute entered into force after acquiring its required 60th ratification. The Rome Statute of the International Criminal Court celebrated its 20th anniversary on July 17, 2018.

International criminal justice remains a work-in-progress. Globalization helped the social attitude of the international community to ensure perpetrators of the worst crimes of international concern are prosecuted and punished for their crimes. Current international criminal tribunals are a direct result of the International Military Tribunal, which, itself, was greatly influenced by centuries of international relations, and, in particular, the debates in the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and the Advisory Committee of Jurists, as well as the League of Nations' Convention for the Creation of an International Criminal Court.

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111. Rome Statute, *supra* note 3, art. 5.

FENTANYL: HOW CHINA'S PHARMACEUTICAL LOOPHOLES ARE FUELING THE UNITED STATES' OPIOID CRISIS

Chris Battiloro*

On April 1, 2019, China banned all forms of fentanyl and classified fentanyl-related drugs as controlled substances. This note was written and prepared for publication prior to this ban, at a time when fentanyl was freely available in China.

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INTRODUCTION

Have you ever ordered something on Amazon and had it delivered to your home? What if you were told ordering drugs could be as easy as shopping on Amazon? Moreover, what if you were told you could have synthetic drugs, more powerful than heroin, delivered right to your doorstep? You would likely think such a possibility to be absurd. Unfortunately, the reality is synthetic opioids, such as fentanyl, are being purchased online and delivered right to the consumer's door.

Americans consume more opioids than any other country in the world.[1] Federal officials have scrambled to combat the pervasive opioid addiction, which has become a national emergency in the United States.[2] The issue is that the internet has cut out the middleman and streamlined the delivery process with little legal risk to the manufacturer. This matter will not be "greatly help[ed]" by a newer, bigger, or stronger border wall, as President Trump suggests.[3] The root of the opioid crisis lies in China, where synthetic opioids and their precursors are manufactured before being shipped overseas.[4] While some changes are being made domestically,

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* J.D. Candidate, 2019, Syracuse University College of Law. First and foremost, I would like to thank my family, specifically my parents, for providing immeasurable support throughout my academic career. I would also like to thank Professor Kim Wolf-Price for taking the time to provide indispensable guidance throughout this process. Finally, I wish to thank my friends who, throughout this process, forwarded me any opioid articles they came across.

1. CHRIS CHRISTIE ET AL., THE PRESIDENT'S COMMISSION ON COMBATING DRUG ADDICTION AND THE OPIOID CRISIS 115 (2017), *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final_Report_Draft_11-1-2017.pdf (last visited Mar. 24, 2019).

2. *See id.*

3. Dan Merica, *Trump Declares Opioid Epidemic a National Public Health Emergency*, CNN (Oct. 26, 2017), *available at* https://www.cnn.com/2017/10/26/politics/donald-trump-opioid-epidemic/index.html (last visited Mar. 24, 2019).

4. U.S. DEP'T OF ST., INT'L NARCOTICS CONTROL STRATEGY REP. 1, 8 (2017). The Bureau for International Narcotics and Law Enforcement Affairs (an agency within the U.S. State Department) published its 2017 International Narcotics Control Strategy Report listing China as a "Major Precursor Chemical Source."

thanks to the internet, this issue has no borders and cannot be unilaterally controlled.

China is a dominant figure in the world's global market for pharmaceuticals and pharmaceutical ingredients.[5] However, gaps in China's legislation stemming from political corruption are fueling an opioid epidemic in the United States.[6] Due to its market prominence, China cannot afford to turn a blind eye to how significantly its regulatory deficiencies affect the United States. The flaws in both international and domestic laws governing pharmaceutical manufacturing and trade must be addressed to prevent traffickers from exploiting the system.

The first section of this paper will set the scene of the current opioid crisis in the United States. The objective of this section is to introduce fentanyl and discuss what makes the drug so dangerous. Specifically, this section will focus on: (1) how fentanyl affects the user; and (2) how it fuels the largest opioid epidemic recorded in history.

The second section will address the complicated structure of China's present organization of administrative agencies and the issues that accompany it. It will explain how China's laws and regulations have created a loophole that is being exploited by chemical companies, and why political corruption contributes to the issue. Furthermore, this section will touch upon the barriers inhibiting quicker and more effective action, as well as actions undertaken thus far.

The third section will assess the United States' and China's cooperative efforts in combating illicit narcotics. This section will explain the framework of how the two countries work together and the various groups that are involved. This section will also discuss the significance of the policy implications behind the United States and China's cooperation.

The fourth section will address the importance of international conventions and the role they play in global narcotics regulations. It will outline the numerous treaties and organizations that are presently in effect and how each influences narcotics law.

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5. Melanie Lee & Ben Hirschler, *Special Report: China's "Wild East" Drug Store*, REUTERS (Aug. 28, 2012), *available at* https://www.reuters.com/article/us-china-pharmaceuticals/special-report-chinas-wild-east-drug-store-idUSBRE87R0OD20120828 (last visited Mar. 24, 2019).

6. SEAN O'CONNOR, U.S.-CHINA ECON. AND SECURITY REV. COMM'N, FENTANYL: CHINA'S DEADLY EXPORT TO THE UNITED STATES (2017), *available at* https://www.uscc.gov/sites/default/files/Research/USCC%20Staff%20Report_Fentanyl-China's%20Deadly%20Export%20to%20the%20United%20States020117.pdf (last visited Mar. 24, 2019).

The fifth section will address the United States' laws and organizations in charge of regulating illicit narcotics. This section will analyze the systems the United States presently has in place, and actions being contemplated to curtail the epidemic.

Finally, the sixth section will include recommendations for each of the issues discussed above. Recommendations will be based upon the status quo, developing trends, and pending legislation corresponding to each issue addressed as a factor in this epidemic.

I. WHAT IS THE U.S. OPIOID EPIDEMIC?

A. Introduction to Opioids

Opioids are medications that mimic the pain reducing properties of opium by binding to μ-opioid receptors in areas of the brain that control pain and emotion.[7] Once bound to these receptors, opioids trigger the release of dopamine in the brain's reward area, resulting in a euphoric "high" feeling.[8] Over time, the brain becomes accustomed to this feeling and requires more of the opioid to trigger the same level of pain relief.[9] This increase in tolerance results from the user's dependence upon the opioid to satisfy the feelings of withdrawal, which occur when the euphoric feeling wears off.[10]

In 2015, the quantity of opioids prescribed in the United States was sufficient to keep every citizen "medicated around the clock for three weeks."[11] Opioid addiction often begins with the misuse of legally prescribed medications such as morphine, oxycodone, or hydrocodone.[12] Users quickly develop a tolerance to prescription opioids and struggle to

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7. *Opioid Crisis Fast Facts*, CNN (Jan. 16, 2019), *available at* http://www.cnn.com/2017/09/18/health/opioid-crisis-fast-facts/index.html (last visited Mar. 24, 2019).

8. *Id.*

9. *Id.*

10. *Id.*

11. Joanna Walters, *America's Opioid Crisis: How Prescription Drugs Sparked a National Trauma*, THE GUARDIAN (Oct. 25, 2017), *available at* https://www.theguardian.com/us-news/2017/oct/25/americas-opioid-crisis-how-prescription-drugs-sparked-a-national-trauma (last visited Mar. 24, 2019).

12. *Opioid Crisis Fast Facts, supra* note 7. Opioid drugs are generally much cheaper than their safer alternatives. A serious issue made worse by insurance companies restricting access to pain medications with lower rates of addiction and dependence. Katie Thomas & Charles Ornstein, *Amid Opioid Crisis, Insurers Restrict Pricey, Less Addictive Painkillers,* N.Y. TIMES (Sept. 17, 2017), *available at* https://www.nytimes.com/2017/09/17/health/opi
oid-painkillers-insurance-companies.html (last visited Mar. 24, 2019).

find enough to get high. As a result, users turn to stronger illicit drugs such as heroin and fentanyl.[13]

This behavior has driven what has become the deadliest drug epidemic in American history.[14] Presently, the United States is experiencing a "death toll equal to September 11th every three weeks," a sobering statistic that cannot be ignored.[15]

B. Fentanyl

Fentanyl is an opioid medication generally prescribed to cancer patients who are in severe pain.[16] Classified as a Schedule II drug,[17] it is 50 times more powerful than heroin and 100 times more powerful than morphine.[18] Fentanyl is so potent that just touching an amount the "size of a few grains of sand" is enough to kill a person.[19]

What makes fentanyl attractive to users is the rapid and intense euphoric effect it elicits. Fentanyl works and binds the same way as all other opioids, but it crosses the blood-brain barrier quicker than other substances, resulting in a stronger high.[20] The side effects of fentanyl

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13. *See Opioid Crisis Fast Facts*, *supra* note 7.

14. Maya Salam, *The Opioid Epidemic: A Crisis Years in the Making*, N.Y. TIMES (Oct. 26, 2017), *available at* https://www.nytimes.com/2017/10/26/us/opioid-crisis-public-health-emergency.html (last visited Mar. 21, 2019).

15. Ali Vitali and Corky Siemaszko, *Trump Vows U.S. Will 'Win' Fight Against Opioid Crisis*, NBC NEWS (Aug 8, 2017), *available at* https://www.nbcnews.com/storyline/americas-heroin-epidemic/trump-vows-u-s-will-win-fight-against-opioid-crisis-n790751 (last visited Mar. 21, 2019).

16. Sara Sidner, *Fentanyl: The Powerful Opioid That Killed Prince*, CNN (Oct. 25, 2017), *available at* http://www.cnn.com/2016/05/10/health/fentanyl-new-heroin-deadlier/index.html (last visited Mar. 21, 2019). Fentanyl was introduced as an intravenous anesthetic, but also comes in the form of patches and lozenges. O'CONNOR, *supra* note 6, at 3.

17. A drug classified as Schedule II is legally available; however, it has a high potential for abuse, so it may only be obtained through a non-refillable prescription. *Id.* at 15.

18. *Id.*

19. Sidner, *supra* note 16.

20. Alice G. Walton, *Why Fentanyl Is So Much Deadlier Than Heroin*, FORBES (Apr. 9, 2016), *available at* https://www.forbes.com/sites/alicegwalton/2016/04/09/why-fentanyl-is-so-much-more-deadly-than-heroin/#69ffe9627f6a (last visited Mar. 21, 2019). When fentanyl binds to opioid receptors in the brain, it floods your brain's reward centers with dopamine. Dopamine is a neurotransmitter that increases when you have a rewarding experience, prompting you to look for that same response again. However, the dopamine response to drugs of abuse is orders of magnitude more, which is why people with addictions are constantly seeking the same rewarding feeling. They are not addicted to the drug; their brain is addicted to the neurochemical surge the drug elicits. The brain then becomes accustomed to this surge and requires this constant stimulation for the

include nausea, vomiting, analgesia, and sedation.[21] Most significantly, fentanyl causes respiratory depression which can lead to death by respiratory arrest.[22] The rate of respiratory depression is proportional to the dose of fentanyl and can range from a slow to immediate death.[23]

Originally, fentanyl users illegally extracted the chemical from pharmaceutical patches and either injected it or pressed it into pills.[24] Presently, fentanyl sold on the street is largely synthetically manufactured in China and shipped to the United States and Mexico.[25] Compared to heroin, fentanyl is much simpler to make and results in higher profits for manufacturers.[26]

Fentanyl's key ingredient is N-Phenethyl-4-piperidinone (hereinafter "NPP"). NPP is a chemical precursor, used in the manufacture of fentanyl, which can be purchased from Chinese chemical companies.[27] Depending on the current market price, one could purchase 25 grams of NPP for approximately $87.[28] NPP is then combined with $720 worth of other chemicals, which results in about 25 grams of fentanyl.[29] Thus, it costs about $810 to create enough fentanyl to make up to $800,000 worth of pills on the black market.[30]

In addition to being cheap, fentanyl is also easier to distribute because its potency permits smaller volume shipments.[31] Chinese chemical exporters utilize several methods to illicitly ship fentanyl to the Western Hemisphere. Some common strategies include forwarding systems, mislabeling packaging, concealing the drug in silica packets, and modifying

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user to function normally. Depriving the brain of this stimulation causes the user to become violently "sick" and unable to function normally. Thus, opioid addiction is not an issue of will, it is a neurochemical issue within the most primitive part of the brain. *Fentanyl: The Drug Deadlier Than Heroin*, VICE VIDEO (2016), *available at* https://video.vice.com/en_us/video/fentanyl-the-drug-deadlier-than-heroin/57169d30dbb30e8656f09c76 (last visited Mar. 21, 2019).

21. Walton, *supra* note 20.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Walton, *supra* note 20.

27. Jeanne Whalen & Brian Spegele, *The Chinese Connection Fueling America's Fentanyl Crisis*, WALL ST. J. (June 23, 2016), *available at* https://www.wsj.com/articles/the-chinese-connection-fueling-americas-fentanyl-crisis-1466618934 (last visited Mar. 21, 2019).

28. *Id.*

29. *Id.*

30. *Id.*

31. Walton, *supra* note 20.

the chemical structure.[32] United States Customs and Border Protection ("CBP") officials seize fentanyl more frequently than any other synthetic opioid.[33] In August and September of 2017, federal officials seized about 200 pounds of fentanyl and fentanyl-laced heroin in two separate New York City raids.[34] This seizure alone contained enough fentanyl to kill more than 32 million people and had a street value worth well over $30 million.[35] And while CBP is seizing a great deal of fentanyl, much more is making its way to the United States from China.

C. Present Status of the United States

On October 26, 2017, amid the worst ever drug epidemic in U.S. history, President Trump declared the opioid epidemic a public health emergency, pursuant to the Public Health Services Act ("PHSA").[36] This declaration directs federal administrative agencies to focus funds towards combating the epidemic, while States are given the flexibility to allocate federal grants to addiction, treatment, and prevention.[37]

This order differs from a national emergency declaration pursuant to the Stafford Act, which would permit the government to tap into the Federal Emergency Management Agency's ("FEMA") Disaster Relief Fund.[38] FEMA funds are preserved to alleviate instances of natural disasters—not health emergencies.[39] This is because the Stafford Act is designed to respond to emergencies that are brief and isolated to a geographic area.[40] The opioid crisis is a complicated nationwide health crisis that does not have a short-term solution.[41] Moreover, FEMA's current

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32. O'CONNOR, *supra* note 6, at 3.

33. *Id.*

34. *NYC Authorities Seize Nearly 200 Pounds of Fentanyl Worth $30 Million*, FOX NEWS (Sept. 19, 2017), *available at* http://www.foxnews.com/health/2017/09/19/nyc-authorities-seize-nearly-200-pounds-fentanyl-worth-30-million.html (last visited Mar. 21, 2019).

35. *Id.*

36. Merica, *supra* note 3.

37. Christina Wilkie, *Trump Declares the Opioid Epidemic a Public Health Emergency*, CNBC (Oct. 26, 2017), *available at* https://www.cnbc.com/2017/10/26/trump-declares-the-opioid-epidemic-a-public-health-emergency-.html (last visited Mar. 21, 2019).

38. Dan Merica, *White House to Declare Opioid Epidemic a Public Health Emergency*, ABC ACTION NEWS (Oct. 26, 2018), *available at* https://www.abcactionnews.com/news/national/white-house-to-declare-opioid-crisis-a-public-health-emergency (last visited Mar. 12, 2019).

39. *Id.*

40. *Id.; see generally* Robert T. Stafford Disaster Relief and Emergency Assistance Act, Public Law 93-288, 42 U.S.C. § 5121 et seq., (1988).

41. Merica, *supra* note 3.

funds have been depleted from the several hurricanes that have devastated the U.S. coastline.[42] Therefore, a national emergency declaration would have done little to impact the opioid epidemic.

In a deeply partisan and divided Congress, declaring this emergency was one of the few recent issues that received bipartisan support. Approximately 35,000 Americans died of heroin or opioid overdoses in 2015.[43] Since then, the death rate from synthetic opioids has risen by more than 72 percent.[44] These statistics indicate the significance of this epidemic because opioid abuse continues to increase. The inability to curb fentanyl's popularity indicates there is an immediate need to initiate conversations with China to stymie the production of Chinese opioids.

II. CHINA'S ROLE IN THE OPIOID EPIDEMIC

A. Control Over the Global Pharmaceutical Market

Second only to the United States in size, China's pharmaceutical market consists of 5,000 companies that rely on mass producing inexpensive generic drugs and pharmaceutical ingredients for revenue.[45] Fueled by government sponsored export tax rebates, China's pharmaceutical companies are the world's largest manufacturer and exporter of pharmaceutical ingredients; China nets approximately $105 billion in annual sales from pharmaceutical exports.[46] China's control over the industry is so firm that should it stop exporting active pharmaceutical ingredients (hereinafter "APIs"), the world's pharmacies would be empty within three months.[47]

Additionally, China is a significant contributor in the global chemical market. It is estimated that there are over 160,000 chemical companies operating legally and illegally, with some facilities generating over one million pills a day.[48] Through the first 11 months of 2015, China generated $60 billion in sales from chemical production, a 6.8 percent increase from 2014.[49] While the statistics on fentanyl production were

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42. *Id.*

43. Vitali & Siemaszko, *supra* note 15.

44. Jacob Soboroff, Mitch Koss, & Aarne Heikkila, *Fentanyl Crisis: Deadly Drug Easily Available for Online Purchase*, NBC NEWS (Aug. 9, 2017), *available at* https://www.nbcnews.com/storyline/americas-heroin-epidemic/fentanyl-crisis-deadly-drug-easily-available-online-purchase-n791311 (last visited Apr. 1, 2019).

45. O'CONNOR, *supra* note 6, at 7.

46. *Id.*

47. Lee & Hirschler, *supra* note 5.

48. O'CONNOR, *supra* note 6, at 7.

49. *Id.*

not specifically available, it was estimated that more than half of the 178 global suppliers of NPP reside in China.[50] This dominant grip on the world's pharmaceutical and chemical markets is what makes addressing this issue both so pressing and complicated to approach.

B. China's Regulatory Framework

China is one the largest manufacturers of pharmaceutical ingredients and a significant contributor to the global chemical market.[51] However, as a nation, it maintains little control over these industries.[52] Unlike the United States, China does not have an issue with illicit fentanyl use, so little attention is paid to regulating its production and distribution.[53] Liu Yuejin, Commissioner of China's National Narcotics Control Commission ("NNCC") and Vice Minister for Public Security, asserts that nations who consume illegal narcotics are "not justified in requiring only drug-producing countries to counter the manufacture of drugs."[54] While this statement is true, the measures China has taken have had little to no impact on curbing illicit opioid production.

China's administrative structure is complex and contains multiple overlapping agencies. China's regulatory deficiencies are exacerbated by its complicated and disorganized administrative structure.[55] The agencies that have a hand in drafting, administering, and enforcing regulations for chemical manufacturing and exports include: (1) China Food and Drug Administration; (2) State Council Leading Group on Product Quality and Food Safety; (3) NNCC; (4) Anti-Smuggling Bureau within the General Administration of Customs; (5) Ministry of Chemical Industry; (6) Ministry of Agriculture; (7) Ministry of Commerce; and (8) General Administration of Quality Supervision, Inspection, and Quarantine.[56] A system with eight agencies involved in one issue is susceptible to bureaucratic infighting, which can prevent efficient and effective governing.[57] This is likely one reason why gaps plague China's legislation regarding the scope of administrative agencies.

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50. *Id.* at 8.
51. Justin Madden & John Caniglia, *Tracing the Path of a Deadly Batch of Heroin from China to Akron*, CLEVELAND.COM (Aug. 31, 2017), *available at* https://www.cleveland.com/metro/index.ssf/2017/08/tracing_the_path_of_a_deadly_b.html (last visited Mar. 24, 2019).
52. *Id.*
53. *Id.*
54. Whalen & Spegele, *supra* note 27.
55. O'CONNOR, *supra* note 6, at 8.
56. *Id.*
57. *Id.*

Similar to U.S. Congressional structure, China's State Council oversees the nation's administrative functions and executes its laws.[58] The State Council administers 22 ministries, seven commissions, and other offices directly under the Council, all of which comprise the State Council's primary policymaking and supervisory offices.[59]

One of the offices that falls directly under the State Council is the National Medical Products Association ("NMPA") (formerly known as the China Food and Drug Administration ("CFDA")). In 2018, the NMPA was established as a result of regulatory reform aimed at splitting the duties of the CFDA.[60]

The CFDA was responsible for drafting the country's laws and regulations on food and drugs, as well as publishing the national pharmacopeia.[61] When the CFDA was formed, it was intended to consolidate power, remove bureaucracy, and improve drug regulation.[62] However, despite this attempt to address issues through an administrative reorganization, gaps remain in China's regulatory policies. This latest restructuring aims to bridge these gaps by separating the food and drug regulatory responsibilities into two new administrative bodies. Thus, the NMPA will only be responsible for: (1) overseeing the quality and safety of medicines, medical devices and cosmetics; (2) drafting regulations and standards for medicines, medical devices and cosmetics; (3) the registration of medicines, medical devices and cosmetics; (4) the post-marketing risk control of medicines, medical devices and cosmetics; and (5) the registration of licensed pharmacists, etc.[63]

Previously, API producers could manufacture and distribute illicit ingredients into the global marketplace with little to no oversight from

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58. *China's State Organizational Structure,* CONG. EXEC. COMM'N ON CHINA, *available at* https://www.cecc.gov/chinas-state-organizational-structure#sc (last visited Mar. 24, 2019).

59. *Id.*

60. Nick Beckett & Daisy He, *Clarification of the Role of China National Medical Products Administration*, LEXOLOGY (Oct. 9, 2018), *available at* https://www.lexology.com/library/detail.aspx?g=6e0382ab-20f4-4739-b06d-5e32d6a617e4 (last visited Mar. 24, 2019).

61. *See Main Responsibilities*, CHINA FOOD AND DRUG ADMIN., *available at* http://www.sfdachina.com/info/51-1.htm (last visited Mar. 29, 2019).

62. *See* Alexander Gaffney, *China's SFDA Becomes CFDA Amidst Consolidation of Power and New Leadership*, RAPS (Mar. 25, 2013), *available at* https://www.raps.org/regulatory-focus%E2%84%A2/news-articles/2013/3/china-s-sfda-becomes-cfda-amidst-consolidation-of-power-and-new-leadership (last visited Mar. 24, 2019).

63. Beckett & He, *supra* note 60.

the State Food and Drug Administration ("SFDA").[64] Until 2014, chemical companies were exploiting a loophole that distinguished them from pharmaceutical companies.[65] The SFDA regulated everything produced by pharmacies, but chemical companies, which produce "everything from sweeteners to solvents," were not subject to these policies.[66] Thus, chemical companies would manufacture drug ingredients and classify them as chemicals rather than APIs.[67] While these ingredients are in fact chemicals, their more specific designation would have subjected them to the SFDA's regulations.[68] This gray area permitted these companies to operate free from inspection and certification requirements. China closed this loophole in 2014 when China's State Administration of Work Safety imposed new regulations and tighter licensing requirements on chemical production.[69] Regardless, chemical companies continue to manufacture manipulated pharmaceuticals and ship them overseas where the substances are illegal.[70]

The root of the problem is that these companies are not in violation of any Chinese legislation. These manufacturers are producing APIs that are completely legal under Chinese law; however, they are shipping them, for "research means," to countries where APIs are illegal.[71] Moreover, it is unlikely these companies are probing the buyer's alibi to ensure their purpose is truly for research.

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64. Lee & Hirschler, *supra* note 5. Until March 2013, the SFDA was in charge of regulating China's medical devices as well as food and drug sectors. It was at this time that the SFDA was restructured and rebranded into the CFDA, which was a reflection of the agency's accession to ministerial level—placing them under the purview of China's State Council. Stewart Eisenhart, *China: State Food and Drug Administration Renames Itself China Food and Drug Administration (CFDA)*, EMERGO (Mar. 27, 2013), *available at* https://www.emergobyul.com/blog/2013/03/china-state-food-and-drug-administration-renames-itself-china-food-and-drug (last visited Apr. 19, 2019).

65. O'CONNOR, *supra* note 6.

66. Lee & Hirschler, *supra* note 5.

67. *Id.*

68. *See id.*

69. O'CONNOR, *supra* note 6. The concepts of the pharmaceutical industry are constantly changing and are a modern aspect of society. Therefore, legislation more than twenty years old may no longer be relevant or effective for maintaining policy objectives and redrafting legislation might be necessary. *See* Enrique Fefer, *6 Pharmaceutical Legislation and Regulation in* MANAGING ACCESS TO MEDICINES AND HEALTH TECHNOLOGIES (2012), *available at* http://apps.who.int/medicinedocs/documents/s19577en/s19577en.pdf (last visited Apr. 1, 2019).

70. Fefer, *supra* note 69.

71. *Deadly Fentanyl Trade Linked to Chinese Companies*, NPR (Apr. 21, 2016), *available at* https://www.npr.org/2016/04/21/475161589/deadly-fentanyl-trade-linked-to-chinese-companies (last visited Mar. 19, 2019).

A team from NBC News recently investigated exactly how easy it was to order fentanyl online.[72] In one Google search the team was directed to Ching Labs—the first result populated.[73] Within minutes the investigators were in communication with an employee guaranteeing shipping.[74] The employee was so confident in Ching's packaging that they offered free reshipping if the first order was confiscated.[75] The entire process took a matter of clicks and the employee never once questioned the buyer's intended use of the fentanyl.[76] This news segment emphatically demonstrated how easily a person may purchase illicit substances over the internet, and why the United States struggles to contain opioid abuse.

C. Regulations

China's poor regulatory structure is a foundational issue in curtailing both the illicit production and trafficking of narcotics. China's drug control policy focuses on "prevention, education, illicit crop eradication, interdiction, rehabilitation, commercial regulation, and law enforcement."[77] The Ministry of Public Service ("MPS"), an agency under the State Council, oversees public security and enforces criminal regulations nationwide.[78] The MPS encompasses a variety of bureaus, including the Narcotics Control Bureau and Anti-Smuggling Bureau, who enforce China's drug control laws.[79] China has adopted narcotics control provisions, but the law is loosely constructed and offers little guidance.

Recent policy changes now permit the MPS to control other synthetic substances that have no known medicinal purpose.[80] When evaluating a substance for control, the MPS can now consider the harm to

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72. *See* Soboroff, Koss, & Heikkila, *supra* note 44.

73. *Id.* (see video embedded within the article).

74. *Id.*

75. *Id.*

76. *See id.*

77. *China: Bureau of International Narcotics and Law Enforcement Affairs 2016 International Narcotics Control Strategy Report (INCSR)*, U.S. DEPT. OF ST. (2016), *available at* https://www.state.gov/j/inl/rls/nrcrpt/2016/vol1/253251.htm (last visited Mar. 25, 2019) [hereinafter *INCSR Report*].

78. *Id.*

79. *Id.* The Anti-Smuggling Bureau ("ASB") within the General Administration of Customs is responsible for the enforcement of China's drug control laws at seaports, airports, and land border check points. *Id.*

80. Press Release, U.S. Drug Enforcement Admin., Acting Administrator Chuck Rosenberg Meets with Drug Control Officials in China (Jan. 13, 2017), *available at* https://www.dea.gov/divisions/hq/2017/hq011317.shtml (last visited Mar. 25, 2019).

citizens of foreign countries when evaluating a substance for control.[81] This encourages a clear line of communication between the United States Drug Enforcement Administration ("DEA") and Chinese officials. With deaths due to opioid overdoses rising, DEA officials are now encouraged to communicate with Chinese agencies to ensure the scheduling of all opioids, analogs, and precursors.[82] Lance Ho, the head of DEA's Beijing office, stated "[o]nce China controls a substance it has a dramatic effect on the United States in terms of lives saved."[83] However, Chinese efforts during this epidemic have been slow and too sporadic to have a significant impact. Still, the U.S.'s narcotics control efforts are dependent upon China's cooperation as chemical analogues and precursors are originating from Chinese labs.

In 2008, China approved the Narcotics Control Law of the People's Republic of China which contained provisions governing narcotics manufacture and export, including:

> [t]he state practices the licensing system to the manufacture, trading and transportation of precursor chemicals; [t]he state exercises control over narcotic drugs and psychotropic drugs, and practices the licensing system and the examination and inspection system to the experimental research, manufacture, trading, use, storage and transportation of such drugs; [w]here anyone violates state provisions during the course of production, trading, transportation, import or export of precursor chemicals and causes the precursor chemicals to flow into illegal channels, if a crime is constituted, he shall be subject to corresponding criminal responsibility; and [w]here any narcotic drugs, psychotropic drugs or precursor chemicals are stolen, robbed, lost, or diverted into illegal channels, the involved entity shall immediately take necessary control measures, and report the situation to the public security organ immediately.[84]

These regulations provide administrative power and prohibit illicit narcotic transactions, but alone they fail to restrict the behavior of chemical companies. Under these regulations, chemical companies are only compliant so long as they are licensed manufacturers and are distributing their products through legal channels. However, most manufacturers do

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81. *Id.*

82. *Id.*

83. Philip Wen, *China Disputes Trump's Claims of Fentanyl 'Flood' Into United States*, REUTERS (Nov. 3, 2017), *available at* https://www.reuters.com/article/us-china-drugs-usa/china-disputes-trumps-claims-of-fentanyl-flood-into-united-states-idUSKBN1D30DB (last visited Mar. 25, 2019).

84. (**中华人民共和国禁毒法**) [Narcotics Control Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective June 1, 2008), arts. 21, 23, 64, *available at* http://www.lawinfochina.com/display.aspx?lib=law&id=6604 (last visited Mar. 25, 2019).

not label themselves as pharmaceutical companies, but as chemical research companies to elude the scope of these provisions. Thus, as long as the companies are not manufacturing any substances prohibited under Chinese law, they have not violated any of these provisions. The issue has been both plugging these gaps in legislation and tracking those outright producing illicit substances.

Additionally, China's regulations require that administrative officials foster cooperation with other countries and adhere to international conventions regarding narcotics control. Chinese law mandates the NNCC to be "in charge of organizing and conducting international cooperation in narcotics control upon the authorization of the State Council."[85] Moreover, the law calls for the State Council to "make more efforts in exchanging narcotics control information with the law enforcement organs of other countries or regions as well as international organizations."[86] These provisions are important for the United States as they compel the Chinese to work with federal agents and exchange information that will target companies circumventing regulations.

D. How Chemical Companies Circumvent Regulations

While China has made some regulatory changes, part of the challenge for U.S. counternarcotic efforts is to keep up with the illusive efforts of Chinese chemical exporters. These exporters use online marketplaces to anonymously sell synthetic drugs for low prices and at low risk. The internet facilitates the export of APIs as one search produces hundreds of results for Chinese companies selling ingredients that have not been Good Manufacturing Practice ("GMP") or CFDA certified.[87] Buyers can order fentanyl through online listings, and exporters will ship the products through a series of forwarding systems that inhibit authorities' ability to track the source.[88] Moreover, chemical companies hire broker companies to relabel and conceal these substances to further cover their tracks.[89] This is not a difficult task for exporters as fentanyl's potency allows it to be shipped in smaller quantities, making it easier to disguise. As the team from NBC News discovered, these companies have become so confident in their deception that they will guarantee a free second shipment should customs intercept the first.[90]

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85. *Id.* art. 54.
86. *Id.* art. 56.
87. Lee & Hirschler, *supra* note 5.
88. *Id.*
89. *Id.*
90. O'CONNOR, *supra* note 6; *see also* Soboroff & Heikkila, *supra* note 44.

These companies are creative in their deception. U.S. CBP is often unable to identify and seize APIs or drugs because Chinese manufacturers alter their structures to create unregulated substances.[91] Thus, these companies are eluding legal ramifications by taking advantage of how easy it is to manipulate the fentanyl molecule.[92] By the time regulators can identify one analogue these distributors have already created a new unregulated molecule, which allows distributors to remain one step ahead of the law.[93] To truly make a difference, the process for regulating illicit substances must be streamlined to keep up with the sophistication of exporters.

China maintains that the U.S.'s claims regarding China-based opioid shipments are inflated, which has strained the United States and China's cooperative efforts.[94] Until recently, there has been little to no presence of law enforcement in the illicit chemical field.[95] Regulators are vastly outnumbered by the number of chemical companies throughout the country, and are incapable of inspecting all production and distribution facilities.[96] This lack of oversight makes it easy for chemical companies to evade authorities. When there is a threat of law enforcement, many unregistered labs quickly shutdown and relocate, resuming operation somewhere else.

Moreover, because of the lucrative nature of China's pharmaceutical and chemical industry, the gaps present in Chinese legislation may exist because of political corruption.[97] To date, no senior central Chinese government official has been found in association with the production, distribution, or laundering of illicit substances; the concern lies with local leaders who may actively undermine chemical regulations.[98] In 2014, China launched investigations and removed local government officials associated with corrupt practices.[99] In the Yunnan province alone, 41

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91. *Id.*

92. Jessica Schneider, *DOJ Indicts Two Chinese Nationals in Fentanyl Trafficking Case*, CNN (Oct. 18, 2017), *available at* http://www.cnn.com/2017/10/18/politics/doj-chinese-nationals-fentanyl-trafficking/index.html (last visited Mar. 25, 2019).

93. *Id.*

94. O'CONNOR, *supra* note 6.

95. *Id.*

96. *Id.*

97. *See id.*

98. *China*, U.S. DEPT. OF ST., *available at* https://www.state.gov/j/inl/rls/nrcrpt/2016/vol1/253251.htm (last visited Mar. 19, 2019); *see also* O'CONNOR, *supra* note 6.

99. O'CONNOR, *supra* note 6; *see also* Wendy Lipworth & Ian Kerridge, *China's Pharma Scandal and the Ethics of the Global Drug Market*, THE

officials were expelled for drug use.[100] Most notably, Zhou Yongkang, former Minister of Public Security, was arrested in 2015 on graft charges[101] that lead to the sentencing of many of his colleagues.[102] While central government corruption is likely not a widespread issue, local corruption coupled with a chaotic administrative framework is not conducive to transparent regulating. Chinese law gives too many agencies a hand in chemical and narcotics regulation, which can easily disguise political corruption for bureaucratic infighting. China's laws, regulations, and efforts up to this point have failed to curb the behavior of chemical companies and halt the flow of opioids through its borders.

E. China's Approach to Opioid Abuse and Actions Taken Thus Far

Like most nations, China focuses on issues impacting its people first; illicit fentanyl abuse is not a significant issue in China. Therefore, until recently, Chinese authorities placed little emphasis on controlling its production and export.[103] In October 2015, China named 116 synthetic substances, including six fentanyl analogs, to its list of controlled chemical substances.[104] At that time, China only controlled for 19 fentanyl-related products, and many chemical precursors—such as NPP—remained unregulated.[105] Once these substances were banned in China, the DEA reported that seizures of the listed compounds dropped significantly.[106] This is likely because underground Chinese labs had begun

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CONVERSATION (Sept. 18, 2013), *available at* http://theconversation.com/chinas-pharma-scandal-and-the-ethics-of-the-global-drug-market-16424 (last visited Mar. 25, 2019) (noting that corruption investigations began after GlaxoSmithKline was accused of bribery for the inappropriate promotion of antidepressants and failing to report safety data. It was estimated $3.34 million was fraudulently exchanged in this case.).

100. O'CONNOR, *supra* note 6.

101. In a legal context, charges of graft are charges of political corruption. *See* Eric Angevine, *What is the Meaning of Graft & Corruption?*, LEGAL BEAGLE (Dec. 19, 2018), *available at* https://legalbeagle.com/6635615-meaning-graft-corruption.html (last visited Mar. 19, 2019).

102. *China, supra* note 98; *see also* Nectar Gan, *Ex-Aide of Disgraced China Security Tsar Zhou Yongkang Jailed for Corruption*, S. CHINA MORNING POST (Feb. 15, 2017), *available at* https://www.scmp.com/news/china/policies-politics/article/2071053/ex-aide-disgraced-china-security-czar-zhou-yongkang (last visited Mar. 19, 2019).

103. O'CONNOR, *supra* note 6, at 5.

104. *Id.* at 6.

105. *Id.*

106. Eric Niiler, *Keeping Fentanyl Out of the U.S. Will Take More Than a Wall*, WIRED (Mar. 1, 2017), *available at* https://www.wired.com/2017/03/keeping-fentanyl-us-will-take-wall/ (last visited Mar. 20, 2019).

tweaking the fentanyl molecule's chemical structure, and were manufacturing a new unregulated analog.

The prominence of fentanyl analogues prompted an increase in scheduling legislation. Beginning March 1, 2017, China agreed to stop the sale and manufacture of carenfentanyl, furanyl fentanyl, acrylfentanyl, and valeryl fentanyl—analogs that had become prevalent since previous regulations.[107] More importantly, taking effect February 1, 2018, China's MPS announced scheduling controls over the two fentanyl precursors NPP and 4-anilino-N-phenethylpiperidine (hereinafter "ANPP"), a measure that will make it more difficult to manufacture all forms of fentanyl.[108] Nevertheless, lawmakers and chemical companies continue to play a chess match with each other, a game that does not favor lawmakers.

China has displayed mixed intentions throughout its efforts to resolve the opioid crisis. At the 2016 G20 Summit, China stated it was "committed to targeting U.S. bound exports" of chemicals that are outlawed in the United States but not in China. Since 2016, the NNCC reports that Chinese authorities have arrested "dozens" of synthetic drug exporters, confiscated eight illegal labs, and seized about two tons of various psychoactive substances.[109] However, Chinese regulators have also obstructed the United States' ability to conduct drug inspections by delaying visa approvals for Federal Drug Association ("FDA") officials. In the past, Chinese officials have stated "foreign companies should take responsibility for standards by buying products from properly certified exporters"[110]—a statement that clearly intends to distinguish whom China feels should bear the burden of liability in these transactions.

The issue with this logic is that the substances fueling the opioid crisis are not being bought by companies, but by individuals looking to make or sell opioids for illicit purposes. Therefore, it should fall under China's responsibility to regulate companies whom they are benefiting from—especially when their business practices are illegal in nature and have public health implications on an international scale.

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107. *Id.*

108. This legislation was the result of the ongoing collaboration between the DEA and China's MPS. *China Announces Scheduling Controls on Two Fentanyl Precursor Chemicals*, U.S. DRUG ENF'T ADMIN. (Jan. 5, 2018), *available at* https://www.dea.gov/divisions/hq/2018/hq010518.shtml (last visited Mar. 20, 2019).

109. *China Bans Drug So Deadly Considered a Terrorist Threat*, N.Y. POST (Feb. 16, 2017), *available at* https://nypost.com/2017/02/16/china-bans-drug-so-deadly-its-considered-a-terrorist-threat/ (last visited Mar. 20, 2019).

110. Lee & Hirschler, *supra* note 5.

While China has generally cooperated with the U.S.'s efforts to reduce opioid production and trafficking, on several occasions it has fervently denied the significance of its role in the epidemic. In August 2017, Yu Haibin, director of China's Narcotics Control Bureau, proclaimed that the United States could not "solely blame China for fentanyl's abuse."[111] He further stated that China was ahead of the United States in outlawing fentanyl analogues and was working with the States to curb trafficking.[112] Yu doubled down on this position in November when he asserted that China's "biggest challenge" regarding opioid smuggling "is the huge demand from the U.S."[113] He claimed the United States needed to bolster its educational and promotional campaigns to reduce domestic demand, reduce its internet-based drug crimes, and share more lab data with China to improve their detection efforts.[114] He also took a jab at the United States' evolving drug policy, implying the expanding legalization of medical and recreational marijuana was fueling the opioid epidemic.[115] Yu stated, "I think this trend has had a negative effect on public recognition or mentality on the opioid problem."[116]

Yu's statements illustrate China's refusal to address its role in the problem and are indicative of why curbing the opioid epidemic has been so difficult. The U.S. government has grasped the severity of the present circumstances and began instituting corrective action. However, the U.S.'s efforts alone will not be sufficient to control the opioid market. The United States needs China to take its role in this epidemic seriously and increase its own self-policing. This epidemic will only come to an end if both countries take cooperative efforts to crack down on their respective weaknesses.

III. THE UNITED STATES AND CHINA'S COOPERATIVE EFFORTS

It is imperative that the United States and China maintain open communication on matters relative to opioid abuse. Both the United States and China are parties to an agreement that requires bilateral

111. Soboroff, Koss, & Heikkila, *supra* note 44.

112. *Id.*

113. Steven Jiang, *China Says US Not Doing Enough to Cut Demand for Opioids*, CNN (Dec. 28, 2017), *available at* http://www.cnn.com/2017/12/28/asia/china-drugs-us-intl/index.html (last visited Mar. 22, 2019).

114. *Id.*

115. *Id.*

116. *Id.*

cooperation in criminal matters.[117] Signed on June 19, 2000, the Agreement on Mutual Legal Assistance in Criminal Matters ("AMLACM") requires the two countries to provide mutual legal assistance during investigations, prosecutions, and other criminal proceedings.[118] This agreement is significant within the scope of the opioid epidemic because it requires China to assist in the investigation of illegal production and trafficking reported by the United States[119]

The agreement clearly lays out the ways in which China must provide assistance. Some of the avenues defined under assistance include: (1) taking the testimony or statements of persons; (2) making persons available to give evidence or assist in investigations; (3) locating or identifying persons; (4) executing requests for inquiry, searches, freezing and seizures of evidence; and (5) transferring persons in custody for giving evidence or assisting in investigations.[120] Thus, under the purview of this agreement, China obligated itself to undertake greater investigation into the illegal production of opioids and precursor chemicals being illegally shipped into the United States.

In addition, under the AMLACM, and per the framework of the United States–China Joint Liaison Group on Law Enforcement Cooperation,[121] the Bilateral Drug Intelligence Working Group[122] and the

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117. *INCSR Report*, *supra* note 77.

118. *Id.*

119. In December 2017, after acting on a tip from U.S. officials, Chinese officials raided an illicit fentanyl factory and arrested nineteen people associated with the endeavor. Additionally, Chinese officials are awaiting proof from the U.S. regarding two Chinese kingpins accused of manufacturing fentanyl and supplying hundreds of American dealers. Keegan Hamilton, *China Raids Fentanyl Factory But Remains Silent on Wanted Kingpins*, VICE NEWS (Dec. 28, 2017), *available at* https://news.vice.com/en_ca/article/yw5we7/china-raids-fentanyl-factory-but-remains-silent-on-wanted-kingpins (last visited Mar. 22, 2019).

120. *INCSR Report*, *supra* note 77.

121. The Joint Liaison Group, established in 1998, is a major channel for China-US law enforcement cooperation. It involves the foreign ministries, security departments, justice departments and others. *China, US to Discuss Law Enforcement Cooperation*, ST. COUNCIL OF CHINA (Nov. 16, 2016), *available at* http://english.gov.cn/news/international_exchanges/2016/11/16/content_281475492603192.htm (last visited Mar. 22, 2019).

122. DEA and the Narcotics Control Bureau of China are parties that established the BDIWG, which brings legal and law enforcement experts together to share information and discuss cooperation. *INCSR Report*, *supra* note 77. BDIWG is held to discuss ways to improve and enhance U.S.–China joint drug investigations. This group's cooperative efforts have been essential in combating the fentanyl and psychoactive substance epidemic. *Id.*; *see also* Press Release, U.S. Drug Enforcement Agency, U.S. and Chinese Drug Enforcement Agencies Meet on Synthetic Opioid Efforts (Sept. 29, 2016), *available at* https://www.dea.gov/press-

Counternarcotics Working Group[123] meet to form a mutual understanding of the current drug issues. During this meeting, the parties exchange observations and information on trends in drug abuse and trafficking as well as the relevant legal and regulatory challenges.[124] The goal of these annual meetings is to address obstacles in precursor chemical control, discuss recent progress, and find mutual regulatory interest.

On October 6, 2017, both parties met and emphasized their intentions to continue to improve cooperation on narcotics control and administration.[125] Specifically, the parties discussed the need to exchange intelligence, track new substances, combat "illicit production and trafficking of fentanyl . . . and precursor chemicals," and share tracking information for packages shipped between the two countries.[126] Both countries also agreed to begin reviewing international narcotics control issues during UN–based, and other multi-national, forums.[127]

Agreement alone is not enough. It is important that both parties maintain diligent efforts to ensure their end of these obligations are met. Constant communication is crucial in tackling an epidemic that is based upon an ever-evolving industry. In order to start making a serious dent in the opioid crisis, both countries must continue to target high profile traffickers and shut down clandestine labs. Additionally, both the United States and China must begin to draw more strongly from multinational forums to form a strong system of narcotics regulation.

IV. INTERNATIONAL LAW AND ORGANIZATIONS

Every country has different regulations and maintains a different level of oversight over its illicit drug market. This inconsistency in regulatory management is what permits the illicit narcotic market to exist; consequently, this is the gap international conventions are designed to bridge.[128] However, even international agreements have flaws and cannot alone serve as a universal solution to the narcotic market.

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releases/2016/09/29/us-and-chinese-drug-enforcement-agencies-meet-synthetic-opioid-efforts (last visited Mar. 22, 2019).

123. *INCSR Report*, *supra* note 77.

124. *Id.*

125. *First U.S.-China Law Enforcement and Cybersecurity Dialogue*, U.S. DEP'T OF JUST. (Oct. 6, 2017), *available at* https://www.justice.gov/opa/pr/first-us-china-law-enforcement-and-cybersecurity-dialogue (last visited Mar. 22, 2019).

126. *Id.*

127. *Id.*

128. *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS 30-32 (3rd ed. 2015).

In addition to national law and regulations, countries must also comply with international law and code set by adopted conventions. International law is distinct from state-based legal structures because it primarily applies to countries rather than private citizens.[129] However, some forms of international law become national law when they require state-based legal systems to conform to certain standards.[130] While most international law is consent-based authority, the overall goal of these directives is to create a stable framework for international relations.[131]

A. Treaties

International drug treaties drafted to stem drug trafficking are not new. First, in 1961, the United Nations drew up a treaty known as the Single Convention on Narcotic Drugs (hereinafter "1961 Convention").[132] This treaty was designed to curb illicit drug production, trafficking, and possession by establishing a system of enforcement that penalizes according to the classification of the drug.[133] This was the first implementation of a four-tier drug scheduling system which classified drugs based upon their accepted use and potential for abuse.[134] Over 184 countries became a signatory to this agreement, which required them to implement its terms into their domestic law.[135] While these signatories are permitted to make the law stricter, they must adhere to the baseline

129. Robert J. Beck, *International Law and International Relations*, OXFORD RES. ENCYCLOPEDIAS (Jan. 2018), *available at* http://internationalstudies.oxfordre.com/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-406?product=oreisa#acrefore-9780190846626-e-406-bibItem-21 (last visited Mar. 20, 2019).

130. CHOW & SCHOENBAUM, *supra* note 128, at 31.

131. Beck, *supra* note 129.

132. *The Single Convention on Narcotic Drugs*, FINDLAW, *available at* http://criminal.findlaw.com/criminal-charges/the-single-convention-on-narcotic-drugs.html (last visited Mar. 25, 2019).

133. *Id.* (however, the 1961 Convention does explicitly provide both medicinal use and scientific research as exceptions to its provisions).

134. *Id.*; *see also Drug Schedules*, DEA, *available at* https://www.dea.gov/druginfo/ds.shtml (last visited Mar. 21, 2019). Article 3(3)(iii) also accounts for the scheduling and regulation of precursor chemicals used to manufacture illicit narcotics. U.N. OFF. ON DRUGS AND CRIME, THE INTERNATIONAL DRUG CONTROL CONVENTION 28 (2013), *available at* https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf (last visited Mar. 25, 2019).

135. *The Single Convention on Narcotic Drugs*, *supra* note 132 (stating that "[t]he United States implemented The Single Convention on Narcotic Drugs into its federal laws as The Controlled Substances Act which makes it illegal to possess even a small quantities of narcotics.").

requirements of the treaty.[136] However, this freedom has encouraged nations to implement the 1961 Convention differently.[137] For example, despite its illegality, the Netherlands eluded international law regarding recreational marijuana use by fostering a policy of non-enforcement.[138] Thus, it should be no surprise that, despite commitments to international legislation, national governments still find a way to bend the law in a manner consistent with their views.

Second, in 1990, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (hereinafter "CAIT") was enacted to support the 1961 Convention and 1971 Convention on Psychotropic Substances Act.[139] CAIT was created to combat the still growing demand for narcotics for recreational use, and largely devoted its influence to targeting organized crime.[140] The treaty requires its signors to cooperate in the investigation and confiscation of all drug related assets. Moreover, CAIT relaxed bank secrecy laws, permitting authorities to acquire bank, financial, or commercial records related to organized drug offenses.[141] Article three of the treaty also mandates signatories ban possession of drugs for personal use, stating:

> Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention . . .[142]

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136. *Id.*

137. *Id.*

138. *Id.* Officials have not prohibited state-level legalization of marijuana in the United States, despite the Controlled Substances Act, due to the impracticality of enforcement. The 1961 Convention provides signatories some ambiguous language to support these nonconforming undertakings: "[p]arties shall adopt such measures *as may be necessary* to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant (emphasis added)." Molly Quinn, *Implications of U.S. Noncompliance With the Single Convention on Narcotic Drugs of 1961*, MICH. J. OF INT'L. L., *available at* http://www.mjilonline.org/implications-of-u-s-noncompliance-with-the-single-convention-on-narcotic-drugs-of-1961/ (last visited Mar. 25, 2019).

139. Jimmy Gurulé, *The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances–A Ten Year Perspective: Is International Cooperation Merely Illusory?*, 22 FORDHAM INT'L. L. J. 74, 77-78 (1998).

140. *Id.*

141. *Id.*

142. CHRISTINE VAN DEN WYNGAERT, INTERNATIONAL CRIMINAL LAW A COLLECTION OF INTERNATIONAL AND REGIONAL INSTRUMENTS 1079 (4th ed. 2011).

This language establishes a caveat by providing possession is only prohibited if "contrary to the provisions of the 1961 Convention."[143] This creates ambiguity because the 1961 Convention asserts possession is not permitted "except under legal authority."[144] This ambiguity creates the wiggle room for states, such as Colorado, to introduce laws legalizing marijuana possession. It also provides wiggle room for China to permit chemical companies to continue exploiting regulatory weaknesses for economic advantage. This shows that there are even gaps within international law that need to be tightened if the world's illicit narcotic market is to be controlled.

B. Organizations

International organizations were implemented to ensure the success of international treaties and conventions. The World Health Organization ("WHO") is an agency within the United Nations that concentrates on international public health.[145] Part of its obligations, under the United Nations Single Convention on Narcotic Drugs (1961), the United Nations Convention on Psychotropic Substances (1971), and the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) is to report to the United Nations regarding statistics on abuse of narcotics.[146] These treaties grant WHO the authority to advise on the scheduling of a substance according to its dependence producing properties.[147]

In addition to WHO, the International Narcotics Control Board ("INCB") is an independent body established under the authority of the 1961 Convention responsible for implementing the United Nations' international drug regulation conventions.[148] As an impartial convention, the INCB works to identify and forecast alarming trends in drug use, and recommends the required preventative measures.[149] Furthermore, it evaluates chemicals being trafficked in illicit transactions and gauges whether

143. *Id.*

144. U.N. OFF. ON DRUGS AND CRIME, *supra* note 134, at 53.

145. *See About WHO*, WHO, *available at* http://www.who.int/about/en/ (last visited Mar. 25, 2019).

146. *Essential Medicines and Health Products*, WHO, *available at* http://www.who.int/medicines/areas/quality_safety/sub_under_int_control/en/ (last visited Mar. 25, 2019).

147. *Id.*

148. *International Narcotics Control Board (INCB)*, U.N. OFF. ON DRUGS AND CRIME, *available at* https://www.unodc.org/lpo-brazil/en/drogas/jife.html (last visited Mar. 25, 2019).

149. *Id.*

they need to be scheduled under international law.[150] It also pinpoints weaknesses in both national and international regulatory systems, facilitating improvements in these systems.[151] This oversight assists governments in preventing the delivery of narcotics and precursor chemicals, from illicit sources, from reaching unregulated markets.

It is not only illegal opioids that are subject to international oversight, but also prescription opioids. Established in 1980, the International Conference of Drug Regulatory Authorities ("ICDRA") is another authority aimed at encouraging WHO members to develop an international consensus on drug regulations.[152] Gathering every two years, the ICDRA guides regulatory authorities in both the national and international regulation of medicines, vaccines, biomedicines, and herbals.[153]

While the ICDRA conference does not focus specifically on narcotics and narcotics abuse, the opioid crisis is rooted in the abuse of prescription opioids. An estimated 21 to 29 percent of patients who receive prescription opioids for chronic pain misuse them, and 8 to 12 percent of those patients develop an opioid abuse disorder.[154] The ICDRA offers WHO member states a forum for drug regulatory authorities to collaborate on strengthening cooperation and consensus regarding pharmaceutical regulations.[155] This conference assembles authorities who are empowered to solve the foundational issue in the opioid crisis. International agreement and action are critical. The international community needs to establish a consensus standard for opioid prescriptions and monitoring of patients who receive such prescriptions. This would eliminate variation in pharmaceutical standards and cause a dramatic decrease in patients developing an opioid dependence.

Similar to the goals of the ICDRA, the International Conference on Harmonization of Technology for Registration of Pharmaceuticals for Human Use (hereinafter "ICH") assembles regulatory authorities in the

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150. *Id.*

151. *Id.*

152. *International Conference of Drug Regulatory Authorities*, WHO (2018), *available at* http://www.who.int/medicines/areas/quality_safety/regulation_legislation/icdra/en/ (last visited Apr. 1, 2019).

153. *Id.*

154. *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (Jan. 2019), *available at* https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis (last visited Apr. 1, 2019). In 2012, over 255 million opioid prescriptions were dispensed in the U.S. *U.S. Prescribing Rate Maps*, CDC (July 31, 2017), *available at* https://www.cdc.gov/drugoverdose/maps/rxrate-maps.html (last visited Apr. 1, 2019). This number has since decreased to around 191 million prescriptions. *Id.*

155. Fefer, *supra* note 69, at 6.4.

pharmaceutical industries of the United States, Europe, and Japan to examine the technical and scientific facets of drug registration.[156] The objective of this conference is to harmonize the technical guidelines and requirements for new and existing pharmaceutical registration, an issue China's government struggles to control.[157] However, China is not a party to the ICH.[158] While WHO is intended to act as a bridge between ICH and non–ICH countries, through the ICDRA the influence of the ICH has not reached China's porous pharmaceutical regulations.[159] China's loophole-ridden pharmaceutical regulations are a foundational issue of the opioid crisis, an issue the ICH could standardize.

Lastly, there is the United Nations Office on Drugs and Crime ("UNODC"), created specifically to combat trafficking of illicit drugs and international crime.[160] Its governing body, the Commission on Narcotic Drugs ("CND"),[161] is granted explicit permission under the 1961 Convention to: (1) amend the schedules; (2) bring relevant matters to the attention of the INCB; (3) make recommendations for implementing the 1961 Convention; and (4) convince non-parties of the 1961 Convention to act in accordance with its recommendations.[162]

In March 2017, the UNODC voted to "schedule" two chemical precursors and a new fentanyl analog to the international control list.[163] Both ANPP and NPP—the two primary chemicals used in illicit fentanyl production—were added to the international control list in hopes of making it more difficult for illicit labs to acquire them.[164] While this is far from a silver bullet, this decision will obligate "countries to regulate the production, sale, and export of the precursors to fentanyl, and to criminalize

156. *Id.* at 6.5.

157. *Id.*

158. *See id.*

159. *Id.* at 6.6.

160. *About UNODC*, U.N. OFF. ON DRUGS AND CRIME (2018), *available at* https://www.unodc.org/unodc/en/about-unodc/index.html?ref=menutop (last visited Apr. 1, 2019).

161. *CND*, U.N. OFF. ON DRUGS AND CRIME (2018), *available at* http://www.unodc.org/unodc/en/commissions/CND/index.html (last visited Apr. 1, 2018).

162. Single Convention on Narcotic Drugs art. 8, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151.

163. *U.N. Drugs Body Places Fentanyl Ingredients on Control List*, REUTERS (Mar. 16, 2017), *available at* https://www.reuters.com/article/us-un-drugs-fentanyl/u-n-drugs-body-places-fentanyl-ingredients-on-control-list-idUSKBN16N2MB (last visited Mar. 24, 2019).

164. *Id.* (stating that the fentanyl analog scheduled is known as butyrfentanyl).

sale or trafficking outside of those regulations."[165] This is a significant step forward and will substantially reduce the global presence of these substances, ultimately reducing the production of fentanyl.

In addition, the UNODC annually publishes two reports as part of the Global Synthetics Monitoring: Analyses, Reporting and Trends Programme ("SMART"), which detail the "emerging patterns and trends" in the global synthetic drug market.[166] In March 2017, SMART released an update that focused its attention on fentanyl and the growing opioid market.[167] The update reveals how the increasing complexity of the opioid market has impacted more than just the United States—it has become a global issue.[168] This is an alarming revelation, which shows that on a global scale legislation is insufficient to regulate this persistently expanding market. As detailed above, there are multiple governing bodies, organizations, and treaties whose responsibility is to manage narcotics regulations and illicit activity. Nevertheless, our best efforts to stymie illicit manufacturers and traffickers are quickly circumvented. International conventions are weakly enforced and lack the stringent language and global enforcement necessary to compel signatories, such as China, to abide to their commitments.

V. U.S. LAW AND ORGANIZATIONS

International conventions are important guideposts, but they are simply not enough. The United States cannot rely on China's promises of reform and cooperation during the opioid crisis. Instead, the United States must also make concerted efforts of its own to slow the progression of opioid use.

Time is being wasted trying to persuade China that it is the primary contributor of illicitly manufactured and distributed synthetic opioids. The primary issue in the United States is not manufacture, but internal distribution and abuse. Rather than pleading with China to reform its pharmaceutical and chemical regulatory structure, a change that seems

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165. *Id.*

166. Press Release, U.N. Office on Drugs and Crime, Report: Fentanyl's Increasing Flows Fuel Steep Rise in Overdose Deaths (Mar. 6, 2017), *available at* https://www.unodc.org/unodc/en/press/releases/2017/March/report_-increasing-flows-of-fentanyl-fuel-a-steep-rise-in-overdose-deaths.html (last visited Mar. 24, 2019).

167. *Id.*

168. *See generally Global SMART Update: Fentanyl and Its Analogues – 50 Years On*, U.N. OFF. ON DRUGS AND CRIME (Mar. 2017), *available at* https://www.unodc.org/documents/scientific/Global_SMART_Update_17_web.pdf (last visited Mar. 24, 2019).

unlikely, the United States should focus on improving border screening regulations. Obstructing the import and internal sale of opioids can have a huge impact on the demand for these substances on the web.

A. Public Health Emergency

In response to the media attention and public outcry over the opioid epidemic, the United States is seeking legislative measures to assist in reducing opioid abuse within the country. In January 2018, Health and Human Services ("HHS") voted to extend the public health emergency for another 90 days.[169] While this renewal is important for spreading awareness, it has yet to draw the additional funding it was intended to.[170] Without Congressional funding this declaration is little more than a public service announcement.[171] However, there are other ways of tackling the opioid epidemic.

B. Controlled Drug Substances Act

One such way is rethinking the way fentanyl is classified. The Controlled Drug Substances Act ("CSA") is a U.S. federal drug policy that regulates the "manufacture, importation, possession, use and distribution of certain narcotics, stimulants, depressants, hallucinogens, anabolic steroids" and other chemicals as dictated by the DEA, HHS, or FDA.[172] The CSA falls under title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which establishes the five schedules under which medications, chemicals, and other substances are classified based on their potential for abuse, medical application, and safety.[173] Fentanyl is classified as a schedule II drug because of its high potential for abuse, but since it is used for treating cancer patients, it also has an accepted medical use in the United States.[174] While fentanyl will likely never be upgraded to a schedule I substance, the DEA stated it will classify any illicit

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169. Rachel Roubein, *HHS Extends Trump's Emergency Declaration for Opioids*, THE HILL (Jan. 19, 2018), *available at* http://thehill.com/policy/healthcare/369853-hhs-extends-trumps-emergency-declaration-for-opioids (last visited Mar. 24, 2019).

170. *Id.*

171. Brianna Ehley, *Trump Administration Extending Opioid Emergency Declaration*, POLITICO (Jan. 19, 2018), *available at* https://www.politico.com/story/2018/01/19/trump-opioids-emergency-declaration-extension-300590 (last visited Mar. 24, 2019).

172. L. Anderson, *CSA Schedules*, DRUGS.COM (May 18, 2018), *available at* https://www.drugs.com/csa-schedule.html (last visited Mar. 24, 2019).

173. *Id.*

174. *Id.*

analogues of fentanyl as schedule I substances.[175] This action would permit the criminal prosecution of anyone caught possessing, distributing, or manufacturing illicit variations of the drug; a task previously burdensome for prosecutors.[176]

Such change is critical as prosecutions regarding fentanyl are arduous. Previously, prosecutors could prosecute for the manufacture, distribution, or possession of analogues of a controlled substance pursuant to the Federal Analogue Act.[177] However, this was a difficult task as it required prosecutors to prove both that the analogues were "structurally similar to other scheduled drugs" and that they had the "same effects on the body."[178] This often resulted in a legal dispute between multiple scientific expert witnesses testifying to the chemical structure of the drugs in dispute.[179] Changing the scheduling of fentanyl analogues would eliminate lengthy litigation and permit prosecutors to quickly remove those involved in the illicit narcotic market from the streets. Such legislative action would allow authorities to keep pace with clandestine labs attempting to bypass regulations by altering the chemical structures of controlled substances.

C. INTERDICT Act

In addition to the regulation and treatment of illicit substances, another policy goal of the United States is to prevent illicit substances from being shipped into the country altogether. On January 10, 2018, President Trump signed into effect the INTERDICT Act.[180] This Act will raise funding for screening equipment used by CBP agents in identifying fentanyl, fentanyl analogs, and other illicit substances being shipped into the

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175. Sarah N. Lynch, *U.S. Drug Agency to Toughen Stance on Illicit Fentanyl Analogues*, REUTERS (Nov. 9, 2017), *available at* https://www.reuters.com/article/us-usa-justice-opioids/u-s-drug-agency-to-toughen-stance-on-illicit-fentanyl-analogues-idUSKBN1D92RI (last visited Mar. 25, 2019).

176. *See id.*

177. Federal Analogue Act, 21 U.S.C. § 813 (1988) (stating that "A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.").

178. Lynch, *supra* note 175; *see also* United States v. Forbes, 806 F. Supp. 232 (D. Colo. 1992) (holding the statute must be interpreted conjunctively to prevent legal substances with similar effects to controlled substances being labeled illegal).

179. Lynch, *supra* note 175.

180. Dave Boyer, *Trump Signs Law to Gives Border Patrol Better Tools to Stop Smuggling of Fentanyl*, WASH. TIMES (Jan. 10, 2018), *available at* https://www.washingtontimes.com/news/2018/jan/10/trump-signs-interdict-act-help-border-patrol-detec/ (last visited Mar. 25, 2019).

United States.[181] Fentanyl's ability to be shipped in such small quantities compels such changes. As mentioned earlier, traffickers actively conceal fentanyl in packages shipped into the United States. Thus, an increase in personnel at borders and improved screening technology at post offices will reduce the supply reaching dealers in the United States. Moreover, because fentanyl is a man-made substance, it is easier for officials to determine who manufactured and distributed the seized product.[182] Thus, border control is critical to U.S. officials identifying and shutting down more illegal labs. These legislative steps are essential as the United States cannot sit idly waiting for China to bolster its customs. The United States must continue to make unilateral efforts to cut off the flow of illicit narcotics coming in from China.

D. STOP Act

A legislative initiative fully on point is the Synthetics Trafficking and Overdose Prevention Act ("STOP") proposed by Senator Rob Portman.[183] In conjunction with the INTERDICT Act, STOP is designed to prevent illegal shipments of opioids from entering the United States. Presently, CBP only receives advanced electronic data on mail that enters the country through private carriers.[184] However, the vast majority of mail enters the country through foreign postal services and with no background information to screen it.[185] This act will require all foreign mail to have advance electronic data before being allowed into the United States.[186] The requisite information would include who the mail is addressed to, where it is going, and what it contains.[187] Having this information in advance will permit authorities to better target incoming packages and ultimately prevent these narcotics from being distributed throughout the country. More importantly, CBP authorities will have the capability of identifying illicit manufacturers and working with Chinese

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181. Hannah Schwarz, *Fentanyl Legislation Would Beef Up Border Detection*, PRESSCONNECTS (Apr. 12, 2017), *available at* https://www.pressconnects.com/story/news/local/2017/04/12/fentanyl-legislation-would-beef-up-border-detection/100376132/ (last visited Mar. 25, 2019).

182. *Id.*

183. *See* Press Release, Rob Portman, Portman, Klobuchar, Rubio, Hassan Introduce Legislation to Address Overdose Spike from Synthetic Opioids, (Feb. 14, 2017), *available at* https://www.portman.senate.gov/public/index.cfm/2017/2/portman-klobuchar-rubio-hassan-introduce-legislation-to-address-overdose-spike-from-synthetic-opioids (last visited Mar. 25, 2019).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

officials to shut them down. The goal is to target the source of the epidemic by slowly cutting off its life line. Eventually, the financial and legal risks will become too great and the prominence of the Chinese chemical market will wane.

E. SUPPORT for Patients and Communities Act

Most recently, President Trump authorized comprehensive legislation designed to support policies governed by the Centers for Medicare & Medicaid Services and the U.S. Food and Drug Administration.[188] The Substance–Use Disorder Prevention That Promotes Opioid Recovery and Treatment Act ("SUPPORT") is constructed to improve addiction treatments and curtail prescription abuse.[189] First, the bill designates more funding for "health homes" that provide care for persons who suffer from substance abuse.[190] It also loosens restrictions on substance abuse treatments conducted via telehealth[191] and permits Medicare to cover treatment programs that employ drugs and therapy.[192]

Second, SUPPORT highlights the FDA's authority to regulate that painkiller packaging be restricted to "blister packs," which support treatment regimens lasting only a few days.[193] The law also permits the FDA to include the "reduced effectiveness [of opioids]" under the definition of "adverse effects of opioids."[194] These measures are intended to revamp the entire health care continuum. Specifically, the measures aim to prevent patients from developing a prescription drug abuse disorder, and to improve the treatment available to those who suffer from such disorders.[195] Additionally, the legislation aims to improve electronic tracking on international mail, to prohibit kickbacks on referrals to rehabilitation

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188. Jeff Overley, *Trump Signs Vast Opioid Legislation into Law*, LAW360 (Oct. 24, 2018), *available at* https://www.law360.com/articles/1095464/trump-signs-vast-opioid-legislation-into-law (last visited Mar. 25, 2019).

189. *Id.*

190. *Id.*

191. Telehealth employs electronic information and technologies such as videoconferencing, streaming services, the internet, and wireless communications to support long-distance clinical health care, health care related education, and public health services. *What is Telehealth? How is Telehealth Different From Telemedicine?*, HEALTHIT (Sept. 22, 2017), *available at* https://www.healthit.gov/faq/what-telehealth-how-telehealth-different-telemedicine (last visited Mar. 25, 2019).

192. Overley, *supra* note 188.

193. *Id.*

194. *Id.*

195. Kathleen McDermott et al., *A First Look at the Sweeping New Opioid Law*, LAW360 (Oct. 25, 2018), *available at* https://www.law360.com/articles/1095542/a-first-look-at-the-sweeping-new-opioid-law (last visited Mar. 25, 2019).

centers, and to require controlled substances covered by Medicare to be electronically prescribed.[196] Thus, SUPPORT aims to improve oversight over both ends of substance abuse—exposure and treatment—which are the two areas most crucial to reducing substance abuse.

VI. RECOMMENDATIONS

The opioid crisis is a multifaceted epidemic that has bloomed because of several compounding international issues, flawed national regulation and oversight, and the ease of opioid accessibility. All of these issues stem from China's vast and generally unchecked chemical companies. Nevertheless, the present state of the epidemic cannot be overcome without multiple authorities taking corrective action on foundational issues.

First, at the very root of the issue, China needs to take corrective action and close the gaps within its regulations. Second, international cooperation between China and the United States in identifying major illicit manufacturers and traffickers must become a priority. Third, international authorities need to establish a single, unified convention that all countries must strictly adhere to. Fourth, the United States must enforce measures that will curb the demand for illicit opioids, increase border/customs security, and streamline regulatory action.

Loopholes in China's pharmaceutical regulation are a significant barrier to reducing the number of opioids and precursor chemicals being illegally trafficked. Chinese chemical labs are taking advantage of the present legislation and lack of oversight—factors the United States has no influence on. China has legal power, human and financial resources, and independence in decision making. However, to be effective, Chinese regulatory officials must also have the "necessary political support."[197] The absence of oversight over the pharmaceutical and chemical industries is due to a lack of political urgency, which China must address immediately.[198]

China must take divisive action to slow the shipment of illicit narcotics to the U.S. markets. Presently, Chinese officials must draft regulations that increase attention towards precursor chemicals and make them tougher for illegal manufacturers to obtain. Kai Pflug, a consultant in China's chemical industry, stated the opioid "problem will persist" so long as "in China, you can produce chemicals without serious

196. Overley, *supra* note 188.
197. Fefer, *supra* note 69, at 6.15.
198. *See id.*

supervision."[199] In the long term, China must reorganize its administrative system and establish an effective system of regulatory enforcement.

Second, the United States must continue to be diligent in its collaborative efforts with China. To this point, China prohibited the manufacture of 23 fentanyl analogues, a clear sign of its commitment to assist the United States.[200] It is crucial that the United States maintain open communication with Chinese officials to expose underground labs, dealers, and changes in chemical structure. Unilateral action will have no influence on an industry that remains a step ahead of the law.

Third, international law needs a single international convention that binds all nations to its standards. Current conventions only apply to those who are signatories to the agreement, and even then, conventions only require those signatories to maintain the baseline requirements. Thus, parties may establish various standards of regulation so long as they comply with the basic guidelines of the given convention. The issue with permitting such leeway is the variation in national standards that develops as a result.[201] In some countries, the treaty's requirements are improperly implemented at the national level and fall below the designated requirements, or are disregarded entirely.[202] This leads to global tension between abiding countries and those who choose not to observe the "universal adherence."[203] A 1994 report on the effectiveness of international control stated that a "large part of the shortcomings" of international drug control is because these conventions were intended to be universal, but have yet to be universally adopted.[204] Presently, there is too much parity in implementing narcotics regulations across the globe. A stronger international convention needs to be established that unifies all countries under the same obligations and reduces opportunity to exploit loopholes.

Fourth, the United States must take measures to reduce the internal demand for fentanyl and its derivatives. There are several approaches officials can take to substantially reduce the impact opioid use is having

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199. Sui-Lee Wee & Javier C. Hernandez, *Despite Trump's Plea's, China's Online Opioid Bazaar is Booming*, N.Y. TIMES (Nov. 8, 2017), *available at* https://www.nytimes.com/2017/11/08/world/asia/china-opioid-trump.html (last visited Mar. 29, 2019).

200. *Id.* (stating that China maintains a "hard-line stance" when it comes to domestic narcotics activity, as the country's strict narcotics laws carry a penalty of execution for those found guilty of trafficking).

201. *See generally* Int'l Narcotics Control Bd., Rep. on the Effectiveness of the Int'l Drug Control Treaties, U.N. DOC. E/INCB/1994/1/Supp.1 (1994).

202. *Id.* ¶ 110(b)

203. *Id.* ¶ 110(a).

204. *Id.*

on American society. First, action must be taken to curtail the amount of opioid prescriptions being written by doctors. While opioid prescriptions have decreased since 2010, prescription rates remain three times higher than they were in 1999 and four times higher than they are in Europe.[205] The FDA should mandate that only doctors who complete training in pain management are permitted to prescribe opioids for extended use. Moreover, state governments should restrict the size of opioid prescriptions to minimize the risk of dependence and prevent excess pills from being distributed illegally.[206]

Moreover, actions should be taken that impact pharmaceutical companies themselves. Pharmaceutical companies and their distributors have largely taken a blind eye to pill mills.[207] The federal government is responsible for ensuring that pharmaceutical companies monitor their supply and distribution of drugs.[208] One way of ensuring better oversight over opioid distribution is for insurance companies to begin limiting coverage for certain medications.[209] This would prevent doctors from prescribing opioids except to those who suffer from severe and chronic pain.

Another way to combat illicit opioid use is to treat those who have addiction disorders. Too often, patients who overdose are not offered long-term treatment and regularly leave the emergency room seeking their next high.[210] Additional funding and state intervention is necessary to establish more treatment programs.[211] To protect the lives of drug users, some States are considering "safe injection" clinics that allow people to use drugs under the supervision of medical professionals.[212] Similar

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205. Michael R. Bloomberg, *A Seven-Step Plan for Ending the Opioid Crisis*, BLOOMBERG (Jan. 10, 2018), *available at* https://www.bloomberg.com/opinion/articles/2018-01-10/a-seven-step-plan-for-ending-the-opioid-crisis (last visited Mar. 25, 2019).

206. *Id.* (stating that some states have already restricted the size of opioid prescriptions, but all states must enact restrictive regulation for an impact to be felt).

207. *Id.*

208. *Id.*

209. *Id.*

210. Bloomberg, *supra* note 205.

211. *Id.*

212. Christine Vestal, *As Fentanyl Death Toll Spikes, States Step Up Their Interventions*, PBS NEWS HOUR (May 8, 2017), *available at* https://www.pbs.org/newshour/health/as-fentanyl-spreads-states-step-up-responses (last visited Mar. 25, 2019). Many states have also employed designated "Safe Stations" where people struggling with addiction can go for medical assistance. Steven R. Johnson, *Scramble is on to Find New Ways to Stop Opioid Overdose Deaths*, MODERN HEALTHCARE (July 10, 2017), *available at* http://www.modernhealthcare.com/article/20170710/NEWS/170719999 (last visited Mar. 25, 2019). Between May 2016 and June 2017, over 1,800 people reportedly sought help at

clinics in foreign countries have demonstrated success in reducing the number of deaths due to overdose.[213] However, such sites are unlikely to become commonplace in the United States as they are prohibited under federal drug laws.[214] Providing opioid abusers a safe location to use is the first step towards treatment; it ensures safe use of the drug and prevents the patient from losing their life due to an overdose.[215]

The United States must also improve its system of screening international mail. A January 2018 report produced by U.S. Senators Rob Portman and Tom Carpenter detailed the results of an investigation into illicit fentanyl trafficking.[216] A subpoena of Western Union uncovered $230,000 in payments between six online sellers and U.S.–based buyers, spread out over 500 financial transactions.[217] The street value of these orders roughly translates to about $766 million worth of fentanyl.[218] Currently, only 36 percent of United States Postal Service ("USPS") bound shipments have advanced electronic data attached to them.[219] Officials are advocating for several federal improvements, beginning with requiring all international packages to come with advanced electronic data.[220] Moreover, USPS is being asked to automate their process for turning over targeted packages to keep up with CBP's increasing rates of suspicious packages.[221]

CONCLUSION

The Chinese government consists of numerous overlapping administrative agencies. Instead of having one central agency overseeing regulatory functions, the Chinese split this responsibility across numerous governing bodies. When a government fragments its regulatory functions in this fashion, it becomes susceptible to inconsistent implementation,

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designated Safe Stations, which have been credited with reducing overdose emergency calls by 30%. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* With fentanyl, people do not have time to realize they are overdosing. Vestal, *supra* note 212. Unlike those who use regular drugs, fentanyl users "don't even have time to pull the needle out [before] they're on the ground." *Id.*

216. Erin Mershon, *For Chinese Fentanyl Sellers, USPS Is the 'Virtually Guaranteed' Route to Not Get Caught*, STAT NEWS (Jan. 24, 2018), *available at* https://www.statnews.com/2018/01/24/china-fentanyl-usps/ (last visited Mar. 25, 2018).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Mershon, *supra* note 216.

lapse of enforcement, duplicated responsibilities, and wasted resources.[222] Moreover, such systems are also susceptible to corruption which could prevent necessary legislative changes from being passed. Thus, China's poor regulatory control over its pharmaceutical and chemical industries is a direct result of its administrative organization.

If China strengthened and enforced its regulatory language, the illicit stream of narcotics flowing into the United States would significantly reduce. In fact, as discussed above, every time China makes regulatory changes the United States reaps immediate benefits. As a result, the significance of China's recent decision to schedule fentanyl precursors is an important step that will protect both Chinese and American citizens. While China is unlikely to prohibit the manufacture of fentanyl, it can enact systems of oversight that ensure its labs are engaging the legal side of the market. Enacting a customs procedure which requires advanced electronic data on packages shipped to the United States, similar to the proposed STOP Act, would help ensure the shipments being sent are for legal purposes.

Furthermore, present international conventions have done little to enhance China's regulatory standards. The lack of a strict universal standard for narcotics regulation has permitted China and other countries to continue to loosely regulate drug manufacture and distribution. There is too much deference given to national governments when it comes to enforcing international conventions. National governments manipulate the baseline requirements of a convention and ultimately create different standards that allow gaps in international relations. Presently, international conventions function as little more than a suggestion and offer no multinational framework. The issue is, how does one compel a nation to become party to a convention they have no interest in? Countries who are global leaders in the manufacture of chemicals, pharmaceuticals, and narcotics should be required to adhere to global standards or be subject to economic sanctions.

The United States must also accept responsibility for its own deficiencies. First and foremost, the United States must take action to curb internal demand for opioids. This starts with reducing the number of opioid prescriptions written, effectively preventing people from developing a reliance. This means setting a higher standard for opioid prescriptions, increasing training for physicians licensed to issue prescriptions, and limiting the amount issued per prescription. Additionally, the United States must take the initiative and continue establishing measures that make it more difficult for illicit opioids to enter the country. Presently, the CBP

222. *See* Fefer, *supra* note 69, at 6.7.

is ill equipped to properly deal with the deceptive methods of traffickers. And while the root of the issue lies in China, U.S. officials cannot continue to point their finger and wait for the problem to be solved—this is a multifaceted issue. For the United States to bring the epidemic to an end it must work with China to simultaneously correct their respective issues. Unilateral efforts will only permit the opioid epidemic to continue to thrive, as narcotics traffickers will continue to outpace national officials.

ADDENDUM

On April 1, 2019, China announced that it would ban all variations of fentanyl, a move that bypasses the lengthy case-by-case procedure that was previously being employed.[223] Effective May 1, 2019, this latest attempt to curb illicit fentanyl manufacture should plug the gaps that have plagued China's regulations.[224]

While this move is a monumental step forward in controlling the opioid epidemic, there are still flaws that will require attention. First, the ban does not cover all precursor chemicals used to produce fentanyl and its analogues.[225] Thus, these precursors could still be manufactured and shipped to Mexico where they could be used to produce various fentanyl analogues.[226] Second, and perhaps most important, is whether China has the capacity to enforce this effort upon its vast pharmaceutical empire.[227]

Both parties must remain vigilant in their efforts to regulate and adapt to the constantly evolving efforts of illicit manufactures. China's pledge must be taken for exactly what it is, a pledge—it does not guarantee that the production of illicitly produced fentanyl will suddenly cease. More importantly, it does not excuse the United States from fortifying its own legislation and protections. If China's measures are to be effective, the United States must, at minimum, continue to bolster its border patrol, narcotics treatment, and narcotics prevention efforts.

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223. Steven L. Meyers & Abby Goodnough, *China Bans All Types of Fentanyl, Cutting Supply of Deadly Drug to U.S. and Fulfilling Pledge to Trump*, N.Y. TIMES (Apr. 1, 2019), *available at* https://www.nytimes.com/2019/04/01/world/asia/china-bans-fentanyl-trump.html (last visited Apr. 20, 2019).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

PRICELESS KIDNEY: THE INEFFECTIVENESS OF ORGAN TRAFFICKING LEGISLATION

Sarah Shepp*

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INTRODUCTION

"The pound of flesh which I demand of him [i]s dearly bought. 'Tis mine and I will have it."[1] This quote from William Shakespeare's *The Merchant of Venice* describes the historic and practical nature of organ trafficking. Organ trafficking is a global concern that has risen in recent decades.[2] Human organs are both voluntarily and coercively sold as a black-market commodity for a variety of reasons.

Organ trafficking legislation at the international level is ineffective because it is only prohibited by one treaty—the Council of Europe Convention against Trafficking in Human Organs ("CECTHO").[3] Additionally, only a small amount of reliable scientific data exists regarding the illicit sale of organs because the illegal organ trade operates underground and is difficult to detect. Furthermore, doctor-patient confidentiality impedes the reporting of organ trafficking incidents. Similarly, legislation at the domestic level is ineffective because such laws are not enforced, are ignored by local law enforcement, and generally do not deter organ trafficking.

The first section of this paper will define organ trafficking and describe the process of illegal organ sales. It will explain the roles of origin and destination countries, as well as the significance of middlemen in facilitating the illicit sale of human organs. This section will then provide background on the current treaties, resolutions, and declarations that have been implemented at the international level to eliminate organ trafficking. In conclusion, this section will outline the various motives for organ trafficking.

The second section will discuss the ineffectiveness of international and domestic legislation which attempts to eliminate organ trafficking. This part of the paper will address enforcement of these laws and whether they act as effective deterrents. This section will specifically examine organ trafficking legislation in Singapore, Brazil, Mexico, and China. These four countries have been selected because organ trafficking legislation is ineffective in each of these nations for a different reason: (1) in

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1. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 4, sc. 1.

2. Tazeen H. Jafar, *World Kidney Forum Organ Trafficking: Global Solutions for a Global Problem*, 54 AM. J. OF KIDNEY DISEASES 1145, 1145 (2009).

3. *See* U.N. OFF. ON DRUGS AND CRIME, *Assessment Toolkit: Trafficking in Persons for the Purpose of Organ Removal* 18 (2015), *available at* https://www.unodc.org/documents/human-trafficking/2015/UNODC_Assessment_Toolkit_TIP_for_the_Purpose_of_Organ_Removal.pdf (last visited Mar. 5, 2019).

Singapore, the laws fail to deter the practice; (2) in Brazil, laws against organ trafficking are ambiguous and are not enforced; (3) in Mexico, cases pertaining to the illicit organ trade are not investigated because of government corruption; and (4) in China, powerful political parties directly profit from the illegal sale of organs.

Furthermore, this section will discuss the laws against organ trafficking, punishments for violating those laws, and each of the four countries' willingness to prosecute organ trafficking cases. It will also examine what these countries' governments are doing to enforce the laws already in place and how they investigate cases of organ trafficking. Additionally, case studies will illustrate the ineffectiveness of organ trafficking legislation. Moreover, this section discusses why organ trafficking legislation at the international and domestic levels is ineffective in investigating and prosecuting organ traffickers and reducing incidents of organ trafficking.

Lastly, the third section will address recommendations for effectively prohibiting organ trafficking. This section will build on the methods of enforcing legislation currently in place, as well as propose ideas to implement more effective legislation, particularly at the international level. This portion of the paper will discuss the following solutions: (1) implementation of international treaties; (2) encouragement of efforts by the United Nations ("U.N.") to eliminate organ trafficking; (3) reduction of the organ donation shortage; (4) creation of an exception for doctor-patient confidentiality; (5) instilling domestic laws that impose harsher sentences for all parties involved in the illegal sale of organs; and (6) making the sale of organs legal.

I. WHAT IS ORGAN TRAFFICKING?

Imagine Liam, a 50-year-old hard working Swedish man who loves his family. Recently he felt nausea and fatigue, noticed a decreased urinary output, and felt sick for weeks. After going to various doctors, he learns he is suffering from kidney failure and needs a kidney transplant. Without a healthy kidney, Liam will die. In Sweden, like other first world nations, organ donation operates through an altruistic system.[4] This means that individuals unselfishly donate their organs with no corresponding profit motive.[5] However, through the altruistic system many individuals are not motivated to donate their organs, which results in an

4. SUSANNE LUNDIN, ORGANS FOR SALE: AN ETHNOGRAPHIC EXAMINATION OF THE INTERNATIONAL ORGAN TRADE 3 (2015).

5. *Id.*

organ shortage.[6] If Liam is lucky, he may make it onto a kidney donation waitlist. Yet, even if he does, he could be on that waitlist for years. So, Liam, like thousands of other sick individuals in need of organs, makes the risky decision to go abroad and buy a kidney from someone in Brazil. Liam chose to participate in the organ black-market for a chance at life instead of waiting for his impending death.

Organ trafficking, also known as trafficking in human organs, is:

> the recruitment, transport, transfer, harboring or receipt of the organs of a living or deceased person by means of threat, use of force, abduction, fraud, deception, of the abuse of power . . . or of the giving to, or receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for the purpose of transplantation.[7]

Organ trafficking is a serious issue. It is estimated that as of 2011, the illicit organ trade generated illegal profits between 600 million and 1.2 billion U.S. dollars per year.[8] There are black markets for hearts and lungs, as well as other body parts. However, the markets for those organs are relatively small in comparison to the illegal kidney market.[9] Kidneys make up the largest portion of illegal organ sales because a donor can survive with just one kidney.[10]

Organ trafficking stems from a complicated network involving individuals from many different countries.[11] Typically, the global organ economy follows a geographical and societal flow.[12] The origin countries, also known as supply countries, are the states from which the organ comes.[13] These are normally poor, developing, or underdeveloped countries in Eastern Europe, Asia, South America, the Middle East, and

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6. *See id.*

7. Francis L. Delmonico, *Declaration of Istanbul on Organ Trafficking and Transplant Tourism*, 18 INDIAN J. OF NEPHROLOGY 135, 136 (2008).

8. Jeremy Hakeh, *Transnational Crime in the Developing World*, GLOB. FIN. INTEGRITY (Feb. 2011), *available at* http://www.gfintegrity.org/wp-content/uploads/2014/05/gfi_transnational_crime_high-res.pdf (last visited Mar. 25, 2019).

9. Simon Tomlinson, *Inside the Illegal Hospitals Performing Thousands of Black Market Organ Transplants Every Year for $2000,000 a Time*, DAILY MAIL (Apr. 9, 2015), *available at* http://www.dailymail.co.uk/news/article-3031784/Inside-illegal-hospitals-performing-thousands-black-market-organ-transplants-year-200-000-time.html (last visited Mar. 31, 2019).

10. *Id.*

11. LUNDIN, *supra* note 4, at 6.

12. *Id.*

13. Jacqueline Bowden, *Feeling Empty? Organ Trafficking & Trade: The Black Market for Human Organs*, 8 INTERCULTURAL HUM. RTS. L. REV. 451, 457 (2013).

various nations in Africa.[14] The recipients of the organs are normally located in richer first world countries such as Sweden, Israel, the United States, the United Kingdom, Germany, Australia, and Japan.[15] These are known as destination countries, or demand countries.[16] Most organ transplant surgeries are not conducted in the recipient's country of citizenship for fear of being discovered.[17] The medical operations are often performed in another country, located between the demand and supplier countries.[18] Popular locations for the operation to take place include nations in South East Asia, Latin America, or Eastern Europe.[19]

Middlemen, known as recruiters or brokers, are paid individuals who assist with illegal organ sales and play a crucial role in organ trafficking.[20] Middlemen usually come from poorer countries and help facilitate the organ buying transaction.[21] These recruiters identify vulnerable individuals and persuade them to sell their organs.[22] They also coordinate the logistics of the illegal organ trade and set the prices for the organ sales.[23] In addition to middlemen, doctors (such as transplant specialists, nephrologists and anesthesiologists) play an important role in the organ trade.[24] These doctors perform the illegal organ transplant and receive financial gain for their services.[25]

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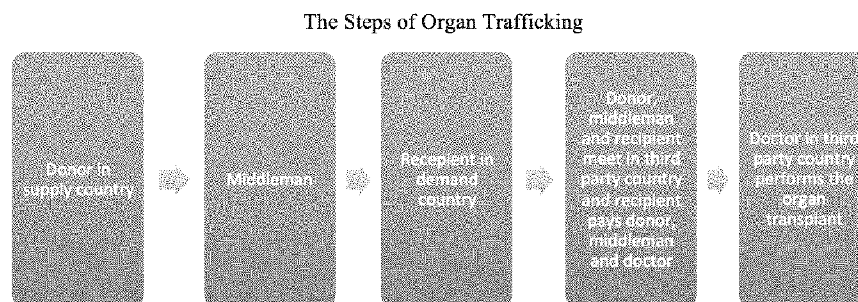
14. LUNDIN, *supra* note 4, at 6.
15. *Id.*
16. Bowden, *supra* note 13, at 457.
17. LUNDIN, *supra* note 4, at 6.
18. *Id.*
19. *Id.*
20. *Id.*
21. Claire Suddath & Alex Altman, *How Does Kidney-Trafficking Work?*, TIME (July 27, 2009), *available at* http://content.time.com/time/health/article/0,8599,1912880,00.html (last visited Apr. 5, 2019).
22. U.N. OFF. ON DRUGS AND CRIME, *supra* note 3, at 28.
23. *Id.*
24. *Id.* at 30.
25. *Id.* at 31.

The Steps of Organ Trafficking



A. Legal Standard for International Organ Transplants

Organ transplantation is a remarkable medical development which, since its advent in the 1950's, has saved and prolonged the lives of thousands of patients.[26] There are globally recognized standards for organ transplants described in the 2010 World Health Organization ("WHO") resolution WHA63.22.[27]

The WHO resolution discusses guidelines for both deceased and living donors.[28] In the case of a deceased organ donor, the donor must consent to the donation or there must be reason to believe that the deceased person would not object to the organ removal.[29] Living donors should be "genetically, legally or emotionally related to their recipients (unless such related person does not match well immunologically)."[30] Living donors should also give informed and voluntary consent and act willingly and free of any undue influence or coercion.[31] An important component of the guidelines for living donors is discussed in the WHO resolution. The guidelines state that "organs should be donated freely, without any monetary payment or other reward of monetary value" and "purchasing, or offering to purchase organs for transplantation, or their sale by living persons should be banned."[32] The resolution continues to advocate that doctors and other medical professionals should not engage in for-profit

26. *Guiding Principles on Human Cell, Tissue and Organ Transplantation*, WHO, *available at* http://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf (last visited Apr. 5, 2019).

27. *See* Sixty-Third World Health Assembly Res. 63, at 63.22 (May 21, 2010).

28. *See generally id.*

29. *Guiding Principles on Human Cell, Tissue and Organ Transplantation*, *supra* note 26.

30. U.N. OFF. ON DRUGS AND CRIME, *supra* note 3, at 9.

31. *Id.*

32. *Id.* at 9-10.

transplantation procedures.[33] The resolution also suggests that health insurers and other payers should not cover such procedures if the organs are obtained through exploitation or coercion of, or payment to, the donor.[34]

The WHO is "committed to the principles of human dignity and solidarity which condemns the buying of human body parts for transplantation and the exploitation of the poorest and most vulnerable population."[35] Additionally, the guidelines state that advertising the need or availability of an organ for money must be prohibited.[36]

B. The Council of Europe Convention Against Trafficking in Human Organs

The CECTHO is the only international treaty that addresses organ trafficking.[37] The treaty aspires to prevent and combat organ trafficking by protecting the rights of victims and facilitating cooperation at both the national and international levels.[38] The treaty recognizes that organ trafficking "violates human dignity, the right to life and constitutes a serious threat to public health."[39] This international agreement aims to begin the eradication of the illegal sale of organs through the implementation of more domestic legislation that criminalizes organ trafficking.[40]

As required by this treaty, each member state shall,

> take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the removal of human organs from living or deceased donors where in exchange for the removal of organs, the living donor, or a third party, has been offered or has received a financial gain.[41]

The treaty also mandates that signatory nations develop criminal offenses for when a third party is offered or receives financial gain to facilitate in the process of organ removal.[42] Additionally, this treaty establishes that parties investigate allegations of organ trafficking within their

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33. *Id.* at 10.
34. *Id.*
35. World Health Organization, WHA 63.22, at 1 (May 21, 2010).
36. *Guiding Principles on Human Cell, Tissue and Organ Transplantation*, *supra* note 26, at 6.
37. U.N. OFF. ON DRUGS AND CRIME, *supra* note 3, at 18.
38. Council of Europe Convention Against Trafficking in Human Organs, Mar. 25, 2015, C.E.T.S. 216 [hereinafter Council of Europe].
39. *Id.*
40. *Id.*
41. *Id.* art. 4(b).
42. *Id.* art. 4(c).

countries.[43] The treaty recognizes that in order for organ trafficking cases to be tried in international tribunals, the investigations and prosecution of organ traffickers must begin at the domestic level.[44]

In the domestic sphere, this treaty requires that each party take measures to eliminate organ trafficking.[45] These measures include spearheading investigations of organ trafficking and requiring that each party establish equitable access to legal transplantations services.[46] It is expected that parties communicate with health care professionals in their countries to look for signs that illegal organ transplants were performed, and for medical professionals to report suspected organ trafficking cases to the relevant local authorities.[47] Additionally, CECTHO mandates that each party take the necessary measures to prohibit the advertising of donors and recipients of human organs for a monetary gain.[48]

The treaty also imposes measures at the international level. It encourages parties to cooperate with each other to prevent trafficking of human organs.[49] The cooperation takes the form of the procedural requirement of a national contact point for exchange of information relating to organ trafficking.[50] If the terms of this treaty are violated, signatory nations are subjected to criminal or non-criminal monetary sanctions.[51] Depending on the violation, these sanctions may include temporary disqualification from exercising commercial activity and/or placing the nation under the supervision of the Committee.[52]

C. The U.N.'s Stance on Organ Trafficking

The U.N. has not passed any treaties, resolutions, or declarations that pertain to organ trafficking. However, the U.N. addressed the issue of trafficking in persons for organ removal.[53] This is a different offense than trafficking in organs. In trafficking in persons for organ removal, the object of the crime is the person and the offense is a type of human trafficking.[54] Conversely, in organ trafficking the object of the crime is the

43. Council of Europe, *supra* note 38, art. 15.
44. *Id.* art. 21.
45. *Id.*
46. *Id.*
47. *Id.* art. 21(2)(a).
48. Council of Europe, *supra* note 38, art. 21(3).
49. *Id.* art. 22(a).
50. *Id.* art. 22(b).
51. *Id.* art. 12(2).
52. *Id.*
53. U.N. OFF. ON DRUGS AND CRIME, *supra* note 3, at 17.
54. *Id.*

organ, not the person being trafficked.[55] This paper discusses only organ trafficking, which is an issue not yet examined by the U.N.

D. Declaration of Istanbul

From April 30 through May 2, 2008, more than 150 medical professionals, scientists, scholars, government officials, social scientists, and ethicists convened at a summit in Istanbul, Turkey to draft the Declaration of Istanbul on Organ Trafficking and Transplant Tourism, known as the "Declaration of Istanbul."[56] The purpose of this declaration was to highlight the unethical practice of organ trafficking and to identify the exploitation of the poor for the sale of their organs.[57] This global initiative served to implement efforts to eradicate organ trafficking.[58] As previously stated, the declaration first defined organ trafficking as:

> the recruitment, transport, transfer, harboring or receipt of the organs of a living or deceased person by means of threat, use of force, abduction, fraud, deception, of the abuse of power... or of the giving to, or receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for the purpose of transplantation.[59]

The Declaration of Istanbul was an initiative that emphasized the global need to regulate organ trafficking. During the summit, members suggested that efforts to combat organ trafficking must begin at the domestic level. The Declaration of Istanbul proposed the idea of reducing organ shortages. Representatives believed that this could be accomplished by implementing "systems and structure to ensure standardization, transparency and accountability of support for [organ] donation."[60] The Declaration also encouraged countries to promote deceased organ donation as another way to increase organ availability and discourage people from participating in the organ black-market.[61] The Declaration of Istanbul is not a binding source of legislation, but it brought attention to the issue of organ trafficking and generated a discussion of ways to eliminate the problem and preserve the nobility of organ donation.[62]

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55. *Id.*
56. *See generally* Delmonico, *supra* note 7.
57. *See* Dr. Ranee Khooshie Lal Panjabi, *The Sum of a Human's Parts: Global Organ Trafficking in the Twenty-First Century*, 28 PACE ENVT. L. REV. 1, 113 (2010).
58. *Id.*
59. Delmonico, *supra* note 7.
60. *Id.* at 138.
61. *Id.* at 136.
62. *Id.* at 135.

E. Why Organ Trafficking Exists?

There are two main rationales that explain why organ trafficking exists. First, organ donation is incredibly scarce, particularly due to a shortage of organ donors in first world countries. In the United States, 114,000 people a year are on waiting lists for organ donations.[63] On average, 22 people die each day waiting for an organ and 8,000 deaths occur each year because organs are not donated.[64] Similar statistics occur in other western countries as well. The reasoning behind this shortage is that countries such as the United States, Sweden, the United Kingdom, and Israel rely on the altruistic system.[65] This system relies on the assumption that people will willingly donate their organs.[66] Therefore, the number of transplants that occur is dependent on citizens' desire to donate in the first place.[67] This system does not incentivize individuals to donate organs, and this lack of incentive results in an organ shortage.[68]

Second, extreme poverty in the developing world contributes to the prevalence of organ trafficking. For example, organ trafficking is prevalent in the Jalisco territory of Mexico, where the poverty rate is 41 percent.[69] Kidneys typically sell for $18,000 U.S. dollars, which can be more money than poor villagers in Mexico make in ten years.[70] One Jalisco resident explained that extreme poverty makes it difficult to put food on the table for his family.[71] The resident stated that, "[i]t's no good to me to keep both kidneys and remain with my debts."[72] This is just one example of how extreme poverty impacts individuals by sometimes leading them into organ trafficking.[73]

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63. *Organ, Eye and Tissue Donation Statistics*, DONATE LIFE AMERICA, *available at* https://www.donatelife.net/statistics/?gclid=Cj0KCQjwp_DPBRCZARIsA-GOZYBSJ_V3f2GtQtcJ7c6Egc7u-rlXOtaFRGC-UTibkNavlte99Oe-wOEAsaAqJ_EALw_wcB (last visited Mar. 29, 2019).

64. *Id.*

65. LUNDIN, *supra* note 4, at 3.

66. *Id.*

67. *Id.*

68. *Id.*

69. Edward Fox, *Desperation, Lack of Donors Drives Organ Trafficking in Latin America,* INSIGHT CRIME (July 12, 2012), *available at* http://www.insightcrime.org/news-analysis/desperation-lack-of-donors-drives-organ-trafficking-in-latin-america (last visited Mar. 30, 2019).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

II. ATTEMPTS TO PROHIBIT ORGAN TRAFFICKING ARE NOT SUCCESSFUL

Despite international initiatives such as the CECTHO, the Declaration of Istanbul, and WHO resolutions, organ trafficking persists. The primary reason for the continuance of organ trafficking is that this illegal business operates at the domestic level.[74] Unfortunately, countries around the world fail to pursue investigations and are not enforcing national laws relating to organ trafficking. Additionally, other barriers confront domestic governments from eradicating organ trafficking. Issues such as collecting reliable data about organ trafficking incidents and the reluctance of medical professionals to report suspected organ trafficking cases also impede attempts to prohibit the illicit sale of organs.[75]

A. Issues with Collecting Reliable Organ Trafficking Data

International organizations such as the U.N., the Organization for Security and Co-operation in Europe, and the Council of Europe find it difficult to collect reliable data on organ trafficking.[76] From 2007 to 2013, only 100 cases of organ trafficking were reported worldwide.[77] This number is estimated to be much lower than the actual number of organ trafficking cases that occurred.[78] The lack of reliable scientific data is typical for organized crimes like organ trafficking.

Adequate proof of committed crimes can either be given by the victims or by the criminals themselves.[79] Organ trafficking, like drug dealing, is a type of crime where the victim (buyer) and criminals (the donor, middleman and doctors performing the transplant) are both benefiting.[80] The organ donor is getting paid to give up an organ and the recipient receives an organ that will likely save his or her life. Middlemen benefit because they get paid to transport the organ between the supplier and the recipient. Additionally, the medical professionals performing the illegal transplant get paid to perform the operation. Therefore, none of the parties involved in the criminal transaction have an interest to disclose the illicit organ sale because everyone is benefiting in the short term.[81] Since

74. *See* U.N. OFF. ON DRUGS AND CRIME, *supra* note 3, at 12.
75. *Id.* at 13.
76. *Id.* at 12.
77. *Id.*
78. *See id.*
79. Silke Meyer, *Trafficking in Human Organ in Europe A Myth or an Actual Threat?*, 14 EUR. J. CRIME CRIM. L. & CRIM. JUST. 208, 213 (2006).
80. *See id.* at 225.
81. *Id.*

no one involved in organ trafficking has a motive to report the crime to local authorities, the sale of organs operates invisibly which makes detection even more difficult.[82]

Furthermore, there is a lack of reliable statistics because organ trafficking is a complex business that operates underground, thereby making it hard to verify.[83] In many cases, neither the donor nor the recipient are aware that they are violating organ transplantation legislation.[84] This ignorance of the law occurs because the transplant operations usually take place in a semi-legal business setting like a private hospital, or in a developing country where legislation prohibiting the sale of organs is either nonexistent or unenforced.[85]

Many times, it is a challenge for law enforcement to differentiate between legal and non-legal organ transplants, compounding on the difficulty of detecting organ trafficking. The signs of organ trafficking are hard to identify because the nature of illegal transplants is similar to a legal organ transplant operation. For example, both legal and criminal organ transplants occur in hospitals where licensed physicians perform the operations.[86] Also, since most organ donors are paid in cash, it is nearly impossible to track the financial transaction for the purchase of the organ.[87] The shortage of reliable scientific data occurs because law enforcement simply cannot identify organ trafficking crimes and participants in organ trafficking receive mutual benefits and are unlikely to report the organ sale.

B. Problem of Doctor-Patient Confidentiality

Adherence to doctor-patient confidentiality also thwarts efforts to prohibit organ trafficking. There is an international consensus that a patient's medical records and communication with his or her physician is confidential information.[88] Doctors are required to keep their visits with patients and information about a patient's medical conditions confidential unless the patient gives permission to release their medical records. If a patient did confide in a doctor that he or she received an illegal organ transplant, the patient would likely not authorize that information to be disclosed. Therefore, the physician is bound by doctor-patient

82. *Id.*
83. *See id.* at 213.
84. Meyer, *supra* note 79, at 214.
85. *Id.* at 215.
86. *Id.*
87. *See id.*
88. *Patients' Rights*, WHO, *available at* http://www.who.int/genomics/public/patientrights/en/ (last visited Mar. 29, 2019).

confidentiality not to release the information about the organ transplant. Organ trafficking legislation conflicts with medical regulations that advocate for the right of medical confidentiality and the inaccessibility of medical records.[89] These rules on doctor-patient confidentiality prohibit physicians from disclosing organ trafficking incidents. The adherence to confidentiality makes medical professionals reluctant to report cases of organ trafficking because doctors are afraid to lose their licenses or be sanctioned by medical boards.[90]

Like physicians who treat patients who participated in organ trafficking, medical professionals who perform illegal organ transplants also have no incentive to report the organ trafficking to law enforcement or other local authorities. Health care providers in developing countries receive large sums of money to perform illicit organ transplant surgeries.[91] These doctors get paid more money than they typically make practicing medicine in their home countries. One surgeon in Mexicali, Mexico received $200,000 U.S. dollars to perform an illegal kidney transplant.[92] This is an offer that most physicians will not turn down, and thus monetary gain encourages the continuance of organ trafficking. Physicians who perform the illegal surgeries and those who treat patients who participated in organ trafficking are reluctant to report the trafficking to law enforcement or to national and international health organizations. These doctors are either making a huge financial profit from being involved in the criminal activity, or they are too afraid to report suspected organ trafficking for fear of breaching doctor-patient confidentiality. This is just one more reason why legislation prohibiting organ trafficking is unsuccessful.

C. Organ Trafficking at the Domestic Level

Thus far this paper has examined efforts at the international level to prohibit organ trafficking. It has addressed how lack of scientifically reliable statistics and pushback from doctors cause international initiatives to be ineffective in combating organ trafficking. The discussion will now shift to analyzing domestic legislation attempting to eliminate organ trafficking in various supply countries, specifically in Singapore, Brazil, Mexico, and China.

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89. Meyer, *supra* note 79, at 225.
90. U.N. OFF. ON DRUGS AND CRIME, *supra* note 3, at 13.
91. Fox, *supra* note 69.
92. *Id.*

1. Singapore

Singapore recognizes organ trafficking as a crime.[93] In Singapore, the sale of human organs and blood is prohibited by the Human Organ Transplant Act.[94] The Act states that a person who is guilty of trading in organs and blood "shall be liable on conviction to a fine not exceeding $10,000 [Singapore dollars (approximately $7,500 U.S. dollars)] or to imprisonment for a term not exceeding twelve months or to both."[95] The case *Wang Chin v. Public Prosecutor* represented the first time in Singapore's history that an individual was prosecuted for violating the Human Organ Transplant Act.[96] In that case, Mr. Wang Chin Sing was a middleman who escorted an organ donor to Singapore for transplant surgery.[97] Mr. Wang Chin Sing was paid $300,000 Singapore dollars (approximately $235,000 U.S. dollars) to facilitate this illegal organ transplant.[98] After being caught by Singaporean authorities, Mr. Wang Chin Sing was imprisoned for 14 months.[99]

Another example of a violation of the Human Organ Transplant Act occurred in *Public Prosecutor v. S.D.*, which followed *Wang Chin v. Public Prosecutor* and involved the same actors.[100] In that case, S.D., an organ seller and donor, was convicted for violating the Human Organ Transplant Act by entering an arrangement to supply a kidney to an Indonesian recipient.[101] S.D. was sentenced to two weeks imprisonment and fined $1,000 Singapore dollars (approximately $750 U.S. dollars).[102]

While enforcement of this legislation is a step forward to eradicate organ trafficking, the sentences given in these two cases are insufficient deterrents to prevent individuals from engaging in the illegal sale of organs. In Wang Chin Sing's case, 14 months in jail is minimal when compared to the $300,000 Singapore dollars that he received for being a part

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93. Human Organ Transplant Act 1987, c. 131 A, § 14(1), (2005) (Sing.), *available at* https://sso.agc.gov.sg/Act/HOTA1987?ValidDate=20150921 (last visited Apr. 10, 2019).

94. *Id.* § 14(1).

95. *Id.* § 14(2).

96. *Wang Chin Sing v Public Prosecutor*, UNODC SHERLOC (2008), *available at* https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/sgp/2008/wang_chin_sing_v_public_prosecutor.html?lng=en&tmpl=sherloc (last visited Apr. 10, 2019).

97. *Id.*

98. *Id.*

99. *Id.* (The 14 Month Sentence was an aggravated sentence because Mr. Wang Chin Sing also violated the Oaths and Declarations Act).

100. *Id.*

101. *See Wang Chin Sing v Public Prosecutor*, *supra* note 96.

102. *Id.*

of the organ trafficking crime. Furthermore, S.D.'s sentence of two weeks in jail and a penalty of $1,000 Singapore dollars is disproportionate to the lucrative benefits of participating in the illicit organ trade.

Mr. Wang Chin Sing and S.D. were not effectively penalized for participating in organ trafficking—their minimal sentences will not deter other Singaporeans from doing the same.[103] The limited action by Singapore's government sends a message that encourages continued participation in organ trafficking because the punishment for the crime is insignificant. In performing a cost benefit analysis, a person who desperately needs money or who desperately needs an organ to survive will risk a couple thousand Singapore dollars and a couple of weeks, months, or years in jail to reap the benefits from the sale of organs. The ineffectiveness of domestic laws like the Human Organ Transplant Act contribute to the unsuccessful national attempts to eradicate organ trafficking.

2. Brazil

In Brazil, organ trafficking is a criminal offense punishable by up to eight years in prison.[104] If coercion occurs, the individuals involved are more likely to receive the maximum eight-year prison sentence.[105] If the donor dies during the illegal organ transplant, the prison sentence becomes longer, with involved parties receiving prison sentences of up to 20 years.[106]

Although Brazil's sentences are much longer than Singapore's, one reason Brazilian laws still lack effectiveness is that they fail to specify who should take responsibility for the criminal act of organ trafficking.[107] The laws are vague and ambiguous.[108] For example, if the donor dies during the illicit organ transplant surgery, is it the recipient, the middleman, the physician performing the operation, or all three who are eligible for the maximum 20 year sentence? The Brazilian legislation is also unclear on what types of organ trafficking convictions are to receive three year sentences versus which convictions get eight year sentences.[109] The

103. *See* Charles Lim Aeng Cheng, *Life and Death: A Decade of Biomedical Law Making 2000-2010*, 22 SING. ACAD. OF L. J., 850, 867 (2010).

104. *See generally* Mario Osava, *Brazil: Poor Sell Organs to Trans-Atlantic Trafficking Ring*, INTER PRESS SERV. (Feb. 23, 2004), *available at* http://www.ipsnews.net/2004/02/brazil-poor-sell-organs-to-trans-atlantic-trafficking-ring/ (last visited Apr. 10, 2019).

105. *Id.*

106. *Id.*

107. Bowden, *supra* note 13, at 457.

108. *See id.*

109. *See* Osava, *supra* note 104.

codified laws also fail to explain mitigating factors that could reduce sentences for organ trafficking convictions.[110]

Another reason that organ trafficking legislation in Brazil is ineffective is due to the dire poverty in the country that continues to encourage the illicit organ trade.[111] Throughout Brazil, especially in the slums of Rio de Janeiro, people live in extreme poverty.[112] Brazilians living in these poor areas experience homelessness and starvation.[113] Participating in organ trafficking is seen as a viable option to make money to help alleviate this poverty.[114] To poor Brazilian laborers, like Alerty Jose da Silva, selling a kidney to an international organ trafficking middleman is an opportunity of a lifetime.[115] Mr. da Silva received $6,000 U.S. dollars for selling his kidney, which is more than a decades' worth of wages as a laborer.[116] Two middlemen escorted Mr. da Silva to South Africa where the operation was performed and the kidney was transplanted into an American from Brooklyn, New York.[117] Traveling to South Africa to sell his kidney was a life changing opportunity for Mr. da Silva—one that enabled him to make a large amount of money to provide for his family.[118] Since Brazilian laws prohibiting organ trafficking are ambiguous and unenforced, Mr. da Silva was not prosecuted and ultimately profited from the illegal organ sale.[119] Dire poverty and lack of enforcement of organ trafficking legislation explain why such laws are ineffective at the domestic level in Brazil.[120]

3. Mexico

In Mexico, organ trafficking is illegal.[121] However, the Mexican government does not prioritize investigating possible organ trafficking cases.[122] As of 2012, the Mexican government had received 36 reports

110. *See generally id.*

111. *See* Larry Rohter, *The Organ Trade: A Global Black Market; Tracking the Sale of Kidney on a Path of Poverty and Hope*, N.Y. TIMES (Feb. 23, 2004), *available at* https://www.nytimes.com/2004/05/23/world/organ-trade-global-black-market-tracking-sale-kidney-path-poverty-hope.html (last visited Apr. 1, 2019).

112. *See generally id.*

113. *See id.*

114. *See id.*

115. *Id.*

116. Rohter, *supra* note 111.

117. *Id.*

118. *Id.*

119. *See id.*

120. *See id.*

121. *See* Fox, *supra* note 69.

122. *See id.*

of organ trafficking in the preceding six years.[123] Of those 36 reports of suspicious organ trafficking activity, Mexico's Attorney General's Office only opened a preliminary investigation into four.[124] Therefore, Mexico's Attorney General's Office is not addressing the issue of organ trafficking because it is not prioritizing it as a crime.[125]

Mexican law enforcement officials have turned a blind eye to organ trafficking.[126] Local law enforcement officials are reluctant to investigate reports of organ trafficking because law enforcement officers in Mexico are involved in the organ trafficking process.[127] Law enforcement and government officials participate in organ trafficking by either serving as middlemen or by recruiting donors.[128] In exchange for recruiting organ donors, law enforcement officials receive cash.[129] Due to law enforcement's relationship with trafficking, there is no incentive for law enforcement—particularly the Mexican Attorney General's Office—to investigate reports of possible organ trafficking. Further, this helps explain why the Mexican government is not making organ trafficking a priority, which in turn contributes to the pervasive nature of this crime in Mexico.[130]

4. China

Organ trafficking in The Republic of China used to be legal.[131] In 1984, the Chinese government passed the "Temporary Rules Concerning the Utilization of Corpses of Organs from Corpuses of Executed Criminals in Order" which allows the removal and sale of organs from Chinese prisoners.[132] These organs from living and deceased prisoners are sold to foreign buyers.[133] The profits made from selling these organs go directly to the Chinese government.[134] Uniquely, the Chinese government encourages and directly benefits from organ trafficking.[135]

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123. *Id.*
124. *Id.*
125. *See id.*
126. *Mexico Missing: Links to Organ Trafficking*, CHANNEL 4 NEWS (Jan. 12, 2010), *available at* http://www.channel4.com/news/articles/world/americas/mexico+missing+links+to+organ+trafficking/3497537.html (last visited Apr. 1, 2019).
127. *See id.*
128. *See id.*
129. *Id.*
130. *See id.*
131. Bowden, *supra* note 13, at 458.
132. *Id.* at 459.
133. *See id.* at 458.
134. *See id.*
135. *See id.*

Chinese behavior sparked international controversy when the country was condemned by the U.N. and the Vatican.[136] In 2006, after facing decades of criticism for the legal sale of prisoners' organs, China passed the provision on the "Administration of Entry and Exit of Cadavers and Treatment of Cadavers" in attempt to prohibit organ trafficking.[137] This law prohibits selling organs of dead individuals, including prisoners, in China.[138]

Despite the legislation prohibiting organ trafficking in China, organ trafficking, particularly among prisoners, continues to exist and the Communist Party of China continues to facilitate the illicit sale of prisoner organs.[139] Domestic efforts in China to prohibit organ trafficking are unsuccessful because the Chinese government enables organ trafficking to continue.[140]

III. THE WAY FORWARD: MAKING ORGAN TRAFFICKING LEGISLATION EFFECTIVE

For organ trafficking legislation to become effective, increased effort at the international level must be made to eliminate the illegal sale of organs. Currently, the only binding piece of international legislation regarding organ trafficking is the CECTHO.[141] This one treaty, with only a regional presence, is not enough to make organ trafficking legislation effective worldwide.

International organizations that focus on global crime and human rights—such as the U.N. and WHO—must encourage Member States to implement organ trafficking legislation. Presently, the U.N. has addressed the issue of trafficking in persons for organ removal, but not organ trafficking.[142] The U.N. should focus on creating effective organ trafficking legislation. Not only is establishing effective organ trafficking

136. Stephanie Kirchgaessner, *China May Still Be Using Executed Prisoners' Organs, Official Admits*, THE GUARDIAN (Feb. 7, 2017), *available at* https://www.theguardian.com/world/2017/feb/07/china-still-using-executed-prisoners-organs-transplants-vatican (last visited Mar. 31, 2019).

137. *See Provisions on the Administration of Entry and Exit of Cadavers and Treatment of Cadavers*, LAW INFO CHINA (2006), *available at* http://www.lawinfochina.com/display.aspx?lib=law&id=5362&CGid= (last visited Mar. 27, 2019).

138. *See id.*

139. Benedict Rogers, *Organ Harvesting in China*, THE DIPLOMAT (June 29, 2016), *available at* https://thediplomat.com/2016/06/organ-harvesting-in-china/ (last visited Apr. 27, 2019).

140. *See id.*

141. U.N. OFF. ON DRUGS AND CRIME, *supra* note 3, at 18.

142. *Id.* at 17.

legislation the next logical step after addressing trafficking in persons for organ removal, but it encompasses many other U.N. areas of interest. As discussed throughout this paper, one of the main reasons for organ trafficking is dire poverty. Individuals living at or below the poverty line in the developing world are lured into the illegal organ trade because of the lucrative monetary benefits they receive.

One of the sustainable development goals of the U.N. is to eradicate poverty.[143] Eliminating poverty, particularly in developing countries like Mexico and Brazil, will reduce organ trafficking. Also, closely linked to poverty is the issue of economic development. The U.N., through its Economic and Social Council, focuses directly on economic development.[144] Efforts to increase lawful economic development are related to outlawing organ trafficking. If there are additional employment opportunities for individuals in the slums of Rio de Janeiro or in the poor villages of Singapore, then individuals will be less likely to engage in organ trafficking. Since organ trafficking is closely linked to poverty and decreased economic development, creating legislation that prohibits organ trafficking is in line with the organization's other goals.

A. Reducing the Shortage of Organ Donors

An additional solution to creating effective legislation on organ trafficking is to eliminate the shortage of organ donors. In first world countries like the United States and the United Kingdom, organ recipients are placed on waitlists for years. Tens of thousands die annually, creating a sense of desperateness among waitlist recipients that fuels the practice of organ trafficking.[145] If waitlists are shortened, recipients would be less incentivized to engage in the illegal organ trade.

One method of reducing wait times for organs would be awareness-raising campaigns that promote organ donation.[146] These campaigns would highlight the improved medical technology that is used during organ transplant surgeries.[147] Campaigns could explain the high survival

143. *See generally Goal 1: End Poverty in All Its Forms Everywhere*, U.N., *available at* http://www.un.org/sustainabledevelopment/poverty/ (last visited Mar. 27, 2019).

144. *See generally ECOSOC Brings People and Issues Together to Promote Collective Action for a Sustainable World*, U.N., *available at* https://www.un.org/ecosoc/en/home (last visited Mar. 27, 2019).

145. *See* Part I.E, *supra*.

146. Meyer, *supra* note 79, at 226.

147. *Id.*

statistics for living organ donors and explain the decreased risks of organ donation.[148]

Furthermore, another option to increase organ donations is for more countries to adopt the presumed consent system.[149] Presumed consent is "a regulation where organs can be removed from a deceased person unless he or she objected during his or her lifetime."[150] This method would allow any healthy deceased person's organs to be used for donation, unless the decedent explicitly stated in writing that he or she did not consent to organ donation.[151]

Currently, most organ destination countries—including Germany, Denmark, the United Kingdom, and the United States—have organ donation systems that operate under the expressed consent system.[152] This approach to organ donations requires that an "organ[] can only be removed from deceased persons if they have expressed their consent while still alive."[153] The expressed consent system of organ donation does not reduce the organ recipient waitlist because most individuals do not say anything about posthumous organ donation while they are alive.[154] Therefore, the presumed consent approach is the best option to encourage organ donation and reduce organ trafficking.

B. Organ Trafficking Exception to Doctor-Patient Confidentiality

An additional solution to the organ trafficking concern is to create an organ trafficking exception for doctor-patient confidentiality. As discussed earlier in this paper, one reason that organ trafficking legislation lacks effectiveness is because many cases of organ trafficking are not reported. Failure to report these cases to law enforcement stems from doctor-patient confidentiality forbidding a physician from disclosing a patient's personal information communicated to the doctor. Therefore, if a patient tells the doctor that he or she had an illegal organ transplant, the doctor is prohibited from reporting that information.

However, a solution to making organ trafficking legislation more effective is to include a provision that releases medical providers from doctor-patient confidentiality when they know or reasonably suspect that the patient participated in organ trafficking. For instance, if the patient

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148. *Id.*
149. *Id.*
150. *Id.*
151. Meyer, *supra* note 79, at 226.
152. *Id.*
153. *Id.*
154. *Id.*

told the doctor they had an illegal organ transplant surgery, the doctor must report that information. A physician would reasonably know if a patient had an illegal organ transplant surgery by seeing scars that are not healing well, or observing that a healthy patient lost an organ. Discovering that a sick patient who was unable to get an organ transplant suddenly received one would also be a warning sign that organ trafficking occurred. If a transplant is not included in the patient's medical records, it is a clear sign that he or she underwent an illegal transplant operation.

An exception to doctor-patient confidentiality would enable law enforcement officials to investigate organ trafficking cases. As stated previously, organ trafficking offenses are usually not reported to law enforcement because of the mutual benefit between parties, which creates no incentive for the parties to report organ trafficking offenders.[155] Doctors that treat patients weeks or even months after they have participated in the illegal organ surgery are in the best position to know if organ trafficking occurred. This exception in the form of provision in international treaties or U.N. resolutions will enable organ trafficking legislation to be effective at both the international and domestic levels.

C. Need for Laws that Deter and Are Enforced by Local Governments

Countries like Singapore criminalize organ trafficking, but their laws fail to deter the crime. Being imprisoned for two weeks, or at most 12 months, does not dissuade individuals from engaging in organ trafficking;[156] neither does a minimal fine when the benefits of such a scheme can generate hundreds of thousands of dollars.[157] The risk of getting caught and receiving a maximum sentence of 12 months imprisonment and a minimal fine is likely worth the lucrative financial benefits of becoming involved in organ trafficking for those who are most desperate.[158]

At the international level, once binding legislation is created the International Court of Justice ("ICJ")[159] would maintain the discretion to levy strong penalties for all participants in organ trafficking. These punishments could be long prison sentences (ranging from 15 to 25 years) and large fines. Besides receiving lengthy prison sentences and fines,

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155. *Id.* at 213.

156. Human Organ Transplant Act, Cap. 131A (2012) § 14(2) (Sing.).

157. Aeng Cheng, *supra* note 103, at 866.

158. *See* Part II.C(1), *supra*.

159. The ICJ is the court of the United Nations that has authority to hear legal disputes between countries and hears "requests for advisory opinions on legal questions referred to it by United Nations organs and specialized agencies." *How the Court Works*, INT'L COURT OF JUSTICE, *available at* https://www.icj-cij.org/en/how-the-court-works (last visited Apr. 27, 2019).

doctors who participate in organ trafficking should also have their medical licenses revoked. It is essential that laws at both the international and domestic levels clearly indicate that they apply to all parties involved, including, but not limited to, the donor, the recipient, the middleman, physicians, and other medical personnel involved in the operation.

At the domestic level, laws need to be enforced, act as effective deterrents, and apply to all parties involved in the organ trafficking transaction. Legislation, like the laws in Brazil, act as deterrents but lack enforcement because of the ambiguous language.[160] Instead, countries must implement laws that deter criminal behavior, allow for law enforcement compliance, and are written clearly by stating which parties the organ trafficking offense applies to. Additionally, the U.N. should mandate that countries release data annually to the public on the number of reports of organ trafficking and the number of individuals convicted of organ trafficking. Releasing these statistics will spread awareness of the global presence of organ trafficking while also serving as a deterrent to members of the public. The U.N. should track this data because organ trafficking is an international issue with parties from many different countries acting in concert together.

Another method of implementing effective organ trafficking legislation is to eliminate government corruption. In Mexico, one of the major obstacles of investigating and prosecuting possible organ trafficking cases is the corruption of law enforcement officers, many of whom are involved in covering up the offenses.[161] Domestic legislation must be reformed in Mexico, criminalizing the acts of government officials who become involved or receive bribes for remaining silent in regard to suspected organ trafficking behavior. This legislation should apply to all government officials, including police officers, detectives, lawyers, and other government employees. If government employees are enabling organ traffickers, then the illicit organ trade will persist. Change must occur by penalizing enablers who, in many countries, are government officers.

In addition to creating and implementing laws that forbid government employees from participating in organ trafficking, there also needs to be an international law created by the U.N. that prohibits political parties from profiting from the illegal organ trade. As discussed previously, organ trafficking in China stems from the Communist Party, a powerful political organization that profits from the illegal sale of organs.[162] A solution to organ trafficking in China is promulgation of laws that

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160. Bowden, *supra* note 13, at 457.

161. *See* Part II.C(3), *supra*.

162. *See* Part II.C(4), *supra*.

prohibit government officials, government organizations, or political parties from engaging in and profiting from organ trafficking.

D. Make the Sale of Organs Legal

A highly controversial solution to completely eliminate organ trafficking is to make the sale of human organs legal. Many scholars have proposed this idea, but currently this practice only exists in Iran.[163] If the international community made the sale of organs legal, organ transplantations could be regulated by official transplantation centers.[164] Lists of recipients of the organs would still function on a need-based priority.[165] The argument in favor of legalizing the sale of organs is that with a financial incentive, more living individuals will be motivated to serve as donors.[166] An increase in donors will eliminate the long waitlist for organs. The legalization of selling organs eliminates the issue of organ trafficking because organ trafficking will be lawful, and therefore regulated effectively.

Another argument in support of the legalization of organ trafficking is that selling reproducible parts of the human body is already legal.[167] In many countries, the sale of semen, blood, DNA, or bone marrow is allowed for financial benefit.[168] Proponents of legalizing the sale of organs argue that if these bodily substances are permitted to be sold for monetary gain, and therefore so to should organs.[169] Opponents of legalizing the organ market believe this presents an ethical conflict, because the nature of organ donation is supposed to be altruistic.[170] They argue that the sale of organs impugns human dignity and should not be tolerated in a moral society.[171] The concern is that the sale of organs portrays human beings and their body parts as commodities.[172] If humans are viewed as commodities, altruist organ donations will decrease, leading to individual corruption which will adversely affect human society.

One example of a modification to a law legalizing the sale of organs is placing restrictions on who can buy organs. A common proposition is

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163. I. Glenn Cohen, *Regulating the Organ Market: Normative Foundations for Market Regulation*, 77 L. & CONTEMP. PROBS. 71, 82 (2014).

164. Meyer, *supra* note 79, at 226-27.

165. *Id.* at 227.

166. *Id.*

167. *Id.*

168. *Id.*

169. Meyer, *supra* note 79, at 227.

170. *Id.* at 229.

171. *Id.* at 228.

172. Cohen, *supra* note 163, at 74.

that only the government can buy organs, which is how the Iranian organ market works.[173] Under this approach, once the government purchases organs from individuals, it distributes organs to recipients free of charge.[174] The government would disperse the organs to individuals based on their need, their health condition, and whether the organs physiologically matched the individuals.[175] Additionally, the government could impose some other requirements to distinguish buyers, such as mandating that sellers have a gross taxable income below a certain amount to exclude low income sellers.[176] The government being the sole organ buyer allows for greater regulation of the organ market. Proposing organ regulation by allowing the lawful sale of organs is a controversial solution, but one that does successfully eradicate organ trafficking.

CONCLUSION

Organ trafficking is a global concern that stems from desperation and dire poverty. Individuals in first world countries on long waitlists in desperation of an organ transplant will participate in illegal organ transactions. Just like there are people determined to find healthy organs as their only chance of survival, there are individuals on the other end of the spectrum as well. These individuals are desperate for money and will do anything to ensure their own survival, including selling their healthy organs.

The problem is that current legislation at the international and domestic levels prohibiting organ trafficking is ineffective. On the international stage, there has only been one binding law, the CECTHO, which outlaws organ trafficking. There must be more legislation on the international stage to combat this purely global issue. Global initiatives to combat organ trafficking that are illustrated through WHO resolutions or through conventions such as the Declaration of Istanbul are international efforts to raise awareness of the issue of organ trafficking; however, these are non-binding documents. Additionally, doctor-patient confidentiality and lack of reliable statistics on organ trafficking also contribute to the difficulty in eliminating the illegal organ market.

At the domestic level, legislation prohibiting organ trafficking is ineffective. In Singapore, the laws are not deterrents; in Brazil, the legislation is ambiguous and not enforced; in Mexico, there is corruption of law enforcement officers that impedes on organ trafficking

173. *Id.* at 82.
174. *Id.*
175. *Id.*
176. *Id.*

investigations; in China, the political parties encourage and profit from the illicit organ trade.

There are many recommendations to creating effective organ trafficking legislation at both the international and domestic levels. At the international level, there need to be more treaties and binding legislation from organizations like the U.N. This legislation should include organ trafficking exceptions to doctor-patient confidentiality agreements, because physicians are in the best position to report cases of suspected organ trafficking activity. Additionally, reducing waitlist times for organ recipients is another recommendation to combat organ trafficking. By organizing awareness campaigns and promoting the presumed consent system to organ donations, individuals in need of organs will be able to get their organs through donation instead of monetary purchase.

At the domestic level, there need to be laws that clearly articulate what parties are responsible for organ trafficking offenses and that contain prison sentences serving as deterrents. Domestic laws must penalize government employees and members of political parties who engage in or profit from organ trafficking.

A final solution to the organ trafficking problem is to make the sale of organs legal. There is a great deal of controversy surrounding this proposition, and many believe that the regulation and compensation of the sale of organs will lead to a deterioration in altruistic and moral values. Organ trafficking is an international issue involving parties from many different countries acting in concert together. With effective legislation at both the international and domestic level, organ trafficking can not only be reduced, but overtime can be eliminated entirely.