
ANTONIN SCALIA LAW SCHOOL
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ARTICLES:

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CODIFICATION OF INTERNATIONAL NORMS

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THE EMERGING UN BUSINESS AND HUMAN RIGHTS TREATY AND ITS CODIFICATION OF INTERNATIONAL NORMS

*Ilias Bantekas**

I. INTRODUCTION

The 2019 and 2020 versions of the draft Business and Human Rights Treaty (BHR Treaty) signal a move away from soft law and self-regulation for multinational corporations (MNCs) and entities engaged in transnational business activities. There is some resistance to the treaty from industrialized states, although they have failed to tackle root causes of extra-territorial human rights abuses by MNCs under their control. While the BHR treaty does not absolve states of their primary responsibility as human rights duty bearers, it does however establish a triangular relationship requiring that MNCs observe strict due diligence requirements, as well as provide remedies to victims of human rights violations and abuses caused directly or indirectly by them. The state is compelled to facilitate and enforce corporate due diligence as well as extensive access to justice for victims, including through the provision of legal aid, physical security, effective jurisdiction, corporate and personal sanctions, and even mutual legal assistance.

By way of background, in 2011, the UN Human Rights Council established an inter-governmental working group (Working Group) to address the human rights roles and responsibilities of transnational corporations and other business enterprises.¹ This Working Group was tasked with regulating the activities of transnational corporations and other business enterprises.² The UN Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council in 2011,³ had run its course, necessitating a move away from self-regulation and corporate social responsibility.⁴ Despite some opposition by industrialized states, a proposal was tabled by Norway and forty-four co-sponsors seeking operationalization of the UN Guiding Principles.⁵

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¹ See *Statement on Behalf of a Grp. of Countries at the 24rd [sic] Session of the Human Rights Council*, BUS. & HUMAN RIGHTS RES. CTR. (Sept. 2013), <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>.

² Human Rights Council Res. 26/9, U.N. Doc. A/HRC/26/L.22/Rev.1, at 2, ¶ 1 (June 25, 2014).

³ See *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, OHCHR, U.N. Doc. HR/Pub/11/04 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter *Guiding Principles*].

⁴ See Larry Catá Backer, *Shaping a Global Law for Business Enterprises: Framing Principles and the Process of a Comprehensive Treaty on Business and Human Rights*, 42 N.C. J. INT'L L. 418, 419-20 (2017).

⁵ See Human Rights Council Res. 26/22, U.N. Doc. A/HRC/26/L.1 (June 23, 2014).

Some states backtracked and there was significant opposition by the US and the EU.⁶

The first two sessions⁷ of the Working Group focused largely on deliberating the content, scope, nature, and structure of a BHR treaty and how this would fit within the existing international human rights architecture. During the third session, the Working Group began a holistic discussion on the possible elements of a draft treaty, prepared by the Chairperson of the Working Group.⁸ Many of these issues had already been discussed in the first two sessions. Ecuador, on behalf of the Chairperson of the Working Group, prepared a Zero Draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, as well as a Zero Draft optional protocol.⁹ The Zero Draft was effectively the basis for further negotiations and exchange of ideas during the fourth session of the Working Group.¹⁰

The Zero Draft was subsequently amended, and a second draft was produced by the Working Group Chairperson on July 16, 2019,¹¹ along with a

⁶ See *EU Contribution to First Session*, OHCHR, at 3-4, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/EuropeanUnion.doc> (last visited Jan. 28, 2021) (The Contribution notes that the EU does not see the additional benefit to the UN Guiding Principles (UNGPs) by the adoption of a binding treaty, stressing that: “pushing for a legally binding document at this stage unnecessarily polarizes the debate.” The EU further stressed the role of self-regulation through its Corporate Social Responsibility (CSR) Strategy with a view to implementing the UNGPs.); Treaty Alliance, *Resolution on Binding Human Rights Standards Passes in Human Rights Council*, GLOB. POL’Y F. (June 27, 2014), <https://www.globalpolicy.org/component/content/article/221-transnational-corporations/52651-treaty-alliance-press-release-on-resolution-on-binding-human-rights-standards.html>; see also Stephen Townley, *Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights*, U.S. MISSION TO INT’L ORG. GENEVA (June 26, 2014), <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/>.

⁷ See Working Group, Rep. on the First Session, U.N. Doc. A/HRC/31/50, at 1 (Feb. 5, 2016); see also Working Group, Rep. on the Second Session, U.N. Doc. A/HRC/34/47, at 3 (Jan. 4, 2017).

⁸ See Working Group, Rep. on the Third Session, U.N. Doc. A/HRC/37/67, at 3 (Jan. 24, 2018).

⁹ The so-called Zero Draft was the first ever draft BHR treaty adopted by the Working Group. While it was clear that this would not be the definitive text, the expectation was that to a very large degree it reflected a minimum consensus as to the duties of both states and MNCs. See generally *Legally Binding Instruments to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, OHCHR (July 16, 2018), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> [hereinafter Zero Draft], (the full Zero Draft). See *Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. HUMAN RIGHTS COUNCIL, <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx> (last visited Jan. 28, 2021).

¹⁰ See Working Group, Rep. on the Fourth Session, U.N. Doc. A/HRC/40/48, at 3 (Jan. 2, 2019).

¹¹ See *OEIGWG Chairmanship Revised Draft, Legally Binding Instruments to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other*

revised Optional Protocol.¹² The 2019 draft treaty was the subject of significant debate, both within the UN and academia.¹³ However, unlike in the past, this debate was largely hosted on electronic platforms, such as expert blogs,¹⁴ where ideas were exchanged rapidly and in many cases in real time. This accelerated the debate considerably, compared to the significant amount of time such debates are accustomed to in print media or legal periodicals.¹⁵ This helps to explain, to some degree, why a new draft was produced in August 2020¹⁶ with the aim of addressing concerns related to the 2019 Zero Draft. This article focuses on the Zero Draft to the degree it has not been amended by the 2020 draft and will employ the 2020 draft where it introduces new or revised terms. This analysis is based on the assumption that the 2019 Zero Draft generally codifies existing customary and treaty law, and that it would be wrong to see subsequent amendments to the Zero Draft as rendering the Zero Draft obsolete, or that most of its provisions do not reflect a much broader consensus.¹⁷ This assumption further helps preserve the topicality of this article, even if subsequent drafts are ultimately produced.¹⁸

Any BHR treaty will have to be undertaken in a global treaty landscape that is already rather complex. It will need to deal with, or traverse through, issues precipitated by bilateral investment treaties (BITs), human rights treaties, treaties dealing with international trade, international criminal law agreements

Business Enterprises, OHCHR (July 16, 2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf [hereinafter 2019 BHR Draft].

¹² The Protocol establishes a committee for the enforcement of member states' obligations, as well as a supplementary national implementation mechanism. *See Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, OHCHR, at 1; 3-4, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.pdf> (last visited Jan. 28, 2021) [hereinafter Draft Optional Protocol].

¹³ *See Briefing Paper on the Zero Draft: Unpacking Arguments Against the Treaty*, BUS. & HUMAN RIGHTS RES. CTR.,

<https://www.business-humanrights.org/en/latest-news/experts-reflect-on-the-zero-draft-of-the-legally-binding-treaty-on-business-and-human-rights/> (last visited Jan. 28, 2021) (offering examples of various debate about the 2019 Zero Draft treaty).

¹⁴ *See generally* THE CORP. SOC. RESP. AND BUS. ETHICS BLOG, <https://corporatesocialresponsibilityblog.com/category/business-and-human-rights/> (last visited Jan. 28, 2021); *see also* BUS. & HUMAN RIGHTS RES. CTR., <https://www.business-humanrights.org/en/latest-news/new-blog-business-human-rights-the-limits-of-law/> (last visited Jan. 22, 2021) (offering examples of expert blogs where debates mostly took place).

¹⁵ *See Blog: Reflections on the Zero Draft Treaty*, BUS. & HUMAN RIGHTS RES. CTR., https://www.business-humanrights.org/en/blog/?opinion_series=8&backdate_after=&backdate_before=&query= (last visited Jan. 28, 2021) (a blog dedicated entirely to debate the Zero Draft treaty).

¹⁶ *See* Surya Deva, *BHR Symposium: The Business and Human Rights Treaty in 2020—The Draft Is “Negotiation-Ready” but are States Ready?*, OPINIOJURIS (Sept. 8, 2020), <http://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/>.

¹⁷ *Id.*

¹⁸ To justify this assertion, it is instructive that key provisions of the Zero Draft have either remained unchanged or slightly altered. *See id.*

(including extradition and mutual legal assistance treaties), bilateral tax treaties, private international law (both choice of law and choice of courts), as well as general international law and customary international law. The proposed BHR treaty also engages fundamental regulatory spheres of states, such as the law of corporations, extra-territorial jurisdiction, and the law of obligations (i.e., contracts). This extensive shopping list is meant to illustrate the myriad hurdles that the drafters of the BHR treaty have had to consider. No new treaty in the twenty-first century can possibly claim to be an 'island' and hence must be consistent with existing international law, whether treaties, custom, or general principles.¹⁹ The problem, of course, is that many of these other treaties are either narrow in scope, express the politics of a different era, or are downright antithetical to the very notion that corporations possess, or should possess, some human rights obligations. This necessarily means that any new cross-cutting treaty will be subject to severe limitations.

As a result of these considerations, it is not self-evident that a new treaty always advances the aims and objectives of its driving stakeholders. A treaty severely limited from the outset may not only have little to offer, but worse, if put to a vote even its limited focus may be shot down by a large number of states. The danger with the latter outcome is that in its pre-treaty manifestation its substantive provisions may have been considered customary in nature, or already adequately reflected in transnational legal practice or self-regulation.²⁰ These qualities are lost to a draft treaty that is subsequently dismissed.²¹ The paradigm of the International Law Commission's (ILC's) Articles on State Responsibility and the wisdom of then ILC Rapporteur James Crawford to reject the draft treaty option resulted in their unequivocal recognition as principles of customary international law;²² an outcome far better than a watered-down treaty, or an instrument ultimately shelved and rejected. This is not the case with the proposed BHR treaty, whose articulation in treaty form, as will be shown below, is welcomed because it fills gaps in domestic laws and practice that are absent from the current transnational corporate architecture.

¹⁹ In fact, the 2019 draft treaty contains a provision aiming to achieve "consistency with international law" (Article 12), which in its majority concerns non-intervention and state responsibility. *See* 2019 BHR Draft, *supra* note 11, at art. 12. One has to reach the penultimate paragraph (6) to find a discussion on compatibility with bilateral and multilateral treaties "on issues relevant to the [treaty and protocol]." *Id.* Article 12(6) of the BHR treaty stipulates that such bilateral and multilateral treaties "shall be compatible and interpreted in accordance with [states' obligations under the BHR treaty and its protocol]." *Id.* In reality, the likelihood of conflict is high and there is no principle of international law that obliges states to renege on existing treaties on the basis of subsequent treaty obligations. *See* below section 3 of this article for a more thorough discussion and the additions made in this respect by the 2020 draft.

²⁰ *See generally* G.A., *Report of the International Law Commission*, U.N. Doc A/73/10 (2018).

²¹ *Id.*

²² *See* James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 886, 889 (Oct. 2002).

So, what are the 'forces' that the proposed BHR treaty has to contend with? First and foremost is the notion that human rights are owed only by states and it is only states that are responsible for their protection and fulfillment. Any other result, despite the subject matter of the proposed treaty, would be absurd. If MNCs²³ became the duty bearers of international human rights, even within their sphere of operation, states would be justified to decrease their positive and negative human rights obligations in all those areas of regulation where MNCs have even the faintest of presence. Moreover, if MNCs were conferred the same obligations as states, demarcation would become an impossible exercise and by implication MNCs would request, and rightly so, that they be endowed with powers typically exercised by states.

Another contentious issue concerns aligning the proposed BHR treaty with the existing international regulatory architecture. Much of the work of the BHR treaty could be undertaken through BITs, whether by amending existing BITs and/or inserting pertinent provisions in new BITs. BITs can strengthen the regulatory weaknesses of host states and expand the extra-territorial reach of home states, such as by ensuring that all suppliers are conforming to strict standards that are to be monitored and supervised by the parent company.²⁴ Moreover, just as they confer rights directly to investors, like access to arbitration, they could equally confer specific duties on investors/MNCs.²⁵

This change is not in the interests of powerful home states and most developing host states are reluctant to tighten their regulatory grip out of fear of losing out on inward investments.²⁶ BITs generally create a cocktail of rights for investors that override constitutional norms and even general international human rights law; the latter on the ground that international foreign investment law is fragmented from other spheres of international law, and hence there is no real need to reconcile possible conflicts.²⁷ This issue is examined in more detail

²³ The terms MNCs, corporations and business entities, whether domestic or transnational in nature, will be used interchangeably throughout this article. The meaning ascribed to both coincides with the subject matter of the BHR draft treaty. In fact, several delegations during the Working Group sessions queried which term was more appropriate. The consensus position was in favor of a broad approach, not only because all types of legal entities, domestic and multinational as well as state-owned, can commit violations, but also because a narrow definition could induce an entity to choose a particular type of incorporation to avoid being encompassed under the BHR treaty. See Working Grp., Rep. of the Fifth Session, U.N. Doc. A/HRC/43/55, at 8, ¶ 41 (Jan. 9, 2020).

²⁴ See Ilias Bantekas, *The Human Rights and Development Dimension of Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws*, 31 FLA. J. INT'L L. 339, 340-42 (2020).

²⁵ See Rep. of the Fifth Session, *supra* note 23 at 8, ¶ 41.

²⁶ See, e.g., Kenneth J. Vandeveld, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469, 499 (2000) ("BITs seriously restrict the ability of host states to regulate foreign investment....").

²⁷ See Anne van Aacken, *Fragmentation of International Law: The Case of International Investment Protection*, 17 FIN. Y.B. INT'L L. 91, 92-93 (2008). It should be admitted, however, that there is a growing body of practice and scholarly opinion advocating in favor of the principle of systemic integration between human rights and foreign investment obligations in accordance with Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT). See Silvia

in Section 3 below. What this means is that the proposed BHR draft treaty cannot be in conflict with the global BIT architecture,²⁸ as well as other treaties, such as WTO agreements, which directly or indirectly grant rights to investors/MNCs/traders/suppliers above the human rights of persons in states where such entities operate.

Finally, a BHR treaty that obliges states to strengthen their regulation of corporate activities, stretching to each and every supplier, necessitates the active participation of the bulk of the international community. If not, certain states may rightly perceive their self-exclusion as a competitive advantage against other signatory states.²⁹ Hence, it is important not only that the treaty is compatible with existing limitations, but that enough political leverage is exercised against potential opt-out states so that universal participation is guaranteed.

Despite such restrictions, there is still significant scope for a proposed BHR treaty to make a difference, so long as one delineates from the outset what it is that it should seek to achieve. Clearly, the problem seems to lie in the fact that: a) very little, if any, international human rights and environmental law applies to MNCs, despite the fact that it is otherwise binding on states; and b) poor, developing states, have little incentive to impose strict regulation on foreign MNCs because of the potential negative impact on their economies. It is exactly these important issues that the proposed BHR treaty seeks to address, without upsetting, at least intentionally and vocally, the existing international treaty architecture to which it is bound.

This article discusses seven main concepts related the 2020 BHR draft treaty's codification of international human right norms: (1) Territorial scope of the treaty; (2) Material Scope of the treaty; (3) Preventative due diligence obligations; (4) Liability of MNC as legal persons; (5) Jurisdiction for victim's rights; (6) Characterization of victimhood under the treaty; and (7) Institutional arrangements created by the treaty.

II. TERRITORIAL SCOPE OF THE PROPOSED TREATY

The territorial scope of the draft BHR treaty is wholly different from other universal and regional human rights treaties, all of which generally prescribe territorial application regardless of the nationality or other status of the victims or perpetrators.³⁰ In fact, the draft BHR's territorial scope concerns

Steinger, *What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration*, 31 LEIDEN J. INT'L L. 33 (2017).

²⁸ Concerns about such a clash have arisen in the discussions of the Working Group. See Rep. of the Fourth Session, *supra* note 10, at ¶ 51.

²⁹ See MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* (The Free Press 1990).

³⁰ See International Covenant on Civil and Political Rights, art. 2(1), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 173 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992) [hereinafter ICCPR]. Of course, there is a long list of domestic and international case law clearly stipulating that effective control over foreign territory is tantamount

chiefly, but not exclusively, extra-territorial acts. This is because the draft treaty is intended to encompass “all business activities, including particularly but not limited to those of a transnational character.”³¹ The term *transnational* is not readily susceptible to a neat definition or quantification,³² but for the purposes of the 2019 draft treaty a business activity is considered transnational in nature if:

- a. It is undertaken in more than one national jurisdiction or State; or
- b. It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State; or
- c. It is undertaken in one State but has substantial effect in another State.³³

This provision is provocative because it allows member states to assume jurisdiction over business activities that are extra-territorial in nature. If this were not so, however, the draft BHR would simply replicate the formalism of territorial incorporation of MNCs and allow parent companies to relinquish due diligence obligations over their affiliates and supply chains. Such a narrow view of MNCs is inconsistent with general international human rights law and the control of the parent company over its affiliates and suppliers arising from MNC intra-shareholding or equity-based ownership. Even so, Article 13(1) and (2) of the 2019 draft BHR treaty is at pains to emphasize that there is nothing in the proposed treaty authorizing intervention in the domestic affairs or jurisdiction of other states. Article 1(3) of the 2020 version expands the notion of “business activities” to also include state-owned enterprises.³⁴ A new Article 1(4) has been added in the 2020 version, with the aim of defining “business activities of a transnational character.” It is defined as any business activity that: a) is undertaken in more than one jurisdiction; b) is just in one state through any

to a state’s own territory for the purposes of the coverage of human rights treaties. See MARKO MILANOVIĆ, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (Oxford Univ. Press 2013). A long list is beyond the scope of this article.

³¹ See 2019 BHR Draft, *supra* note 11, at art. 3(1).

³² The consistent practice of MNCs, as well as state enterprises acting as *fiscus* in particular cross-border industries gives rise to rules (and forms of self-regulation) recognized by courts and domestic laws, whether expressly or tacitly, as private custom or acceptable conduct. See Roger Cotterell, *What is Transnational Law?* 37 L. & SOC. INQUIRY 500, 502 (2012) (book reviews). This ‘rule-making capacity’ of corporate entities and MNCs is known as *lex mercatoria* and is part of a much larger process known as transnational law. See *id.* Moreover, States are increasingly using private contracts and private law as their governing law, rather than treaties. See Ilias Bantekas, *The Globalization of English Contract Law: Three Salient Illustrations*, 137 L.Q. REV. 330, 334 (2021) (explaining how private law is used by State entities to bypass the formalities of transactions that would otherwise be subject to public law).

³³ See 2019 BHR Draft, *supra* note 11, at art. 3(2).

³⁴ See OEIGWG Chairmanship Second Revised Draft, *Legally Binding Instruments to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, OHCHR at art. 1(3) (June 8, 2020) [hereinafter 2020 BHR Draft].

business relationship, “albeit a substantive part of its preparation, planning, direction, control, design, processing or manufacturing, storage or distribution takes place in another state,” or; c) is undertaken in one state but produces a substantial impact in another.³⁵ Article 3(1) of the 2020 version makes it clear that the scope of the draft BHR treaty encompasses “business enterprises” whereas its predecessor only referred to “business activities.”³⁶

One of the myths as to why extra-territorial regulation is disfavored is because of its interventionist effect in other legal systems. While this is prima facie true, there is no doubt that: a) the ability to regulate an entity under one’s control, such as a company incorporated in the home state, makes the home state complicit in the illegal conduct of that entity abroad; and b) where the conduct of the entity abroad produces effects on the territory of the home state, as well as elsewhere, measures against such effects are justified under international law on the basis of territoriality. Even so, the obligation of states to respect, protect and fulfill human rights (especially socio-economic rights) extraterritorially stems from general international law and particularly the law on state responsibility.³⁷ Paragraph 9 of the 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural (ESC) Rights, states that such an obligation arises in situations over which:

- a. [A state] exercises authority or effective control, whether or not such control is exercised in accordance with international law;
- b. State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
- c. The State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize ESC rights extraterritorially, in accordance with international law.³⁸

The Maastricht Principles iterate nothing more than general international law. In a globalized world, powerful states are able to exert a significant amount of financial, fiscal, trade, or other similar control over their weaker counterparts. Hence, international law clearly considers that states

³⁵ *Id.* at art. 1(4).

³⁶ *Id.* at art. 3(1).

³⁷ In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Provisional Measures, 2008 I.C.J. Rep. 353, ¶ 109 (Oct. 15), a question posed to the Court was whether the CERD, which like the ICESCR does not contain a jurisdictional provision may nonetheless apply extraterritorially. Despite the absence of such a provision, the International Court of Justice (ICJ) held that the CERD generally applies “to the actions of a state party when it acts beyond its borders.” *Id.*

³⁸ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, ¶ 9 (2011), https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23.

effectively controlling the fate of ESC rights in third nations have an obligation to reverse the effects of their actions. Such a gap in the law would render ESC rights meaningless in the era of globalization.

Given that corporations can only be incorporated in the territorial state, the only way that affiliates established abroad may be owned and controlled by the parent company is through intra-shareholding.³⁹ Intra-shareholding allows affiliates in the group to control not only the overall profits within the group, but also the directorship of each affiliate. If affiliates were open to unlimited publicly available purchase of shares (so-called initial public offering), then the parent company, as well as other affiliates, would lose all control over the other affiliates.⁴⁰ This is nothing short of catastrophic for MNCs, because each affiliate trades in, or produces, patented products and sought-after brands. If each affiliate were able to profit from such patents or brands without profits going to the parent company, and without the parent company controlling the use of trade secrets, then the creation of MNCs in this manner would be detrimental to the parent company and the group as a whole.⁴¹ While intra-shareholding allows for development-oriented investments, as well as growth across the globe, the weak transnational corporate architecture, with its emphasis on the race to the bottom as far as developing states are concerned, gives rise to serious human rights and environmental concerns.⁴² The first and most obvious is the likelihood of forum/investment shopping through the MNC model for the weakest regulatory regime.⁴³ Such a choice may be predicated on regulatory compliance costs considerations (e.g., low or no pension contributions; insufficient environmental compliance; light health and safety requirements), tax avoidance, or avoidance of public scrutiny by civil society organizations, especially in autocratic states.⁴⁴ No doubt, MNCs typically set up affiliates chiefly in order to create new consumer bases and expand the range of their operations.

When MNCs are allowed to operate in weak regulatory environments, it is clear that little or no meaningful development can ever take place in the

³⁹ For an excellent analysis, see Katharina Lewellen & Leslie Robinson, *Internal Ownership Structures of Multinational Firms* (2013), https://www.law.nyu.edu/sites/default/files/ECM_PRO_075236.pdf.

⁴⁰ See Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. OF FIN. 471 (1999).

⁴¹ Press Release, UNCTAD, Increasingly Complex Ownership Structures of Multinational Enterprises Poses New Challenges of Investment Policy-Makers, U.N. Press Release UNCTAD/PRESS/PR/2016/016 (June 21, 2016), <https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=303>.

⁴² From a budgetary and tax perspective, see Rosanne Altshuler & Harry Grubert, *The Three Parties in the Race to the Bottom: Host Governments, Home Governments and Multinational Corporations*, 7 FLA. TAX REV. 153 (2005).

⁴³ See UNCTAD, *supra* note 41.

⁴⁴ See generally BJÖRN P. EBERT, FORUM SHOPPING IN INTERNATIONAL INVESTMENT LAW: FORUM PLANNING, FORUM ENHANCEMENT, AND FACILITATION OF PROCEDURE (Mohr Siebeck 2017).

sense of the human development index⁴⁵ and that human rights generally deteriorate.⁴⁶ Under such circumstances, inward investment becomes injurious to the host state, because it culminates in the depletion of natural resources, assists corrupt regimes to consolidate their power, while exacerbating poverty and under-development. This is absurd, because investment is meant to augment growth and emulate solid democratic governance practices.⁴⁷ Poor regulation further breeds poor corporate conduct, driven by the desire of corporate directors to please shareholders and of elite service providers to find loopholes in the system. Transfer pricing is emblematic as to why the business conduct of MNCs should be subject to extra-territorial control. Transfer pricing allows *all* the affiliates of an MNC to declare the *same* losses and expenses incurred in one jurisdiction in their own annual tax returns, as long as they possess shares or some form of equity in that other affiliate. Hence, the same losses and expenses are declared in several national tax declarations around the world, even though they have only been incurred once and in only one jurisdiction. This mechanism allows all affiliates to decrease their tax burden and in doing so decrease the amount of tax owed to the country of incorporation, which in turn impacts social services and the enjoyment of fundamental rights.⁴⁸ Fortunately, the Organization for Economic Co-operation and Development (OECD) is in the process of taking measures against transfer

⁴⁵ The three indicators of HDI are: longevity, knowledge, and decent living standards. *See* UNDP, HUMAN DEVELOPMENT REPORT 1990: CONCEPT AND MEASUREMENT OF HUMAN DEVELOPMENT, 11-12 (Oxford Univ. Press 1990). *See also* Amartya Sen, *Capability and Well-Being*, in Martha Nussbaum & Amartya Sen, *THE QUALITY OF LIFE*, 30 (Oxford Univ. Press 1993), who distinguishes between capabilities and wellbeing. Sen's capabilities approach demonstrates that wellbeing differs from welfare in that the latter concerns prosperity in terms of material needs. *See id.* He measures the developmental progress of states by reference to the capabilities of their citizens (capabilities approach) and distinguishes between positive and negative freedoms. *See id.* Sen, whose influence was significant in the formulation of the HDI, has argued that only bottom-up development is sustainable, whereas development driven exclusively by governments is unsustainable because of the violation of rights and the lack of empowerment involved in the process. *See id.*

⁴⁶ According to a 2017 survey by the Chartered Institute of Procurement and Supply (CIPS), 34% of business entities required by the UK Modern Slavery Act to complete the report/audit stipulated under the Act failed to do so, with a significantly large number found to have adopted no pertinent policies. *See One in Three Businesses are Flouting Modern Slavery Legislation – And Getting Away with It*, CIPS NEWS (Sept. 6, 2017), <https://www.cips.org/en-gb/who-we-are/news/one-in-three-businesses-are-flouting-modern-slavery-legislation--and-getting-away-with-it/>. The survey was bleak in its conclusion that despite the disappointing findings, the industry was adamant that self-regulation was sufficient. *See id.*

⁴⁷ *See* Zeng Huaqun, *Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice*, 17 J. INT'L ECON. L. 299, 323 (2014) (arguing that the concepts of 'balance' and 'sustainable development' be inserted in BITs).

⁴⁸ This has led to a scholarly literature arguing in favor of a unitary taxation of MNCs. *See* Alexander Ezenagu, *Unitary Taxation of Multinationals: Implications for Sustainable Development*, CTR. FOR INT'L GOVERNANCE INNOVATION (Nov. 2019), https://www.cigionline.org/sites/default/files/documents/SDG%20PB%20no.4_0.pdf.

pricing through its Base Erosion and Profit Shifting (BEPS) mechanism,⁴⁹ but such measures will not have global application absent a multilateral treaty.⁵⁰

As a matter of unilateral state practice—as opposed to the BEPS that is an exercise of collective state practice—extra-territorial laws regulating particular aspects of corporate conduct are on the rise, chief among these being the United Kingdom’s Modern Slavery Act of 2015⁵¹ and the Australian Modern Slavery Act of 2018.⁵² Section 54 of the United Kingdom’s Act requires commercial entities with a turnover of £36 million, irrespective of their place of incorporation, but which undertake even a part of their business in the United Kingdom, to prepare annual slavery and trafficking audits.⁵³ In equal measure, the French Corporate Duty of Vigilance Law 2017 (Vigilance Law)⁵⁴ imposes a duty of care on large French companies (on the basis of number of employees) and their subsidiaries or entities under their control for a wide range of environmental and human rights obligations.⁵⁵ A similar initiative was undertaken by India through the adoption of its National Guidelines on Responsible Business Conduct in 2018.⁵⁶ This trend is increasingly witnessed in the case law of industrialized states. In *Nevsun Resources Ltd. v. Araya*, the Canadian Supreme Court held that Canadian corporations are liable for the

⁴⁹ *International Collaboration to End Tax Avoidance*, ORG. FOR ECON. CO-OPERATION & DEV., <https://www.oecd.org/tax/beeps/> (last visited Jan. 30, 2021). See Ilias Bantekas, *Inter-State Tax Arbitration in International Law*, 8 J. INT’L DISP. SETTLEMENT 507, 522 (2017) (explaining that while BEPS is the most progressive tax mechanism by which to deter transfer pricing, its application is limited).

⁵⁰ See generally RICHARD S. COLLIER & JOSEPH L. ANDRUS, TRANSFER PRICING AND THE ARM’S LENGTH PRINCIPLE AFTER BEPS (2017) (analyzing the effectiveness of ALP and BEPS).

⁵¹ Modern Slavery Act 2015 (c. 30) (U.K.).

⁵² Modern Slavery Act 2018 (No. 153/2018) (Austl.); see also MODERN SLAVERY BUS. ENGAGEMENT UNIT, COMMONWEALTH MODERN SLAVERY ACT 2018: GUIDANCE FOR REPORTING ENTITIES (2019), <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>.

⁵³ Modern Slavery Act 2015 (c. 30) (U.K.).

⁵⁴ Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Law 2017-399 of Mar. 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Mar. 28, 2017, p. 1 (Fr.). For a useful English summary, see *French Corporate Duty of Vigilance Law – Frequently Asked Questions*, EECJ (Feb. 23, 2017), <https://corporatejustice.org/documents/publications/french-corporate-duty-of-vigilance-law-faq-pdf>. See also *France’s Law on the Corporate Duty of Vigilance: A Practical and Multidimensional Analysis in English*, BUS. & HUMAN RIGHTS RES. CTR. (Mar. 28, 2018), <https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-a-practical-and-multidimensional-analysis-in-english>.

⁵⁵ In *Sherpa v. Lafarge*, the Paris Appeals Court held that Lafarge had paid several million USD to ISIS in Syria to maintain operations at its cement factory. *Sherpa and EECHR to Appeal Decision in Lafarge/Syria Case at French Supreme Court*, ECCHR (Nov. 7, 2019), <https://www.ecchr.eu/en/press-release/sherpa-and-ecchr-to-appeal-decision-in-lafargesyria-case-at-french-supreme-court/>. The Court held that the company, among others, endangered the lives and fundamental rights of its employees and was further liable for terrorist financing. *Id.*

⁵⁶ MINISTRY OF CORP. AFFAIRS, NATIONAL GUIDELINES ON RESPONSIBLE BUSINESS CONDUCT (2018), https://www.mca.gov.in/Ministry/pdf/NationalGuideline_15032019.pdf.

breach of customary and *jus cogens* obligations.⁵⁷ Significantly, such liability is not limited to tort, particularly given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.⁵⁸

Finally, there is a significant practice by industrialized states in exercising broad extra-territorial jurisdiction in respect of foreign corporate acts that produce harm upon their territory or economic interests. The application of several varieties of the “effects doctrine” is of particular relevance in this context.⁵⁹ Transnational corruption by MNCs abroad impacts the ability of the home state to collect taxes (e.g., because full extent of profits are not revealed), the level of financial aid due to the host state, the ability of its other corporations to freely compete in international bids, as well as any additional offences related to the repatriation of profits, such as money laundering. It is simply fictitious to assume that other illegal or injurious actions of an MNC affiliate abroad will produce no financial, social, criminal, or other effect in the territory or the global interests of the home state of the MNC. It is precisely because of the effects of such actions that home states not only have a direct interest, but an obligation, to take appropriate measures.

The draft treaty clearly exhibits a consensus concerning the need for a multilateral regulatory framework for MNCs that encompasses not only the home state, but also extra-territorial jurisdiction. As explained, this consensus draws on recent state practice that holds MNCs accountable in home states for acts and omissions committed abroad.

III. MATERIAL SCOPE OF TREATY

Article 3(3) of the 2019 Zero Draft encompasses business activities that impact or affect “all human rights treaties.”⁶⁰ The problem with such a broad scope is that, in theory, states which are parties to the BHR treaty may not necessarily be parties to all UN human rights treaties; as a result, non-ratified treaties cannot form part of the material scope of those states’ obligations.⁶¹ Article 9 of the 2019 draft treaty serves to remedy this inconsistency. Paragraph 1 thereof provides that all procedural and substantive

⁵⁷ *Nevsun Res. Ltd. v. Araya*, [2020] S.C.J. No. 5 (Can.).

⁵⁸ *Id.*

⁵⁹ Its application, in fact, lies in several areas of regulation, including anti-competition. *See, e.g., C-413/14, Intel Corp. v. Commission*, 2017 E.C.R. I-0000; *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945) (confirmed in *Hartford Fire Ins. v. California*, 509 U.S. 764, 796 (1993)).

⁶⁰ *See* 2019 BHR Draft, *supra* note 11.

⁶¹ In the First Session, the issue of human rights reference in a preamble was raised by one delegation but was not discussed. *See* First Session, *supra* note 7, at ¶ 97. In the Fifth Session, a similar reference in the preamble was found to be inflexible, with some delegates asking that the language found in Principle 12 of the UNGPs be used instead. *See* Fifth Session, *supra* note 23, at ¶¶ 24, 43. Furthermore, some delegations argued that “all human rights” might not comply with the principle of legality, while also permitting the infusion of different standards among states. *See id.*

issues regarding claims shall be governed by the *lex fori*, including the forum's conflict of laws rules.⁶² Where substantive human rights law-related claims are not covered by the *lex fori*, the competent court of the forum may apply the laws of another state, if its domestic law so allows.⁶³ Paragraph 2 of Article 9 of the Zero Draft thus effectively allows the use of conflict of laws rules—which typically concern the civil law of obligations—to import substantive human rights rules. This is a unique tool that should not go unnoticed. Paragraph 2 of the Zero Draft placed some limitations on such importation where:

- a. the acts or omissions that result in violations of human rights covered under this [treaty] have occurred; or
- b. the victim is domiciled; or
- c. the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this [treaty] is domiciled.⁶⁴

This provision fills some of the most significant hurdles in transnational tort suits against corporate business conduct. Suits brought before the courts of states with minimal links to the conduct or its impact have generally been disinclined to entertain such disputes and invoke the *forum non conveniens* doctrine to decline jurisdiction.⁶⁵ Moreover, the courts of countries whose human rights armory is weak can assert jurisdiction and apply a more extensive gamut of rights that are in force in a country with a link to the claim under consideration.

States limited by BITs that constrain the regulatory authority of host states can make use of the laws of the home state, or other connected states. The human rights discrepancy in the foreign investment architecture is glaring and not necessarily the fault of corporations. On the one hand, there are few, if any, human rights obligations on investors/corporations in BITs and multilateral investment treaties.⁶⁶ In fact, an underlying aim of BITs, at least from the perspective of industrialized home states, is to permit their corporations to expand their operations abroad with as few regulatory restrictions as possible, including environmental and human rights. On the other hand, host states are bound to observe human rights obligations arising from treaties and domestic laws, but these may turn out to conflict with obligations under BITs and multilateral investment treaties. In such events, treaty and constitutional-based human rights obligations are overridden by investment guarantees under BITs

⁶² See 2019 BHR Draft, *supra* note 11, at art. 9(1).

⁶³ *Id.* at art. 9(2).

⁶⁴ *Id.*

⁶⁵ See, e.g., *AAA v. Unilever PLC* [2018] EWCA Civ 1532 (QB) (holding no duty of care by a U.K. parent company in respect of third parties harmed by the business conduct of a foreign subsidiary); see also *Kalma v. African Minerals Ltd.*, [2020] EWCA Civ 144 (QB) (deciding that there was no liability for a UK company's operations in Sierra Leone mired by police abuse).

⁶⁶ A study was conducted by UNCTAD in 2001, which demonstrated that BITs contain a very tiny amount of investor obligations. See U.N. CONFERENCE ON TRADE & DEV., SOCIAL RESPONSIBILITY, at 17, U.N. Sales No. E.01.II.D.4 (2001).

and multilateral investment treaties.⁶⁷ At the same time, the home state is under no real obligation to supervise the human rights conduct of its corporations/investors in the host state. There exists no such obligation in any BIT, which in any event would have amounted to interference in the domestic affairs of the host state. The lifting of the limitations in BITs under Article 3 of the BHR treaty should, in theory at least, apply also to so-called umbrella clauses in BITs,⁶⁸ the existence of which was a surprise to most developing states when arbitral disputes began to be filed before ICISD. Umbrella clauses, in short, serve to extend BIT protection to privileges and guarantees included in investment contracts, even if these are not stipulated in the BIT itself.⁶⁹ This effectively means that contracts between investors and host states ultimately end up having the same effect as BITs and hence override constitutional law and other laws that would ordinarily apply, including the human rights law and the obligations of the host state.

The material scope of the treaty is important, apart from what has already been said, in at least two practical respects: a) in order to ascertain whether a human rights violation is attributable to a business entity, which by extension gives rise to the jurisdiction of one or more national courts; b) because the existence of a human rights abuse or violation constitutes the *duty* element of the pertinent tort,⁷⁰ whose breach in turn gives rise to a claim by the victim(s). Hence, the exact number of human rights encompassed under the 2019 draft BHR treaty was deemed crucial for ascertaining the rights of victims to appropriate remedies under Articles 4(5) and 6(4) of the treaty.⁷¹ As will be shown below, such as extensive recitation of rights was considered redundant in the 2020 draft because it may easily be codified through a more generic clause.

⁶⁷ The *Tecmed* case serves as a good illustration. It involved an investment agreement between Tecmed and Mexico with the purpose of constructing a landfill. *See Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 116 (May 29, 2003). Following the expiry of the first license period the Mexican government refused to renew the license, arguing correctly that the project caused adverse environmental and health effects on the local population. *See id.* As a result, the investment was effectively terminated, and the investor stood to suffer a financial loss. The investment tribunal to which the dispute was referred held that the “government’s intention [was] less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measure.” *See id.*; *see also* *Compãnia del Desarrollo de Santa Elena S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, ¶ 71 (Feb. 17, 2000). *See also* Ilias Bantekas, *The Linkages between Business and Human Rights and their Underlying Causes*, 43 HUM. RTS. Q. 118, 130 (2021) (arguing that the underlying cause of business violations are weak host State laws and as well as the absence of human rights obligations in BITs).

⁶⁸ *See* Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations and the Divide between Developed and Developing Countries in Foreign Investment Disputes* 14 GEO. MASON L. REV. 137, 137 (2006).

⁶⁹ *Id.*

⁷⁰ *See* *Vedanta Resources PLC and Another v. Lungowe and Others* [2019] UKSC 20, [45]-[46], [92] (appeal taken from EWCA Civ 1528) (Eng.) (which unlike other cases (¶ 45) did find a duty of care arising from a company’s overseas business operations or in the Cape case (¶ 92)).

⁷¹ *See* 2019 BHR Draft, *supra* note 11, at art. 4(5), 6(4).

Liability arising from a business activity and the claims this liability entails are meaningless without understanding its precise legal basis. Articles 1(2) and 6(1) of the 2019 draft BHR treaty leave no doubt that liability of corporations/MNCs arises from "human rights violations or abuses," which includes any harm committed by a state-owned enterprise⁷² or a private business/enterprise through acts and omissions in the course of business activities.⁷³ As has already been explained, only states are duty bearers of human rights obligations and accordingly human rights violations are attributable to them alone. While some human rights language increasingly finds itself in the newer generation of BITs,⁷⁴ this does not necessarily give rise to corporate human rights obligations. In equal measure, although some investment tribunals accept human rights defenses,⁷⁵ these are not translated into obligations on investors.⁷⁶ The language of "human rights violations and abuses" is therefore unfortunate, but perhaps also unavoidable.⁷⁷ Although technically incorrect, in practice a wrongful act or omission committed by a

⁷² The regulation of state-owned enterprises in the 2019 draft BHR treaty is hardly straightforward. In fact, there is an emerging scholarship on so-called state capitalism, which several scholars assume is wholly antithetical to free market economy and that ultimately MNCs are hurt by state capitalism. See Alvaro Cuervo-Cazurra et al., *Governments as Owners: State Owned Multinational Companies*, 45 J. OF INTL. BUS. STUD. 919, 919 (2014). At the most basic level, states incur liability from unlawful acts and omissions of state-owned enterprises, hence their inclusion in the BHR treaty dilutes the liability of MNCs. See *id.* Of course, this is not necessarily the case with state-owned enterprises open to private shareholding. See *id.* Moreover, while state-owned enterprises acting as *fiscus* would not enjoy immunity from process or enforcement, it is doubtful that many states of origin would make them susceptible to BHR claims before their national courts. See *id.*

⁷³ See 2019 BHR Draft, *supra* note 11, at art. 1(2), 6(1).

⁷⁴ See, e.g., U.S. Model BIT, Art. 8(3)(c)(i), 12, 13 (2012); Canadian FIPA, Art. 10(1), 11 (with its Norwegian counterpart); Indian Model BIT, Art. 5.5; Brazilian CFIA, Art. 16 (which is effectively a Model BIT/MIT).

⁷⁵ See Johannes Hendrik Fahner & Matthew Happold, *The Human Rights Defense in International Investment Arbitration: Exploring the Limits of Systemic Integration* 68 INT'L & COMPAR. L. Q. 741, 741 (2019).

⁷⁶ In the event of conflicts between national constitutions and BIT obligations, several countries have been forced to take a stand. South Africa, e.g., adopted the Promotion and Protection of Investment Act in 2013, after a commissioned report concluded that BITs were incompatible with section 25 of the South African Constitution, which concerns expropriation and compensation. See Constitution of the Republic of South Africa 1996, § 25 (S. Afr.); Promotion and Protection of Investment Act § 5(1)-(4) (2013). Countries in South America have also gone ahead to denounce BITs through the so-called Bolivarian Alternative for the Americas. See *What is the Alba?*, Alba Info: Information of The Bolivarian Alliance (Blog), (Mar. 20, 2019), <https://albainfo.org/what-is-the-alba/>.

⁷⁷ Not surprisingly, this has been the subject of heated debates. Some delegations felt it was unclear what level of harm had to be present to constitute a human rights abuse or violation. See Emilio Rafael Izquierdo Miño, *Draft report on the Fifth Session of the Open Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, at ¶ 35, U.N. Doc. A/HCR/XX (2020), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/IGWG_5th_DraftReport.pdf. There were multiple calls for greater consideration of the distinction between "violation" and "abuse," with a few delegations suggesting that the revised draft refer only to "abuses" throughout the document. See *id.* Another delegation and a non-governmental organization suggested defining "abuse" and "violation" separately. See *id.*

legal entity is no less a human rights violation simply because it is not committed by a state entity. This is what the BHR aims to illustrate, without at the same time diminishing the primary human rights responsibility of the state.

Article 14 of the 2020 version clarified one of the most contentious provisions found in its predecessor, which referred to the consistency of the BHR with states' existing international obligations. It was perhaps felt that the 2019 version retained the much-maligned status quo, which provided sufficient discretion to fragment and prioritize between treaties. Article 14(5) of the 2020 draft, although still rather weak and less intrusive than would otherwise be desired requires that states shall ensure that:

- a. Any existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be interpreted and implemented in a manner that will not undermine or limit their capacity to fulfill their obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments.
- b. Any new bilateral or multilateral trade and investment agreements shall be compatible with the State Parties' human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments.⁷⁸

The material scope of the BHR encompasses aspects that largely divide states. Non-state actors, such as MNCs do not generally have human rights obligations under international law. The draft treaty respects this status of affairs yet obliges states to impose tort-based liability on MNCs violating human rights norms. In this manner the draft treaty, while not departing from general international law on the rights and obligations of non-state actors, demands that states hold them accountable at the domestic level. Such an outcome does not depart from customary international law.

IV. PREVENTIVE DUE DILIGENCE OBLIGATIONS

The purpose of the BHR treaty is twofold. On the one hand, it sets out to create a uniform set of largely host state obligations, while on the other hand, it extends enforceable rights to victims of corporate human rights abuses and violations directly against the perpetrators themselves. States are required to take certain measures by which to ensure that corporations are prevented from abusing human rights, while at the same time rendering the corresponding obligations justiciable and subject to dissuasive penalties and fines. Article 5(2)

⁷⁸ See 2020 BHR Draft, *supra* note 34, at art. 14(5).

of the 2019 draft stipulates that such preventive measures are to be enforced through domestic law, principally by means of human rights due diligence assessments encompassing not only potential human rights impact arising from a corporation's direct conduct, but also potential human rights impact arising, or likely to arise, from a corporation's other contractual relationships,⁷⁹ typically its supply chain, or sub-contractors.⁸⁰ Article 1(4) of the 2019 version, which dealt with the meaning of contractual relationships, has been deleted and replaced with a new Article 1(5) in the 2020 version, which refers to these as "business relationships." Accordingly, they are defined as:

any relationship between natural or legal persons to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State, including activities undertaken by electronic means.⁸¹

Human rights impact assessments (HRIAs) are now common practice in the work of international financial institutions (IFIs),⁸² UN bodies,⁸³ the EU,⁸⁴

⁷⁹ See Miño, *supra* note 77, at ¶ 37 (where certain delegations felt there was a danger that the term could be interpreted narrowly, excluding certain relevant relationships (e.g., equity-based relationships)). It was queried whether it might be wise replacing the phrase with "business relationship," as contained in the UNGP. *See id.* Other delegations proposed the term "economic relationship." Björn FASTERLING, *Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk*, 2 BUS. & HUM. RTS. J. 225, 225 (2017).

⁸⁰ See 2019 BHR Draft, *supra* note 11, at art. 5(2)(a)-(d).

⁸¹ See 2020 BHR Draft, *supra* note 34, at art. 1(5).

⁸² Comm. on Econ., Soc., and Cultural Rts., *Public Debt, Austerity Measures in the International Covenant on Economic, Social and Cultural Rights*, at ¶ 4, 11, U.N. Doc. E/C.12/2016/1, (July 22, 2016); *see, e.g.*, H.R.C., *Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on The Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights on His Mission to Greece*, ¶ 81(a)-83(b), U.N. Doc. A/HRC/31/60/Add.2 (Jan. 12, 2016). The World Bank Group has set up quasi-judicial mechanisms, such as the Bank's Inspection Panel and the Multilateral Investment Guarantee Agency (MIGA) Ombudsman, which are competent to hear complaints concerning violations of the Bank's internal rules, not violations of human rights law, albeit as these arise from violations of assessments incumbent on corporate borrowers. *See* The Inspection Panel, *Mandate and Procedures*, <https://www.inspectionpanel.org/about-us/panel-mandate-and-procedures> (last visited Feb. 1, 2021).

⁸³ *See* H.R.C., *Guiding Principles on Human Rights Impact Assessment for Trade and Investment Agreements*, U.N. Doc. A/HRC/19/59/Add.5 (Dec. 19, 2011); H.C.R., *Guiding Principles on Extreme Poverty and Human Rights*, U.N. Doc A/HRC/21/39 (July 18, 2012); CESCR, *General Comment No. 24*, ¶ 17, 21-22, 24 (Aug. 17, 2017); CRC Comm., *General Comment 19*, ¶ 47, 19, U.N. Doc. CRC/CG/19 (July 10, 2016).

⁸⁴ Eur. Comm'n, *Working Paper Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments*, SEC (2011) 567 Final, (May 6, 2011). The CJEU has, in fact, emphasized the importance of such HRIAs in the adoption of primary and secondary EU legislation. *See* *Schecke and Eifert v. Land Hessen*, ECLI:EU:C:2010:662, Case No. C-92/09, C-93/09, (Nov. 10, 2010). HRIAs are also required through two EU instruments, namely: The Directive on Public Procurement and the Directive on Non-Financial Information Disclosure. *See* Eur. Comm'n, *Public Procurement*,

private sector banks, and elsewhere.⁸⁵ Hence, there is access to an excellent body of best practices, and there exists a global industry that advises on and undertakes HRIAs on behalf of states and corporate actors.⁸⁶ Paragraph 3 of Article 5 of the 2019 draft BHR treaty specifies further where HRIAs are appropriate and what they should focus on. The results of HRIAs and environmental impact assessments should be integrated in the relevant “internal functions and processes [of MNCs] ... [and further be used to] take appropriate action.”⁸⁷ Domestic laws should further mandate meaningful consultations with pertinent stakeholders “through appropriate procedures with representative institutions,” with particular emphasis on those most vulnerable, including women, children, persons with disabilities, those in flight, indigenous persons, and others.⁸⁸ While the principle of free, prior, and informed consent (FPIC) is specifically reserved to indigenous persons in Paragraph 3(b) of Article 5 of the 2019 draft treaty,⁸⁹ consultations encompassing similar principles are required for all urban populations as is generally mandated under domestic planning, zoning, and other laws.⁹⁰ Paragraph 3(c) of Article 5 of the 2019 draft treaty further imposes on states an obligation to require financial and non-financial reporting from MNCs with a view to highlighting how they assess and mitigate pertinent human rights and environmental risks.⁹¹ In every case, all due diligence and HRIAs should integrate the impact of the MNC’s contractual relationships on human rights and the environment.⁹²

It should be noted that HRIAs and environmental impact assessments are commonplace in some domestic laws, as a species of contractual obligation imposed by IFIs or private banks, or as a matter of self-regulation. Article 5(4) of the 2019 draft BHR treaty went further than the express stipulation in Article 5 by requiring that due diligence be mandated by law. It stipulates that in requiring national procedures to assess whether MNCs have complied with their

procurement_en (last visited Feb. 14, 2021); Eur. Comm’n, *Non-Financial Reporting*, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en (last visited Feb. 14, 2021). Under the latter, companies with over 500 employees are required to disclose information on policies, risks and results as regards their respect for human rights. See *Non-Financial Reporting*, *supra* note 84.

⁸⁵ See also UNTAD, *supra* note 41; EBERT, *supra* note 44; UNDP, *supra* note 45.

⁸⁶ See GRI, *GRI’s Contribution to Sustainable Development 2016-2020*, (2016), [www.globalreporting.org/resourcelibrary/GRI%27s%20Contribution%20to%20Sustainable%20Development%202016-2020%20\(2\).pdf](http://www.globalreporting.org/resourcelibrary/GRI%27s%20Contribution%20to%20Sustainable%20Development%202016-2020%20(2).pdf); OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm> (last visited Feb. 1, 2021).

⁸⁷ See 2019 BHR Draft, *supra* note 11, at art. 5(3)(a).

⁸⁸ *Id.* at art. 5(3)(b).

⁸⁹ *Id.*; see G.A. Res. 61/295, at 9 (2007), https://www.un.org/development/desa/indigenouseoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

⁹⁰ See The Town and Country Planning (Development Management Procedure), SI 2015/595, pt. 3, art. 15 (Eng.), <https://www.legislation.gov.uk/uksi/2015/595/article/15> (describing that in the U.K., for example, local planning authorities are required to undertake a formal period of public consultation, prior to deciding a planning application).

⁹¹ See 2019 BHR Draft, *supra* note 11, at art. 5(3)(c).

⁹² *Id.* at art. 5(3)(d)-(e).

due diligence obligations, these be made: "available to all natural and legal persons having a legitimate interest, in accordance with domestic law."⁹³ This is crucial because not only is due diligence elevated to a statutory requirement, it is subject to broad *locus standi* by anyone directly or indirectly affected. Hence, the obligations contained in Article 5 of the 2019 draft BHR treaty are rendered justiciable in character.⁹⁴ Article 4 of the 2019 draft treaty is, in fact, at pains to set out the concept of corporate victimhood, to be explored in a subsequent section of this article, with the aim of securing sufficient jurisdiction to claim remedies for human rights abuses and violations.

Unless due diligence obligations move beyond their current self-regulated character where content, procedure, and ethics are optional and subject to the contractual relationship between auditor and audited company, human rights audits will suffer from significant ethical pitfalls and culminate in box-ticking exercises.⁹⁵ Despite the existence of several recognized frameworks for sustainability/human rights corporate due diligence, such as the GRI Sustainability Reporting Standards,⁹⁶ the OECD Due Diligence Guidance for Responsible Business Conduct (2018) the UNGC's Communication on Progress,⁹⁷ the International Organization for Standardization ("ISO") 26000⁹⁸ and the UN Guiding Principles Reporting Framework,⁹⁹ no framework hints at ethical rules or regulation of auditors and audit firms. The pertinent ethical issues in due diligence make the difference between human rights-based reporting and potentially tarnished outcomes. Chief among these is respect for participants, informed consent, specific permission required for audio or video recording, voluntary participation, participants right to withdraw, full disclosure of funding sources, no harm to participants, avoidance of undue intrusion, deception techniques, issues with anonymity, participants' right to check and modify a transcript, confidentiality in respect of personal matters, data protection, enabling participation, ethical governance, provision of grievance

⁹³ *Id.* at art. 5(4).

⁹⁴ See generally FONS COOMANS, *JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS* (Intersentia 2006).

⁹⁵ See Jonathan Bonnitcha & Robert McCorquodale, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights*, 28 EUR. J. INT'L L. 899, 901 (2017); see also John Gerard Ruggie & John F. Sherman III, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28 EUR. J. INT'L L. 921, 925 (2017); see also Ilias Bantekas & Alexander Ezenagu, *Ethical Considerations in Financial (Tax) and Non-Financial Corporate Human Rights Reporting*, 28 U. MIAMI INT'L & COMP. L. REV. (forthcoming 2021) (explaining that the HRIA industry is subject to no ethical rules whatsoever and there is little visible willingness to change this state of affairs).

⁹⁶ See *New Standards into Effect for Reporting in 2021*, GRI (2021), <https://www.globalreporting.org/standards/>.

⁹⁷ *Transparency Builds Trust*, U.N. GLOB. COMPACT (2021), <https://www.unglobalcompact.org/participation/report>.

⁹⁸ *ISO 26000 Social Responsibility*, ISO, <https://www.iso.org/iso-26000-social-responsibility.html> (last visited Feb. 13, 2021).

⁹⁹ See *U.N. Guiding Principles Reporting Framework*, SHIFT & MAZARS, <https://www.ungpreporting.org> (last visited Feb. 13, 2021).

procedures, appropriateness of research methodology, full reporting of methods, conflicts of interest, moral hazard, and duty of care.¹⁰⁰ Finally, empirical studies have aptly shown that non-financial disclosures of particular industries (e.g., mining) are not susceptible to neat comparisons and benchmark against other corporations in diverse industries.¹⁰¹

A new Article 3(2) was added in the 2020 draft treaty, which provides some clarity between the conduct expected of corporations of vastly varying size. It says that:

when imposing prevention obligations on business enterprises under this (Legally Binding Instrument), State Parties may establish in their law, a non-discriminatory basis to differentiate how business enterprises discharge these obligations commensurate with their size, sector, operational context, and the severity of impacts on human rights.¹⁰²

This is a welcomed addition to the text of the final draft. It is absurd to impose HRIA or other unnecessarily stringent burdens on small corporations in the exact same manner as MNCs. A distinction of what is expected based on size and capacity is important and allows corporations to assess how best to mitigate the negative impact of their operations. It is equally likely that smaller corporations have little to no human rights impacts, and that unnecessarily high regulatory burdens pose disproportionately higher operating costs to smaller corporations than MNCs.

The draft treaty makes it clear that effective due diligence obligations, imposed by law and not on the basis of self-regulation, represent the cornerstone of prevention. Given that human rights impact assessments currently operate on a voluntary basis, the draft treaty imposes a major shift in HRIsAs. This is key to ensuring responsible corporate conduct.

V. LIABILITY OF MNCs

Liability of MNCs, envisaged in Article 6 of the 2019 draft BHR treaty, presupposes the conferral of legal personality. Legal personality entails that an entity possesses rights and duties under a legal system (domestic or international) and a capacity to enforce these, whether in the courts or through other binding mechanisms. Hence, liability is a necessary extension of legal personality. A distinction should be made here between the legal personality of MNCs under domestic and international law. Liability under domestic law is uncontested given that MNCs and their affiliates are incorporated under the

¹⁰⁰ Frank Vanclay et al., *Principles for Ethical Research Involving Humans: Ethical Professional Practice in Impact Assessment Part 1*, 31 *IMPACT ASSESSMENT & PROJECT APPRAISAL* 243, 251 (2013), <https://www.tandfonline.com/doi/pdf/10.1080/14615517.2013.850307?needAccess=true>.

¹⁰¹ See Alberto Fonseca et al., *Sustainability Reporting Among Mining Corporations: A Constructive Critique of the GRI Approach*, 84 *J. OF CLEANER PROD.*, 70, 75 (2012).

¹⁰² See 2020 BHR Draft, *supra* note 34, at art. 3(2).

laws of the territorial or host states. What remains unclear is the international legal personality of MNCs. Unlike natural persons who are conferred rights and duties directly – rather than through incorporated domestic laws – by a significant number of treaties (e.g., European Convention on Human Rights), this is rare as regards private legal persons.

The few examples serve to illustrate that even where legal entities are the subject matter of treaties, states are reluctant to confer duties directly upon them. Articles 9 and 10 of the Charter of the Nuremberg Tribunal, which gave authority to the Tribunal to assess and declare groups or organizations as being criminal in nature, were intended to target membership therein and not in the legal entity itself.¹⁰³ Corporate criminality was also rejected in the context of the ICC Statute, although a proposal to that effect was lodged with the aim of attributing criminal liability to a person in a position of control and acting under the consent of the corporation.¹⁰⁴ The rationale of this proposal was not so much the criminal liability of the wrongdoer, as it was the possibility of achieving a substantial compensation from the corporation. Ultimately, the idea was dropped because not all member states recognized this type of liability, which would consequently risk rendering the principle of complementarity moot.

Some transnational crime treaties have addressed the criminal liability of corporations but only through the medium of domestic laws that seek to harmonize sanctions – while leaving the nature of the liability to the law of each member state.¹⁰⁵ This is understandable given the lack of uniformity in the member states' legal systems on this matter. With regard to crime-specific corporate criminality, some degree of liability is prescribed in anti-corruption treaties, such as Articles 2 and 3(2) of the 1997 OECD Convention and Article 26 of the 2003 UN Convention against Corruption. It is true that these provisions do not oblige member states to promulgate the criminal liability of legal persons, but only to adopt "effective, proportionate and dissuasive" sanctions, whether of a civil, administrative, or criminal nature in conformity with their legal systems. Nonetheless, these conventions do provide for the criminal liability of the natural persons who committed the pertinent offences, particularly where they were acting as agents of the legal person.¹⁰⁶ Therefore, as a result of treaty law – under which only ratifying states are bound – corporate criminal liability with respect to corruption entails: a) criminal liability of the

¹⁰³ See *Trials of War Criminals Before the Nuernberg Military Tribunals*, Control Council Law No. 10, at 15 (1952), https://www.loc.gov/tr/frd/Military_Law/pdf/NT_war-criminals_Vol-VI.pdf.

¹⁰⁴ See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1st mtg. at 132, U.N. Doc. A/CONF.183/C.1/SR.1 (June 16, 1998).

¹⁰⁵ See generally Council Framework Decision 2001/413, art. 7-8, 2001 O.J. (L 149) 1, 3 (EU); Council Framework Decision 2000/383, art. 8-9, 2001 O.J. (L 140) 2, 3 (EU); Council Framework Decision 2002/629, art. 4, 2002 O.J. (L 203) 3 (EU).

¹⁰⁶ G.A. Res. 55/25, at 4, 22 (Jan. 8, 2001). See also Ilias Bantekas, *The Legal Personality of World Bank Funds under International Law*, 56 TULSA L. REV. 101, 117 (2021) (explaining the complexity of international legal personality, which may take the form of a bank account all the way up to a fully fledged international organisation).

legal person only where this is possible in the law of the signatory; and b) the criminal liability of corporate agents for the crime they committed, as principals or accomplices, as a matter only of international law. The agents' link to the legal person, although not wholly relevant for ICC criminal proceedings except only for evidentiary purposes, could provide the backbone for a subsequent civil suit brought by victims and their families against the legal person.¹⁰⁷

Article 8(9) of the 2020 draft treaty introduced the concept of “functional liability,” which eliminates the need for a long list of transnational and international crimes enunciated in the 2019 draft version. It states that:

Subject to their legal principles, States Parties shall ensure that their domestic law provides for the criminal or functionally equivalent liability of legal persons for human rights abuses that amount to criminal offences under international human rights law binding on the State Party, customary international law, or their domestic law. Regardless of the nature of the liability, States Parties shall ensure that the applicable penalties are commensurate with the gravity of the offence. States Parties shall individually or jointly advance their criminal law to ensure that the criminal offences covered in the listed areas of international law are recognized as such under their domestic criminal legislation and that legal persons can be held criminally or administratively liable for them. This article shall apply without prejudice to any other international instrument which requires or establishes the criminal or administrative liability of legal persons for other offences.¹⁰⁸

Article 6(1) of the 2019 draft obliges member states to domesticate the liability of MNCs through “comprehensive and adequate” legislative measures. This domestication follows the language of predecessor treaties, namely: “effective, proportionate and dissuasive” sanctions, but unlike those past treaties whose aim was solely to impose sanctions against the legal person, the BHR treaty’s aim is to link liability to reparation of victims.¹⁰⁹ The draft treaties seem to be replicating the language of past treaties dealing with transnational corporate criminality that provided significant latitude to participating states as to the nature of their legislative measures – chiefly because corporate criminality was not available in many jurisdictions. Paragraph 7 of Article 6 of the 2019 draft starts off with: “Subject to their domestic law, state parties shall ensure that their domestic legislation provides for criminal, civil or administrative liability of legal persons for the following offences....”¹¹⁰ It includes offences such as genocide, crimes against humanity, grave breaches

¹⁰⁷ See Ilias Bantekas, *Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies*, 4 J. INT'L CRIM. JUST. 466, 471-79 (2006).

¹⁰⁸ See 2020 BHR Draft, *supra* note 34, at art. 8(9).

¹⁰⁹ See 2019 BHR Draft, *supra* note 11, at art. 6(4).

¹¹⁰ See *id.* at art. 6, ¶ 7.

(e.g., serious war crimes), torture, etc.¹¹¹ The disjunctive ‘or’ and the phrase “subject to their domestic laws” indicates that contracting states can frame corporate liability under the legal framework that conforms with their laws, that is, either criminal, administrative, or civil. Although this might seem rather light given the range of core international crimes, it is in fact logical. The liability of the legal person is effective when the sanctions imposed against it are commensurate with the harm caused by it; hence, the nature of the sanctions is irrelevant.

The liability of the legal entity is of course distinct from the personal liability of the directing minds of the legal person. This is strongly emphasized in Paragraph 6 of Article 6 of the 2019 draft treaty and in any event reflects customary international law.¹¹² Individual criminal liability arising out of corporate conduct may be distinguished twofold: a) under domestic law; and b) under international law.¹¹³ Article 6 attempts nothing unusual here. It does not create a new form of individual criminal liability under international law (i.e., under the 2019 draft treaty) and it is wholly unlikely that any industrialized state would have entertained such a notion. While Article 6(6) of the 2019 draft treaty is a conservative iteration of individual criminal liability, it leaves gaping a key issue, namely: on what grounds may a corporate employee, or a person associated with the operations of a corporation/legal person become criminally liable for the acts and conduct of said corporation/legal person. At the very least the “controlling mind(s)” of the legal entity, namely its decision makers, should incur criminal liability for any human rights abuses amounting to international crimes.¹¹⁴ This will encompass directors and potentially shareholders, to the degree that they were complicit in the criminal conduct. The level and degree

¹¹¹ See *id.*

¹¹² See *id.* at art. 6, ¶ 6; see generally, ILIAS BANTEKAS, PRINCIPLES OF DIRECT AND SUPERIOR RESPONSIBILITY IN INTERNATIONAL HUMANITARIAN LAW (Manchester Univ. Press 2002).

¹¹³ The criminal liability of the directing minds of corporations was considered significant in post-WWII prosecutions. In *Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Roehling*, Judgment on Appeal to the Superior Military Government Court of the French Occupation Zone in Germany (Roehling Judgment on Appeal), 14 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 1097 (1949), the accused were convicted for having permitted slave labor and ill-treatment and for not having done their best to end the abuses. *Id.* at 1136. Similarly, in *United States v. Flick*, the accused were leading industrialists who were charged with war crimes and crimes against humanity for their involvement in plans concerning the enslavement and deportation of civilian and POW slave labor in their industrial enterprises. *United States v. Flick* (The Flick Case), 6 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10. 1187, 1202 (1947). Of the six accused, only Flick and his inferior Weiss, were held accountable; the former under the theory that he had a duty to prevent the criminal acts of his subordinate, Weiss. *Id.*; see also *United States v. Krauch* (The I.G. Farben Case), 8 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 1081 (1948); *United States v. Krupp*, 10 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 (1948).

¹¹⁴ See Nadia Bernaz, *Corporate Criminal Liability Under International Law*, 13 J. INT'L CRIM. JUST. 313 (2015). For a domestic approach, see Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose does it Serve?*, 109 HARV. L. REV. 1477 (1996).

of participation will further dictate each person's liability, as either direct perpetrator,¹¹⁵ accomplice, or under the doctrine of superior responsibility.¹¹⁶ The enumeration of the various types of participation in crime in Article 6(9) of the 2019 draft treaty is far too superficial and generally insufficient.

The other, even bigger, problem with an ill-defined personal criminal liability arising from corporate-related conduct concerns the linkages of such conduct to human rights violations, and by extension criminal law-related violations. States habitually associate criminal conduct of corporate directors with financial crimes, typically in the fields of securities, antitrust, and corruption. The criminal liability of corporate directors for conduct linked to future human rights impact is a fiction in even the most advanced legal systems. In most cases the human rights impacts materialize over time,¹¹⁷ and/or legislators and prosecutors are untrained or not particularly interested in ascribing a criminal character to a human rights impact.¹¹⁸ Unfortunately, the BHR treaty fails to oblige states to stress this point and make the necessary connections.

In closing, it is perhaps Paragraph 6 of Article 6 of the 2019 draft treaty that is the most innovative and which breaks some new ground. It stipulates that:

States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a contractual relationships, from causing harm to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place.¹¹⁹

This provision, while reiterating the enforcement of both personal and corporate liability – in relation to human rights violations – goes a step further by adding a crucial jurisdictional element; namely, that the laws and courts of the parent company, as well as of an affiliate *mutatis mutandis*, encompass conduct that is extra-territorial. This effectively gives rise to transnational treaty-based, albeit domesticated, tort and perhaps other forms of liability. Such liability is

¹¹⁵ See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 at Pt. 3, Art. 25 (1998), reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

¹¹⁶ See Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573, 577 (1999).

¹¹⁷ See Bantekas, *supra* note 107, at 474-76.

¹¹⁸ Human rights linkages are now commonplace in the U.N. Human Rights Council. See, e.g., Cephas Lumina, *Sovereign Debt and Human Rights: Making the Connection*, in SOVEREIGN DEBT AND HUMAN RIGHTS, 185 (Oxford Univ. Press 2018).

¹¹⁹ See 2019 BHR Draft, *supra* note 11, at art. 6, ¶ 6.

predicated on both direct as well as indirect conduct (supply chain and foreign incorporated affiliates), involving a high-threshold knowledge standard (foreseen or should have foreseen). It will be interesting to see how such a groundbreaking provision will be transposed in domestic laws. It may be wise for an entity such as the Hague Conference on Private International Law or UNCITRAL to explore the likelihood of a model law on transnational corporate tort liability.¹²⁰

The draft treaty sets out a *sui generis* international legal personality for MNCs, in the same manner as transnational criminal law treaties. Although the contours of such personality manifest in domestic law, which in turn under the terms of the draft treaty imposes liability on the person of the corporation and its directing minds, it is no less significant. Domestic legislation and effective prosecution by competent and independent law enforcement authorities is far more decisive than international liability absent effective domestic institutions.

VI. JURISDICTION FOR VICTIMS' RIGHTS

Two types of adjudicatory jurisdiction¹²¹ arise from the terms of the BHR treaty. The first concerns acts and omissions in respect of obligations incumbent on legal persons, irrespective if they produce harm. This is true, for example, with regard to due diligence obligations owed by legal persons to the territorial state. The second type of jurisdiction is key to the *raison d'être* of the BHR treaty. It links the rights of victims of human rights abuses to make claims to domestic courts. One needs to understand Articles 4 (victims) and 7 (adjudicative jurisdiction) of the 2019 draft as being inextricably linked. Victims are granted particular rights under Article 4 of the BHR treaty, in the same way as other international human rights treaties, which are to be enforced through domestic courts. The right of access to remedies is aptly explained in Article 4(5) of the 2019 draft treaty as follows:

Victims shall have the right to fair, effective, prompt, and non-discriminatory access to justice and adequate, effective, and prompt remedies in accordance with this instrument and international law. Such remedies shall include, but shall not be limited to:

- a. Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims;

¹²⁰ At present, the only international instrument is EU Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). *See* Regulation No. 864/2007, O.J. (L 199) 40 (EC). Chapter II of this Regulation covers torts/delicts, all of which may be committed by both physical and legal persons. *See id.* at ch. 2. The Regulation, however, simply delineates jurisdictional issues. *See id.*

¹²¹ It is assumed that readers are familiar with the concept of jurisdiction. For further reading, *see* JAN KLABBERS, *INTERNATIONAL LAW*, 91-98 (Cambridge Univ. Press 2d ed. 2017).

- b. Environmental remediation and ecological restoration where applicable, including covering of expenses for relocation of victims and replacement of community facilities.¹²²

It is only in the context of Article 4(5) that the type of jurisdiction stipulated in Article 7 of the 2019 draft treaty can be fully understood. Normally, any claims for human rights violations (whether the state is the direct perpetrator or complicit), save in respect of core international crimes, are usually subject to territorial jurisdiction.¹²³ Exceptionally, some courts are willing to entertain extra-territorial tort jurisdiction, chiefly on grounds suggesting some link with the forum, such as conduct attributed to an affiliate abroad controlled by the parent company.¹²⁴ But this is exceptional and even U.S. courts have limited the scope of the Aliens Tort Claim Act (ATCA), which confers federal jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹²⁵ In 2010, the Second Circuit Court of Appeals in *Kiobel v. Royal Dutch Petroleum Co.* entertained a suit by Nigerian nationals alleging that various MNCs, including the sued oil giant, were complicit in human rights violations in Nigeria.¹²⁶ The allegations were dismissed on the ground that the ATCA does not allow claims against corporations.¹²⁷ Upon *certiorari*, the U.S. Supreme Court affirmed the District Court’s ruling against the extraterritorial presumption of claims under the ATCA, holding that: “all the relevant conduct took place outside the United States. Even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application... Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”¹²⁸ The U.S. Supreme Court’s opinion seems to exclude tort claims alleging violations of customary law based solely on conduct occurring abroad.¹²⁹ However, given that the Supreme Court never actually stated that corporations may never incur criminal liability, other district courts have taken the view that, although exceptional, corporations can indeed be found liable under the ATCA.¹³⁰

¹²² See 2019 BHR Draft, *supra* note 11, at art. 4(5).

¹²³ See Vandeveld, *supra* note 26.

¹²⁴ See, e.g., *Chandler v. Cape PLC* [2012] EWCA (Civ) 525 (Eng.); see also *Vedanta Resources*, *supra* note 70; but see Rep. of the Fourth Session, *supra* note 10, at ¶ 82 (raising concerns).

¹²⁵ 28 U.S.C. § 1350 (1948).

¹²⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 116-17 (2d Cir. 2010).

¹²⁷ *Id.* at 149.

¹²⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

¹²⁹ See *Balintulo v. Daimler AG*, 727 F.3d 174, 182 (2d Cir. 2013).

¹³⁰ By way of illustration, in *Doe v. Unocal Corp.*, the district court held that although Unocal benefited from the abuses it was not proven that the company wanted to control, or that it in fact controlled, the Burmese military to perpetrate these acts. *Doe v. Unocal Corp.*, 110 F.Supp.2d 1294, 1310 (2004). On appeal, the Court of Appeals for the Ninth Circuit reversed this decision, holding that plaintiffs need only demonstrate Unocal’s assistance to the military. *Doe I v.*

Against this background that increasingly seeks to limit¹³¹ the jurisdiction of courts in respect of extra-territorial tort claims, Article 7(1) of the 2019 draft boldly held that:

1. Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

- a. such acts or omissions occurred; or
- b. the victims are domiciled; or
- c. the natural or legal persons alleged to have committed such acts or omissions in the context of business activities, including those of a transnational character, are domiciled.¹³²

Article 9(1) of the 2020 version makes a significant departure as opposed to Article 7(1) of the 2019 version. In elaborating on the jurisdiction of national courts, while retaining: a) the *locus delicti commissi* (the place where the abuse occurred); and b) the place of domicile of the MNC, it has removed the domicile of the victim. Article 9(1) of the 2019 version has replaced this with the place where “the act or omission contributing to the human rights abuse occurred.”¹³³

Paragraph 2 of Article 7 of the 2019 draft treaty goes on to explain the “place of domicile” of a natural and legal person conducting business activities of a transnational nature, as being its:

- a. place of incorporation; or
- b. statutory seat; or
- c. central administration; or
- d. substantial business interests.¹³⁴

What Article 7 of the 2019 draft treaty clearly suggests is that member states to the BHR treaty must adopt wide-ranging extra-territorial legislation as regards the rights of victims to seek remedies from MNCs. Some degree of forum

Unocal Corp., 395 F.3d 932, 945 (2002); *see also In Re South Africa Apartheid Litigation*, 15 F.Supp.3d 454, 465 (S.D.N.Y. 2014) (The court had no problem finding that corporations can indeed incur liability in tort, rejecting the idea that a group of individuals could escape liability simply because they had incorporated into a legal person.)

¹³¹ Several district and circuit courts have, nonetheless, been more permissive of ATCA actions than the Supreme Court. *See Doe v. Unocal* (I), 963 F. Supp. 880, 892 (C.D. Cal. 1997); *In re South African Apartheid Litigation*, 15 F.Supp.3d 454, 465 (S.D.N.Y. 2014) (holding that corporations can indeed incur liability in tort, rejecting the idea that a group of individuals could escape liability simply because they had incorporated into a legal person); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, (9th Cir. 2014) (holding that allegations whereby the corporation was aware of child slavery among its supply chain, yet none the less retained these suppliers motivated by profit, was sufficient to establish the ‘aiding and abetting’ of child slavery under the ATCA...).

¹³² *See* 2019 BHR Draft, *supra* note 11, at art. 7, ¶ 1.

¹³³ *Id.* at art. 9, ¶ 1.

¹³⁴ *Id.* at art. 7, ¶ 2.

shopping or strategic filing may even be available for victims – such as where a victim has a choice of applying to either the corporation's statutory seat or place of incorporation, or where there are multiple victims and the suit is lodged by victims domiciled in a particular country – with the expectation that non-domiciled victims can be enjoined there.¹³⁵ Forum shopping may be encouraged by secondary matters, such as fees, speed of trial, expansive discovery, and others.¹³⁶ If adoption of the BHR is not universal, this can give rise to problems of comity, reciprocity, and conflicts of existing treaty obligations, particularly as regards conflicts of laws agreements.¹³⁷

In equal measure, lack of near universal ratification will render extra-territorial jurisdiction moot, particularly where the forum court or prosecutor is unable to obtain relevant evidence. It is for this purpose that a long provision on mutual legal assistance (MLA) has been inserted in the 2019 draft BHR treaty (Article 10), which seeks to facilitate the exchange of evidence, investigation, information gathering, and others. The language and procedures are reminiscent of international and transnational criminal law treaties, such as the 2000 UN Transnational Organized Crime (TOC) Convention.¹³⁸ While the TOC and other similar treaties deal exclusively with transnational and international crimes, MLA requests need not be of a criminal nature. Member states may opt for any sanctions, as long as they are effective, proportionate, and dissuasive, and there is no obligation to treat a violation as criminal, at least as far as the legal person is concerned.¹³⁹ In any event, as is typical of multilateral transnational criminal law treaties, it is only exceptionally that member states predicate MLA requests on the basis of said multilateral treaties.¹⁴⁰ This is usually achieved on the basis of existing bilateral MLA agreements, or via newly negotiated ad hoc arrangements.

¹³⁵ Domicile, both corporate and personal, differs in the various legal spheres, e.g., transnational family law or international commercial arbitration. Domicile shopping, not surprisingly, is rather common. See Leon Trakman, *Domicile of Choice in English Law: An Achilles Heel?*, 11 J. OF PRIV. INT'L L. 317, 318 (2015).

¹³⁶ See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1781 (2017) (holding that in order for state courts to exercise jurisdiction over tort claims arising in other states, the suit must arise out of or relate to the defendant's contacts with the forum); see generally Mark Moller, *The Checks and Balances of Forum Shopping*, 1:1 STAN. J. COMP. LIT. 171, 189 (2012). With the proliferation of transnational commercial courts, these may well become forums for BHR litigation, especially since most have a regulatory tribunal. See Ilias Bantekas, *The Rise of International Commercial Courts: The Astana International Financial Center Court*, 33 PACE INT'L L. REV. 1 (2020).

¹³⁷ No wonder then that Art. 12 of the 2019 BHR treaty, and particularly Paragraph 3 thereof, stipulates that Art. 7 of the same treaty should not be construed in a manner that violates the sovereignty or the laws of other states. See 2019 BHR Draft, *supra* note 11, at arts. 7, 12.

¹³⁸ See G.A. Res. 55/25, at art. 18 (Jan. 8, 2001).

¹³⁹ Art. 10 of the 2019 draft BHR treaty provides for the full range of typical MLA measures, including joint investigation teams, but only in respect of criminal offences. See generally CLIVE NICHOLLS et al., *THE LAW OF EXTRADITION AND MUTUAL LEGAL ASSISTANCE* (Oxford Univ. Press 3d ed. 2013).

¹⁴⁰ See 2019 BHR Draft, *supra* note 11, at art. 12, ¶4.

Separately, a recurrent theme, if not a cornerstone of the BHR treaty, is “to ensure effective access to justice and remedy for victims.”¹⁴¹ It obliges states to provide victims with “the right to fair, effective, prompt and non-discriminatory access to justice and adequate, effective and prompt remedies.”¹⁴² In addition, member states to the BHR treaty must guarantee to all victims “the right to submit claims to the courts and state-based non-judicial grievance mechanisms of the state parties.”¹⁴³ Non-judicial grievance mechanisms may comprise any adjudicatory or non-adjudicatory mechanism, so long as they are expressly agreed by the parties, satisfy fair trial guarantees, and are capable of providing adequate, effective, and prompt remedies.¹⁴⁴ It is now universally acknowledged that arbitral proceedings are tantamount to state-based proceedings and provide all fair trial guarantees.¹⁴⁵ The complementary nature of non-judicial mechanisms, particularly arbitration and ADR (particularly internal grievance boards, dialogue-based, or other), has been highlighted by the UN Guiding Principles.¹⁴⁶

With respect to arbitration, in particular, the Working Group on Business and Human Rights Arbitration (Hague Working Group) suggested that existing arbitration rules, such as the UNCITRAL Rules, could be adapted for the exigencies of BHR disputes.¹⁴⁷ In consultation with other stakeholders, the Hague Working Group produced in 2019 the so-called Hague Rules on Business and Human Rights Arbitration (Hague Rules).¹⁴⁸ Although BHR arbitration is rare, some of the key attributes of international commercial arbitration, such as speed, confidentiality, and flexibility, have the potential to make it attractive for both victims and MNCs, especially if most access to justice guarantees stipulated in Article 4 of the 2019 draft BHR treaty (e.g., legal aid) are incorporated therein.¹⁴⁹ A paradigmatic illustration may be provided by the only (to the knowledge of this author) BHR arbitration following the Rana Plaza incident, which culminated in two arbitrations under the Accord on Fire and

¹⁴¹ See *id.* at art. 2, ¶ 1; 2020 BHR Draft, *supra* note 34, at art. 2, ¶ 1.

¹⁴² See 2020 BHR Draft, *supra* note 34, at arts. 2, ¶ (1) (b); 4, ¶ 2(c).

¹⁴³ See *id.* at art. 4, ¶¶ 2(d), 8.

¹⁴⁴ See Stefan Zagelmeyer et al., *Non-State Based Non-Judicial Grievance Mechanisms: An Exploratory Analysis*, Report for U.N. Office of the High Commissioner (July 13, 2018), <https://www.ohchr.org/Documents/Issues/Business/ARP/ManchesterStudy.pdf>.

¹⁴⁵ See Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69 INT'L & COMP. L. Q. 991, 992 (2020).

¹⁴⁶ See *Guiding Principles*, *supra* note 3, at 35-36.

¹⁴⁷ See generally The Hague Rules on Business and Human Rights Arbitration Centre for International Legal Cooperation, pmbl. (Dec. 12, 2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf. [hereinafter “Hague Rules”].

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at art. 4.

Building Safety in Bangladesh.¹⁵⁰ Both were administered by the Permanent Court of Arbitration.

VII. VICTIMHOOD UNDER THE BHR TREATY

There is considerable debate in international legal discourse about whether every human rights violation corresponds to an automatic remedy for the victim. If this is not so, it follows that victims must provide proof of a substantive right to a remedy and *locus standi* in respect of each and every violation.¹⁵¹ This seems to be a minority position, however, given that the general trend, particularly as this is expressly enshrined in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, points to the opposite direction.¹⁵² The right to an effective and non-derogable remedy is amply recognized in all the global human rights instruments, namely Article 8 of the Universal Declaration of Human Rights,¹⁵³ Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR),¹⁵⁴ and Article 14(1) of the UN Convention against Torture.¹⁵⁵ These, alongside regional human rights treaties, provide either for an individual entitlement to an effective remedy, or oblige states parties to ensure their availability to victims of crimes.¹⁵⁶ The definition of victimhood in

¹⁵⁰ IndustriALL Global Union and UNI Global Union (Claimants) v. [Global fashion brand], (Perm. Ct. Arb. Case No 2016-36); IndustriALL Global Union and UNI Global Union (Claimants) v. [Global fashion brand] (Perm. Ct. Arb. Case No 2016-37).

¹⁵¹ This was claimed for example by the German Supreme Court in respect to the Compensation for Distomo Massacre, Bundesgerichtshof [BGH] [Federal Court of Justice] June 26, 2003, BGH III ZR 245/98, (Ger.). The suit for reparations against Germany was initially brought about by survivors and relatives of the Distomo victims before Greek courts. *See* Prefecture of Voitia v. Fed. Republic of Germany. Case No. 11/2000. Areios Pagos (Hellenic Supreme Court), May 4, 2000 cited in Bernard Oxman & Maria Gavouneli, *Sovereign Immunity-Tort Exception-Jus Cogens Violations- World War II Reparations-International Humanitarian Law*, 95 AM. J. INT'L L. 198, 198-204 (2001). *See also* CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM, 309-11 (2d ed. 2008) (arguing against the existence of a right to reparation with regard to violations of humanitarian law).

¹⁵² G.A. Res. 60/147, (Mar. 21, 2006) [hereinafter Basic Principles]; U.N. Economic and Social Council Res. 2005/30, (July 25, 2005). *See also* Commission on Human Rights Report on the Sixty-First Session, U.N. Doc. E/2005/23 (Apr. 22, 2005). This was preceded twenty years earlier by the G.A. Res 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985) [hereinafter Victims Declaration]. The 1985 Declaration remains the more authoritative of the two and has been cited as such by all ICC Chambers. *See* ICC Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on the Applications by Victims to Participate in the Proceedings, ¶ 48 (Dec. 15, 2008).

¹⁵³ G.A. Res. 217 (III) A, art. 8, Universal Declaration of Human Rights, (Dec. 10, 1948).

¹⁵⁴ *See* ICCPR, *supra* note 30, at art. 2(3).

¹⁵⁵ U.N. Human Rights Comm., General Comment 29, States of Emergency (Article 4), ¶ 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001). The Committee stressed the non-derogable nature of this entitlement.

¹⁵⁶ *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter "ECHR"]; OAS, American Convention on Human Rights, art. 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Eur. Parl. Directive 2012/29, 2012 O.J. (L 315/57).

the 2020 draft version is significantly more detailed than its predecessor, encompassing the infliction of "physical or mental injury, emotional suffering, or economic loss, or substantial impairment of their human rights, through acts or omissions in the context of business activities, that constitute human rights abuse."¹⁵⁷ Beyond immediate family members, victims are also considered those "persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."¹⁵⁸

The right to an effective remedy does not encompass merely a procedural right to seek redress but includes a positive obligation to provide substantive reparation.¹⁵⁹ The trend towards an automatic individual entitlement in respect of violations of human rights and humanitarian law seems to be shared also by the ICJ, as expressed in its Advisory Opinion in the *Palestinian Wall* case.¹⁶⁰ The right to a remedy is a feature found only in contemporary international instruments. It is absent, for example, in humanitarian law treaties adopted prior to the 1990s, despite the existence of provisions such as Article 3 of the 1907 Hague Convention IV and Article 91 of Protocol I of 1977, which require parties to pay compensation for violation of the laws and customs of war. These were addressed to states and were not meant to produce direct effect before national courts.¹⁶¹ The Basic Principles recognize five basic forms of reparation: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.¹⁶² A more contemporary application of these principles has given rise to two additional distinct rights for victims of crime, namely: the right to physical protection, which is guaranteed by states as well as international criminal tribunals, and the right to participation in criminal proceedings.¹⁶³

Victimhood is at the heart of the BHR treaty because one of its key aims is to link human rights abuses and violations with a right of one or more

¹⁵⁷ See 2020 BHR Draft, *supra* note 34, at art. 1(1).

¹⁵⁸ Victimhood in international law and international human rights law has a long and distinguished history. See, e.g., Basic Principles, *supra* note 152; see Victims Declaration, *supra* note 152; Comm'n on Human Rights Rep. on the Sixty-First Session, *supra* note 152.

¹⁵⁹ See U.N. Human Rights Comm., 80th Sess., General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant, ¶¶ 15-16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

¹⁶⁰ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, paras. 149-160 (July 9).

¹⁶¹ Nonetheless, it is fair to argue that these treaties should be construed in accordance with contemporary developments, which necessitates reading a right to effective remedy therein. See ILIAS BANTEKAS & LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE, 668-717 (3d ed. 2020).

¹⁶² See Basic Principles, *supra* note 152, at princ. 18.

¹⁶³ See e.g., ICC Statute, *supra* note 98, at art. 68(3). See also S.C. Res. 827, arts. 15, 20, 22, Statute of the International Criminal Tribunal for the Former Yugoslavia, (May 25, 1993) [hereinafter "ICTY Statute"]; S.C. Res. 955, arts. 14, 19, 21, Statute of the International Criminal Tribunal for Rwanda, (Nov. 8, 1994) [hereinafter "ICTR Statute"]; Statute of the Special Court for Sierra Leone, arts. 15, 16, 19(3), Jan. 16, 2002, 2178 U.N.T.S. 138.

victims to effective reparation and respect for fundamental human rights.¹⁶⁴ This link is apparent in the extensive provisions on the obligations and liability of legal persons and the jurisdiction of national courts.¹⁶⁵ Although reparation is inherent in other human rights treaties, the obligations thereto are addressed directly to states, whereas in the context of the BHR treaty states are mandated to establish reparation mechanisms in respect of violations committed (mostly, but not exclusively) by non-state actors, chiefly MNCs and other business entities.¹⁶⁶ Ordinarily, reparations of this nature would be encompassed under the law of tort in national legal systems, without the infraction being classified as a human rights violation. Moreover, it is not self-evident that human rights abuses under the BHR treaty would otherwise qualify as torts under domestic laws. Therefore, the concept of victimhood under Article 4 of the 2019 treaty and its links to corporate obligations, liability and jurisdiction are wholly innovative under international law. The drafters of Article 4 of the 2019 draft were cognizant of the fact that submitting a claim against a large MNC is not a simple exercise, particularly for persons with few resources and in countries that have little, or no, respect for the rule of law. It is important in such contexts that all rights of victims are fully respected and protected in the run up to filing a claim until an award or judgment is rendered.¹⁶⁷ Access to justice in the context of a claim submitted against an MNC is of a wholly different nature because, ordinarily, disputes or claims between private actors are not amenable to legal aid for the weaker of the two parties. Access to justice, and all its sub-rights such as legal aid and the right to legal representation, serves to provide minimal arm's length guarantees against the state machinery and the overwhelming power of MNCs. No such protection is recognized or afforded in respect of private disputes; but clearly this is an artificial and legalistic approach to human rights-based claims against an MNC by affected stakeholders.¹⁶⁸

¹⁶⁴ Even so, many delegations to the Working Group sessions have doubted the utility of such a provision altogether, as well as the absence of distinction between victims and alleged victims. See Human Rights Council, Draft report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, para. 34, A/HRC/43/XX, (Mar. 2020).

¹⁶⁵ See generally 2020 BHR Draft, *supra* note 34.

¹⁶⁶ *Id.* at arts. 7(7), 9.

¹⁶⁷ See 2019 BHR Draft, *supra* note 11, at art. 4(1)-(4).

¹⁶⁸ This matter has been addressed, albeit sparsely by some national courts. Exceptionally, the Portuguese Supreme Court in *Wall Street Institute de Portugal - Centro des Ingles SA WSI – Consultadoria e Marketing and others v Centro des Ingles Santa Barbara LDA*, judgment no. 311/2008 (May 30, 2008) (Port.), held that where a party to arbitral proceedings had become indigent it was entitled to legal aid and hence recourse to litigation, whereby legal aid is available. The Court's rationale was based on the argument that the interest sacrificed by the rejection of the arbitration clause was purely procedural as opposed to the substantive interest in the case of the right to a fair trial. The general rule strongly and universally rejects this approach. The German Federal Supreme Court has approached the same issue from a different (i.e., contractual) perspective, holding that where a party to an agreement containing an arbitration clause is genuinely unable to finance the costs associated with arbitration, then the arbitration agreement is incapable of performance and the indigent party may seek to resolve the dispute in the courts and receive legal aid. CLOUT Case 404, III ZR 33/001 (Sept. 4, 2000). For an account of the standard position, see *Schweizerisches Zivilprozessordnung, [ZPO] [Code on Civil Procedure] Dec. 19, 2008, SR 101, art. 380 (Switz.)*, which excludes the possibility of legal aid from domestic arbitral

Paragraphs 6-9 of Article 4 of the 2019 draft BHR treaty aptly recognize this reality and confer wide-ranging access to justice rights to victims of human rights violations. The 2020 version of the treaty expands on the range of human rights that are applicable. Unlike Article 3(3) of the 2019 version, which referred to "all human rights," the 2020 draft version covers:

all internationally recognized human rights and fundamental freedoms emanating from the Universal Declaration of Human Rights, any core international human rights treaty and fundamental ILO convention to which a state is a party, and customary international law.¹⁶⁹

Article 4 of the 2019 draft, moreover, took into consideration, as indeed the treaty does throughout, that BHR disputes are triangular in nature, involving not only the corporation and the victims, but also the concerned state (as guarantor and preventive agent). Victims' rights are meaningless without a fair judicial system, the existence of remedies, or the availability of a safe and secure environment to make claims. Paragraphs 9 to 14 of Article 4 of the 2019 draft treaty, therefore, set forth a number of procedural rights and guarantees that are essential for a weak litigant to go up against a formidable opponent with vast resources.¹⁷⁰

Article 4 (rights of victims) of the 2019 draft version was broken down into two more manageable provisions in the 2020 draft version, namely Articles 4 (rights of victims) and 5 (protection of victims).¹⁷¹ Article 7 of the 2020 version is equally a new provision, albeit building on bits and pieces found in various provisions of the 2019 version. Its aim is to accentuate the existence of "access to remedies" for victims.¹⁷² A significant innovation is Paragraph 5 of the 2020 draft version, which removes one of the most burdensome hurdles in the litigation of transnational tort claims, namely *forum non conveniens*.¹⁷³ Paragraph 5 of the 2020 version obliges states to eliminate the likelihood of their courts dismissing legitimate proceedings brought by victims on the basis of the *forum non-conveniens* doctrine.¹⁷⁴

proceedings. The Swiss Federal Supreme Court in Bundesgericht [BGer] [Federal Supreme Court] July 29, 2020, 4A_178/2014 (Switz.), confirmed that the same exclusion applies also to international arbitrations; equally *D.L.T. Holdings Inc. v Grow Biz International*, decided by Canada's Prince Edward Island's Supreme Court, [2001] 199 Nfld. & Prince-Edward-Island Reports 135, CLOUT Case 501. The Court held that the financial bargaining disparity between the parties did not offend public policy.

¹⁶⁹ See 2020 BHR Draft, *supra* note 34, at art. 3 ¶ 3.

¹⁷⁰ In *Steel and Morris v. United Kingdom*, the ECtHR found that the vast financial disparity between an MNC, McDonalds, and the two defendants, a gardener and a postman, rendered the subsequent litigation in tort wholly unfair from a procedural perspective. See *Steel and Morris v. United Kingdom*, 41 Eur. Ct. H.R. 22 (2005).

¹⁷¹ See 2020 BHR Draft, *supra* note 34, at art. 4, 5; 2019 BHR Draft, *supra* note 11, at art. 4.

¹⁷² See 2020 BHR Draft, *supra* note 34, at art. 7.

¹⁷³ *Id.* at art. 9, ¶ 5.

¹⁷⁴ See *id.* art. 9, ¶ 3.

A significant innovation is introduced through Article 9, Paragraphs 3-5 of the 2020 draft treaty, for which there is nothing equivalent in the 2019 version. More specifically:

- a. Where victims choose to bring a claim in a court as per Article 9.1, jurisdiction shall be obligatory and therefore that courts shall not decline it on the basis of *forum non conveniens*.
- b. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is closely connected with a claim against a legal or natural person domiciled in the territory of the forum State.
- c. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair trial is available and there is a sufficiently close connection to the State Party concerned.¹⁷⁵

The draft treaty connects the liability of MNCs and the obligation of states to assume jurisdiction over corporate human rights violations with a corresponding right of victims to remedies. Under the existing self-regulatory regime, no victimhood or remedies are universally available and tort-based remedies were sparingly used. Victimhood and remedies under the draft treaty are now streamlined and the restrictions previously imposed by private international law against extra-territorial remedies are removed.

VIII. INSTITUTIONAL ARRANGEMENTS

In the mold of the core UN international human rights treaties, the BHR treaty sets up three important institutions, namely: a BHR Committee, an Assembly of States Parties (ASP), and a trust fund for victims. An additional protocol “to regulate in international human rights law the activities of transnational corporations and other business enterprises” obliges member states (to the protocol) to establish so-called national implementation mechanisms (NIMs) and to recognize the competence of the Committee to receive individual and group/collective communications.

A. *The Committee*

The BHR treaty Committee’s role and function are set out in Article 13 of the 2019 draft BHR treaty. Its key role is to assist states in compiling their reports on the implementation of the BHR treaty, as well as examining these reports. This corresponds to one of the key roles of human rights treaty

¹⁷⁵ See *id.* art. 9, ¶ 3-5.

bodies.¹⁷⁶ Treaty bodies are typically endowed with two other functions, besides state reporting, namely: receipt of individual communications and resolution of inter-state disputes, as well as the conduct of inquiries.¹⁷⁷ More recently, treaty bodies have undertaken other roles on their own initiative, the most significant of which is the production of General Comments.¹⁷⁸ This function is specifically stipulated in Article 13(4)(a) of the 2019 draft BHR treaty.¹⁷⁹

The BHR treaty does not confer authority on the Committee to entertain individual or group communications; this is stipulated in the Optional Protocol that is explored below. The importance of the reporting procedure should not be under-estimated. It will allow the Committee to assist states to rectify shortcomings in their laws and practices, as well as harmonize best practices across all member states. It is also likely that if the BHR treaty becomes part of the core UN human rights treaties it will be included in the Universal Periodic Review (UPR) process.¹⁸⁰ This would allow universal scrutiny of pertinent issues by the entire human rights community, including civil society organizations.

The Optional Protocol sets out further competences for the Committee. As will be explored in the next sub-section, NIMs may transmit to the Committee all cases of non-compliance with the terms of an amicable settlement. Its most important function, however, is its competence to receive individual and group complaints from alleged victims, in accordance with Article 8 of the Optional Protocol.¹⁸¹ The admissibility requirements are the same as other treaty bodies,¹⁸² namely that applications not be anonymous, not

¹⁷⁶ See The United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc A/39/51 at art. 19 (Dec. 10, 1984) [hereinafter CAT]; The U.N. Convention on the Rights of the Child, G.A. Res. 44/25, at art. 44 (Nov. 20, 1989); Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, at art. 73 (Dec. 18, 1990); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, at art. 18 (Dec. 18, 1979). Treaty bodies have gone on to produce guidelines for state reporting. See, e.g., Guidelines on Periodic Reporting to the Committee on the Rights of Persons with Disabilities, Including Under the Simplified Reporting Procedures, U.N. Doc. CRPD/C/3 (Sept. 2, 2016).

¹⁷⁷ CAT art. 20 sets forth a confidential inquiry procedure on the basis of information containing "well-founded indications that torture is being systematically practiced in the territory of a state party." See CAT, *supra* note 176, at art. 20. Rule 81 of the CAT's Rules of Procedure, U.N. Doc. CAT/C/3/Rev.6 (Sept. 1, 2014), set out practical guidance. This procedure inspired Art. 8 of the Optional Protocol to CEDAW and Art 6. of the Optional Protocol to the CRPD relating to inquiries into grave and systemic violations of rights.

¹⁷⁸ For U.N. treaty bodies' general comments, see Human Rights Treaty Bodies – General Comments, U.N. HUMAN RIGHTS, <https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx> (last visited Feb. 14, 2021).

¹⁷⁹ See 2019 BHR Draft, *supra* note 11, at art. 13 ¶ 4(a).

¹⁸⁰ See HILARY CHARLESWORTH & EMMA LARKING, HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM (Cambridge Univ. Press 2015).

¹⁸¹ See Draft Optional Protocol, *supra* note 12, at art. 8.

¹⁸² For a comparative study on all U.N. treaty-based complaint procedures, see Tina Stavrinaki, *Le Régime des Procédures de Communications Individuelles dans le Système des Traités des Nations Unies relatifs aux Droits de l'Homme* (Editions Pedone 2016).

manifestly ill-founded, the facts occurred prior to the entry in force of the Protocol and domestic remedies have been exhausted, unless these are ineffective or unnecessarily prolonged.¹⁸³

Traditionally, individual or group communications pit the complainant/victim against the state. This is naturally not the case here, unless of course the violating legal entity is a state-owned enterprise. States have an interest, no doubt, as to how their corporations are affected by human rights claims before an international quasi-judicial committee. It is for this reason that 'concerned' states are involved in the resolution of individual or group complaints against corporations.¹⁸⁴ When the Committee receives a complaint it shall invite the concerned state, the corporation, and the alleged victim to cooperate in the examination of the communication and submit within six months "written explanations or statements clarifying the matter and the remedy, if any, that may have been taken in the matter."¹⁸⁵ Following explanations by all three parties, as well as "any other relevant information available to it,"¹⁸⁶ which is a reference to any third party, including CSOs and NIMs,¹⁸⁷ the Committee commences a confidential inquiry procedure by assigning one or more of its members to the case at hand.¹⁸⁸ The force or outcome of this procedure is rather weak. After completing its inquiry, the Committee shall transmit its findings to the three parties concerned "together with any comments or suggestions which seems appropriate in view of the situation."¹⁸⁹

The confidentiality of the procedure is disappointing. Even a weak mechanism, without the possibility of any recommendations, would have been preferable because of the reputational risks to the corporation, particularly given the involvement of CSOs. Alas, it is doubtful that this process will be of much use to potential complainants, unless corporations perceive that the claim will not escape the attention of the global CSO community and will inevitably trigger the jurisdiction of national courts under Article 7 of the 2019 draft BHR treaty.

¹⁸³ See *Draft Optional Protocol*, *supra* note 12, at art. 9.

¹⁸⁴ The Protocol leaves open the question of corporate "nationality." Although ordinarily this would be the country of incorporation, the parent company of a MNC affiliate may wish the diplomatic protection of the parent company's country of incorporation, as may also said country itself. There are no conflict rules in the likelihood of a tug-of-war between the two competing countries. This issue arises, in more or less similar circumstances, in the determination of an investor's country of nationality with a view to applying the pertinent bilateral investment treaty (BIT). See Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping before International Tribunals: (Real) Problems, (Im)possible Solutions*, 42 CORNELL INT'L L.J. 72 (2009).

¹⁸⁵ See *Draft Optional Protocol*, *supra* note 12, at art. 10.

¹⁸⁶ *Id.* at art. 11.

¹⁸⁷ This may be achieved through several means, including third party intervention, submission of amicus briefs, personal communication, or others. These would not probably be as of right, but rather by permission.

¹⁸⁸ See *Draft Optional Protocol*, *supra* note 12, at art. 11.

¹⁸⁹ See *id.* at art. 11(2).

B. *Assembly of States Parties*

The older generation of human rights treaties prior to the 1990s simply set out the pertinent rights and at best established a quasi-judicial entity to receive and assess periodical state reports and individual communications. This monitoring and implementation model is best exemplified with the ICCPR. The absence in this model of an inter-governmental entity that would possess several administrative, fundraising, and enforcement capacities led to the adoption of treaties since the early 1990s whereby a conference (or assembly) of parties (COP) undertook a variety of functions and powers.¹⁹⁰ The greatest advancements typically associated with the operations of COP are in the field of environmental law, which in turn convinced treaty makers to establish similar entities in treaties dealing with international and transnational crimes, such as the Assembly of Parties (ASP) to the Rome Statute of the International Criminal Court (ICC)¹⁹¹ and its counterpart in the context of the 2003 UN Convention against Corruption.¹⁹² Article 13(5) of the 2019 draft BHR treaty sets up its own ASP, albeit none of its powers and functions are set out. The practice of existing ASP will, no doubt, be useful in setting up its own rules and procedures. It is in the interests of all stakeholders to establish such rules that render the ASP an institution that not only drives developments, but which also actively ensures greater accountability.

C. *Fund for Victims*

Although trust funds are common under international law, particularly as a means of collecting and channeling resources to identified causes, existing under a large variety of legal structures, they are rare as a means of satisfying reparation awards made by international courts and tribunals.¹⁹³ The most

¹⁹⁰ See Jutta Brunneé, *COPing with Consent: Law-Making under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. 1 (2002); Art. 63(1) of the 2003 U.N. Convention against Corruption (CAC) established a COSP with extensive powers, namely, to improve capacity and cooperation between states, as well as promote and review the implementation of CAC. To this end it has established an elaborate review mechanism of CAC. See U.N. Convention Against Corruption, *Summary of the State of Implementation of CAC*, U.N. Doc. CAC/COSP/2015/5 (Aug. 19, 2015). For an analysis of COSP in the context of the negotiation of Art. 40 CRPD, see Expert Paper on Existing Monitoring Mechanisms, Possible Relevant Improvements and Possible Innovations in Monitoring Mechanisms for a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, prepared by the Office of the United Nations High Commissioner for Human Rights for the Ad Hoc Comm. on a Comprehensive & Integral Int'l Convention on Protection & Promotion of the Rights & Dignity of Persons with Disabilities, 7th Sess., U.N. Doc. A/AC.265/2006/CRP.4 at 65-66 (2006).

¹⁹¹ See Rome Statute, *supra* note 115, at art. 112. It should be remembered, however, that unlike the CRPD the ICC was constituted as an international organization.

¹⁹² U.N. Convention Against Corruption, Ch. VII, Dec. 2, 2003, 2349 U.N.T.S. 41; see also G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 40 (Jan. 24, 2007).

¹⁹³ See generally Ilias Bantekas, *The Emergence of the Intergovernmental Trust in International Law*, 81 BRIT. Y.B. INT'L L. 224 (2011).

innovative such mechanism is the trust fund established under Article 79 of the ICC Statute. In order to facilitate the purpose of reparations to victims under the ICC Statute, Article 79 thereof provides for the creation of a trust fund for the benefit of victims and their families.¹⁹⁴ When the ICC Statute received the requisite sixty ratifications and came into existence the ASP speedily adopted a resolution giving life to the trust fund.¹⁹⁵ This was followed in 2005 by a resolution on the Fund's Regulations.¹⁹⁶ The Fund is managed by a Board of Trustees whose members participate in their individual capacity and serve on a *pro bono* basis.¹⁹⁷ The Fund is generally financed through voluntary donations by states and non-state entities, but does not accept voluntary contributions that create a manifest inequality between the recipient victims.¹⁹⁸ Besides voluntary contributions, the ICC trust fund may be replenished by "money and other property collected through fines or forfeiture transferred to the Fund if ordered by the Court pursuant to Article 79(2) of the ICC Statute," as well as from "resources collected through awards for reparation if ordered by the Court."¹⁹⁹

Unlike the ICC Statute, the BHR fund for victims is only meant to "provide legal and financial aid to victims."²⁰⁰ This is in line with Articles 4(7), (12), and (13) of the 2019 draft BHR treaty, which oblige member states to ensure that lack of resources is never an impediment for victims to make or continue their claims. It is expected, of course, that any judgments or awards made will themselves offer reparation to the victims that is to be paid by the incumbent corporation. There is thus no need for a compensation fund, which is otherwise the case in criminal proceedings where convicted persons may possess little, or no, assets.

D. National Implementation Mechanisms

The NIMs set out in the optional protocol are meant to emulate independent national human rights institutions under the Paris Principles.²⁰¹ Unlike many national human rights institutions, NIMs possess the following authority to monitor human rights and receive complaints from victims. Article 6 of the Optional Protocol provides competence to NIMs to:

1. ... receive and consider complaints of human rights violations alleged to have been committed by natural or legal persons conducting business activities of a transnational

¹⁹⁴ See Rome Statute, *supra* note 115, at art. 79.

¹⁹⁵ International Criminal Court Assembly of States Parties Res. 1/6 ¶ 1 (Sept. 9, 2002).

¹⁹⁶ International Criminal Court Assembly of States Parties Res. 4/3 (Dec. 3, 2005).

¹⁹⁷ International Criminal Court Assembly of States Parties Res. 4/3, Annex ¶ 16 (Dec. 3, 2005).

¹⁹⁸ International Criminal Court Assembly of States Parties Res. 1/6 (Sept. 9, 2002).

¹⁹⁹ International Criminal Court Assembly of States Parties Res. 4/3, Annex ¶ 21(b-c) (Dec. 3, 2005). See Carla Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15 LEIDEN J. INT'L L. 667 (2002).

²⁰⁰ See 2019 BHR Draft, *supra* note 11, at art. 13, ¶ 7.

²⁰¹ G.A. Res. 48/134, National Institutions for the Promotion and Protection of Human Rights Annex (Dec. 20, 1993) (the so-called "Paris Principles").

character brought by victims or a group of victims, their representatives, or other interested parties.

2. The National Implementation Mechanism shall investigate the complaint received under the requirements of due process of law [recognized] under the legal and administrative system of the State Party concerned.

3. The National Implementation Mechanisms shall bring any complaint under the present [Protocol] to the attention of the natural or legal persons conducting business activities of a transnational character and the State party concerned as soon as possible, and shall, among others, have the competence to:

- a. Request and receive all necessary information from States Party concerning the grounds of the complaint;
- b. Request and receive additional information from States Parties, intergovernmental or non-governmental organizations, or other reliable sources it deems appropriate, and receive written or oral testimony from victims, the concerned business [enterprise], experts, witnesses, victims associations and others;
- c. Conduct visits or inspections to the place where the violation occurred or it is taking place and conduct joint inquiries with other National Implementation Mechanisms and relevant authorities of the State Party concerned;
- d. Transmit to the State Party concerned, for its urgent consideration, a request to relevant authorities to take interim measures as it might be necessary to avoid possible irreparable damage to the victim or victims of the alleged violations.²⁰²

The purpose of this procedure is to reach an amicable settlement between the author(s) of the complaint and the legal entity against which the complaint has been submitted. In a case of non-compliance with the terms of the amicable settlement, the NIM may transmit the case to the Protocol Committee, in accordance with Article 6(6) of the Optional Protocol to the BHR treaty.²⁰³ Article 7 of the Protocol makes clear that victims may submit claims before a court or other entity enjoying jurisdiction under Article 7 of the 2019

²⁰² See *Draft Optional Protocol*, *supra* note 12, at art. 6.

²⁰³ See *id.*

draft BHR treaty.²⁰⁴ However, in that case the NIM shall discontinue its good offices to reach an amicable settlement.

The NIM goes well beyond existing 'enforcement' mechanisms in the UN Global Compact and the OECD Guidelines for Multinational Enterprises. The former has set up an annual reporting procedure known as Communication on Progress, on the basis of which listed corporations self-assess their progress against the ten principles in the Compact.²⁰⁵ The enforcement mechanism in the OECD Guidelines is closer to the model set forth in the NIM. Although the Guidelines do not constitute a treaty, member states have agreed to 'adhere' to the creation and operationalization of National Contact Points. These are engaged where an affected party, usually (but not exclusively) trade unions lodge a complaint against a corporation.²⁰⁶ The National Contact Point will try to reach agreement between the parties through mediation, and if this proves fruitless will issue a public statement.²⁰⁷ There is no obligation on corporations to even address the National Contact Point, although large multinationals will consider the reputational costs associated with non-engagement. Many scholars take the view that both of these systems have generally failed to achieve the objectives for which they were set up.²⁰⁸

The international enforcement mechanism of the draft BHR treaty and its protocol is a hybrid between global human rights treaties and CSR soft law instruments. The absence of a quasi-judicial mechanism (such as the Human Rights Committee of the ICCPR) is compensated by the obligation to set up extensive jurisdiction and conferral of remedies at the domestic law. The NIM, in turn, ensures that all alleged violations are investigated and, at the very least, brought to light.

IX. CONCLUSION

The proposed BHR treaty is remarkable in many respects, even if it never moves beyond a draft treaty. One of its key political aims is to avoid

²⁰⁴ See *id.* at art. 7.

²⁰⁵ See Uzma Hamid & Oliver Johner, *The United Nations Global Compact Communication on Progress Policy: Origins, Trends and Challenges*, in *THE UNITED NATIONS GLOBAL COMPACT: ACHIEVEMENTS, TRENDS AND CHALLENGES* 265 (Andreas Rasche & Georg Kell eds., Cambridge Univ. Press 2010).

²⁰⁶ See OECD, *STRUCTURES AND PROCEDURES OF NATIONAL CONTACT POINTS FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (OECD Publishing 2018); Juan Carlos Ochoa Sanchez, *The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation*, 84 *NORDIC J. INT'L L.* 89 (2015).

²⁰⁷ See Juan Carlos Ochoa Sanchez, *The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation*, 84 *NORDIC J. INT'L L.* 89 (2015); John Ruggie & Tamaryn Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges*, working Paper No. 66 at Kennedy School of Government (Harv. U. 2015).

²⁰⁸ Stefanie Khoury and David Whyte, *Sidelining Corporate Human Rights Violations: The Failure of the OECD's Regulatory Consensus*, 18 *J. HUM. RIGHTS* 363 (2019).

upsetting the existing status quo, while at the same time making MNCs accountable in a manner that renders any obligation justiciable, thus moving away from self-regulation. While some elements of the status quo remain unchanged (e.g., the supremacy of the rights of investors under BITs), others, such as tort-based jurisdiction for victims of corporate human rights violations reflect ongoing developments in key states. The 2020 version retains the state as the chief incumbent duty bearer of human rights obligations, but creates a triangular relationship encompassing victims of human rights violations and MNCs. The regulatory gap evident in BITs and the permissive laws of developing states is being mitigated through broad extra-territorial jurisdiction, concrete reporting and due diligence obligations on corporations and an overarching duty on states to ensure that such obligations are fully justiciable and victims are equipped with remedies and ample access to justice.

There is little doubt that industrialized states yielding global financial power will disfavor the BHR treaty. They will naturally fear that the regime of the BHR treaty will threaten to not only upset but abolish decades of BIT work that has resulted in enhanced protection of the corporations abroad. Although there is some truth to such argument, the absence of strong extra-territorial corporate laws, lack of adequate regulation by developing host states, and an international financial/investor architecture that imposes only rights but no discernible obligations on powerful corporate actors, has unsurprisingly led to a significant lack of accountability. The reparation and jurisdictional mechanism in the BHR treaty is by no means comparable to 'lawfare,'²⁰⁹ which many industrialized states find detestable. It is a natural extension of the customary principles of the right to reparation for harm and access to justice for victims of harm. The fact that these principles have dismissed against transnational business conduct is the direct result of the one-sided international financial/investment architecture as described above.

Despite the opposition against this treaty, this author is confident that it will ultimately be adopted, chiefly because civil society will play a significant part in lobbying in its favor.²¹⁰ While the business community will equally voice its antipathy against the treaty, states will ultimately have to balance competing interests, with corporate accountability outweighing deference to self-regulation.

²⁰⁹ See Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865 (2009).

²¹⁰ See Nadia Bernaz & Irene Pietropaoli, *The Role of Non-Governmental Organizations in the Business and Human Rights Treaty Negotiations*, 9 J. HUM. RTS. PRAC. 287 (2017).

REGULATION OF CAPTIVES IN THE FACE OF GLOBAL DOMICILES' COMPETITION: CHALLENGES AND PERSPECTIVES

Shuwen Deng*

I. INTRODUCTION

From Bermuda to China, renewed interest in captives has captivated investors from various industries—and as countries compete to capture the business of international conglomerates—suitable regulation of captives has never been more important. There are a variety of risk management tools, including traditional commercial insurance and alternative mechanisms of covering risks.¹ Captive insurance, one of the alternative risk financing mechanisms, has been growing in popularity internationally.² A captive insurance company (“captive”) is “an insurance company created and wholly owned by one or more non-insurance companies to insure the risks of its owner (or owners).”³ As a type of self-insurance vehicle,⁴ captives assume the risks exposed by their policyholders/insureds (e.g. a large commercial company, group, or association).⁵ Unlike traditional

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¹ See Greg Nowakowski & Jenna Simon, *Best Practices in Alternative Risk Financing*, 98 MICH. B.J. 48, 48 (2019).

² See Constance A. Anastopoulou, *Taking No Prisoners: Captive Insurance as an Alternative to Traditional or Commercial Insurance*, 8 OHIO ST. ENTREPREN. BUS. L.J. 209, 213 (2013); See also Phillip England, Isaac E. Druker & R. Mark Keenan, *Captive Insurance Companies: A Growing Alternative Method of Risk Financing*, 2 J. PAYMENT SYS. L. 701, 701 (2007).

³ *Captive Insurance Companies*, NAIC, https://content.naic.org/cipr_topics/topic_captive_insurance_companies.htm (last updated Feb. 27, 2020).

⁴ Self-insurance is also known as retention, which means that a corporation retains the financial consequences of the loss exposure to itself, different from the traditional commercial insurance in which the corporation transfers the financial consequences to another (See William B. Barker, *Federal Income Taxation and Captive Insurance*, 6 VA. TAX REV. 267, 270 (1986)). In a captive insurance arrangement, the captive insurer is owned by the insured which is the parent corporation. (See *Captive Insurance Companies*, supra note 3). Because the risks have not actually been transferred to another, captives are a type of self-insurance.

⁵ See Patrick Salve & Douglas Simpson, *Alternative Risk Transfer: Risk Transfer Solutions at the Margins of Insurability -- the Legal and Regulatory Challenges*, RES. HANDBOOK ON INT’L INS. LAW & REG. 544, 557 (Julian Burling & Kevin Lazarus eds., Edward Elgar 2011).

commercial insurance, captives have earned global popularity due to their special benefits such as tax treatment, availability of coverage, affordability of cost, and better efficiency.⁶ In the wake of growing demands for captives, captive domiciles, which typically are a state, territory, or country in which the insurance companies are licensed and regulated,⁷ accordingly compete for the purpose of building the captive insurance market and further developing the local economy.⁸ If domicile selection is compared to picking a long-term business partner,⁹ it is easy to understand why domiciles are competing for more captive incorporation.

A notable expansion of domiciles shows a global increase in jurisdictions competing to be captive domiciles, thereby inevitably leading to global competition. Since the first modern captive came into being in Bermuda,¹⁰ captive domiciles have seen a dramatic geographic expansion from originally Bermuda and the Caribbean areas to North America, Europe, and Asia-Pacific Areas.¹¹ With increasing demands for captives, a global race of constructing captive domiciles is rapidly intensifying. Under the circumstances, some core regulatory requirements have been under consideration more seriously, including: capitalization requirements, incorporation expenses, incorporation timelines, lines allowed to underwrite, and tax treatments.¹²

⁶ See Ron Kozlowski & Johnny Ho, *Hong Kong: Another Chance as a Captive Domicile?*, INT'L RISK MGMT. INST. (Apr. 2012), <https://www.irmi.com/online/cicr/ch000000/2012april/hong-kong-another-chance-as-a-captive-domicile.aspx> (last visited Feb. 12, 2021).

⁷ MATTHEW QUEEN & LIGHT TOWNSEND, MODERN CAPTIVE INSURANCE: A LEGAL GUIDE TO FORMATION, OPERATION, AND EXIT STRATEGIES 4 (American Bar Association 2019) ("Domicile is defined by the state or country that licenses an insurance company and has the primary regulatory oversight over that business.").

⁸ Insurance is regarded as a fundamental economic activity and even separating law of insurance from the economics of it is considered to be an artificial attempt. See Lloyd R. Cohen & Michelle E. Boardman, *Methodology: Applying Economic to Insurance Law -- An Introduction*, RES. HANDBOOK ON INT'L INS. LAW & REG. 19, 19 (Julian Burling & Kevin Lazarus eds., Edward Elgar 2011).

⁹ See QUEEN, *supra* note 7, at 4.

¹⁰ See Shanique Hall, *Recent Developments in the Captive Insurance Industry*, NAIC, https://www.naic.org/cipr_newsletter_archive/vol2_captive.htm (last visited Feb. 12, 2021).

¹¹ See Marsh & McLennan, *The Captive Landscape Report -- 50 Years of Risk Financing Innovation*, 1, 7, <https://www.marsh-mbj.com/en/campaigns/captive-report-2018.html> (last visited Feb. 12, 2021) ("Captives have spread geographically into dozens of countries, evolved into multiple forms, and financed a variety of risks. . . North America and Europe continue to be home to most of the world's captives, although strong growth is occurring in regions such as Asia-Pacific."); In addition, according to the data of the Report, 38.1% of total captives worldwide are domiciled in North America, while the Caribbean shares 32.4%, the Europe occupies 25.1%, and 4.2% chooses Asia-Pacific.

¹² See QUEEN, *supra* note 7, at 5.

Competition among domiciles will stimulate regulatory development such as Bermuda's innovative sandbox and insurance hub.¹³ However, competition among the captive domiciles also comes with challenges which will impede regulation of captive insurance. On the one hand, regulation of captives is still lacking international and domestic collaboration. Typically, captives and the relevant risk locations often are separately situated in different jurisdictions,¹⁴ which means some captives might conduct cross-border¹⁵ supply of risk management services.¹⁶ On the other hand, it also causes some regulatory authorities to ignore potential challenges in strengthening regulatory requirements, by the headlong pursuit of more investors, fee revenue, and local employment.

This article includes six main parts. Following this introduction, Part II guides an overview of captives, including their origin, development, types, and lines allowed to underwrite. Next, Part III does a comparative research on the captive-related regulatory advantages among the main captive domiciles in the world. Then, Part IV, as one of the core parts of the paper, summarizes and analyzes four main challenges faced by the regulation of captives: (1) There is a lack of effective coordination in the area; (2) The prudential regulation is insufficient to ensure captives' financial stability; (3) There are regulatory loopholes in controlling abuse of the fronting arrangements by captives; and (4) There is unclear regulation over insurers'

¹³ See *Innovation*, BERM. MONETARY AUTH., <https://www.bma.bm/insurance-innovation> (last visited Feb. 12, 2021) ("BMA recognizes the growing importance of innovation in the insurance and wider financial industry and the critical role that innovation plays in promoting efficiency and enhancing competitiveness in the market. It is to this end that the Authority launched two parallel innovation tracks: an Insurance Regulatory Sandbox ('Sandbox') and an Innovation Hub, both initially targeted at insurance technology (InsurTech) companies.").

¹⁴ For example, in 2017, 67% of captives registered in Bermuda assumed the risks from North America and Bermuda, while 21% of local captives dealt with risks from Europe. See *BMA Captive Report 2018*, BERM. MONETARY AUTH. 3, <https://cdn.bma.bm/documents/2018-12-28-07-23-56-BMA-Captive-Report-2018.pdf> (last visited Feb. 12, 2021). In the Cayman Islands, by the end of March 2020, 90% of captives wrote the risks from North America, while 3% of captives worked with risks from the Caribbean & Latin America. See *Insurance Company by Risk Location Q1 2020*, CAYMAN IS. MONETARY AUTH., https://www.cima.ky/upimages/commonfiles/1587142527InsuranceCompanybyRiskLocationQ12020_1587142527.pdf.

¹⁵ "Border" in international trade law originally means border of customs territory. For example, Mainland China and Macao China are separate customs territories.

¹⁶ According to the General Agreement on Trade in Services (GATS) by World Trade Organization (WTO), "[T]rade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member." See General Agreement on Trade in Services, art. 1, Apr. 15, 1994, 1869 U.N.T.S. 183. For instance, when a U.S. parent establishes its wholly-owned captive in Barbados to insure the risks from the parent's business risks in the U.S., which means that the captive provides risk management services from Barbados into the U.S., falling within both mode (a) and mode (c).

transfer of third-party risks to their captives. After that, Part V, the other core section, generally explains that traditional captive domiciles respond to the global competition with several regulatory innovations while the world insurance market is moving east with rising and developing Asian captive domiciles. In the end, Part VI concludes that the global regulation of captives is challenging and competitive, and effective global cooperation is necessary.

II. OVERVIEW OF CAPTIVES

The first modern captive was formed in the 1950s by Frederic M. Reiss,¹⁷ although captives trace their origins to the mutual insurance companies in the early marine voyages.¹⁸ So far there have been numerous types of captives, including: single-parent captives, group captives, association captives, rent-a-captives, and risk retention groups (RRG). Not only do they issue policies in the traditional lines, but they also provide coverage for the emerging risks.¹⁹

A. *The Origin and Development of Captives*

In general, captives are created to satisfy some well-funded enterprises' needs for risk transfer, and to deal with the upward trend of insurance premium rates and unavailability of commercial insurance in special fields.²⁰ It is well recognized that the birth of captives could be traced from the early marine voyages.²¹ In the early 1500s, some London coffeehouses were popular with ship owners, who met there, shared shipping information, and shared risks among different shippers.²² Their mutual arrangements especially have been regarded as the infancy of captive insurance.²³ As early as 1782, the members of a particular industry started to build mutual insurance companies to provide insurance coverage, which are similar to captives insuring the risks of their owners.²⁴ In the wake of

¹⁷ See Hall, *supra* note 10.

¹⁸ See *The Early Days of Captives (through 1984)*, CAPTIVE, <https://www.captive.com/resources/captive-insurance-history/before-1985> (last visited Feb. 12, 2021).

¹⁹ See Rosemary M. McAndrew, *Captives: Here to Stay*, http://www.businessforum.com/RMM_01.html (last visited Feb. 12, 2021).

²⁰ For example, financial institutions, health care, manufacturing, retail/wholesale, transportation, construction, communication, media, technology, and energy share the vast majority of the industry by captives. See Marsh & McLennan, *supra* note 11, at 9.

²¹ See *The Early Days of Captives (through 1984)*, *supra* note 18 (describing "Early captives shared risks among shippers on the same voyage and among different owners of different voyages.").

²² See McAndrew, *supra* note 19.

²³ *Id.*

²⁴ See *Issues Paper on the Regulation and Supervision of Captive Insurance Companies*, INT'L ASS'N OF INS. SUPERVISORS, at 5 (Oct. 2006).

increasing insurance premiums, some English and American businesses preferred to form their subsidiaries to insure their risks in order to reduce the cost of insurance.²⁵ For example, in 1860, an insurance company called Commercial Union was established by a group of London merchants.²⁶ In the 1800s, when high fire insurance rates were prevailing, a group captive (in the form of a mutual company), which “ultimately evolved into what is now known as the Factory Mutual System,”²⁷ was established by New England textile manufacturers.²⁸

Although the mutual insurance arrangements have developed and expanded for a long time, the first modern captive was formed approximately 70 years ago. Not until the 1950s was the term “captive” created by Frederic M. Reiss.²⁹ In the early 1960s, there were approximately one hundred captives worldwide.³⁰ The past 30 years witnessed a significant growth in the captive market, from roughly 1,000 captives in 1980 to 7,000 captives currently around the globe.³¹

B. *Types of Captives*

In order to meet various needs, businesses have created numerous types of captives, mainly including: single-parent captives, group captives, association captives, rent-a-captives, and risk retention groups (RRG). A single-parent captive is the most common form among the captive market,³² which refers to “a captive solely and wholly owned by its parent company,” and the parent solely provides funding source for it.³³ According to the data

<https://www.iaisweb.org/file/34279/issues-paper-on-regulation-and-supervision-of-captive-insurance-companies-october-2006> (last visited Feb. 12, 2021).

²⁵ *See id.*

²⁶ *See id.*

²⁷ *See* McAndrew, *supra* note 19.

²⁸ *Id.*; *See also* CICA, *Captives: An Overview*, at 7, https://media.cicaworld.com/wp-content/uploads/2020/06/CICA_CaptiveOverview_2018_FINAL.pdf; *See also* *The Early Days of Captives (through 1984)*, *supra* note 18.

²⁹ *See* Hall, *supra* note 10 (stating “Reiss, known as the father of captive insurance, used the term “captive” to describe an insurance company he helped form to provide insurance coverage solely to the parent . . . In 1960, Bermuda became an offshore financial center and, in 1962, Reiss set up the first modern-day captive there called International Risk Management Ltd.”).

³⁰ *See* CICA, *supra* note 28, at 7.

³¹ *See* *Captive Insurance Companies*, *supra* note 3 (The data originally came from AM Best Captive Center).

³² *See* FLORIAN KLINGENSCHMID, CAPTIVE INSURANCE COMPANIES IN RISK MANAGEMENT: CAPTIVE INSURANCE COMPANIES AND THEIR INFLUENCE ON THE RISK MANAGEMENT AND THE RATING OF THE PARENT COMPANY 19 (2008); *See also* Tyler J. Cummings, *Captive Insurance Business Deductions: The Evolution from the Parent-Subsidiary Captive Structure to the Brother-Sister Captive Structure*, 57 S. TEX. L. REV. 279, 280 (2016).

³³ *See* *Glossary of Insurance and Risk Management Terms*, (9th ed.) 207 DALLAS, TEX.: INT’L RISK MGMT. INST. (2004).

at A.M. Best's captive center, in January 2020, the share of single-parent captives was still the largest among all captives, amounting to approximately 37%.³⁴ In theory, risks insured by single-parent captives initially were only limited to their parents' risks or their siblings' risks, while in practice some of them are willing to underwrite non-related parties' risks or retain minor risks by purchasing reinsurance.³⁵

A group captive, also called multiple-parent captive, means a captive who is established by a group of unrelated entities to insure the risks from each of the entities.³⁶ This form of captives can include stock captives as well as mutual captives.³⁷ Akin to group captives, some association captives also have more than one owner/parent, however, these owners are typically correlated within a trade or professional association.³⁸ For example, in order to avoid expensive commercial insurance costs, a medical malpractice captive in the United States (U.S.) was created by groups of doctors to insure professional risks.³⁹

Rent-a-captive, is a special arrangement based on a licensed captive, which "rents" the facilities relevant to a captive business to an unrelated entity without captive qualification in exchange for a renting fee.⁴⁰

In addition, the Risk Retention Groups (RRGs) are another specific type of group captives subject to the Risk Retention Act (RRA) of 1986 in the U.S., which authorizes particular group captives to cover all liability exposures except workers compensation exposures.⁴¹ Notably, the RRGs are

³⁴ See *Best's Captive Review Book: Single-Parent and Group Captives, Risk Retention Groups and Protected Cell Captives*, AM BEST (Jan. 2020), <http://www.ambest.com/captive/captivereviewbook.pdf> (last visited Feb. 12, 2021).

³⁵ See *Captives and the Management of Risk*, (3rd ed.), IRMI (Oct. 2014) https://www.irmi.com/online/bkcaptiv/glossary/appndx04.aspx#jd_s (Note: If a single-parent captive only insures its parent's risks, the captive is referred to as a "pure captive.").

³⁶ See *Glossary of Insurance and Risk Management Terms*, *supra* note 33, at 111.

³⁷ For example, Oil Insurance Limited is a Bermuda-based mutual captive, which "was formed in 1972 by 16 energy companies in response to two large-scale industry accidents that occurred in the late 1960s. The combination of an oil spill in Santa Barbara, California and a refinery explosion in Lake Charles, Louisiana resulted in inadequate coverage and pricing provided by the commercial markets, which triggered the formation of OIL [Oil Insurance Limited]." OIL INS. LTD., *Oil History*, <https://www.oil.bm/history/> (last visited Feb. 12, 2021). However, it also recognized "mutual insurance company as a self-insurance syndicate," because it has a much more complex structure than the mutual captive we talk about in theory and "[s]ome members of OIL participate directly in OIL, whereas others participate via their captive and use OIL for reinsurance of certain exposures retained in the captive." See CHRISTOPHER L. CULP, *STRUCTURED FINANCE AND INSURANCE: THE ART OF MANAGING CAPITAL AND RISK* 872 (2006) (Note the page is based on an electronic version and it might be different from relevant page on a physical version.).

³⁸ See *Glossary of Insurance and Risk Management Terms*, *supra* note 33, at 29.

³⁹ See Chris Johnson, *Gibraltar for Captive Market*, 9 INT'L TAX REV. 41, 41 (1998).

⁴⁰ See *Glossary of Insurance and Risk Management Terms*, *supra* note 33, at 191.

⁴¹ See *id.* at 199.

created under the federal law which is specifically related to the field, where according to the reverse-preemption rule in the McCarran-Ferguson Act, the business of the RRGs is completely controlled by the RRA unless otherwise specified in a state statute.⁴²

C. Lines Underwritten by Captives

A captive is able to underwrite the identical risks as a commercial insurance company,⁴³ because it is an insurance company by nature. However, it is established with special purposes. In practice, captives insure various types of risks, including the risks insured in the traditional commercial insurance market and those uncovered by traditional commercial insurers.⁴⁴

On the one hand, captives are formed to routinely provide coverage in traditional lines. They are especially welcomed in the lines of liability, including: primary general liability, products liability, auto liability, directors and officers liability, professional liability (such as medical malpractice), and excess and umbrella liability.⁴⁵

On the other hand, as their purposes demonstrate,⁴⁶ captives are utilized to underwrite some risks either unavailable in commercial market or available but with expensive premiums in the traditional market. Practically, there is a growing popularity to employ captives to deal with more complex emerging exposures, including: "medical stop-loss (MSL) coverage, miscellaneous legal expenses, cyber-liability, difference in conditions (DIC), and employee benefits."⁴⁷ In addition, captives are under consideration by construction project owners in some owner-controlled (or contractor-

⁴² See 15 U.S.C. § 1012(b) (2012) (providing "(b) . . . No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.").

⁴³ See Hall, *supra* note 10.

⁴⁴ See McAndrew, *supra* note 19.

⁴⁵ See *id.*

⁴⁶ See *Captive Formation Consideration Basics; RF Perspectives*, IRMI (Vol. 28 No. 1, Jan. 2011), <https://www.irmi.com/online/ir/ch0news/11nws281.aspx> (last visited Feb. 12, 2021) (stating "When developing the captive program, insureds should look at risks which can be addressed more cost efficiently, or risks for which it is difficult to arrange comprehensive coverage").

⁴⁷ Donald Riggan, *Captive Insurance Innovations*, THE RISK REP. (Vol. XXXIX, No. 8, Apr. 2017), <https://www.irmi.com/online/ir/ch001320/captive-insurance-innovations.aspx> (For example, "From a captive's standpoint . . . MSL constitutes third-party insurance business, which may satisfy the Internal Revenue Service (IRS) guidelines for risk distribution necessary to make premiums deductible . . . [and] The goal of placing MSL into a captive is to [save the insurance cost] associated with the first layer of coverage excess of the per-employee self-insured retention.").

controlled) insurance programs (OCIPS or CCIPs), while some captives are established to provide the warranty programs with the financial supply.⁴⁸

III. LEGISLATIVE ADVANTAGES IN CAPTIVES REGULATION AMONG DIFFERENT DOMICILES

The global leading captive domiciles mainly include: the traditional offshore domiciles (e.g., Bermuda and the Cayman Islands), the leading U.S. captive domiciles (e.g., Vermont and Utah), and the leading European captive domiciles (e.g., Guernsey and Luxembourg), each of which has the unique legislation to gain more captives. The main legislative advantages of Bermuda and Cayman are their flexible classified regulation and the loose tax regimes for captives. Moreover, the laws of Cayman Islands make it possible for a portfolio insurance company established by a segregated portfolio company to operate as an independent captive.⁴⁹ In contrast, Vermont and Utah of the U.S. regulate captives with efficient administration, friendly capitalization requirements, and low fees and taxes, according to their respective codified captive laws. For European domiciles, Guernsey has the advanced legislation to support captives to operate as protected cell companies⁵⁰ or incorporated cell companies,⁵¹ while Luxembourg's laws facilitate captives licensed under Luxembourg's requirements to enter the markets of the other competent E.U. members.⁵²

A. *Regulation of Captives in the Traditional Offshore Domiciles*⁵³

There is a belief that captives originated from offshore jurisdictions,⁵⁴ because it is well-recognized that captives established in the

⁴⁸ See *Captive Formation Consideration Basics; RF Perspectives*, *supra* note 46.

⁴⁹ See Kevin C. Butler, *Cayman Islands Portfolio Insurance Companies*, CONYERS DILL & PEARMAN, at 3 (Jan. 2015), https://www.conyers.com/wp-content/uploads/2018/06/2015_01_Article_Cayman_Islands_Portfolio_Insurance_Companies.pdf.

⁵⁰ See James A. McConvill, *Of Turquoise Waters and Captivating Dreams: The Cook Islands as an International Captive Insurance Center*, 14 J. INT'L BUS. & L. 1, 26 (2015).

⁵¹ *Id.* at 31.

⁵² See Luxembourg for Finance, *Luxembourg Captive Reinsurance Companies*, CAPTIVE, at 9 (2019).

⁵³ The section selected Bermuda, the Cayman Islands, and Barbados as the research samples because they are the top three captives domiciles both in 2018 and in 2019, as well as the typical captives offshore domiciles. See *Background on: Captives and Other Risk-financing Options*, INS. INFO. INST., INC. (Mar. 12, 2020) <https://www.iii.org/article/background-on-captives-and-other-risk-financing-options> (last visited Feb. 12, 2021) (citing the data from Business Insurance (www.businessinsurance.com), March 2020).

⁵⁴ Offshore captives refer to "special purpose insurance [companies] domiciled outside of the country where the insured risk is located." See *Glossary of Insurance and Risk Management Terms-definition of Offshore Captive*, *supra* note 33.

early times were offshore.⁵⁵ Bermuda has become the largest captive domicile in the world since the 1980s.⁵⁶ Until 2019, Bermuda, licensing 715 captives, still retained the largest share of captives globally.⁵⁷ It was closely followed by the Cayman Islands (Cayman) (ranking at second place with 618 captives in 2019)⁵⁸ and then Barbados (at sixth place with 294 captives in 2019).⁵⁹ Bermuda, Cayman, Barbados,⁶⁰ and other jurisdictions with a stable political environment and friendly regulatory climate are usually regarded as preferred captive domiciles.⁶¹

i. Bermuda Implements the Innovative and Strict Legislation to Regulate Captives

In general, there is innovative and strict regulation of captives in Bermuda. The majority of Bermuda-based captives underwrite risks originating from North America and Europe.⁶² Bermuda has been widely recognized to have a “blue-chip reputation,”⁶³ and the Insurance Act of 1978 (as amended), collaborating with other related regulations such as the Companies Act of 1981 (as amended) and the Insurance Returns and Solvency Regulations of 1980 (as amended), has basically built-up the legal framework for captives regulation.⁶⁴

⁵⁵ See Joseph W. Tucciarone & Louis Biscotti, *Captive Insurance Companies -- A Common Sense Approach to Improved Risk Management*, THE CPA J. (Dec. 2018), <https://www.cpajournal.com/2018/12/19/captive-insurance-companies/> (last visited Feb. 12, 2021).

⁵⁶ See *Bermuda Captive Market 2017: Growing and Thriving*, *Captive Insurance Company Reports*, IRMI (Nov. 2017), <https://www.irmi.com/online/cicr/ch000000/2017nov/bermuda-captive-market-2017.aspx>.

⁵⁷ See *Background on: Captives and Other Risk-financing Options*, *supra* note 53.

⁵⁸ *Id.*

⁵⁹ *Id.* (demonstrating the third to the fifth places individually stood the U.S. states of Vermont, Utah, Delaware, which would be discussed next section).

⁶⁰ Of the three traditional domiciles, Bermuda and Cayman have developed the systemic legislation in favor of captives, which will be analyzed in the following subsections. For Barbados, the major legislative advantage is its loose tax policy that zero tax is imposed upon the captives underwriting related risks. See *Barbados Repeals Exempted Insurance Act, Captives Maintain Zero Tax*, CAPTIVE (Nov. 21, 2018), <https://www.captive.com/news/2018/11/26/barbados-repeals-exempted-insurance-act-captives-zero-tax>.

⁶¹ See Charles R. Irish, *Tax Havens*, 15 VAND. J. TRANSNAT'L L. 449, 454 (1982).

⁶² See *BMA Captive Report 2018*, *supra* note 14, at 3 (exhibiting “In 2017, as in the prior year, the majority of risk assumed by Bermuda captives originated in North America and Bermuda – 69% – and Europe – 19%. This is unsurprising considering 75% of captives have a parent in these domiciles. The Authority observed an increase in business written from the United States and a reduction in EU business in 2017 as compared to 2016.”).

⁶³ See *Bermuda Captive Market 2017*, *supra* note 56.

⁶⁴ See Bala Nadarajah et al., *Bermuda*, IFLR (Jun. 24, 2003), <https://www.iflr.com/article/b1ltxvbdp0q4nm/bermuda>.

(a) Proportional Classified Regulation over Captives

There is a classified regulatory insurance regime in Bermuda, contributing to a flexible regulation of captives. Under the multi-license regulatory system,⁶⁵ general insurers are categorized into six classes, including: single-parent captives (class 1),⁶⁶ multi-owner captives (group captives and association captives) (class 2),⁶⁷ commercial insurers or captives with more capitalization and surplus, excess liability (re)insurers and property catastrophe reinsurers (class 4),⁶⁸ and the other three types of special commercial insurers and captives (including: class 3, class 3A and class 3B).⁶⁹ In addition, long-term insurers are classified into five groups,⁷⁰ and special purpose insurers are regulated as an individual class.⁷¹ Under the circumstances, minimum capital and surplus requirements, regulatory fees, solvency margins, and other requirements vary in each class.⁷² Generally, a lighter regulation is imposed upon the single-parent captives and group or association captives, while regulatory stringency grows with their increasing business capacity.⁷³

(b) Tax-free Treatment of the Exempted Insurers

The vast majority of captive owners care about friendly tax treatment even though taxation is not the only factor for domicile selection. Bermuda law allows a non-Bermuda business to incorporate a Bermuda-based company in order to conduct business outside of Bermuda, which is called an exempted company.⁷⁴ Under Bermuda legislation, those exempted are treated tax-free on profits, income, dividends, and capital gains, and duty-free in

⁶⁵ See *Licensing*, BERM. MONETARY AUTH., <https://www.bma.bm/insurance-licensing> (last visited Feb. 12, 2021).

⁶⁶ See Insurance Act, 1978 (Act No. 1978: 39), § 4B, (Berm.).

⁶⁷ See *id.* at § 4C.

⁶⁸ See *id.* at § 4E.

⁶⁹ See *id.* at §§ 4D, 4DA & 4DB.

⁷⁰ See *id.* at §§ 4EB, 4EC, 4ED, 4EE & 4EF.

⁷¹ See *id.* at § 5(2).

⁷² See *Non-US Captive Insurance Domicile Comparison Chart, Bahrain–Bermuda*, (as of Dec. 2019), IRMI, <https://www.irmi.com/online/rf/ch0apdx/b/chart-bahrain-barbados-bermuda.aspx> (last visited Jan. 28, 2021).

⁷³ See *Solvency Modernization Initiative Country Comparison Analysis November 2009 -- Bermuda*, NAT'L ASS'N OF INS. COMM'R 1 (Nov. 2009), https://naic.org/documents/committees_smi_int_solvency_bermuda.pdf (last visited Feb. 12, 2021).

⁷⁴ See Companies Act, 1981 (Berm.), sec. 127.

estate and death, although they are still required to undertake annual fees.⁷⁵ These taxation exemption rules will likely remain in effect until 2035.⁷⁶

(c) International Tax Recognition for Insurance Businesses

In addition to almost zero taxes charged by Bermuda's government, Bermuda's international tax treaties increased Bermuda's competitive position. Bermuda "did its best" to help its insurers to get the similar free tax treatment via many international tax treaties.⁷⁷ For example, in light of the US-Bermuda Tax Treaty of 1986,⁷⁸ a Bermuda-based insurance company would be basically free of the U.S. income tax.⁷⁹ Additionally, the treaty is targeted at tax matters solely in insurance business,⁸⁰ which highlighted parties' purpose in liberalizing trade and investment in international insurance services. For another example, the Canada-Bermuda Tax Information Exchange Agreement, which promotes the exchange of tax information, actually brought waves of Canadian investment, such as the establishment of captives, into Bermuda "through the repatriation of tax-free dividends to Canada—creating a win-win situation for both countries."⁸¹

⁷⁵ See *Exempted Companies -- Procedure for the Incorporation of Companies in Bermuda*, BERM. MONETARY AUTH., <https://www.bma.bm/viewPDF/documents/2019-01-01-10-11-12-Exempted-Companies.pdf> (last visited Feb. 12, 2021).

⁷⁶ See *Non-US Captive Insurance Domicile Comparison Chart*, *supra* note 72.

⁷⁷ Yelena Tsvaygenbaum, *A Tax Treaty that Doesn't Tax - The Unique History of the United States-Bermuda Tax Treaty and the Subsequent Problems Facing the United States Insurance Industry*, 15 CONN. INS. L.J. 267, 267 (2008). International multilateral/bilateral tax agreements/treaties are typically used to avoid double taxation, to attack illegal tax evasion, or to achieve both, through information exchange and international cooperation.

⁷⁸ Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (On Behalf of the Government of Bermuda) Relating to the Taxation of Insurance Enterprises and Mutual Assistance in Tax Matters, U.S.-Berm., § 2, Jul. 11, 1986, T.I.A.S. No. 11, 676 [hereinafter *The US-Bermuda Tax Treaty of 1986*].

⁷⁹ *Id.* at art. 4.1 ("The business profits of an enterprise of insurance of a Covered Jurisdiction derived from carrying on the business of insurance (including insubstantial amounts of income incidental to such business) shall not be taxable in the other Covered Jurisdiction unless the enterprise carries on or has carried on business in the other Jurisdiction through a permanent establishment situated therein . . .").

⁸⁰ See *id.*; See also Tsvaygenbaum, *supra* note 77, at 367.

⁸¹ See *Canada-Bermuda Tax Information Exchange Agreement*, PWC (Sept. 15, 2011), https://www.pwc.com/bm/en/assets/document/pwc_bda_tiea.pdf.

ii. The Cayman Islands (“Cayman”) Has the Sophisticated and Unique Legislation for Captives

Likewise, Cayman⁸² has also established a sophisticated and unique legal regime for captive regulation which remains a popular option for health care captives.⁸³

(a) Classified Regulations over Captives

In order to provide a suitable regulation, the Insurance Law of Cayman 2010 also adopts a multi-license regulation regime for insurers, but it differs from Bermuda law. Cayman classifies insurers granted with licenses into four groups, in which minimal capital requirements, application fees, and annual license fees vary. Whereas the classification is not solely based on the size of business referred to in Bermuda law, instead, it particularly distinguishes domestic captives (Class A),⁸⁴ offshore captives (Class B),⁸⁵ and special reinsurers (Class C⁸⁶ and Class D⁸⁷). Accordingly, the special classification between domestic captives (Class A) and offshore captives (Class B) contributes to a legislative difference, which is much more favorable to offshore captives. For example, there are significantly lower application fees and annual fees for Class B⁸⁸ than Class A,⁸⁹ which is considerably attractive for the foreign investors eager to reduce application costs. As of September 2020, captives shared 87.4% of the total insurance companies based in Cayman.⁹⁰

⁸² Cayman is especially competitive in medical malpractice liability, which shared 26% of licenses in Cayman insurance market, and Workers' Compensation, which shared the second most licenses at 22%. *See International Insurance Company Statistics (In US\$) statistics by Primary Class of Business*, CAYMAN IS. MONETARY AUTH. (Mar. 31, 2020), https://www.cima.ky/upimages/commonfiles/InsuranceCompanybyPrimaryClassofBusinessQ12020_1587142167.pdf.

⁸³ *See* James A. Christopherson, *Captive Medical Malpractice Insurance Company Alternative*, 5 ANNALS HEALTH L. 121, 138 (1996) (“The first health care captive-started by Harvard University in the 1970’s-was originally to be domiciled in Bermuda. However, Bermuda regulators resisted the captive’s formation because of a fear of physician malpractice risk. So the captive was domiciled in the Cayman Islands. Beginning with the Harvard captive, the Cayman Islands has been the domicile of choice for many other health care captives”).

⁸⁴ *See* Insurance Law, 2010 (Law no. 32/2010), § 4(3)(a), (Cayman Is.).

⁸⁵ *See id.* at § 4(3)(b).

⁸⁶ *See id.* at § 4(3)(c).

⁸⁷ *See id.* at § 4(3)(d).

⁸⁸ Offshore captives are charged for application fee and annual fee from \$8,500 through \$10,500 while domestic captives are charged with \$75,000. *See id.* at Schedule 2.

⁸⁹ *See id.*

⁹⁰ *See Insurance Statistics Overview*, CAYMAN IS. MONETARY AUTH., <https://www.cima.ky/insurance-statistics> (last visited Nov. 8, 2020) (demonstrating “There were a total of 775 insurance licensees under the supervision of the Insurance Supervision

(b) Tax Neutrality Systems

Similar to Bermuda law, it is well-known Cayman does not require the payment of income tax, corporation tax, or capital gains.⁹¹ Thereby the only costs for captives are their licensing fees and annual fees. In addition to eliminating double taxation risk,⁹² the tax-free environment in Cayman maximizes social welfare⁹³ by decreasing the cost of operating captives, which accordingly improves efficiency of capital flowing without prejudice to the taxation system of the parent companies' jurisdictions.⁹⁴

(c) Progressive Legislation on the Segregated Portfolio Companies

For the owners seeking to establish their segregated portfolio companies (SPCs), Cayman is more competitive due to special legislation. SPCs have grown to be the second largest group of Cayman-based insurance companies.⁹⁵ To some extent, the legislation plays an incentive role in boosting growth of SPCs.⁹⁶ SPCs are also called "Cayman's version of incorporated cells companies," which are popular due to "cost savings through the economy of scale that a [portfolio] captive can offer."⁹⁷ In Cayman, a portfolio insurance company (PIC) has been recognized as an independent legal entity registered as an exempted company which is established by SPCs.⁹⁸ A PIC, as an entire legal entity, has its own separate

Division (the "Division") as of 30 September 2020, of which 98 and 677 related to domestic and international insurance markets respectively.").

⁹¹ See *Worldwide Tax Summaries*, PWC, <https://taxsummaries.pwc.com/cayman-islands> (last visited Feb. 12, 2021); See *Cayman Islands, Captive Insurance Law and Captive Domicile Summary*, IRMI, <https://www.irmi.com/online/rf/ch0apdx/b/1lappb-cayman-islands-captive-domicile.aspx> (last visited Feb. 12, 2021).

⁹² See *Tax Neutrality Benefits Cayman Captives*, CAPTIVE, <https://www.captiveinternational.com/contributed-article/tax-neutrality-benefits-cayman-captives> (last visited Feb. 12, 2021).

⁹³ See Michael S. Knoll, *Reconsidering International Tax Neutrality*, 64 TAX L. REV. 99, 104 (2011).

⁹⁴ See *Tax Neutrality Benefits*, *supra* note 92.

⁹⁵ As the statistics of March 2020, Segregated Portfolio Companies shared 20% of licenses in Cayman insurers while the largest one is Pure Captives at 43%. See *International Insurance Company Statistics*, *supra* note 82.

⁹⁶ See Butler, *supra* note 49, at 3.

⁹⁷ See *2017 Resolutions from CICR Commentators, Captive Insurance Company Reports*, IRMI, (Feb. 2017), <https://www.irmi.com/online/cicr/ch000000/2017feb/2017-resolutions-from-cicr-commentators.aspx>.

⁹⁸ See Insurance (Portfolio Insurance Companies) Regulations, 2015 (Cayman Is.), reg.3; See also Ogier, *Portfolio Insurance Companies in the Cayman Islands* (Oct. 2, 2015), <https://www.ogier.com/publications/portfolio-insurance-companies-in-the-cayman-islands> (describing a structure: "New or existing insurers (other than Class A Insurers) operating as SPCs are now able to incorporate one or more of their segregated portfolios by establishing one or more "portfolio insurance companies" (PICs) underneath the SPC. In essence, a PIC is a Cayman Islands exempted company that is a subsidiary of the SPC under which it is established but is related to a particular cell of such controlling SPC.").

account and individual liability, which reduces its business risks associated with other cells under the SPC. In addition, it is able to contract with other PICs/cell insurers, which solves a longstanding limitation for SPCs -- segregated portfolios in the SPC cannot contract with each other.⁹⁹

B. *Regulation of Captives in the U.S. Domiciles*

As of May 2020, 34 U.S. states, the District of Columbia, Guam, Puerto Rico, and Virgin Islands have formed regulations and legislation concerning captives.¹⁰⁰ Of these, Vermont and Utah are the largest captive domiciles in the U.S.¹⁰¹

i. Vermont's Codified Captive Law Provides A Transparent and Friendly Regulation of Captives

Enactment of the Special Insurer Act of 1981 made Vermont the first U.S. state to compete for captives against Bermuda and Cayman.¹⁰² The law is designed to provide a captive-friendly regulatory climate within the state and to develop a local captive market.¹⁰³ Since the passage of the Act, a wave of parents settled their captives in "the Green Mountain State,"¹⁰⁴ and Vermont rapidly moved into the forefront in captive business both domestically and globally.¹⁰⁵ As of the end of 2019, Vermont, with 585 captives operating, has become the largest captive domicile in the U.S. as well as the third largest domicile in the world.¹⁰⁶

⁹⁹ See Butler, *supra* note 49, at 1.

¹⁰⁰ See *Captive Domiciles*, CAPTIVE, <https://www.captive.com/domiciles> (last visited Feb. 29, 2021) (34 states include: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia.).

¹⁰¹ See *Background on: Captives and Other Risk-financing Options*, *supra* note 53.

¹⁰² Note that Vermont is the first state to aim to compete with international offshore captive domiciles, rather than the first state to recognize captives' formation. "Colorado, which, in 1972, became the first US state to allow captive formations, has seen little growth over the years in the number of licensed captives. Currently, Colorado has seven captives, compared to eight in 2006." See *How the United States Became Home to More Captives Than Any Other Country*, IRMI, <https://www.captive.com/news/2019/05/29/how-the-us-became-more-captives-than-any-other-country> (last visited Feb. 12, 2021).

¹⁰³ See *Advantages of Captive Insurance*, ST. OF VT. DEP'T OF FIN. REG., <https://dfr.vermont.gov/industry/captive-insurance/become-vermont-captive/advantages-captive-insurance> (last visited Feb. 12, 2021).

¹⁰⁴ See *How the United States Became Home to More Captives Than Any Other Country*, *supra* note 102.

¹⁰⁵ See *Background on: Captives and Other Risk-financing Options*, *supra* note 53.

¹⁰⁶ See *id.*

Similar to traditional offshore captive domiciles, Vermont offers the advantages of efficient administration, cheap fees, and favorable tax regime.¹⁰⁷ Unlike Bermuda and Cayman, which charge no tax, there is a premium tax on the Vermont-based captives. However, the rate is very low.¹⁰⁸

In an effort to compete with Bermuda and Cayman, Vermont's aggressive legislating has kept its captives statutes up-to-date.¹⁰⁹ For example, since 1988, Vermont has recognized captives to directly insure excess workers compensation risks.¹¹⁰ In 1993, a bill was enacted to significantly slash captive premium taxes.¹¹¹ The 2008 bill established a more enabling approval process to facilitate the use of letters of credit for captive capitalization.¹¹² The 2009 Bill created a premium tax credit for new captives born in the second half of the year.¹¹³ The new legislation passed in 2017 saw that agency captives began to be recognized as types of captives in Vermont.¹¹⁴

Moreover, codification of Vermont captive law makes requirements clearer for the captives' owners, given that codification is clearly articulated

¹⁰⁷ See Andrew Morriss, *The Role of Offshore Financial Centers in Regulatory Competition*, ILL. L. & ECON. RES. PAPERS SERIES Research Paper No. LE07-032, 1, 58 (2008).

¹⁰⁸ See Vt. Stat. tit.8, § 6014 (West (2020)). In Vermont, generally there are lower tax rates of reinsurance than those of direct insurance for the same amount of premiums, and the rates would drop down as the premiums go to the class with higher amount. For example, for the direct insurance premiums, the rate is 0.38% for the first 20 million dollars while the rate is 0.072% for the part exceeding 60 million dollars. On the other hand, for the part beyond 60 million dollars, the rate for reinsurance premiums is 0.024%, much lower than that of direct insurance premiums.

¹⁰⁹ See Morriss, *supra* note 107, at 60.

¹¹⁰ See *Charting Vermont's Captive Insurance History*, BUS. INS., <https://www.businessinsurance.com/article/20060806/story/100019430/charting-vermonts-captive-insurance-history> (last visited Feb. 12, 2021); See also Vt. Stat. tit.8, §6002 (a)(8) (West (2020)) (demonstrating, "Any captive insurance company may provide excess workers' compensation insurance to its parent and affiliated companies, unless prohibited by the federal law or laws of the state having jurisdiction over the transaction. Any captive insurance company, unless prohibited by federal law, may reinsure workers' compensation of a qualified self-insured plan of its parent and affiliated companies.").

¹¹¹ *Id.*

¹¹² See *Advantages of Captive Insurance*, *supra* note 103; See also Vt. Stat. tit.8, § 6004 (c) (West (2020)) (providing, "Capital and surplus may be in the form of cash, marketable securities, a trust approved by the Commissioner and of which the Commissioner is the sole beneficiary, or an irrevocable letter of credit issued by a bank approved by the Commissioner.").

¹¹³ *Id.*

¹¹⁴ See *New Vermont Captive Insurance Legislation Signed into Law*, IRMI, (May 3, 2017), <https://www.captive.com/news/2017/05/03/new-vermont-captive-insurance-legislation-signed-2017> (last visited Feb. 12, 2021); See also Vt. Stat. tit.8, § 6001(5) (West (2020)) (demonstrating, "'Captive insurance company' means... agency captive insurance company...").

and easily accessible to the public.¹¹⁵ Unlike Bermuda, Cayman, and Barbados, in which the captive-related law and regulation are scattered in several acts, Vermont captive insurance law was codified in 2003, and the new amendments have been inserted into the statutes over time.¹¹⁶ Vermont captive law was recodified with the emerging amendments, building it into a cohesive and transparent entire body of law.¹¹⁷

In addition, captives regulation in Vermont also attracted attention of other states such as Connecticut. For example, an act concerning captive insurance companies (Connecticut Senate Bill 281),¹¹⁸ which was signed by the Governor of Connecticut on June 2, 2008, has been recognized as modeled on the captive regulation of Vermont.¹¹⁹

ii. Utah Code Provides a Support to Build a Loose Regulation for Captives

Not far behind Vermont, Utah is the second largest domestic captive domicile and also the fourth largest one globally, with 435 licensed captives in 2019.¹²⁰ The development of captives in Utah is especially dramatic, as the state adopted its first captive legislation recently in 2003¹²¹ and then soon after started licensing captives.¹²² Likewise, the captive-related legislation has been codified in Utah Code, mainly including: the Captive Insurance Companies Act¹²³ and the Special Purpose Financial Captive Insurance Company Act.¹²⁴ Similarly, Utah has adopted numerous captive-friendly laws by: removing restrictions on the types of captives and the lines underwritten, eliminating burdens of premium taxes, lowering minimum capital and surplus requirements, and keeping confidential captive records.¹²⁵ Especially in contrast to Vermont, Utah's annual fees have replaced premium

¹¹⁵ See Timothy H. Jones, *Judicial Review and Codification*, 20 LEGAL STUD. 517, 520 (2000).

¹¹⁶ See *Advantages of Captive Insurance*, *supra* note 103.

¹¹⁷ *Id.*

¹¹⁸ See Proposed Bill No. 281, 2008 Leg., 1st Sess. (Conn. 2008); See also CONN. GEN. ASSEMB., *Substitute for Raised S.B. No. 281 Session Year 2008*, https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=281&high_year=2008 (last visited Feb. 12, 2021) (“To allow captive insurance companies to be licensed and domiciled in this state.”).

¹¹⁹ See Kely Cruz-Brown, Hilary Rowen, Susan Stead & R. John Street, *Recent Developments in Insurance Regulation*, 44 TORT TRIAL & INS. PRAC. L.J. 591, 615 (2009).

¹²⁰ See *Background on: Captives and Other Risk-financing Options*, *supra* note 53.

¹²¹ In 2003, Utah legislature passed Captive Insurance Companies Act, Utah Code Ann. § 31A-37-101 (LexisNexis 2020).

¹²² See Cassandra R. Cole & Kathleen A. McCullough, *Captive Domiciles: Trends and Recent Changes*, 26-4 J. INS. REG. 61, 69 (Summer 2008).

¹²³ See Utah Code Ann. § 31A-37 (LexisNexis 2020).

¹²⁴ See *id.* at § 31A-37(a)-101.

¹²⁵ See Cole, *supra* note 122, at 72.

taxes since January 2005.¹²⁶ However, property taxes on the personal and real property of captives still apply in Utah.¹²⁷

C. *Regulation of Captives in the European Domiciles*

In Europe, Guernsey is well-known for its innovative legislation that encourages captives to carry on business as the new forms while Luxembourg is preferred due to the “EU-passport for insurers.”¹²⁸

i. Guernsey’s Ground-breaking Legislation Makes it a Pioneer in Captives Regulation

Guernsey is the largest captive domicile in Europe,¹²⁹ as well as the ninth largest worldwide with 305 captives in 2019.¹³⁰ In addition to the features common to traditional captives jurisdictions, Guernsey has its own selling points on basis of its unique location.

On the one hand, Guernsey, located in the English Chanel, enjoys close proximity to London, which keeps it competitive for the companies seeking to enter into the U.K. market.¹³¹ On the other hand, since it is situated in Europe but not a member of the European Union (E.U.), Guernsey is particularly suitable for some investors who are eager to expand business to the European market but are hesitant to comply with the Solvency II of the E.U.¹³²

On the aspect of regulatory legislation, a notable differentiation of Guernsey is its ground-breaking legislation applied to captives, including: first permitting captives to do business as protected cell companies (PCCs)¹³³

¹²⁶ See Jerry Geisel, *Utah Lawmakers Replace Captive Tax with Annual Fee*, BUS. INS., (Feb. 25, 2005), <https://www.businessinsurance.com/article/20050225/NEWS/20005089>.

¹²⁷ See *Captives in Utah – Know the Basics*, UTAH INS. DEPT., <https://insurance.utah.gov/captive/research/in-utah> (last visited Feb. 12, 2021).

¹²⁸ Petra Pohlmann, *Principles-based Insurance Regulation: Lessons to be Learned from a Comparison of the EU and German Law of Risk Management*, RESEARCH HANDBOOK ON INTERNATIONAL INSURANCE LAW AND REGULATION 329 (Julian Burling & Kevin Lazarus eds., 2011).

¹²⁹ See *European Union Captives - An Update, Captive Insurance Company Report*, IRMI, (Apr. 2020), <https://www.irmi.com/online/cicr/ch000000/2020apr/european-union-captives-an-update.aspx> (stating “Guernsey . . . is Europe’s (in the larger amount sense) largest captive domicile.”).

¹³⁰ See *Background on: Captives and Other Risk-financing Options*, *supra* note 53.

¹³¹ See *China Captives Expand into Europe Via Guernsey Domicile*, IRMI (Oct. 25, 2019), <https://www.captive.com/news/2019/10/25/china-captives-expand-into-europe-guernsey-domicile>.

¹³² See *A Century of Captive Experience*, WE ARE GUERNSEY, <https://www.weareguernsey.com/finance-industry/insurance/captive-insurance/> (last visited Feb. 12, 2021).

¹³³ See McConvill, *supra* note 50.

and introducing the incorporated cell companies (ICCs) legislation concerning captives.¹³⁴ Especially under the ICCs regulatory environment, Guernsey is a pioneer in strongly supporting captives set up as ICCs to participate in the transfer of longevity risks for pension funds.¹³⁵ Guernsey is in the forefront of ICC captives because recently captive-based longevity risk swaps managers prefer establishing Guernsey-domiciled ICCs to deal with the risk transfer.¹³⁶ For example, the BT Pension Scheme¹³⁷ formed a pure captive to access reinsurance from the US-based life insurer Prudential, thus indirectly transferring its longevity risks through its captive to Prudential (reinsurance market).¹³⁸ Still based on the cell structures, on the other hand, Guernsey takes the lead in allowing captives to do insurance-linked security (ILS) business.¹³⁹

ii. Luxembourg's Laws Facilitate Local Captives to Expand Business to Other E.U. Members

Behind Guernsey, Luxembourg is the second largest captives jurisdiction in Europe with 195 captives in 2019,¹⁴⁰ as well as the second largest reinsurance captive domicile, with a regional market share of 24% in Europe.¹⁴¹

Unlike Guernsey, Luxembourg is an E.U. member, which means Luxembourg is obligated to implement the E.U. law concerning insurance regulation and thus Luxembourg-based captives are indirectly subject to the

¹³⁴ *Id.* at 31.

¹³⁵ See *Longevity Risk Transfer: Peace of Mind for Scheme Sponsors, Trustees and Members*, WE ARE GUERNSEY, <https://www.weareguernsey.com/media/4966/longevity-risk-transfer.pdf> (last visited Feb. 12, 2021) (“The difficulty is that pension funds are not licensed to directly access the reinsurance market . . . [and the solution is] [a] pension trustee can form a captive insurance company, typically a Guernsey-domiciled Incorporated Cell Company . . . which issues an insurance contract to the pension scheme. The captive insurance company then cedes 100% of the risk to the pension trustee’s chosen reinsurer. In this manner, the pension trustee has gained access to the reinsurance market, to which the longevity risk has been transferred.”).

¹³⁶ *Id.*

¹³⁷ BT refers to British Telecom. The BT Pension Scheme is the largest private-sector pension scheme in the U.K. See Geof Stapledon, *Termination Benefits for Executives of Australian Companies*, 27 SYDNEY L. REV. 683, 694 (2005).

¹³⁸ See Taha Lokhandwala, *BT Pension Scheme Transfers £16bn of Longevity Risk in Mammoth Deal*, IPE (Jul. 4, 2014), <https://www.ipe.com/bt-pension-scheme-transfers-16bn-of-longevity-risk-in-mammoth-deal/10002396.article>.

¹³⁹ See *Insurance-Linked Securities: Guernsey Is Perfectly Placed*, WE ARE GUERNSEY, <https://www.weareguernsey.com/media/2060/insurance-linked-securities.pdf> (last visited Feb. 12, 2021).

¹⁴⁰ See *Background on: Captives and Other Risk-financing Options*, *supra* note 53.

¹⁴¹ See *The EU Centre for Cross-border Insurance and Pension Vehicles*, LUXEMBOURG FOR FINANCE, <https://www.luxembourgforfinance.com/en/financial-centre/insurance/> (last visited Feb. 12, 2021).

E.U. regulatory environment.¹⁴² Generally, the captives in Luxembourg are governed by the law of 7 December 2015 on the insurance sector (as modified) and the law of 27 July 1997 on insurance contracts.¹⁴³ Both of these laws are responses to EU's Directive 2009/138/EC of 25 November 2009 (typically called Solvency II).¹⁴⁴ In addition, Luxembourg-domiciled captives received an advantage in 2007 when Luxembourg approved mutual recognition of authorizations and prudential control systems by starting implementing the European Reinsurance Directive 2005/68/EC ("The Directive").¹⁴⁵ Thus, if a captive is authorized to do reinsurance business by Luxembourg's regulatory authority according to the local regulatory standards, it is also allowed to carry on its business in the jurisdictions of the other E.U. members which also implement the Directive.¹⁴⁶ Under the circumstances, the Luxembourg-domiciled captive is still only subject to the financial requirements of Luxembourg even if it expanded its business beyond Luxembourg, because the Directive prohibits the additional financial supervision by non-Domicile states.¹⁴⁷

IV. CHALLENGES IN REGULATION OF CAPTIVES

While captives' flexible types, cheap costs, and friendly tax treatments make captives increasingly popular around the world, these advantages create challenges for regulators. First, there is a lack of effective coordination in regulation of captives, both on the international level and the interstate level of the U.S. Second, the existing prudential regulation is insufficient to safeguard the captives' financial stability. Third, no special regulatory regime has been formed to prevent abuse of the fronting arrangements by captives. Finally, as the increasing insurers transfer their

¹⁴² See *Luxembourg Captive Reinsurance Companies*, *supra* note 52.

¹⁴³ See *How to Set Up an Insurance Company*, LUXEMBOURG FOR FINANCE, <https://www.luxembourgforfinance.com/publication/insurance-2/> (last visited Feb. 12, 2021).

¹⁴⁴ See *The New Legislation on the Insurance Sector*, LEXGO (Nov. 3, 2016), <https://www.lexgo.lu/en/papers/insurance-reinsurance/insurance-and-reinsurance-law/the-new-legislation-on-the-insurance-sector,102829.html>.

¹⁴⁵ See *Luxembourg Captive Reinsurance Companies*, *supra* note 52.

¹⁴⁶ See 2005 O.J. (L. 323) 2, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32005L0068> (last visited on Feb. 12, 2021) ("... The Member State of the branch or of the provision of services may not require a reinsurance undertaking which wishes to carry on reinsurance business in its territory and which has already been authorized in its home Member State to seek fresh authorization . . ."); See *Luxembourg Captive Reinsurance Companies*, *supra* note 52 ("The [European Reinsurance Directive 2005/68/EC] ensures the mutual recognition of authorizations and prudential control systems, thereby making it possible to grant a single authorization that is valid throughout the European Union, while applying the principle of home country [e.g., Luxembourg] supervision.").

¹⁴⁷ See 2005 O.J., *supra* note 146 ("... Furthermore a reinsurance undertaking which has already been authorized in its home Member State should not be subject to additional supervision or checks related to its financial soundness performed by the competent authorities of an insurance undertaking which is reinsured by that reinsurance undertaking . . .").

written risks to their captives, it has been in debate whether the old regulation is still applicable to the new problems in the area, particularly on the transparency issue of life insurance.

A boom in the industry significantly relies on favorable captives' regulation specially designed for those companies. However, that favorable regulation does not necessarily equal excessively loose regulation, and moreover it should be seriously considered whether the primary objective of the regulation should be facilitating captives-based economy or focusing on consumer protection.¹⁴⁸

A. *Lack of Effective Coordination in Regulation of Captives*

The absence of effective harmonization around the globe as well as in the U.S. puts regulation of captives to an acid test.

- i. International Level: The Troubling Implementation of the Insurance Core Principles of the International Association of Insurance Supervisors.

It is not necessary to develop identical supervisory and regulatory systems around the world, instead, effective and coordinated rules would properly regulate captives. In general, the Insurance Core Principles (ICPs) issued by the International Association of Insurance Supervisors (IAIS) are a set of flexible rules to develop a uniform and coordinated supervisory and regulatory system around the globe, however those rules face challenges to implementation.

In 2011, the IAIS formally issued the ICPs,¹⁴⁹ which are a set of benchmarks for insurance supervision.¹⁵⁰ They serve to maintain consistent, highly-efficient supervision over insurers for all the jurisdictions for the purpose of consumer protection and financial stability in the insurance industry.¹⁵¹ They cover supervision over insurers and reinsurers, over private insurers and government-controlled insurers, and over traditional insurance as well as digitally-conducted insurance.¹⁵² Also, they include general

¹⁴⁸ See John S. Carroll, *Captive Insurance Companies and Sexual Abuse Policies*, 84 UMKC L. REV. 211, 223 (2015).

¹⁴⁹ See *Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups*, INT'L ASS'N OF INS. SUPERVISORS, at 3 (Updated Nov. 2019), <https://www.iaisweb.org/page/supervisory-material/icp-on-line-tool>.

¹⁵⁰ See *Insurance Core Principles*, NAT'L ASS'N OF INS. COMM'R (Updated Apr. 30, 2020), https://content.naic.org/cipr_topics/topic_insurance_core_principles.htm.

¹⁵¹ See *Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups*, *supra* note 149, at 6.

¹⁵² See *id.* at 7.

requirements relating to insurance regulation, such as reinsurance, other forms of risk transfer,¹⁵³ and enterprise risk management for solvency purposes¹⁵⁴ and capital adequacy.¹⁵⁵ Thus, ICPs are also potentially applicable to captive insurance, even though application ultimately depends on corresponding regulatory legislation in each individual jurisdiction.

The IAIS rules provide flexible references to supervision and regulation of insurance around the globe. First, nothing suggests that IAIS, as well as its ICPs, is created to achieve an identical supervisory and regulatory system globally. As the IAIS's mission indicates, effective policyholders protection and financial health, which are based on a safe and sound insurance markets, are calling for effective and consistent insurance supervision and regulation.¹⁵⁶ In addition, "proportionality," which underlies the ICPs, encourages supervisory and regulatory authorities to translate the ICPs' principle and standards into a suitable framework in an appropriate manner based on the local environment.¹⁵⁷ Notwithstanding the IAIS's calls on its members to consider observing the ICPs, it still emphasizes the flexibility and the proportionality of application.

To some extent, the original nature of the IAIS caused its implementation problem. Unlike the World Trade Organization (WTO), under which all the members are bound by multilateral agreements like the

¹⁵³ See *ICPs 13 Reinsurance and Other Forms of Risk Transfer*, INT'L ASS'N OF INS. SUPERVISORS,

https://www.iaisweb.org/index.cfm?event=icp:getICPList&nodeId=25227&icpAction=listIcps&icp_id=7&showStandard=1 (demonstrating "The supervisor requires the insurer to manage effectively its use of reinsurance and other forms of risk transfer. The supervisor takes into account the nature of reinsurance business when supervising reinsurers based in its jurisdiction."); See also *id.* stand. 13.1 (demonstrating "The supervisor requires ceding insurers to have a reinsurance programme that is appropriate to their business and part of their overall risk and capital management strategies."); *id.* stand. 13.2 (demonstrating "The supervisor requires ceding insurers to establish effective internal controls over the implementation of their reinsurance programme.").

¹⁵⁴ See *ICP 16 Enterprise Risk Management for Solvency Purpose*, INT'L ASS'N OF INS. SUPERVISORS,

https://www.iaisweb.org/index.cfm?event=icp:getICPList&nodeId=25227&icpAction=listIcps&std_id=148&icp_id=3&showStandard=1&showGuidance=1&s=148&showPrinciplesOnly=1 (demonstrating "The supervisor requires the insurer to establish within its risk management system an enterprise risk management (ERM) framework for solvency purposes to identify, measure, report and manage the insurer's risks in an ongoing and integrated manner.").

¹⁵⁵ See *ICP 17 Capital Adequacy*, INT'L ASS'N OF INS. SUPERVISORS, https://iaisweb.org/index.cfm?event=icp:getICPList&nodeId=25227&icpAction=listIcps&std_id=31&icp_id=1&showStandard=1&showGuidance=1&s=31 (demonstrating, "The supervisor establishes capital adequacy requirements for solvency purposes so that insurers can absorb significant unforeseen losses and to provide for degrees of supervisory intervention.").

¹⁵⁶ See *Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups*, *supra* note 149, at 2.

¹⁵⁷ *Id.*

General Agreement on Tariffs and Trade (GATT)¹⁵⁸ and the General Agreement on Trade in Services (GATS),¹⁵⁹ the IAIS is a voluntary international organization of insurance supervisors and regulators from 214¹⁶⁰ members.¹⁶¹ Therefore, absent a binding effect, the IAIS's high standards only play a persuasive role.¹⁶² The ICPs to the members are more like the National Association of Insurance Commissioners (NAIC) model laws to the states of the U.S. In a sense, the "guidance" nature of the ICPs has to leave the power to implement or not implement them to individual sovereign authorities.¹⁶³ In addition, actual implementation levels of ICPs also vary significantly among members as well as particular principles and standards.¹⁶⁴ Thus, it is far less than a uniform and consistent implementation of ICPs around the world.

In addition to the general problem in enforceability, the flexibility of those principles and standards are questioned in the competition among the captives' domiciles. Notably, proportionality and relaxed standards of the ICPs are beneficial for supervisors and regulators. However, they also come with substantial challenges for global insurance regulation. To some extent,

¹⁵⁸ See General Agreement on Tariffs & Trade 1994, art. XXXII, Apr. 15, 1994, 1867 U.N.T.S. 190.

¹⁵⁹ See General Agreement on Trade in Services, art. I, Apr. 15, 1994, 1869 U.N.T.S. 183.

¹⁶⁰ See *IAIS Members List*, INT'L ASS'N OF INS. SUPERVISORS (last updated May 17, 2020), <https://www.iaisweb.org/page/about-the-iais/iais-members> (describing that until May 17, 2020, the IAIS has registered 214 members in total, including: 153 members, 7 international members, and 56 NAIC members).

¹⁶¹ See *Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups*, *supra* note 149, at 2.

¹⁶² See *Statement by Thomas Sullivan Associate Director Board of Governors of the Federal Reserve System before the Committee on Banking, Housing, and Urban Affairs U.S. Senate*, 116th Cong. 2, (2019) (testimony by Thomas Sullivan on insurance regulation).

¹⁶³ See *IAIS Annual Report 2017*, INT'L ASS'N OF INS. SUPERVISORS, at 10, <https://www.iaisweb.org/page/about-the-iais/annual-report/previous-annual-reports//file/77856/iais-ar-2017-digital-pdf-def-sp> (last visited Feb. 12, 2021).

¹⁶⁴ For example, under Principle 1, "[For] all regions, the observance of ICP 1 ranged between 46% - 75% except for Latin America where all participating Members were rated largely observed . . . All Members from the North America and Western Europe Regions observed Standard 1.2 (definition of objectives, mandate of the supervisor and legal powers), whereas there was an overall observance level at 80%." See *Peer Review of Mandates and Supervisory Powers Relative to the Standards Set Out in Insurance Core Principles 1 and 2*, INT'L ASS'N OF INS. SUPERVISORS, at 11 (Nov. 2019), <https://www.iaisweb.org/page/supervisory-material/implementation-and-capacity-building/assessments//file/68319/aggregate-report-from-the-expert-team-conducting-the-self-assessment-and-peer-review-of-icps-13-and-24>. Under Principle 13, "Overall, observance levels for ICP 13 appear high, but a large number of jurisdictions are Partly Observed . . . [However][.] [t]he Expert Team is aware that a number of supervisors have approached the IAIS with practical questions related to implementation of requirements for reinsurance activities and on-going supervision of reinsurance activities by primary insurers." See *Report from Expert Team Conducting the Self-Assessment and Peer Review of ICPs 13 and 24*, INT'L ASS'N OF INS. SUPERVISORS, at 11 (Aug. 2017), <https://www.iaisweb.org/page/supervisory-material/implementation-and-capacity-building/assessments//file/68319/aggregate-report-from-the-expert-team-conducting-the-self-assessment-and-peer-review-of-icps-13-and-24>.

the excessive flexibility if the ICPs makes the sovereign authorities totally free to design their own framework with more discretion to better serve their competitive objective. Moreover, in the face of global competition, particular domiciles may be driven by economic profits from captive-related investments and would therefore set out supervisory and regulatory rules that favor investors without prejudice to the general principles in the ICPs. More flexibility in designing regulatory approaches results in less transparency in implementing those requirements and regulation of business.¹⁶⁵ Although the discretion authorized by the ICPs stimulates regulatory competition among the captive domiciles,¹⁶⁶ it would lead to a new issue of how to balance competitive regulation intended to attract capital and regulation protecting the public interests (e.g., policyholders' interests). The solution to this issue is not clear yet, on the basis of operation and exploration of the IAIS and its ICPs.

ii. In the U.S.: Lack of Interstate Coordination on Captives
Regulation in the Competition for Captives

Although the vast majority of countries adopt a national-level regulation of insurance, the U.S. is an exception by having state-level regulation.¹⁶⁷ In the U.S., regulation of insurance has been left to each state since those powers were finalized with the advent of the McCarran-Ferguson Act.¹⁶⁸ In practice, as non-traditional insurers, captives have also been subject to state regulation.¹⁶⁹ In addition to an increasing number of states updating new legislation concerning captive regulation such as Vermont, Utah, and Nevada,¹⁷⁰ those without relevant regulations are considering adding them.¹⁷¹ For example, Connecticut has recently begun updating its captive legislation

¹⁶⁵ See *Challenges Facing Captive Domiciles*, *Captive Insurance Company Reports*, INT'L RISK MGMT. INST. (Sept. 2009), <https://www.irmi.com/online/cicr/ch000000/2009sept/al090920.aspx> (last visited Feb. 12, 2021).

¹⁶⁶ *Id.*

¹⁶⁷ See Peter Kochenburger & Patrick Salve, *An Introduction to Insurance Regulation*, in RESEARCH HANDBOOK ON INTERNATIONAL INSURANCE LAW AND REGULATION 223 (2011).

¹⁶⁸ See 15 U.S.C. § 1012(b) (2012) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . .").

¹⁶⁹ See *Captives and Special Purpose Vehicles -- an NAIC White Paper*, NAT'L ASS'N OF INS. COMM'R 7 (Jul. 2013), <https://www.naic.org/store/free/SPV-OP-13.pdf>.

¹⁷⁰ See *US Captive Domiciles Keeping Captive Statutes Up to Date in 2019*, IRMI, (Jun. 3, 2019), <https://www.captive.com/news/2019/06/03/us-captive-domiciles-keeping-captive-statutes-up-to-date>.

¹⁷¹ See Charlene D. Luke, *Captivating Deductions*, 46 HOFSTRA L. REV. 855, 885 (2018).

and building its own captive regulation regime, aimed at capturing captives currently domiciled abroad.¹⁷²

States regulation of captives is facing some challenges. First, multiple roles of state regulatory authorities raise an issue of how to: balance multiple interests such as stabilizing financial environment, protecting policyholders, and attracting more investment in the face of fierce interstate and international competition of the captives market. Captives are distinguishable from traditional commercial insurance companies on the basis of their stronger “investment” factor,¹⁷³ which means more protection of investment would be considered by state authorities for economic efficiency purposes.¹⁷⁴ In traditional insurance regulation, generally the issues concerning protection of policyholders are primarily emphasized, such as premium rate, policy term, and guaranty funds.¹⁷⁵ However, adequacy of capitalization and management competence are seen to be competitive advantages for captives regulation.¹⁷⁶ Recently, some states have been caring more about the number of captives domiciled and seemingly regarding it as a primary indicator to succeed in captives regulation.¹⁷⁷

Second, national-level coordination in captives regulation is absent in the United States. Little federal legislation specifically relates to regulation of captives so that risks, arising out of discretion, lack guidance and restriction from the national level. In general, there is rare special federal-level legislation of insurance, but with limited exceptions such as the National Insurance Flood Plan (NFIP) and the Terrorism Risk Insurance Act (TRIA).¹⁷⁸

¹⁷² See *The Small State with Big Plans for Captives*, CAPTIVE INT'L (May 6, 2020), <https://www.captiveinternational.com/article/the-small-state-with-big-plans-for-captives>.

¹⁷³ See Spring Consulting Group Team, *7 Ways Captive Insurance Companies Provide a Competitive Edge*, IRMI, (Oct. 14, 2019) <https://www.captive.com/articles/7-ways-captive-insurance-companies-provide-a-competitive-edge>.

¹⁷⁴ See Vicki Been, *Does an International Regulatory Takings Doctrine Make Sense*, 11 N.Y.U. ENVTL. L.J. 49, 61 (2002).

¹⁷⁵ See Michael R. Mead, *Regulation of Captives: Who? Why? What Next?*, INT'L RISK MGMT. INST. (Aug. 2005), <https://www.irmi.com/articles/expert-commentary/regulation-of-captives-who-why-what-next>.

¹⁷⁶ *Id.*

¹⁷⁷ See Haley M. Heath, *Samuel C. Baber, Arkansas Insurance Department Eager for Creation or Re-Domicile of Captive Insurance Programs*, 54-SPG ARK. LAW. 24, 24 (2019) (“It has been two years since Governor Hutchinson signed Act 370, which improved the regulatory environment for captive insurance companies domiciled in Arkansas, into law. However, as of January 2019, only six captive insurance companies are domiciled in Arkansas. In the 2019 session, the Legislature further expanded the state’s insurance captive law to make the state’s regulatory environment even friendlier to insurance captives.”).

¹⁷⁸ See Kochenburger & Salve, *supra* note 167, at 226.

The Federal Reserve System, the U.S. Treasury's Federal Insurance Office (FIO) and the NAIC, informally known as "Team USA,"¹⁷⁹ play a national-level, macro-supervisory roles to monitor the insurance industry, however, with limited substantial effects in practical regulation of captives. Of these, the NAIC faces the most significant challenge concerning regulation of captives. There are a great number of similarities in insurance statutes of the U.S. states, which were largely achieved by coordinating efforts of the NAIC in the form of model laws.¹⁸⁰ Development of captives largely depends on the differences in legislation and regulation. For example, the vast majority of captives operate as reinsurers in the domiciles with friendly regulatory climate but enter another insurance market via fronting plans. However, based on the premise of consumer protection, the NAIC is considering creating model acts to eliminate those differences favorable to captives. In other words, the nature of captives operation is to some extent opposite to the objective of the NAIC.

According to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), "the Federal Reserve is responsible for the consolidated supervision of insurance holding companies that own an insured bank or thrift, as well as insurance holding companies designated for Federal Reserve supervision by the FSOC,"¹⁸¹ while the FIO generally monitors the insurance industry nationally as a whole, assisting in administering the TRIA program, developing federal policy on international insurance matters including representing the U.S. in the IAIS, and negotiating covered agreements with non-U.S. jurisdictions.¹⁸² In general, due to the macro-supervisory feature, there are limited effects on coordinating supervision and regulation of captives from the national level.

¹⁷⁹ See *Statement by Thomas Sullivan Associate Director Board of Governors of the Federal Reserve System before the Committee on Banking, Housing, and Urban Affairs U.S. Senate*, 116th Cong. 1-6, (2019) (testimony by Thomas Sullivan on insurance regulation).

¹⁸⁰ See James Smethurst et al., *Conduct of Business Regulation: A Survey of the UK Regime and A Comparison with the US, German and Hong Kong Approach*, RES. HANDBOOK ON INT'L INS. LAW & REG. 355, 355 (Julian Burling & Kevin Lazarus ed., Edward Elgar 2011) ("The NAIC has drafted model statutes that apply to numerous areas of insurance regulation. Almost all of these model statutes have been enacted into law by states, albeit with many minor and a few major changes.").

¹⁸¹ See *Statement by Thomas Sullivan Associate Director Board of Governors of the Federal Reserve System Before the Subcommittee on Housing and Insurance Committee on Financial Services U.S. House of Representatives*, 114th Cong. 1-6 (2015) (statement by Thomas Sullivan).

¹⁸² See *About The FIO*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/about-fio> (last visited Feb. 12, 2021); See also Kochenburger & Salve, *supra* note 167 at 226-27.

B. *Insufficient Prudential Regulation to Ensure Captives' Financial Stability*

The development of captives is also challenging prudential regulation in the industry. A forefront issue is that the existing prudential regulation is insufficient to ensure that captives are financially capable of paying their claims. Prudential regulation is aimed at contributing to the stability and soundness of a financial institution (micro-prudential regulation) as well as the safety and health of the whole financial system (macro-prudential regulation).¹⁸³ Generally, this type of financial regulation sets out requirements on capital and liquidity.¹⁸⁴ Naturally, one of the goals for insurance regulation is to ensure insurance companies have the ability to pay their policyholders' claims when coverage is triggered,¹⁸⁵ which is closely related to solvency regulation.¹⁸⁶ As a part of prudential regulation,¹⁸⁷ disclosure requires that the significant data or information concerning the financial firms' financial health should be available to insurance regulators.¹⁸⁸ Under the circumstances, insurance companies are obligated to disclose their financial conditions to regulators in a complete and accurate manner.

In regulation of insurance including regulation of captives, there is a global knowledge that the amount of liquidity held by an insurance company should be in proportion to the risks it assumes. Not only the widely recognized Solvency II of the E.U.,¹⁸⁹ but also the Risk-Based Capital system

¹⁸³ See Marc Labonte, CONG. RESEARCH SERV., *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework*, 5 (2017).

¹⁸⁴ See Panagiotis Delimatsis, *Financial Innovation and Prudential Regulation: The New Basel III Rules*, 46 J. WORLD TRADE 1309, 1311 (2012).

¹⁸⁵ Michael T. Cappucci, *Prudential Regulation and the Knowledge Problem*, 9 VA. L. & BUS. REV. 1, 4 (2014) (citing Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 634 (1999)).

¹⁸⁶ See Louise Steinberg, *International Organisations: Their Role and Interconnectivity in Insurance Regulation*, RES. HANDBOOK ON INT'L INS. LAW & REG. 276, 276 (Julian Burling & Kevin Lazarus ed., Edward Elgar 2011); See also Kochenburger & Salve, *supra* note 167, at 230.

¹⁸⁷ See Delimatsis, *supra* note 184, at 1311.

¹⁸⁸ See Labonte, *supra* note 183, at 5.

¹⁸⁹ Solvency II is formally known as "Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)," which is a risk management and supervision framework specially designed for insurance companies, and it focuses on prudential regulation on insurance services. See *Risk Management and Supervision of Insurance Companies (Solvency 2)*, EUR. COMM'N, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/insurance-and-pensions/risk-management-and-supervision-insurance-companies-solvency-2_en (last visited Feb. 1, 2021). It entered into force in Jan. 6, 2010 while it actually began to apply to E.U. members on Mar. 31, 2015. See *Law Details about Directive 2009/138/EC*, EUR. COMM'N, <https://ec.europa.eu/info/law/risk-management-and-supervision->

of the U.S.¹⁹⁰ emphasizes that minimum amount of capital should be appropriate to insurers' fundamental operation (i.e., the amount of the undertaken risks, including the risks insured by insurers plus the internal business risks).¹⁹¹ However, in a typical captive arrangement, a parent company may attempt to inject less capital than is appropriate to the amount of risks its captives would insure.¹⁹²

Particular insurance regulators would also set out a lower minimum capital and surplus level for captives than that for traditional commercial insurers in order to satisfy the parent companies. It appears especially noticeable in some onshore domiciles which provide separate sets of regulatory legislation for traditional insurers and captives. For instance, in Vermont, a stock insurer is required to possess \$2,000,000 as the minimum capital for licensing and then to maintain \$3,000,000 as the minimum surplus,¹⁹³ while a captive is only required to maintain \$250,000 through \$500,000 as their lowest capital as well as their minimum surplus.¹⁹⁴ Insurers underwrite the same or similar amount of risks in the same line (e.g. In general, the captives based in Vermont are authorized to carry on the same business in life insurance, health insurance, and certain types of casualty insurance, as the commercial insurers are).¹⁹⁵ However, prudential regulation

insurance-companies-solvency-2-directive-2009-138-ec/law-details_en (last visited Feb. 1, 2021).

¹⁹⁰ RBC Regime was created by the NAIC and was adopted in the early 1990s. "[It] is a method of measuring the minimum amount of capital appropriate for a reporting entity to support its overall business operations in consideration of its size and risk profile." *See Risk-Based Capital*, NAT'L ASS'N OF INS. COMM'R (last updated Jun. 24, 2020), https://content.naic.org/cipr_topics/topic_risk_based_capital.htm.

¹⁹¹ For example, E.U.'s Solvency II generally sets out, "Supervision shall be based on a prospective and risk-based approach." *See* EUR. COMM'N., Solvency II, art. 29 (2009). For another example, U.S.'s RBC basically consists of two core sub-approaches, including: "the risk-based capital formula . . . [and] a risk-based capital model law." *See id.*

¹⁹² *See Revenue Ruling 77-316 and Carnation Co. v. Commissioner: An Analysis of the Attack on Captive Offshore Insurance Companies*, 2 VA. TAX REV. 111, 112 (1982).

¹⁹³ *See* VT. STAT., tit. 8 §3304 (West, Westlaw through acts 1–102 of the Adjourned Sess. of the 2019-2020 Vt. Gen. Assembly (2020)).

¹⁹⁴ *See* VT. STAT., tit. 8 §6004 (West, Westlaw through acts 1–102 of the Adjourned Sess. of the 2019-2020 Vt. Gen. Assembly (2020)) ("No captive insurance company shall be issued a license unless it shall possess and thereafter maintain unimpaired paid-in capital and surplus of: (1) . . . a pure captive insurance company, not less than \$250,000.00; (2) . . . an association captive insurance company, not less than \$500,000.00; (3) . . . an industrial insured captive insurance company, not less than \$500,000.00; (4) . . . an agency captive insurance company, not less than \$500,000.00 . . . (6) . . . a sponsored captive insurance company, not less than \$250,000.00." (5) Risk-retention Groups omitted)).

¹⁹⁵ *See* VT. STAT., tit. 8 §6002 (West, Westlaw through Acts 1-159, 161-169, 171-179, M-1-M-12 of the Adjourned Sess. of the 2019-2020 Vt. Gen. Assembly (2020)) ("[any] captive insurance company . . . may apply to the Commissioner for a license to do any and all insurance comprised in subdivisions 3301(a)(1), (2), (3)(A)–(C), (E)–(Q), and (4)–(9) of this title and may grant annuity contracts as defined in section 3717 of this title"); *See also* VT. STAT., tit. 8 §3301 (West, Westlaw through Acts 1-159, 161-169, 171-179, M-1-M-12 of the Adjourned Sess. of the 2019-2020 Vt. Gen. Assembly (2020)) (Providing that insurance

provides no justification for having lower minimum capital and surplus requirements for captives than for traditional insurers. Under current legislation, captives possess less liquidity than traditional insurance companies, making them less capable to indemnify huge losses and thereby more vulnerable to insolvency where the same amount of risks are materialized. As mentioned before, captives are not limited to pure captives, rather there are various types of captives, which write numerous risks from non-related policyholders. It is an issue that local legislation does not ensure captives' financial capacity to cover their payments and protect their policyholders.

C. Regulatory Loopholes to Control Abuse of the Fronting Arrangements by Captives

With few regulatory legislations, there is a rising concern that the fronting arrangements by captives disturb local insurance regulation and provide the fronting companies with excessive power to issue policies.

Captives, which usually domicile in a jurisdiction with favorable capital and tax treatments, typically seek fronting arrangements as a path to access another insurance market, without restriction from local regulation. It is relatively common that captives participate in fronting arrangements. Purportedly above half of fronting arrangements involve captives.¹⁹⁶ Although legality of fronting arrangements is questioned, states rarely prohibit them expressly.¹⁹⁷ Fronting arrangements are special reinsurance arrangements for the purpose of assisting an insurance company unlicensed or unauthorized in a jurisdiction that it is conducting business in.¹⁹⁸ A commercial insurer licensed in a jurisdiction issues policies, then it cedes all or substantially all of the risks and premiums to a captive unlicensed therein on the basis of a fronting agreement, and thus original risks ultimately reside with the captive.¹⁹⁹ Typically, a ceding company, known as a fronting company, only plays a policy-issuing role in the front of insurance

subdivisions referred in VT. STAT., tit. 8 §6002 include life insurance, health insurance, certain casualty insurance.)

¹⁹⁶ See Esteban Carranza-Kopper, *Fronting Arrangements: Industry Practices and Regulatory Concerns*, 17 CONN. INS. L.J. 227, 235 (2010).

¹⁹⁷ See John C. Gurley, *Regulation of Reinsurance in the United States*, 19 FORUM 72, 77 (1983).

¹⁹⁸ See U.S. GEN. ACCT OFF., GAO-01-977R SUMMARY OF REINSURANCE ACTIVITIES AND RATING ACTIONS TIED TO SELECTED INSURERS INVOLVED IN THE FAILED 'UNICOVER' VENTURE, 5 n.5 (2001).

¹⁹⁹ See *What Is a Fronting Arrangement, and Why Do Captive Insurers Use Them?*, IRMI, (Nov. 12, 2018), <https://www.captive.com/news/2018/11/12/what-is-fronting-arrangement-why-do-captive-insurers-use-them>.

transaction.²⁰⁰ They usually provide licensing services in exchange for a portion of original premiums (i.e. so-called "fronting fee").²⁰¹ This type of fronting arrangement is similar to how captives "rent" licenses to maximize capacity in a given jurisdiction.²⁰² When a captive operates in fronting transaction as a reinsurer, it develops its insurance business at a lower cost due to savings such as domestic tax deduction²⁰³ and international tax avoidance.²⁰⁴ However, in practice, fronting arrangements appear more complex because a captive might be involved in a multi-level risk transfer including retrocession.²⁰⁵

²⁰⁰ See *Regulation of Reinsurance Fronting Practices*, 48 REC. ASS'N B. CITY N.Y. 194, 196 (1993) (quoting Strain, *Reinsurance* at 145, 160, 654 (College of Insurance 1980), also quoting the Glossary of Insurance and Risk Management Terms at 41, (5th ed., International Risk Management Institute, Inc. 1991)).

²⁰¹ See U.S. GEN. ACCT OFF., *supra* note 198 at 8.

²⁰² See *McCullum v. Continental Ins. Co.*, No. L-92-141, 1993 WL 382455, at *3 (Ct. App. Ohio Apr. 9, 1993) (describing "Essentially, a [']fronting agreement ['] . . . is an insurance term indicating that an entity is renting an insurance company's licensing and filing capabilities in a particular state or states"). In reality, an insurer well licensed in jurisdiction A satisfies the local capital and surplus requirements. An unlicensed insurer seeks to carry on insurance business in jurisdiction A, however, is unable or unwilling to meet local license requirements. The unlicensed insurer negotiates and makes a fronting arrangement with a well-licensed insurer ("fronting company"). Under the plan, the fronting company issues insurance policies in domicile A based on its license. Then, due to the plan, all risks or substantially all risks are ceded to the unlicensed insurer so that the fronting company finally retains few risks and the unlicensed insurer actually insures all risks. The unlicensed insurer indirectly carries on business in jurisdiction A with the fronting company's license. The fronting insurer usually obtains some payments from the unlicensed insurer. To some extent, those payments are considered as "renting fees" for an insurance license in jurisdiction A. Therefore, it is compared to a process that an unlicensed insurer "rents" a license from a local well-licensed insurer and indirectly undertakes insurance business in the jurisdiction.

²⁰³ For example, "[In Europe, t]o cooperate as fronting insurer in a 100% reinsurance contract, whereas there exist no economic or financial reasons, in case the reinsurance contract was concluded with a reinsurer situated in a country with an obviously better tax regime." See Hugo Keulers., *Belgium*, IFLR (Mar. 1, 2002), <https://www.iflr.com/article/b1ltxqmcbb3xr/belgium>. In the U.S., there is only federal exercise tax at 1% of premiums upon reinsurance transaction while 4% for direct insurance. See 26 U.S.C. § 4371 (2018); See also Christopherson, *supra* note 83, at 139. In Canada, "[t]he Canadian excise tax does not apply, at the present time, to a contract of re-insurance and this is frequently one reason for using a fronting company." Julian T. W. Kenney, *British Columbia Captive Insurance Companies: The New Kid on the Insurance Block*, 46 ADVOCATE (VANCOUVER) 351, 361 (1988).

²⁰⁴ See Jerome B. Libin & Leonard B. Terr, *Tax Ramifications of International Insurance Transactions: An Overview*, 19 FORUM 284, 303 (1983) ("Since the IRS in practice has not sought to collect the excise tax (although in principle the tax applies) in the case of foreign-to-foreign transactions, 74 at least where neither party to the transactions is otherwise subject to U.S. tax jurisdiction (e.g., by reason of not being engaged in a U.S. trade or business), no excise tax exposure effectively may exist with respect to the reinsurance premiums paid by the United Kingdom fronting company to the tax haven reinsurer.").

²⁰⁵ For example, after an offshore-domiciled captive reinsures a portion of risks from a U.S.-domiciled insurer, and then cedes all or part of risks to another reinsurer, which is called "retrocession." See *Regulation of Reinsurance Fronting Practices*, *supra* note 200, at 211.

First, fronting arrangements disturb local insurance regulation to some extent. By utilizing fronting insurers to enter the insurance market, captive reinsurers circumvent the local insurance regulation such as minimum capital requirements and minimum surplus requirements.²⁰⁶ For instance, typically minimum capital requirements are calculated accurately to reflect the risks an entity would face so that regulatory authorities are able to monitor and correct the business in time.²⁰⁷ Under a fronting insurance transaction, it is difficult for the regulatory authority in the jurisdiction where direct insurance business is conducted to access the financial information of the captive reinsurer in another jurisdiction unless special agreements between two domiciles provided otherwise.

Second, it is relatively challenging to ensure a fronting company underwrites on the basis of the number of risks for the benefit of its reinsurer, rather than abuses its issuing power. In general, fronting companies are less concerned with loss exposures and have less of an economic incentive to issue policies²⁰⁸ because approximately all the risks and premiums ultimately go to the captive reinsurance company. In other words, there are few substantial duties put on the fronting company except “to record an ‘in and out’ entry in its books.”²⁰⁹

Third, in the U.S., while case law made some achievements curbing an abuse of fronting arrangements, there has been no significant progress in regulatory legislation. In many cases, a payment to its captive insurer will not be regarded as a tax deductible premium payment if the Internal Revenue Service (IRS) and the courts find that there was an insufficient actual transfer of risk outside the “corporate family” group.²¹⁰ By contrast, legislative efforts

²⁰⁶ *Id.* at 196.

²⁰⁷ See Elizabeth K. Brill & Michael K. McDonnell, *An Overview of the NAIC Solvency Modernization Initiative*, 6 PRATT'S J. BANKR. L. 333, 334 (2010).

²⁰⁸ See *Regulation of Reinsurance Fronting Practices*, *supra* note 200, at 196 (arguing that fronting companies have a different measurement of risk).

²⁰⁹ J. Alan Lips, *Consumer Credit Insurance--A Need for Regulation in Kentucky*, 56 KY. L.J. 668, 679 (1967).

²¹⁰ For example, in *Gulf Oil Corp. v. Commissioner of Internal Revenue*, Gulf Oil Corporation (Gulf) created a Bermuda-based wholly-owned captive Insko, Ltd. (Insko) and Marsh & McLennan, Inc. agreed to provide Insko with issuing and related services. Under their arrangement, Gulf and its affiliates directly purchased insurance from the third-parties' commercial carriers and accordingly the major exposures of the carriers were ceded to Insko. Later, the Commissioner questioned whether the premiums “representing the amounts of insurance premium payments made by Gulf and its domestic affiliates to primary insurers that the insurers subsequently ceded to Insko” should be tax-deductible. The Third Circuit did not agree that the payments should be deductible from Gulf's gross income because they were not premiums for insurance. *Gulf Oil Corp. v. Comm'r of Internal Revenue*, 914 F.2d 396, 409-12 (3d Cir. 1990). In addition, there are similar holdings on the point among other federal circuits. See *Clougherty Packing Co. v. Comm'r of Internal Revenue*, 811 F.2d 1297, 1307 (9th Cir. 1987) (stating “Premiums paid by the parent to the captive, whether directly or through an unrelated insurer, may not be deducted by the parent as insurance premiums . . . they may not

regulating fronting arrangements have brought few notable effects. In 1993, the NAIC adopted the "Fronting Disclosure and Regulation Model Act," however, such attempts have drawn fierce objections from the industry as well as some policyholders who want to freely manage their risks via fronting transactions.²¹¹ Moreover, regulators from states unanimously believed that existing insurance legislation was sufficient to deal with fronting issues so that the model standards have not been incorporated by any state statute until now.²¹²

The Fronting arrangements by the captives causes regulatory problems, including: the captives' circumvention of local regulation through the arrangements and the difficulties to ensure the fronting companies to issue policies reasonably. However, there is no special regulatory legislation for the issue.

D. Lacking Regulation Over Insurers' Transferring Third-Party Risks to Their Captives

In addition to traditional regulatory challenges, an emerging issue—some insurers' attempts to transfer their written risks to their own captives²¹³—is also challenging the current insurance regulation regime. Initially, the vast majority of captives were created by non-insurance companies,²¹⁴ in order to deal with a different variety of self-insured risks. Thereby regulation of captives mainly focused on protection of single sophisticated policyholders such as the captives' parent companies and their sibling companies.²¹⁵ Over

be deducted as necessary business expenses under 26 U.S.C. § 162(a)."). *See also* Malone & Hyde, Inc. v. Comm'r of Internal Revenue, 62 F.3d 835, 840 (6th Cir. 1995) (holding that "the payments to such a captive that are designated as insurance premiums do not constitute bona fide business expenses, entitling the taxpayer to a deduction under § 162(a)."); *Szyzyg Insurance Co. v. Comm'r of Internal Revenue*, 117 T.C.M. (CCH) 1165, T.C. Memo. 2019-34, 36 (stating "that U.S. Risk [a fronting company] and Newport Re [another fronting company] were not bona fide insurance companies, which in turn means that they did not issue insurance policies . . . This means Szyzyg's [microcaptive] reinsurance of those policies did not distribute risk; therefore, Szyzyg did not accomplish sufficient risk distribution for Federal income tax purposes through the fronting carriers.").

²¹¹ *See* Carranza-Kopper, *supra* note 196, at 243-44; Howard W. Greene & Jon Harkavy, *Fronting is a Consumer Right*, RISK MGMT. 24, 29 (1991), Vincent J. Vitkowsky & John L. Ingersoll, *Survey of 1992 Developments in the Public Regulation of Insurance*, 28 TORT & INS. L.J. 408, 417 (1993).

²¹² *See Regulatory View of Fronting*, IRMI, <https://www.irmi.com/online/rf/ch004/11041000/al041010-regulatory-view-of-fronting.aspx> (last visited Jan. 22, 2021).

²¹³ In the instance, captives issue policies to protect their parents or siblings against liabilities from unrelated persons, which is generally called insuring "third-party risks" or "unrelated-party risks" *See Glossary of Insurance and Risk Management Terms-definition of Offshore Captive*, *supra* note 33.

²¹⁴ *See* Hall, *supra* note 10, at 6.

²¹⁵ *See The Impact of Domestic Regulatory Standards on the U.S. Insurance Market: Hearing Before the Subcomm. on Housing and Insurance of the Comm. on Fin. Serv. U.S.H.R.*,

time, insurance companies have realized that forming their own captives makes more profits, and the market effects of this realization are growing year by year. For example, according to *The Captive Landscape Report of 2019* published by Marsh,²¹⁶ 22% of Marsh-managed captives profited with premiums of 18.7 billion USD by providing third-party coverage in various forms in 2018.²¹⁷ The growth rate of captives insuring third-parties' risks over the last 5 years is 62%.²¹⁸

The regulation of captives writing third-party risks remains unclear and vague now. Generally, because there is little regulation specially related to this area, regulators question whether the old solutions should be directly applied to new problems.²¹⁹ Until now, the majority of the domiciles in the U.S. provide little prohibition on captives' business in writing third-party risks as well as little special regulation.²²⁰

Especially in the life insurance area, a lack of regulation over captives writing third-party risks has caused concerns and debates on the transparency requirements. Commercial life insurance companies have shown more interests in transferring a portion of risks to their captives,²²¹ especially by forming captive reinsurance companies²²² and by trading insurance securitizations.²²³ Those life insurance companies are interested in establishing their own captives to assume the risks from their direct

114th Cong., 38 (2015) [hereinafter *Regulatory Standard Hearing*] (testimony of John M. Huff, Director, Missouri Department of Insurance, Financial Institutions, and Professional Registration).

²¹⁶ Marsh & McLennan Cos. Inc was the largest U.S. commercial retail broker in 2018 with the retail brokerage revenue of \$3,753,000,000 in the same year. See *Largest US Commercial Retail Brokers*, BUS. INS. (Jan. 1, 2020), <https://www.businessinsurance.com/article/20200101/NEWS06/912325917/Business-Insurance-2019-Data-Rankings-Largest-US-commercial-retail-brokers>.

²¹⁷ See Marsh & McLennan, *supra* note 10, at 4.

²¹⁸ *Id.*

²¹⁹ See Hall, *supra* note 10, at 7.

²²⁰ According to domicile comparison report published on Cayman International Insurance website in 2016, only very few states expressly prohibited captives from entering business in writing third-party risks, including: Florida and Oklahoma. See *Domicile Comparison*, CAYMAN INT'L INS. (Dec. 13, 2013), <https://caymanintinsurance.ky/domicile-comparison/> (an updated Excel spreadsheet with information from 2016 is available through a download link at the bottom of the page).

²²¹ See *Financial Stability Oversight Council Annual Report to Congress: Hearing Before the Comm. on Banking, Hous., & Urban Affairs*, 113th Cong., 75 (2015) [hereinafter *Financial Stability Hearing*]. See also *ACLI Response to New York Department of Financial Services Report on Life Insurers' Reinsurance Transactions*, ACLI (Jun. 12, 2013), <https://www.acli.com/Posting/NR13-022>.

²²² Typically, the arrangements that insurance companies form their own captive reinsurance companies work as the fronting arrangements discussed above.

²²³ See Hall, *supra* note 10, at 6.

insurance.²²⁴ The life insurance companies also utilize captives “to finance the reserve ‘redundancies’ associated with requirements for universal life products with secondary guarantees features and term life insurance.”²²⁵ Under the circumstances, a concern has also been raised about whether the traditional regulation for self-insured-based captives is suitable and sufficient to address the coming issues “regarding transparency and consistency when applied to individual policyholder risks backed by life insurance companies.”²²⁶ NAIC Subgroup members also dispute whether the levels of transparency and confidentiality for commercial insurers should be identically imposed upon the captives providing third-party coverage. Some members assert the confidentiality requirements and question whether transparency is necessary when there is no contractual connection between those captives and the original policyholders.²²⁷ They also raised concerns about whether the same levels of transparency would be harmful to the ceding/reinsuring transaction between the captives and their parents or siblings because the disclosed information for the purpose of regulation is also available to their business competitors.²²⁸ By contrast, other Subgroup members, who aligned with transparency requirements and thus challenged complete confidentiality, believe at least a reasonable amount of information should be disclosed to the public just like the annual financial statement. Instead of being concerned about the harm from competitors, those members focused their attention on improving financial strength through disclosure to the public.²²⁹

Therefore, as an increasing number of captives are involved in underwriting the third-party risks from their parent insurers, the lack of regulation in the field raises questions on whether traditional solutions are applicable to the new problems, particularly on the transparency issues of life insurance.

V. PERSPECTIVES

In order to maintain competitive edges, some traditional captive domiciles, such as Bermuda, Cayman, and Guernsey, have aggressively taken several innovations to reform the local regulatory system and enhanced international cooperation for more foreign businesses. Meanwhile, the pivot of the global insurance market is moving east, with the development of Asian

²²⁴ See *Financial Stability Hearing*, *supra* note 221; see also *Captive Insurance Companies*, ACLI, <https://www.acli.com/Public-Policy/Captive-Insurance-Companies>.

²²⁵ *Regulatory Standard Hearing*, *supra* note 215.

²²⁶ *Id.*

²²⁷ See NAT'L ASS'N OF INS. COMM'RS, *supra* note 169, at 14.

²²⁸ See *id.* at 14-15.

²²⁹ See *id.* at 15.

captive domiciles in which there are huge insurance markets. For the challenging and competitive regulation of captives, an effective international cooperation is needed.

A. Traditional Captive Domiciles Respond to Competition with Regulatory Innovations

In the wake of increasingly intense global competition among captive domiciles, traditional captive jurisdictions have been responsive by creating innovative regulatory mechanisms to adjust to new demands for risk management as well as to ensure effective supervision over the industry.

i. Bermuda's Regulatory Regime Is Evolving to Meet Global Competition

As a leading captive domicile for more than half a century, Bermuda has been evolving and keeping pace in insurance regulation in order to compete with the global insurance market.²³⁰ U.S. taxation reforms are a looming threat to Bermuda's captives market.²³¹ A large portion of Bermuda-based captives have U.S. parents²³² and thereby it would be possible for the U.S. to attract the captives back again by amending the tax laws.²³³

Bermuda has been adjusting its regulations in order to boost steady development in insurance markets and achieve effective regulations and transparency.²³⁴ For example, in 2009, Bermuda created Special Purpose Insurers (SPIs), which are designed to conduct some special insurance transactions such as insurance-linked securities.²³⁵ Later, some initiatives were adopted by the Bermuda Monetary Authority (BMA) to remove a portion of annual fees for the SPIs in 2012, which contributed to a more

²³⁰ See *Bermuda Captive Market 2017*, *supra* note 56.

²³¹ David Fox, *US Tax Reform Is Biggest Theoretical Threat to Island, Says Insurance Boss*, ROYAL GAZETTE <http://www.royalgazette.com/article/20140626/BUSINESS04/140629802> (updated Jan. 26, 2014); see also *Fitch: Tax Reforms Reduce Advantage of Reinsuring US Risks to Bermuda*, CAPTIVE (Jan. 25, 2018) [hereinafter *Tax Reforms*], <https://www.captive.com/news/fitch-tax-reforms-reduce-advantage-of-reinsuring-us-risks-to-bermuda#:~:text=Significant%20declines%20in%20business%20or,stay%20in%20the%20United%20States.>

²³² According to BMA Captive Report of 2018, 69% of the risk insured by captives based in Bermuda arose out of North America and Bermuda and most captives had their parents coming from the jurisdictions. See *BMA Captive Report 2018*, *supra* note 14, at 3.

²³³ See Fox, *supra* note 231; *Tax Reforms*, *supra* note 231.

²³⁴ See *Bermuda Captive Conference*, IRMI, (Aug. 2013), <https://www.irmi.com/online/cicr/ch000000/2013aug/bermuda-captive-conference.aspx> (last visited Feb. 12, 2021).

²³⁵ See *id.*

thriving market on the islands.²³⁶ Also, the SPIs have earned praise due to their successes in taking risks to the capital market at an affordable cost.²³⁷

Aware of growing international competition, BMA initiated two separate innovative solutions focused on insurance technology (InsurTech) companies: an insurance regulatory box ("sandbox")²³⁸ and an innovation hub.²³⁹ Both of them apply to traditional insurance as well as captives²⁴⁰ and insurance linked securities.²⁴¹ The sandbox is a testing mechanism for innovative InsurTech products and services in a specified period of time.²⁴² Ultimately BMA would adjust its regulatory requirements on the basis of feedback from the participating parties as well as the objection of policyholder protection.²⁴³ The insurance hub provides a platform for BMA to communicate with the start-ups about innovative InsurTech products and services.²⁴⁴ In all, those innovation tracks have been expected to provide BMA more regulatory experience consistent with innovative InsurTech and further to contribute to more attractive and appropriate regulatory rules for insurance companies including captives.

²³⁶ *See id.*

²³⁷ *Id.*

²³⁸ *See Innovation in Insurance*, BERM. MONETARY AUTH., <https://www.bma.bm/insurance-innovation>, (last visited Feb. 12, 2021). For example, participating companies of sandboxes includes: AkinovA, which is working on "[a]n electronic marketplace to transfer and trade insurance risks, enabling cedants and intermediaries acting on their behalf to transfer insurance risk to investors" and Nayms Ecosystems Limited, which is working on "[a] smart contract powered platform that allows insurance entities to create fully-collateralised, fully digital, transparent, trustless and tradable reinsurance contracts."

²³⁹ *See id.* For example, ChainThat Limited is operating a project named RiCap BERMUDA, which is "a blockchain-driven electronic platform allowing brokers, insurance companies and reinsurers to do business in a single platform to improve business efficiency and cut frictional cost (phase 1), as well as build a private business network to access third party capital (phase 2 and 3)."

²⁴⁰ For example, "A global company partners with a technology start-up in developing a blockchain application that it seeks to sell to companies that use captive companies to manage risks. The product aims to streamline and simplify the global nature of the captive operations, which usually covers multiple jurisdictions, making a strong case for a distributed ledger solution. The Sandbox will allow the company to test the product on a limited basis to its own affiliates, and the feedback received during the Sandbox tenure will ensure viability for external use for other players." *See Guidance Note: Insurance Regulatory Sandbox and Innovation Hub*, BERM. MONETARY AUTH. 17-18 (Published on Sep. 2018), <https://cdn.bma.bm/documents/2019-03-28-05-10-19-BMA-Insurance-Regulatory-Sandbox-Innovation-Hub-Guidance-Note.pdf>.

²⁴¹ *See id.* at 3.

²⁴² *See id.*

²⁴³ *See id.*

²⁴⁴ *See id.* at 4.

ii. Cayman Develops International Cooperation and Regulatory Innovations to Strengthen Its Competitiveness

Recognizing the accelerating globalization of the insurance market,²⁴⁵ Cayman has been increasing the competitiveness through international collaboration and innovative regulation. First, Cayman attempted to compete by enhancing collaboration with the NAIC of the U.S. on regulatory issues. Similar to Bermuda, the risks assumed by 90% of Cayman-based captives originated North America according to the Cayman Islands Monetary Authority (CIMA)'s statistics of the first quarter in 2020.²⁴⁶ Likewise, the local captive market is also sensitive to legislation in the U.S. For example, as the leading healthcare captive domicile,²⁴⁷ Cayman has witnessed a drop in the number of healthcare captives, as a result of healthcare insurers mergers caused by the U.S. Patient Protection and Affordable Care Act of 2010.²⁴⁸ In order to coordinate in regulation and to provide mutual assistance and information exchange, Cayman signed a memorandum of understanding with the NAIC in August 2018.²⁴⁹

Second, Cayman supports innovative uses of captives. For example, as discussed in Cayman's enabling legislation, introduction of the PICs, which operate under the SPCs, as well as their accompanying regulation has been regarded as a special response to global competition.²⁵⁰ Since the first enactment of the Cayman Insurance (Amendment) Law 2013,²⁵¹ Cayman has

²⁴⁵ See Cindy Scotland, *Keeping Cayman Competitive*, CAPTIVE INTL. (Nov. 28, 2018), <https://www.captiveinternational.com/contributed-article/keeping-cayman-competitive>.

²⁴⁶ See *Insurance Company by Risk Location*, *supra* note 14.

²⁴⁷ See Owen Faulkner, *Healthcare and Beyond in Cayman*, CAPTIVE INT'L (Nov. 28, 2018), <https://www.captiveinternational.com/article/healthcare-and-beyond> (“[T]he Cayman Islands has long been hailed as the leading jurisdiction for captives in the healthcare sector.”).

²⁴⁸ See Ins. Managers Ass'n. of Cayman, *Evolution—How Cayman Is Transforming Itself into an International Insurance & Reinsurance Jurisdiction*, RISK & INS. (Mar. 20, 2017), <https://riskandinsurance.com/evolution-cayman-transforming-international-insurance-reinsurance-jurisdiction/>.

²⁴⁹ See *CIMA Signs MOU with NAIC*, CAPTIVE (Aug. 15, 2018), <https://www.captiveinternational.com/news/cima-signs-mou-with-naic-2490>.

²⁵⁰ See *Cayman Enacts PIC Regulations*, BUS. WIRE, (Jan. 30, 2015), <https://www.businesswire.com/news/home/20150130005900/en/Cayman-Enacts-PIC-Regulations> (Chairman of the Insurance Managers Association of Cayman (IMAC), Kieran O'Mahony, [commented], “[T]he PIC legislation and accompanying regulations both exemplifi[ed] and reinforces Cayman's leading position over other jurisdictions in terms of sensible and proportionate regulation, innovative legislation (based upon a trustworthy and reliable legal system) and the high level of governance and compliance afforded to it.”).

²⁵¹ See *Insurance Law (Amendment) 2013 (Cayman Is.)*, Insertion of Part 4A - portfolio insurance companies; See also Ernst & Young Global Ltd., *Portfolio Insurance Companies -- A Versatile Fool*, https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/financial-services/ey-portfolio-insurance-companies-pics.pdf (last visited Feb. 12, 2021) (“[T]hey are easy to establish and further enhance risk management if you are already part of an SPC or looking to become part of one as an alternative to a traditional pure captive. PICs continue to

seen prosperity in the SPCs captive market, with a number of 135 companies by March 31, 2020. Besides, there has been an innovative expansion in risks underwritten, including “employee medical stop loss, equipment maintenance, and writing of unrelated party risks.”²⁵² Finally, Cayman is also attempting to develop the captive regulation regarding InsurTech. Similar to BMA, CIMA has realized the dominant role of InsurTech in the emerging issues such as cyber risks. Although CIMA appears to be behind BMA in developing InsurTech rules because it has not formally declared any innovative initiatives, it continues to research and explore.²⁵³

iii. Guernsey Enhances International Business Cooperation and Regulatory Transparency to Respond to Competition

Guernsey remains competitive by developing further cooperation with international captive owners and introducing a more transparent regulatory platform. First, without the obligation of implementing the E.U. solvency regulation, Guernsey has been aggressively cooperating with more international captive owners. While the impacts of the E.U. Solvency II on global insurance markets remain to be seen, Guernsey provided a prompt response, making clear that it currently has no plan to follow the E.U. rules on the ground that it is not a member of the E.U.²⁵⁴ Since then, the clear standpoint has been a strong selling point for Guernsey, which is regarded to unburden Guernsey-based captives from additional costs.²⁵⁵

Second, a distinctive strategy for Guernsey is its close cooperation with Chinese captive owners on the basis of its advantageous location – physically close to the U.K. and the E.U. member countries,²⁵⁶ Guernsey Financial Services Commission (GFSC) has signed a set of Memorandums of Understanding with all the Chinese financial services regulatory

make up a significant portion of the new captives created in Cayman since the legislation was enacted.”).

²⁵² See *New Cayman Captive Formations Continue Apace*, CAYMAN INT’L INS. (Jan. 18, 2017), <https://caymanintinsurance.ky/news/new-cayman-captive-formations-continue-apace/>.

²⁵³ See Scotland, *supra* note 245.

²⁵⁴ See *Solvency II Position Statement*, GUERNSEY FIN. SERV. COMM’N., (Jan. 25, 2011), <https://www.gfsc.gg/news/article/solvency-ii-position-statement> (stating “1. The authorities in Guernsey have no plans to seek equivalence under Solvency II . . . [Although] [t]he States of Guernsey and the GFSC will be focused on amending Guernsey’s regulatory regime to take account of these international developments[,] [o]bviously any changes to that regime will need to take account of the nature of, and be appropriate to, Guernsey’s insurance industry.”). And note: No opposite position statement has been published on the official website of GFSC.

²⁵⁵ See Peter Niven, *Guernsey Remains an Attractive Proposition*, CAPTIVE, https://web.archive.org/web/20160813214118/https://www.captive.com/docs/default-source/showcase/guernsey_peternivenarticle.pdf?sfvrsn=2 (last visited Feb. 12, 2021).

²⁵⁶ See *Guernsey Continues to Develop China’s Captive Market*, WE ARE GUERNSEY (Oct. 23, 2019), <https://www.weareguernsey.com/news/2019/guernsey-continues-to-develop-china-s-captive-market/>.

authorities,²⁵⁷ at least indicating that Chinese insurance regulatory authorities and China-based business have positive attitudes towards insurance-related investment in Guernsey. Accordingly, Guernsey's insurance market would be entirely receptive to Chinese businesses.²⁵⁸ In particular, a joint venture established between Guernsey-based independent insurance manager Alternative Risk Management and Beijing Airport Captive Management Consulting, which was designed to form a captive structure in China and to provide captive-related consulting services, has been recognized as a remarkable achievement by the Memorandum of Understanding between GFSC and Beijing Airport Economic Core Zone.²⁵⁹ In 2017, Guernsey welcomed at least three Chinese delegation visits to negotiate establishing captives owned by China-based corporations.²⁶⁰

Besides, in order to serve the prospective "clients" better, GFSC has also introduced a regime called the Innovation Soundbox (Soundbox), close to a combination of Bermuda's Sandbox and Innovation Hub. Likewise, the Soundbox is also designed to improve effective communication between GFSC and businesses in order to promote registrations of financial services businesses.²⁶¹

²⁵⁷ See *Memorandums of Understanding List*, GUERNSEY FIN. SERV. COMM'N, (Feb. 2020), <https://www.gfsc.gg/sites/default/files/uploads/GFSC%20MoU%20list%20Feb%202020%20.pdf> (Those are China Banking Regulatory Commission, China Securities Regulatory Commission and China Insurance Regulatory Commission.) (Note: China Banking Regulatory Commission and China Insurance Regulatory Commission have merged into China Banking and Insurance Regulatory Commission since April 2018.).

²⁵⁸ See *China Looks to Guernsey's Captive Insurance Market*, *Captive Insurance Company Reports*, IRMI, (Jul. 2017), <https://www.irmi.com/online/cicr/ch000000/2017july/china-looks-to-guernseys-captive-insurance-market.aspx>.

²⁵⁹ See *Beijing and Guernsey in Captive Insurance Joint Venture*, WE ARE GUERNSEY (Nov. 29, 2017), <https://www.weareguernsey.com/news/2017/beijing-and-guernsey-in-captive-insurance-joint-venture/> (last visited Feb. 11, 2021) (In addition to citation, it is purported "BACM is the only captive insurance consulting group in China and is backed by the Beijing Airport Economic Core Zone (BAECZ) - a key hub for China's business, industrial and creative sectors.").

²⁶⁰ See Tanya Wu, *China Captives in the Limelight* (Feb. 15, 2017), <https://www.captive.com/news/2018/09/12/china-captives-in-the-limelight>.

²⁶¹ See *The Innovation SoundBox*, GUERNSEY FIN. SERV. COMM'N, <https://www.gfsc.gg/commission/innovations/innovation-soundbox> (last visited Feb. 12, 2021) (stating the Innovation Soundbox provides, "the Innovation SoundBox provide: Access to regulators and Commission policy makers; Transparency on the Bailiwick's regulatory requirements; A steer on potential regulatory difficulties and challenges an innovative proposition could face; Openness on our suitability & eligibility criteria; and Explanation of our requirements and how to submit an application for authorisation." However, no relevant statistics about implementation of the Innovation Soundbox have been found in the GFSC's website.).

B. World Insurance Markets Are Moving East to Foster Asian Emerging Captive Domiciles

In general, Asia is seeing a huge potential in building captive domiciles, although they are not currently at a relatively large scale. Compared with those mature jurisdictions such as Bermuda, the Caribbean, North America, and Europe, obviously Asian captive domiciles are still standing on a developing stage, however, with a robust growth.²⁶² According to a Sigma Research Report in 2019 by Swiss Reinsurance Company Ltd., the pivot of global insurance market is forecasted to move east.²⁶³

i. Asian Traditional Captive Domiciles Are Achieving Visible Development

Due to keen competition within Asia,²⁶⁴ the established international financial centers (i.e., Singapore, Labuan (Malaysia), Federated States of Micronesia and Hong Kong (China)) have made some progress in constructing their own captive regulatory systems, which has contributed to a flourishing captive market and promoted general development in Asian captive markets. The Asia-Pacific area has had a 24% increase in the number of captives over the past five years while the number of captives in Europe, the Middle East, and Africa dropped by 8% during the same term.²⁶⁵

Of the financial hubs, Singapore has recently been the leading Asian captive domicile. By the end of 2019, Singapore ranked as the top Asian

²⁶² See Claire Wilkinson, *Captive Experts Eye Asia-Pacific as Next Region for Growth*, BUS. INS. (May 14, 2019), <https://www.businessinsurance.com/article/20190514/NEWS06/912328427/Captive-experts-eye-Asia-Pacific-as-next-region-for-growth> (“The captive insurance sector in Asia-Pacific is relatively small but has potential for significant growth, as businesses in the region increasingly consider the self-insurance vehicles part of their risk management strategies, experts say. As companies in the region become more exposed to captives and insurance rates firm, captive growth is likely to accelerate, they say. Ratings agency A.M. Best & Co. Inc. said it expects to see ‘significant growth’ in the Asia-Pacific domiciles as businesses seek ‘new and more sophisticated ways of risk management and control,’ in a report published Tuesday.”).

²⁶³ See Swiss Re Inst., *Sigma Research Report 3/2019: World Insurance: The Great Pivot East Continues* (Jul. 4, 2019), <https://www.swissre.com/institute/research/sigma-research/sigma-2019-03.html> (last visited Feb. 12, 2021).

²⁶⁴ See *Hawaii Attracts Japanese-Owned Captives, Captive Insurance Company Reports*, IRMI, (Sept. 2001) <https://www.irmi.com/online/cicr/ch000000/2001sept/al090120.aspx> (“The competition for Asian markets is keen. Singapore is already a thriving domicile for Japanese captives. Guam, Labuan, Hong Kong, and Australia are looking heavily to Asian markets for captive growth.”).

²⁶⁵ See Gavin Souter, *More Captives Take on Third-party Risks: Report*, BUS. INS. (May 30, 2019), <https://www.businessinsurance.com/article/20190530/NEWS06/912328760/More-captives-take-on-third-party-risks-Marsh-Report> (last visited May 22, 2020) (citing Marsh & McLennan, *supra* note 11, at 18).

domicile as well as at the twentieth most competitive domicile globally.²⁶⁶ Its main competitor, Hong Kong, also evidenced an increase from only 1 captive in 2011²⁶⁷ to 4 captives at the end of 2019.²⁶⁸ Although those areas have recently developed, unique competitive advantages for them are still absent in comparison with those of worldwide advanced captive domiciles.

ii. Mainland China is a New Choice of Captive Domicile for Asia as Well as for the World

In the near future, particular areas in Mainland China are expected to grow to be internationally competitive captive domiciles on the basis of the improving captives regulation and the huge insurance markets of Mainland China. On the one hand, China has been exploring and testing new insurance regulatory regimes particularly in the pilot free trade zones²⁶⁹ and in specially-established areas for captive registration, with increasing awareness and understanding of international trade rules in insurance services and international investment rules. On the other hand, the growing demands for alternative risk management are creating an increasingly huge domestic insurance market.

²⁶⁶ See *Background on: Captives and Other Risk-financing Options*, *supra* note 53.

²⁶⁷ See Ron Kozlowski & Johnny Ho, *supra* note 6.

²⁶⁸ See *Hong Kong Captive Insurance Law and Captive Domicile Summary*, IRMI, <https://www.irmi.com/online/rf/ch0apdx/11appb-hong-kong-captive-domicile.aspx> (**last visited Feb. 12, 2021**) (“The competition between Singapore and Hong Kong [(China)] for the title of leading financial center in South East Asia has lasted for well over 50 years. The Singapore government has demonstrated its commitment to the insurance and captive development since the 1980s. Singapore implemented its captive laws a decade earlier than Hong Kong[(China)], which introduced captive legislation in 1997.”) See *Hong Kong: Asia’s Emerging Captive Domicile*, CAPTIVE INT’L (Jun. 30, 2020), <https://www.captiveinternational.com/contributed-article/hong-kong-asia-s-emerging-captive-domicile>.

²⁶⁹ Until May 25, 2020, a total of 18 FTZs have been established in Mainland China. See *Six More FTZs Joining Chinese FTAs Families*, STATE COUNCIL OF CHINA (Updated on Aug. 26, 2019), http://english.www.gov.cn/policies/latestreleases/201908/26/content_WS5d63c4a2c6d0c6695ff7f4e4.html. Note that unlike the U.S., in which each state has its own jurisdiction, Mainland China is a jurisdiction as a whole and all of the Chinese FTZs build a team but with different tasks, who is designed to exploring innovative rules in boosting economy, to provide experience for broad non-FTZ areas in Mainland, and ultimately to put advanced regulatory rules in place around Mainland. See *Chart: Add 6 more! Pilot Free Trade Zones Build a New Layout for Opening Up*, STATE COUNCIL OF CHINA (Aug. 26, 2019), http://www.gov.cn/xinwen/2019-08/26/content_5424774.htm. See *Newsletter Shanghai Forum: Global Governance and Asia*, 12 FUDAN J. OF HUMANITIES AND SOCIAL SCIENCE No.2, at 25 (Sep. 2019), https://fdi.fudan.edu.cn/_upload/article/files/39/68/866fd0ab4e9a881eb705de57eff7/9cd629cc-68fc-4da4-8ba8-43e3a1c7bfaf.pdf.

(a) Innovations in Regulation of Captive-Related Insurance and Corresponding Progress in Mainland China

Particular Free Trade Zones (FTZs) in Mainland China are considering establishing an “offshore international financial center” to attract foreign and domestic banking and insurance businesses. Of these Chinese FTZs, China Shanghai FTZ (“Shanghai FTZ”), especially aims to be an international insurance (reinsurance) center on the basis of its advantages in international trade and international marine shipping.²⁷⁰ In 2015, the People’s Bank of China (the Central Bank of China), collaborating with the Ministry of Commerce of China, China Banking Regulatory Commission,²⁷¹ China Securities Regulatory Commission, China Insurance Regulatory Commission,²⁷² State Administration of Foreign Exchange and Government of Shanghai issued a scheme for building an international financial center in Shanghai, which expressly announced that the reinsurance industrial chain should be established and supported the establishment of Chinese-owned or foreign-owned²⁷³ reinsurance businesses including: captive insurance companies, mutual insurance companies and other non-traditional insurance companies.²⁷⁴ With these innovative guidelines, the Shanghai FTZ has seen notable achievements in regulation concerning captives. For instance, on February 8, 2017, COSCO Shipping Captive Insurance Co. Ltd., whose single parent is China COSCO Shipping Co. Ltd., was created as the first captive registered in Shanghai FTZ.²⁷⁵

²⁷⁰ See CHINA (SHANGHAI) PILOT FREE TRADE ZONE ADMIN. 《牢牢把握自贸试验区战略机遇努力打造上海保险业改革新高地树立保险业开放新标杆--<实施意见>自贸试验区保险市场建设解读》(Dec. 9, 2014), <http://www.china-shftz.gov.cn/NewsDetail.aspx?NID=5e4bdfb2-2bb1-4468-baa1-150b0ea05ad2&CID=f672f518-99a3-4789-8964-1335104906b4&MenuType=1&navType=0>.

²⁷¹ CBRC and CIRC has merged into CBIRC since April 2018.

²⁷² CBRC and CIRC has merged into CBIRC since April 2018.

²⁷³ “Foreign” here specially refers to “Non-Chinese.”

²⁷⁴ See STATE COUNCIL OF CHINA, 《关于印发《进一步推进中国（上海）自由贸易试验区金融开放创新试点 加快上海国际金融中心建设方案》的通知》(Oct. 29, 2015), http://www.gov.cn/zhengce/2015-10/29/content_5055131.htm (“（二十）完善再保险产业链。支持在自贸试验区设立中外资再保险机构，设立自保公司、相互制保险公司等新型保险组织，以及设立为保险业发展提供配套服务的保险经纪、保险代理、风险评估、损失理算、法律咨询等专业性保险服务机构。”）。

²⁷⁵ See COSCO SHIPPING CAPTIVE INS. CO. LTD., *About Us*, <http://captive.coscoshipping.com/col/col13420/index.html> (last visited Feb. 12, 2021); See also CHINA (SHANGHAI) PILOT FTZ ADMIN., 《航运业首家自保公司落户上海自贸区》(Feb. 20, 2017), <http://www.china-shftz.gov.cn/NewsDetail.aspx?NID=39990f63-9e71-4007-a121-707b9b134f76&CID=f672f518-99a3-4789-8964-1335104906b4&MenuType=1&navType=0>; see also HELLENIC SHIPPING NEWS WORLDWIDE, *AM Best Affirms Credit Ratings of COSCO*

Another member of the Chinese FTZs – China (Guangdong) Pilot Free Trade Zone – also aggressively explores insurance regulatory regimes. As an area of China (Guangdong) Pilot Free Trade Zone (Guangdong FTZ), Qianhai, Shenzhen²⁷⁶ specially focuses on the cross-border trade in insurance services and insurance-linked investment. One geographic advantage for Qianhai is that it is just a one-hour drive away from Hong Kong, which strategically attracts Hong Kong-based businesses.²⁷⁷ Similar to Shanghai FTZ, Shenzhen also publicly announces its guideline relating to captive-related insurance innovations, including: encouraging captive insurance companies and other emerging insurance service providers to conduct business in the Qianhai area of Guangdong FTZ.²⁷⁸ By contrast, Qianhai initiated a head start in participating in global cooperation of financial services regulation before Shanghai FTZ and other Chinese FTZs.²⁷⁹ It has been standing as an observer as well as the only Mainland participant in the Global Financial Innovation Network,²⁸⁰ which is a cross-border financial innovation testing mechanism to promote communication between financial regulators and businesses on the basis of international collaboration.²⁸¹

SHIPPING Captive Insurance Co., Ltd. (Sept. 20, 2019), <https://www.hellenicshippingnews.com/am-best-affirms-credit-ratings-of-cosco-shipping-captive-insurance-co-ltd/> (for English version).

²⁷⁶ Shenzhen City of Guangdong Province, with the title of “Window of Mainland China,” was also established for the purpose of China’s Reform and Opening-up policy. Qianhai is an economic development zone of Shenzhen, specializing in collaboration with Hong Kong (China), Macao (China) as well as jurisdictions outside of China. Also, Qianhai has become a core area in Guangdong FTZ. *See generally Welcome to QianHai* (last visited Jan. 24, 2021), <http://www.szqh.com.cn/>.

²⁷⁷ *See* Gabriel Olano, *New Mainland Economic Zone Seeks to Attract Hong Kong Insurers*, INS. BUS. MAG. (Feb. 27, 2018), <https://www.insurancebusinessmag.com/asia/news/breaking-news/new-mainland-economic-zone-seeks-to-attract-hong-kong-insurers-93336.aspx>.

²⁷⁸ *See* GOV’T OF SHENZHEN, 《深圳市人民政府关于加快现代保险服务业创新发展的实施意见》(13 May 2020),

http://www.sz.gov.cn/zfgb/2015/gb920/content/post_4981953.html (“二 . . . (三) 加强保险市场体系建设。大力发展保险总部经济, 吸引保险法人机构落户, 鼓励保险总公司来深设立专业子公司、基金管理公司、项目公司、区域总部、研发中心、运营中心。加快保险机构组织形式创新, 支持设立自保、相互制保险等新型保险机构和航运保险、责任保险、健康保险、养老保险等专业保险机构。支持设立互联网保险公司和新型保险要素交易平台。”)。

²⁷⁹ Until May 26, 2020, Qianhai has been the only one participant in the GFIN, from Mainland China. *See Our Members*, GLOB. FIN. INNOVATION NETWORK, <https://www.thefin.com/members> (last visited Feb. 12, 2021).

²⁸⁰ *See id.*

²⁸¹ *See About GFIN*, GLOB. FIN. INNOVATION NETWORK, <https://www.thefin.com/about> (last visited Feb. 12, 2021).

Besides, Kashgar²⁸² and Karamay²⁸³, which are economic development areas in Xinjiang,²⁸⁴ have adopted favorable regulation specially supporting captives, in order to keep pace with Chinese captives development.

(b) The Potential Domestic Insurance Markets in Mainland China

Generally, increasing demands for alternative risk management in Mainland China and its geographic location would contribute to its huge captive insurance markets in the coming years. First, Mainland China has recently seen a robust growth in the domestic commercial insurance market.²⁸⁵ As a whole, "China's share of the global insurance market went from 0% in 1980²⁸⁶ to 11% in 2018, and [was] forecast to reach 20% in 10 years' time."²⁸⁷ Most recently, according to the data by China Banking and Insurance Regulatory Commission, the monthly nationwide gross premium has almost doubled its growth from 850 billion Renminbi (approximately 119 billion USD) in January 2019²⁸⁸ to 1.670 trillion Renminbi (approximately 234 billion USD) by March 2020.²⁸⁹ The flourishing direct insurance market indicates the development of enterprise risk management practices.²⁹⁰ Also, a positive prospect for captive insurance can be forecast because both of direct insurance and captive insurance are typical risk management solutions and both can be utilized to satisfy the increasing needs for risk management, regardless of whether those solutions are direct or alternative. In addition, the

²⁸² Kashgar announces that registered financial and insurance businesses would obtain a lump-sum award at 1% of amount of capitalization up to 5,000,000 Renminbi (approximately 700,869 USD) as well as special tax awards under specified circumstances. *See* Chinacaptive.org, 《喀什专属自保地介绍》(May 23, 2017), <http://www.chinacaptive.org/practice/addressinfo/100>.

²⁸³ Karamay is the first captive domicile in Mainland China. CNPC Captive Insurance Company Limited, which is the first captive of Mainland China, was registered in Karamay, Xinjiang. *See* China Nat'l Petroleum Corp., 《专属财产保险股份有限公司：中国境内首家自保公司》(Aug. 24, 2015), <http://www.cnpc.com.cn/cnpc/ztxjqyjj/201508/b1e487eac70b4520b07525dcfde79cbc.shtml> (Note: The captive was formed on December, 2013 although the reference paper was published on 2015).

²⁸⁴ Xinjiang refers to a Chinese autonomous region, located in Northwest of China.

²⁸⁵ *See* Wu, *supra* note 260.

²⁸⁶ Since 1978, Mainland China has been implementing Reform and Opening-up Policy, significantly contributing to Chinese economic boom.

²⁸⁷ *See* Sigma Research Report 3/2019, *supra* note 263.

²⁸⁸ *See* CHINA BANKING & INS. REG. COMM'N, 《2019年1月全国各地原保险保费收入情况表》(Mar. 8, 2019), <https://www.cbirc.gov.cn/cn/view/pages/ItemDetail.html?docId=371580&itemId=954&generalType=0>.

²⁸⁹ *Id.*

²⁹⁰ *See* Ron Kozlowski & Johnny Ho, *supra* note 6.

current Mainland market also provides lots of opportunities for captive insurance even though it is still a new player in captive insurance.²⁹¹

Finally, as another element to broaden local captive insurance markets, Mainland China's geographic location would also lead to more establishments of captives. Close proximity and convenient traffic would always be important to captive owners. When selecting a captive domicile, an investor would keep his/her eyes on the proximity between the domicile and the risk location based on consideration for costs and efficiency. As noted above, the majority of captives domiciled in Bermuda assume the risks from North America, and Chinese businesses prefer Guernsey as a springboard to enter into insurance market of the U.K. and the E.U. Likewise, Australia businesses prefer to establish captives in Singapore²⁹² while Japanese businesses choose Hawaii.²⁹³ On this point, Mainland China is likely to be a destination for enterprises that seek a captive solution to assume the risks originating from China as well as China's neighbors (i.e. South Korea, Japan, Thailand, India and etc.).

C. International Cooperation is Key to Improving Global Captives Regulation

One of the best solutions to improve global regulation of captives is effective international cooperation in the area. The challenges in the captives regulation need effective collaboration among the worldwide domiciles via the bilateral,²⁹⁴ regional,²⁹⁵ or multilateral²⁹⁶ approaches. For the issue out of the prudential regulation, it would be helpful to ensure the captives' financial stability and give the appropriate discretion to each authority if these domiciles reach an agreement on the concrete range of minimum capital and surplus requirements for captives. Next, for the purpose of restricting abuse

²⁹¹ See Wu, *supra* note 260.

²⁹² See Ron Kozlowski & Johnny Ho, *supra* note 6 ("Australia greatly contributed to the early prosperity and foundation of Singapore's captive business. Compared to other mature captive domiciles, like Bermuda or Isle of Man, Singapore is located nearer to Australia and is in adjacent time zones; hence, it rapidly attracted Australian companies which have high demand of captives.").

²⁹³ See *Hawaii Attracts Japanese-Owned Captives*, *supra* note 264 ("Another reason Hawaii is so popular is that it is approximately an 8-hour flight from Japan, making it substantially more accessible than most of the other domiciles. Also, the 19-hour time difference means that Hawaii is accessible by phone for about half the business day in Japan.").

²⁹⁴ Bilateral agreements typically refer to the agreements between two parties (e.g., the U.S.-Australia Free Trade Agreement & The U.S.-Korea Free Trade Agreement).

²⁹⁵ Regional arrangements usually refer to the arrangements among the parties in a specified area, with an aim of furthering regional integration (e.g., The Dominican Republic-Central America Free Trade Agreement).

²⁹⁶ Multilateral cooperation refers to the international cooperation involving more than two parties (e.g., The General Agreement on Trade in Services of World Trade Organization is a multilateral trade agreement.).

of the fronting arrangements by captives, it is necessary for the domiciles to form a regime to provide the mutual assistance on financial information verification when a jurisdiction in which a fronting is located makes a request to another domicile of the related captive. Financial information exchanges between or among authorities is an effective way to deal with regulatory loopholes. For example, in this way, the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes has made significant progresses in closing down the loophole of global tax system (i.e., offshore tax evasion).²⁹⁷ Finally, with a lack of regulation on emerging issues, such as captives writing third-party risks, deeper international coordination should be developed to explore the new solutions and provide regulatory guidelines. To some extent, they could work like the ICPs by the IAIS, which "serve as a basic reference."²⁹⁸

VI. CONCLUSION

Global competition of captives regulation is distinctive due to its purpose and objectives (i.e., sound financial system and sufficient policyholder protection). Under the circumstances, the regulation of captives faces challenges in international collaboration (domestic coordination of regulations for the U.S.), prudential and solvency regulations, fronting arrangements regulations, and regulations over third-party coverage arrangements. Recently, economic development in Asia has stimulated significant growth in demands for diverse risk management solutions including captive insurance, which provides a huge risk management market, although accompanying regulation remains to be explored and developed. In the face of the competitive and challenging regulation of captives, effective international cooperation is necessary, and a domicile can rarely solve these regulatory challenges independently. Ultimately, only practice and time will show the best way to achieve the effective regulation over captives.

²⁹⁷ See *OECD SECRETARY-GENERAL REPORT TO G20 LEADERS*, OECD, at 8 (Jul. 2017), <http://www.oecd.org/ctp/oecd-secretary-general-tax-report-g20-leaders-july-2017.pdf> ("[As of July 2017,] 500 000 people having disclosed offshore assets, and around 85 billion euros in additional tax revenue identified as a result of voluntary compliance mechanisms and offshore investigations.").

²⁹⁸ Wallace Wang, *Developing Reinsurance Markets in Emerging Economies: Regulatory Implications and Challenges*, 8 L. & BUS. REV. AM. 395, 421 (2002).

**21ST CENTURY MEDICINE VERSUS ANTI-VACCINATION MYTHS:
ANALYZING THE WORLD-WIDE RESURRECTION OF MEASLES AND WHY
THE UNITED STATES SHOULD END RELIGIOUS AND PHILOSOPHICAL
VACCINATION EXEMPTIONS.**

Kelly Cousoulis¹

I. INTRODUCTION

In the year 2020 alone, we witnessed first-hand the consequential lack of preparedness in governments around the world addressing emerging health crises. One would think that advanced healthcare systems developed world-wide would have been more equipped to take on the novel COVID-19 virus. However, this life-altering virus has shown us that there are a multitude of cracks in the world's healthcare foundation. One of the more visible cracks throughout history has been the handling of mandated vaccinations. A key example of this problem can be seen with the United States' management of the 9th century disease, measles.²

The World Health Organization declared measles eliminated from the United States in 2000 after the success of the measles' vaccine.³ However, on October 1, 2018, measles resurfaced in four New York State counties, causing a spread of about 1,282 individual cases of measles over the next year in 31 different states.⁴ How did this 9th century disease resurge almost twenty years after it had been eliminated from the United States?⁵ Had a new strain of the measles disease developed with the capability of undermining the measles vaccine? Or was there something wrong with the measles vaccine itself? The issue was neither a new strain or the vaccine itself, but rather that measles had been brought into the United States by travelers and was attacking unvaccinated communities, including unvaccinated children whose parents chose to leave them vulnerable against this highly contagious and highly dangerous disease.⁶ In New York, measles resurged from "close-knit and under-vaccinated Orthodox Jewish communities . . . [who] accounted for

¹ George Mason University Antonin Scalia Law School, J.D. Expected May 2021. With special thanks to my parents Michelle and Boyd Cousoulis, my brother Corey, and the ILJ editing team for their unwavering support.

² Centers for Disease Control & Prevention, *History of Measles; Pre-Vaccine Era* (Nov. 5, 2020), <https://www.cdc.gov/measles/about/history.html> [hereinafter CDC, *History of Measles*].

³ Centers for Disease Control & Prevention, *Measles Elimination* (Nov. 5, 2020), <https://www.cdc.gov/measles/elimination.html> [hereinafter CDC, *Measles Elimination*].

⁴ See Centers for Disease Control & Prevention, *Measles Cases and Outbreaks* (Nov. 5, 2020), <https://www.cdc.gov/measles/cases-outbreaks.html> [hereinafter CDC, *Measles Cases and Outbreaks*]; CDC, *History of Measles*, *supra* note 2; see also N.Y. State Dep't of Health, *Statement from New York State Health Commissioner Dr. Howard Zucker on New York State's Public Health Response to Measles*, (Oct. 3, 2019).

⁵ See CDC, *History of Measles*, *supra* note 2.

⁶ See CDC, *Measles Elimination*, *supra* note 3.

seventy-five percent of the measles cases in the United States during 2019.”⁷ From October 2018 to October 2019 the amount of measles reported “would be the largest [amount] reported in a [single] year since 1992.”⁸

With its first traces dating back to the 9th century, measles first became a “nationally notifiable disease in the United States,” in 1912.⁹ Since there are no federal laws concerning childhood immunization, “each state is left to legislate its own [vaccine] requirements.”¹⁰ All states require children entering any public school from kindergarten through Grade 12 to meet certain immunization requirements, but families can avoid compliance with these requirements by claiming a state-level exemption.¹¹ The three main forms of exemptions include medical exemptions, religious exemptions, and philosophical exemptions.¹² All fifty states and D.C. permit a medical exemption that allows children to forgo the immunization requirement if he or she has “a written certification by a private physician, his or her representative, or the public health authorities that immunization is medically inadvisable.”¹³ Another exemption most states accept are religious exemptions; forty-five states and D.C. allow religious exemptions.¹⁴ Prior to its recent measles epidemic, New York also permitted religious exemptions from its immunization requirements.¹⁵ However, after becoming the epicenter for the measles outbreak in the United States, New York ended religious exemptions from its vaccination requirements.¹⁶ “Since the start of the outbreak in October 2018, there have been 654 measles cases in [New York City] and 414 in other parts of [New York State]....”¹⁷ Therefore, the New York legislature took immediate action to address its drastic health situation that its citizens created by not vaccinating their children.

In addition to medical and religious exemptions, fifteen states also allow a form of philosophical exemption from immunization requirements.¹⁸ This exemption allows parents to put entire communities, as well as their own children, at risk and opens the door to future measles outbreaks. The United

⁷ *See id.*

⁸ Aimee Cunningham, *The U.S. Narrowly Eked Out a Measles Win, Keeping Elimination Status*, SCI. NEWS (Oct. 4, 2019), <https://www.sciencenews.org/article/united-states-measles-outbreak-elimination-status>.

⁹ *See CDC, History of Measles, supra* note 2.

¹⁰ Nicole Le Hudson, *The Childhood Vaccinations Debate*, 22 TYL 8, 8 (2017).

¹¹ *See State Vaccination Exemptions for Children Entering Public Schools*, PROCON.ORG (last updated March 2, 2020), <https://vaccines.procon.org/state-vaccination-exemptions-for-children-entering-public-schools/>.

¹² *See id.*

¹³ D.C. Code § 38-506(2) (2007).

¹⁴ PROCON.ORG, *supra* note 11.

¹⁵ Sharon Otterman, *Get Vaccinated or Leave School: 26,000 N.Y. Children Face a Choice*, N.Y. TIMES (Sept. 3, 2019), <https://www.nytimes.com/2019/09/03/nyregion/measles-vaccine-exemptions-ny.html?module=inline>.

¹⁶ *See id.*

¹⁷ *Id.*

¹⁸ PROCON.ORG, *supra* note 11.

States and foreign countries around the world are forced to face the dangers that vaccination exemptions create.

The measles resurgence has advanced both in the United States and abroad, affecting 90,000 people across the European Region in 2019 compared with the 44,175 people affected in the first six months of 2018.¹⁹ France and Canada are two countries which have also struggled to respond to the measles resurgence.²⁰ After dealing with a substantial measles outbreak in 2017, France enforced legislation that required parents to vaccinate their children, including the measles vaccination and eleven other vaccinations.²¹ Additionally, Canada's province of Ontario has addressed its own measles outbreak by requiring parents who wish to use the religious or philosophical exemptions to complete "an immunization education session with a medical officer of health or with a medical officer of health's delegate."²²

The United States should remove religious and philosophical exemptions to make sure it can address contagious diseases quickly, efficiently, and safely with a verified vaccine. In Part I of this comment, I will examine the history of vaccinations, how vaccines were created and how they are transmitted, with a focus on the creation of the measles vaccine. I will then explain the United States' governmental role in immunization efforts and the states' verified police power to carry out children vaccinations prior to their enrollment in public schools. Next, I will present the anti-vaccination argument and the rise of the movement worldwide, followed by my counterargument debunking myths that anti-vaccination supporters rely on. Then, I will explain the three main types of vaccination exemptions: medical exemption, religious exemption, and the philosophical exemption. I will then analyze and compare the state immunization regulations in the United States and immunization regulations in Canada and France to understand how they have addressed their measles outbreaks.

In Part II of this comment, I will analyze both the legal and practical problems that arise from state compulsory vaccination laws, followed by three proposed solutions to these problems. In order to secure a future where preventable diseases remain eliminated, states must learn from France and Canada and address unsubstantiated anti-vaccination movements by either (1) only allowing medical exemptions, (2) requiring parents to attend educational classes on vaccination requirements before invoking an

¹⁹ Palko Karasz, *W.H.O. Warns of 'Dramatic' Rise in Measles in Europe*, N.Y. TIMES (Aug. 29, 2019), <https://www.nytimes.com/2019/08/29/world/europe/measles-uk-czech-greece-albania.html>.

²⁰ *See id.*; *see also Measles Outbreak*, QUEBEC (Oct. 4, 2019), <https://www.quebec.ca/en/health/health-issues/a-z/measles/measles-outbreak/>.

²¹ Code de la Santé Publique [C.S.P.] [Code of Public Health] art. L. 3111-2 (Fr.); *see also* Katie Forster, *France to Make Vaccination Mandatory from 2018 as It Is 'Unacceptable Children are Still Dying of Measles'*, INDEP. (July 5, 2017).

²² Immunization of School Pupils Act, R.S.O. 1990, c I.1 (Can.).

exemption, or (3) implementing penalties if parents refuse to vaccinate their children.

First, all states should follow the strides of France and five other states in the United States by only allowing medical exemptions from state compulsory vaccination laws. This proposed solution would be the most direct response to the measles epidemic and to ensure that all children are safe when attending public school and public day care centers. Although one may argue that this solution infringes on individual rights, this question has already come before the Supreme Court of the United States as well as several state supreme courts, each of which found that the safety of the community takes priority over individual claims to prevent future health epidemics.²³

Second, states which continue to allow religious or philosophical exemptions must also require the parents using these exemptions to attend mandatory educational sessions on the benefits of vaccinations with a licensed medical professional before they can use either exemption. This educational method is already in use in Ontario, Canada and should be implemented in the United States to reeducate the public.²⁴ States need to promote the real benefits of vaccinations to expel anti-vaccination myths. The anti-vaccination movement is based on falsified studies, a lack of trust in the government, and unfounded claims.²⁵ Therefore, it is vital that state legislatures reeducate their citizens to understand the true risks they are taking when they chose to not vaccinate their children. All fifty states must take significant steps towards assuring that preventable diseases, like measles, remain eliminated by taking the time to educate their communities.

Third, if a child's vaccination requirements are not met before his or her first day of public school, the child's parents should be issued penalties and the child should not be allowed to attend school.²⁶ If the child's parents have not claimed one of the exemptions allowed by that state's vaccination laws and still do not vaccinate their child, then it would be appropriate for these penalties to be issued. This method has recently been implemented in New York to assure that parents understand the severity of the situation and meet their responsibility of vaccinating their children.²⁷ Each of these three proffered solutions provide states with efficient methods of combatting the anti-vaccination movement and ensuring the health and safety of its citizens.

²³ See *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905); see also *Wright v. DeWitt Sch. Dist.*, 385 S.W.2d 644, 648 (Ark. 1965); *Brown v. Stone*, 378 So. 2d 218, 222-24 (Miss. 1979); *State ex rel. Mack v. Bd. of Educ.*, 204 N.E.2d 86, 90 (Ohio Ct. App. 1963).

²⁴ See R.S.O. 1990, c I.1 (Can.).

²⁵ See James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 835 (2001).

²⁶ See Forster, *supra* note 21; Melissa Eddy, *Germany Considers Fines for Not Vaccinating Children Against Measles*, N.Y. TIMES (May 7, 2019); see also Otterman, *supra* note 15.

²⁷ See Otterman, *supra* note 15; Eddy, *supra* note 26.

Furthermore, each of these proffered solutions work to prevent future measles outbreaks from affecting thousands of citizens throughout the United States.

II. BACKGROUND

This section will go through the historical evolution of vaccinations, taking a focus on the measles vaccine. I will then analyze the United States' governmental role in immunization efforts and the initial pushback to state compulsory vaccination laws. Next, I will examine the arguments used in support of the anti-vaccination movement both in the United States and abroad, followed by counterarguments to these myths and misconceptions. Then, I will analyze the three main forms of vaccination exemptions. Finally, I will compare the exemptions allowed in the United States to the exemptions allowed in Canada and France.

A. *The History of Vaccinations*

First, I will look at what a vaccine is and its origins in fifteenth-century Europe.²⁸ Next, I will look to how vaccines are transmitted through vaccinations.²⁹ Finally, I will turn a focus to the measles vaccination and how it was developed.

i. What Is A Vaccine?

A vaccine is a powerful medicine, developed to prevent a specific disease, that stimulates the immune system to produce antibodies as if a person were exposed to the disease.³⁰ A vaccine contains "the same germs that cause the disease."³¹ A vaccination is the process of transferring a vaccine containing a virus to a non-exposed individual allowing the individual to build resistance against the virus.³² These vaccinations cause the body to produce antibodies that attack and kill the life-threatening virus before it has the opportunity to spread.³³ "After getting vaccinated, [the body] develops an immunity to that disease, without having to get the disease first."³⁴ Before vaccinations, humanity was seriously threatened by diseases such as "smallpox, the bubonic plague, polio, diphtheria, tuberculosis, measles, mumps, and rubella."³⁵ These infectious diseases were the number one killer of human beings, having the capability of wiping out thousands of

²⁸ See Hodge & Gostin, *supra* note 25, at 838.

²⁹ See *id.* at 837.

³⁰ Centers for Disease Control & Prevention, *Vaccines: The Basics* (March 14, 2012), <https://www.cdc.gov/vaccines/vpd/vpd-vac-basics.html> [hereinafter CDC, *Vaccines: The Basics*].

³¹ *Id.*

³² Hodge & Gostin, *supra* note 25, at 838.

³³ Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children*, 37 U. MICH. J. L. REFORM 353, 363 (2004).

³⁴ CDC, *Vaccines: The Basics*, *supra*, note 30; see also Calandrillo, *supra* note 33, at 838.

³⁵ Calandrillo, *supra* note 33, at 362-63.

individuals.³⁶ Without the life-saving work of Dr. Edward Jenner, these diseases may have led to the end of the human species.

Vaccinations first developed in response to the smallpox disease.³⁷ The smallpox disease traces its roots back to fifteenth-century Europe.³⁸ Dr. Edward Jenner, a physician from England often referred to as the “Father of Vaccination,” took the first influential steps of controlling the smallpox disease.³⁹ After years of experimentation, Dr. Jenner discovered that individuals who had cowpox sores on their body from milking cows did not contract the smallpox disease.⁴⁰ Dr. Jenner tested this theory by taking the live material from the cowpox sore, injecting that material into an eight year old boy, James Phipps, and then weeks later, injected the live material of someone infected with small pox into James as well.⁴¹ The boy did not contract smallpox, thus making this the first successful vaccine in 1796.⁴² Due to this success, the term “vaccine” was “derived from the Latin word *vaccinus*” referring to cows.⁴³ This newly developed smallpox vaccination effectively changed smallpox from an uncontrollable epidemic to a completely eradicated disease.⁴⁴

In addition to predisposing the immune system, vaccines successfully irradiate disease by establishing herd immunity in the community. Herd immunity occurs when a critical portion of the population, which is “the minimum percentage of vaccinated persons essential to provide herd immunity” is vaccinated against the same contagious disease thus creating little opportunity for an outbreak.⁴⁵ For highly contagious diseases, if enough people are vaccinated, the infections stop spreading due to the strength of herd immunity.⁴⁶ When the majority of the community’s population is vaccinated, vaccines such as the measles vaccine have successfully prevented the spread of the contagious disease.⁴⁷

ii. The Measles Disease

Measles first became a nationally notifiable disease in the United States in 1912.⁴⁸ After becoming a notifiable disease, the first decade of

³⁶ *See id.* at 363.

³⁷ Hodge & Gostin, *supra* note 25, at 836.

³⁸ *Id.* at 838.

³⁹ *Id.* at 839.

⁴⁰ *Id.* at 840.

⁴¹ *Id.*

⁴² *Id.* at 840-41.

⁴³ *Id.* at 840.

⁴⁴ *Id.*

⁴⁵ Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 600 (2016) (internal quotations omitted).

⁴⁶ *Id.* at 600-01.

⁴⁷ CDC, *Measles Elimination*, *supra* note 3.

⁴⁸ CDC, *History of Measles*, *supra* note 2.

reported cases held an average of 6,000 measles-related deaths per year.⁴⁹ In 1954, John F. Enders and Dr. Thomas C. Peebles “collected blood samples from several ill students during a measles outbreak in Boston, Massachusetts...with the goal of isolating the measles virus and creating a measles vaccine.”⁵⁰ This goal was accomplished by isolating measles in 13-year-old David Edmonston’s blood.⁵¹ In 1963, John Enders transformed “Edmonston-B strain of measles virus into a vaccine and licensed it in the United States.”⁵² Due to the great success of the measles vaccine, the World Health Organization (WHO) declared measles eliminated in the United States in 2000.⁵³ In addition to the focus of creating a safe and sustainable vaccine, it was also essential for governments to take a leadership role in immunization efforts.

B. *The Governmental Role in Immunization Efforts*

To ensure that citizens were utilizing these lifesaving vaccines, governments across the world took an active role in leading immunization efforts. The first government-led immunization efforts took place in Europe in the early 1800s, with several European countries developing compulsory vaccination programs.⁵⁴ In 1818, one of the earliest school vaccination requirements was put into law by the King of Wittenberg, which required every child to be vaccinated without any possible exemptions.⁵⁵ A series of legislative acts throughout Europe followed, requiring and regulating vaccinations throughout the 1800s.⁵⁶ This included Napoleon’s requirement of vaccinations for all his soldiers, the British Parliament’s enactment of a series of legislative acts providing free medical vaccinations in England and Wales, and other laws which helped drastically reduce the smallpox mortality rate in Europe.⁵⁷

After seeing the success of Dr. Jenner’s smallpox studies, Dr. Benjamin Waterhouse advocated for the use of vaccinations in the United States in 1816.⁵⁸ Initially, vaccinations in the United States were only available to wealthy citizens who could afford them.⁵⁹ However, over time, Congress worked to implement methods of providing vaccinations to the public for free as a matter of public health objectives.⁶⁰ In order to ensure

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ CDC, *Measles Elimination*, *supra* note 3.

⁵⁴ Hodge & Gostin, *supra* note 25, at 840-41.

⁵⁵ *Id.* at 841.

⁵⁶ *Id.*

⁵⁷ *Id.* at 841-42.

⁵⁸ *Id.* at 842.

⁵⁹ *Id.* at 843.

⁶⁰ *Id.* at 843-44.

public health objectives, scientists and researchers had to ensure that each vaccine was fully approved before distributing it to the public.

For the government to accept a vaccination for distribution in the United States today, the vaccination must go through an extremely thorough vaccine approval process.⁶¹ The vaccine approval process has become significantly more stringent over time.⁶² Before vaccines are approved by the Food and Drug Administration (FDA), they are extensively tested to ensure their safety and effectiveness.⁶³ Before vaccines are licensed by the FDA, they go through meticulous rounds of clinical studies and laboratory tests.⁶⁴ Vaccines are first tested on animal subjects and eventually on human subjects to ensure the safety of the vaccine and for scientists to predict how the vaccine will interact with the human immune system.⁶⁵ The licensing of a vaccine can take up to ten years or longer to ensure that they are safe for use in the general public.⁶⁶ Even after a vaccine is licensed, the FDA requires vaccine manufactures to provide all data of any side effects or delayed reactions that may occur.⁶⁷ This information is filed in a surveillance system to monitor any adverse events following vaccination.⁶⁸ This surveillance system, known as the Vaccine Adverse Event Reporting System (VAERS), was put into effect in 1990 in response to the National Childhood Vaccine Injury Act.⁶⁹

The National Childhood Vaccine Injury Act (NCIVA) was implemented after several lawsuits were filed against vaccine manufactures and healthcare providers.⁷⁰ These lawsuits were conducted by citizens who believed they had been injured by their vaccinations.⁷¹ Even though some claims lacked scientific evidentiary support, the paying of damages in these lawsuits lead to several vaccine manufacturers halting production.⁷² A vaccine shortage resulted, and public health officials became extremely

⁶¹ Centers for Disease Control & Prevention, *Overview, History, and How the Safety Process Works* (Sep. 9, 2020), <https://www.cdc.gov/vaccinesafety/ensuringsafety/history/index.html> [hereinafter CDC, *Overview, History, and How the Safety Process Works*].

⁶² *Id.*

⁶³ *Id.* Although no vaccine can be 100 percent effective for every single person because everyone's body reacts to vaccines differently, these tests are done to make sure they are successful for the general population. *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Centers for Disease Control & Prevention, *Vaccine Adverse Event Reporting System (VAERS)* (Sep. 11, 2020), <https://www.cdc.gov/vaccinesafety/ensuringsafety/monitoring/vaers/index.html>.

⁷⁰ CDC, *Overview, History, and How the Safety Process Works*, *supra* note 61.

⁷¹ *Id.*

⁷² *Id.*

concerned about the return of an epidemic.⁷³ In response to this concern, Congress passed the NCVIA in 1986.⁷⁴

The NCVIA established the National Vaccine Program Office to coordinate immunization activities between Department of Health and Human Services (HHS) agencies including: the Centers for Disease and Prevention (CDC), the FDA, the National Institutes of Health (NIH), and the Health Resources and Services Administration (HRSA).⁷⁵ The NCVIA requires health care providers to report adverse events following a vaccination to the VAERS to monitor side effects and conduct research relevant to vaccine safety.⁷⁶ The NCVIA significantly increased communication between the HHS agencies, allowing for more transparency on the effectiveness of government approved vaccinations. The communication between these agencies helped establish the legitimacy of vaccinations as well as its effectiveness. Congress went on to pass the Vaccination Assistance Act in 1962, which appropriated funds to the CDC to support mass immunization campaigns throughout the United States.⁷⁷ As vaccinations became well known for their success, U.S. state governments took steps towards enacting compulsory vaccination laws for children attending public schools.⁷⁸

C. *Compulsory Vaccination Policies in Schools and Initial Pushback*

When first implementing compulsory vaccination laws, state legislatures and health departments struggled to balance the need for children to receive these life-saving vaccinations while also protecting individual rights and freedoms.⁷⁹ In 1827, Boston became the first city to require parents to produce documentation of their children's vaccination history before enrolling them in public school.⁸⁰ Soon after, other states across the country began implementing their own vaccination requirements, first spreading through northeastern states and eventually spreading throughout the country.⁸¹ Forty-four states had smallpox vaccination statutes by 1905.⁸² As state-compelled vaccination laws developed across the country, individuals began bringing claims against states that were requiring its citizens to comply with these laws. One of the main contentions of these claims was that individuals believed that state-compelled vaccinations violated their personal

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See Calandrillo, *supra* note 33, at 382.

⁷⁸ Hodge & Gostin, *supra* note 25, at 851.

⁷⁹ See Calandrillo, *supra* note 33, at 353-54.

⁸⁰ Hodge & Gostin, *supra* note 25, at 851.

⁸¹ *Id.* at 851.

⁸² Alicia Novak, Comment, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1104 (2005).

liberties.⁸³ By 1905, the United States Supreme Court stepped in to voice its opinion for the first time on the constitutionality of state-compelled vaccinations.⁸⁴

In *Jacobson v. Commonwealth of Massachusetts*, the Supreme Court evaluated the constitutionality of Massachusetts' compulsory vaccination laws.⁸⁵ The statute required all inhabitants to be vaccinated, with an exception for children who had proof from a physician that they were "unfit" for vaccination.⁸⁶ Any person over the age of twenty-one who did not comply with these requirements was fined five dollars, which is approximately one-hundred and forty dollars accounted for inflation.⁸⁷ The plaintiff in this case refused to get vaccinated and argued that Massachusetts was violating his individual rights.⁸⁸ The Supreme Court held that the state had the police power to protect and legislate for the public's safety, and "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."⁸⁹

The Supreme Court went on to affirm this reasoning in the 1922 case, *Zucht v. King*, finding that it was appropriate for lawmakers to make compulsory vaccination a prerequisite to school enrollment.⁹⁰ The Supreme Court reasoned that it was in the public's interest to require compulsory vaccinations for school enrollment, which is a stance that most Americans held well into the 1960s when "the modern era of compulsory state immunization laws took off."⁹¹ Therefore, each of these cases strengthened the police powers of the state to authorize governmental action in the interest of public health.⁹² These police powers were to be based on "the necessity of the case" and could not be exercised in "an arbitrary, unreasonable manner."⁹³ Specifically, *Jacobson* supports the proposition that "police powers authorize states to compel vaccination for the public good," and "may condition certain benefits upon the individual on whether he or she has been vaccinated."⁹⁴ By the end of the 1970s, all fifty states had enacted and enforced school entry immunization requirements.⁹⁵

⁸³ JULIE A. BOOM & RACHEL M. CUNNINGHAM, UNDERSTANDING AND MANAGING VACCINE CONCERNS 4 (2014).

⁸⁴ Calandrillo, *supra* note 33, at 383-84.

⁸⁵ *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 12 (1905).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 12-13.

⁸⁹ *Id.* at 27.

⁹⁰ *Zucht v. King*, 260 U.S. 174 (1922); *see also* Novak, Comment, *supra* note 82, at 1105-06.

⁹¹ *Zucht*, 260 U.S. at 177; *see also* Calandrillo, *supra* note 33, at 381-82.

⁹² Hodge & Gostin, *supra* note 25, at 856.

⁹³ *Id.* at 856 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905)).

⁹⁴ Hodge & Gostin, *supra* note 25, at 857.

⁹⁵ Calandrillo, *supra* note 33, at 383.

Despite all fifty states embracing state-compelled immunization requirements for schools, anti-vaccination sentiment still developed over time, sprouting from distrust in the government, suspicions about vaccine manufactures, and fraudulent medical myths connecting vaccinations to other ailments such as autism.

D. *The Rise of the Anti-Vaccination Movement*

Although vaccinations are generally accepted globally for their effectiveness, opponents to compulsory vaccination laws have voiced their concerns about the safety of transmitting vaccinations and possible side effects.⁹⁶ Anti-vaccination beliefs existed during Dr. Jenner's creation of the smallpox vaccination in 1796 and continue to take place centuries later in today's modern age.⁹⁷ The first organized anti-vaccination movement can be traced back to the Anti-Compulsory Vaccination League formed in England in 1866.⁹⁸ This group was formed against the British government's passage of a bill requiring all children to be vaccinated against smallpox.⁹⁹ As a result of this push back, the British government passed a "conscientious objection law" in 1898 that allowed parents to object to vaccinating their children.¹⁰⁰ The number of parents utilizing this conscientious objection law spiked, and immunization coverage rates drastically decreased, causing England to "experience high morbidity and mortality" from smallpox.¹⁰¹

One of the most detrimental events regarding vaccinations occurred in 1955, becoming known as "The Cutter Incident."¹⁰² In this situation, a small Californian pharmaceutical company, Cutter Laboratories, was in a rush to produce polio vaccinations.¹⁰³ By rushing through its production, Cutter Laboratories ended up administering several batches of vaccinations that contained live polio virus instead of the usual inactive virus administered in vaccinations.¹⁰⁴ "Of those who received the vaccine, 70,000 [individuals] suffered mild polio, 200 were permanently paralyzed, and 10 died."¹⁰⁵ The Cutter Incident became one of the worst pharmacologic disasters in US history, creating a severe distrust in the pharmaceutical industry.¹⁰⁶

⁹⁶ Hodge & Gostin, *supra* note 25, at 844-45.

⁹⁷ Kathleen Ramirez, Note, *Protect Our Children: Vaccination Exemptions Can Establish Child Abuse and Neglect*, 57 Fam. Ct. Rev. 258, 261 (2019).

⁹⁸ BOOM & CUNNINGHAM, *supra* note 83, at 3-4. More than 200 anti-vaccination groups would form in the following 30 years. *Id.*

⁹⁹ *Id.* Parents who did not comply with compelled vaccination requirements could be fined or imprisoned. *Id.*

¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.*

¹⁰² *Id.* at 5; see Michael Fitzpatrick, *The Cutter Incident: How America's First Polio Vaccine Led to a Growing Vaccine Crisis*, 99(3) J. Royal Soc'y of Med., 156 (2006).

¹⁰³ BOOM & CUNNINGHAM, *supra* note 83, at 5.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Less than thirty years later, a documentary titled “DPT: Vaccine Roulette” further ignited the anti-vaccination movement.¹⁰⁷ This program depicted parents who believed that their children had been materially harmed after the issuance of the DPT vaccine.¹⁰⁸ The program detailed children with “mental retardation, seizures and other intellectual and physical disabilities.”¹⁰⁹ The program’s airing led to the creation of the well-known anti-vaccination network, “the National Vaccine Information Center (NVIC), which remains a major source of vaccine misinformation in the USA.”¹¹⁰ After thousands of parents refused to vaccinate their children with the DPT vaccine out of fear, Congress responded by passing the National Childhood Vaccine Injury Act, hoping to address parents’ fears while also ensuring the continuation of the national vaccination program.¹¹¹ The NCVIA stressed the importance of transparency so that parents could have all the information regarding each vaccine and feel comfortable vaccinating their children.¹¹²

Although the NCVIA addressed vaccination fears from the DPT documentary, fears resurged in 1998 after an English doctor, Andrew Wakefield, falsely concluded in his study that the measles vaccine (MMR) was linked to causing autism in children.¹¹³ Wakefield’s paper fueled more public fear and caused a large decrease in MMR vaccination rates, leading to measles outbreaks throughout the United Kingdom.¹¹⁴ However, this consequential paper was declared fraudulent and the United Kingdom struck Andrew Wakefield off its medical register, charging him with callous disregard and dishonesty.¹¹⁵

Even though this paper was declared fraudulent and unsound by the medical community, it continues to be the bedrock for the continuing growth of the anti-vaccination movement. American actress Jenny McCarthy generated a significant amount of doubt and distrust amongst parents after she relied on the falsified study from Wakefield, believing that the MMR vaccine was “the autism shot.”¹¹⁶ Having no legitimate science to back up her

¹⁰⁷ See *id.* “DPT: Vaccine Roulette” was a one-hour documentary released on April 19, 1982 on an NBC affiliate in Washington D.C. *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ BOOM & CUNNINGHAM, *supra* note 83, at 5.

¹¹¹ See *id.* at 6. The NCVIA required health care providers to report adverse events following a vaccination to the Vaccine Adverse Event Reporting System to monitor side effects and conduct research relevant to vaccine safety. *Id.*

¹¹² See CDC, *Overview, History, and How the Safety Process Works*, *supra* note 61.

¹¹³ BOOM & CUNNINGHAM, *supra* note 83, at 6.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 6-7; see *Fitness to Practise Panel Hearing*, GEN. MED. COUNCIL (Jan. 28, 2010), <https://briandeer.com/solved/gmc-charge-sheet.pdf>. Soon after this information was released “ten of the thirteen co-authors then withdrew their support of the...paper...” *Andrew Wakefield’s Harmful Myth of Vaccine-induced “Autistic Enterocolitis,”* GI Soc’y: Can. Soc’y of Intestinal Rsch, <https://badgut.org/information-centre/a-z-digestive-topics/andrew-wakefield-vaccine-myth/> (last visited November 20, 2020). Furthermore in 2010, the Lancet formally retracted Wakefield’s paper. *Id.*

¹¹⁶ See BOOM & CUNNINGHAM, *supra* note 83, at 7.

conclusion, McCarthy promoted her ideas on multiple television platforms, criticizing the medical community and lobbying against vaccinations.¹¹⁷ Parents across the nation, like Jenny McCarthy, continued to rely on Wakefield's unfounded conclusion that the MMR vaccine is linked to autism.

To combat this false correlation between the MMR vaccine and autism, a Danish study published in April 2019 debunked the proffered link between the two.¹¹⁸ It evaluated whether the MMR vaccine increases the risk for autism in children after vaccination.¹¹⁹ The study compared thousands of MMR-vaccinated children with unvaccinated children over a period of time after vaccination, and concluded that the "MMR vaccination does not increase the risk for autism, does not trigger autism in susceptible children, and is not associated with clustering of autism cases after vaccination."¹²⁰ Thus, the artificial link between the measles vaccine and autism in children has been discredited by the medical profession and does not serve as a justification for parents to not vaccinate their children.

Despite the overwhelming scientific evidence that proves the safety of vaccinations and debunks proposed medical horror stories, some parents today remain uninformed and choose to not vaccinate their children out of fear.¹²¹ These parents utilize state-level exemptions that allow unvaccinated children to attend public schools. In addition to the anti-vaccination movement being grounded in misinformation and fear, other anti-vaccination stances are rooted in maintaining individualism and freedom from government interference in their personal lives.¹²² These citizens have argued that mandatory vaccinations are an unwarranted interference with one's basic civil liberties.¹²³ However, the Supreme Court has addressed these issues stating that although Americans do have the First Amendment right to be free from state infringement on their personal beliefs, it remains the right of the state to interfere with these personal beliefs if they have harmful effects on a community.¹²⁴

Although each of the anti-vaccination movement concerns have been addressed by fixing previous vaccination issues, debunking medical myths, and confirming the powers of the state to interfere for the safety of the community, states still allow exemptions from its compulsory vaccination

¹¹⁷ *See id.* at 8.

¹¹⁸ Anders Hviid et al., *Measles, Mumps, Rubella Vaccination and Autism: A Nationwide Cohort Study*, 170(8) ANN. INTERN. MED. 513, 518 (2019).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 519.

¹²¹ BLOOM & CUNNINGHAM, *supra* note 83, at 11.

¹²² *See* Calandrillo, *supra* note 33, at 393-94.

¹²³ *Id.* at 394.

¹²⁴ *Id.* at 394-95. The First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

laws.¹²⁵ By maintaining vaccination exemptions, states permit parents to put their children and their communities at risk.

E. The Three Main Types of Vaccination Exemptions

The three main types of exemptions from state compulsory vaccination laws are medical exemptions, religious exemptions, and philosophical exemptions. If individuals meet the specific qualifications of one of these exemptions, which are unique to each state, the state will allow the individual to avoid state-compelled vaccination obligations. This section will analyze each type of exemption by describing which exemptions each state allows and discussing certain state-specific requirements.

i. Medical Exemptions

A medical exemption is utilized when an individual has a medical condition that prevents him or her from receiving a vaccine.¹²⁶ Currently, “all states and the District of Columbia allow medical exemptions“ from state or local requirements.¹²⁷ There has been almost no dispute about the need for medical exemptions from state-compelled vaccinations since vaccines can process differently in some people.¹²⁸ This exemption is necessary to protect individuals whose bodies cannot properly receive vaccinations in their system.¹²⁹ The five states in the U.S. that only allow medical exemptions and nothing else are: California, Maine, Mississippi, New York, and West Virginia.¹³⁰

New York is a recent addition to the list of states that only allow medical exemptions.¹³¹ The state previously allowed religious exemptions from its compulsory vaccination laws, however, it removed this exemption after its recent measles outbreak.¹³² The measles resurgence in New York started on September 30, 2018 and caused more than 600 confirmed cases of measles.¹³³ Many of these cases began in New York’s Orthodox Jewish

¹²⁵ See Calandrillo, *supra* note 33, at 411.

¹²⁶ Centers for Disease Control & Prevention, *School Vax View: What is an Exemption*, (Oct. 12, 2017), <https://www.cdc.gov/vaccines/imz-managers/coverage/schoolvaxview/requirements/exemption.html> [hereinafter CDC, *School Vax View: What is an Exemption*].

¹²⁷ *Id.*

¹²⁸ *Id.*; Centers for Disease Control & Prevention, *Table 2. Recommended Adult Immunization Schedule by Medical Condition and Other Indications, United States 2020*, (Feb. 3, 2020), <https://www.cdc.gov/vaccines/schedules/hcp/imz/adult-conditions.html>.

¹²⁹ CDC, *School Vax View: What is an Exemption*, *supra* note 126.

¹³⁰ PROCON.ORG, *supra* note 11.

¹³¹ See Otterman, *supra* note 15.

¹³² *Id.*

¹³³ Elizabeth Cohen, *The US Eliminated Measles in 2000. The Current Outbreak Could Change That*, CNN HEALTH, (Sept. 3, 2019), <https://www.cnn.com/2019/08/28/health/us-measles-elimination-status-in-jeopardy/index.html>.

communities, where vaccination rates were lower due to families' use of the religious exemption.¹³⁴ To immediately address the measles outbreak in these communities, New York removed its religious exemption.¹³⁵ In August of 2019, New York issued emergency regulations "further strengthening the process by which physicians can grant medical exemptions to school vaccination requirements in order to prevent them from being used for non-medical purposes."¹³⁶ "Under the new law, all children must [get] their vaccines within the first two weeks of classes and complete them by the end of the school year."¹³⁷ If parents refuse to comply with these requirements, they must either homeschool their unvaccinated children or move out of the state.¹³⁸ With the passage of this law, New York became only the fifth state to ban all nonmedical exemptions to its vaccination requirements and now has among the strictest policies in the nation.¹³⁹

ii. Religious Exemption

States across the U.S. have different requirements for individuals to qualify for a religious exemption from compulsory vaccination laws.¹⁴⁰ Some states evaluate a person's claimed religion to see if it is an established religion with actual stances against receiving vaccinations, while other states evaluate the individual person herself to see if her beliefs are genuinely held.¹⁴¹ For example, Virginia allows religious exemptions from school vaccination requirements if the student's family submits "an affidavit to the admitting official stating that the administration of immunizing agents' conflicts with the student's religious tenets or practices."¹⁴² Even though a large majority of states allow religious exemptions for vaccinations, "researchers and journalists have struggled to identify a single major U.S. religious group that advocates against vaccination for children."¹⁴³ Although some state religious exemptions were due to lobbying by the Christian Science Church in the 1960s, this group does not advocate for its members to not vaccinate their

¹³⁴ Aleksandra Sandstrom, *Amid Measles Outbreak, New York Closes Religious Exemption for Vaccinations - But Most States Retain It*, PEW RSCH. CENTER, (June 28, 2019), <https://www.pewresearch.org/fact-tank/2019/06/28/nearly-all-states-allow-religious-exemptions-for-vaccinations/>.

¹³⁵ *Id.*

¹³⁶ N.Y. State Dep't of Health, *supra* note 4.

¹³⁷ Otterman, *supra* note 15.

¹³⁸ *Id.*

¹³⁹ *Id.* "As of June 13, 2019, NY State no longer allows religious exemptions from mandated vaccinations." *Immunizations*, N.Y.C. DEP'T OF EDUC. (2020), <https://www.schools.nyc.gov/school-life/health-and-wellness/immunizations#:~:text=No%20Religious%20Exemptions,religious%20exemptions%20from%20mandate%20vaccinations.&text=Read%20the%20Frequently%20Asked%20Questions,to%20families%20about%20this%20change.>

¹⁴⁰ *See* Novak, Comment, *supra* note 82, at 1107-08.

¹⁴¹ *See id.*

¹⁴² VA. CODE ANN. § 22.1-271.2(C)(i) (2019).

¹⁴³ Sandstrom, *supra* note 134.

children.¹⁴⁴ Additionally religious leaders from “Judaism and Islam have said that the [MMR vaccines] are permissible.”¹⁴⁵ Even so, forty-five states including D.C. allow religious exemptions from compulsory vaccination requirements.¹⁴⁶ Although there is no single major U.S. religion that advocates against child vaccinations, the majority of U.S. states still allow religious exemptions, further putting communities at risk.¹⁴⁷

iii. Philosophical Exemption

The philosophical exemption, or personal exemption as it is referred to in some states, carries an even lower burden of proof than most states’ religious exemptions.¹⁴⁸ The philosophical exemption allows a parent or student enrolling in public school to assert a reason why he or she objects to vaccines.¹⁴⁹ These reasons can range from “objections based on ‘personal’, ‘philosophical’, ‘moral’ beliefs, or other.”¹⁵⁰ For example, Arizona’s state code requires for its philosophical exemption that “[t]he parent or guardian has received information about immunizations provided by the department of health services, understands the risks and benefits of immunizations and the potential risks of non-immunizations, and that due to personal beliefs, the parent or guardian does not consent to the immunization of the pupil.”¹⁵¹ Fifteen states in the U.S. allow philosophical exemptions.¹⁵² The breadth of reasons that one could fit under the philosophical exemption make this exemption dangerous for abuse. Families who may be unaware of the benefits of vaccinations or who may believe one of the anti-vaccination myths can take advantage of states’ philosophical exemptions, increasing the likelihood

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See PROCON.ORG, *supra* note 11. States that allow both medical and religious exemptions, but not philosophical exemptions include Alabama, Alaska, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wyoming. *Id.*

¹⁴⁷ See Sandstrom, *supra* note 134.

¹⁴⁸ See Novak, Comment, *supra* note 82, at 1108-09; see also Sandstrom, *supra* note 134.

¹⁴⁹ See Novak, Comment, *supra* note 82, at 1107.

¹⁵⁰ Kristine M. Severyn, *Jacobson v. Massachusetts: Impact on Informed Consent and Vaccine Policy*, 5 J. PHARMACY & L. 249, 260-61 (1995). There is some overlap between philosophical and religious exemptions. For example, Texas calls its philosophical exemption “an Exemption for Reasons of Conscience” and requires individuals to complete a signed and notarized affidavit on a form provided by the health department stating that “the child’s parent, legal guardian, or the student declines vaccinations for reasons of conscience, including because of the person’s religious beliefs.” See Tex. Health & Hum. Servs., *Exemption Information – School Immunizations*, TEX. DEP’T OF STATE HEALTH SERVS., <https://www.dshs.texas.gov/immunize/school/exemptions.aspx#conscience> (last visited Nov. 15, 2020).

¹⁵¹ ARIZ. REV. STAT. ANN. § 15-873(1) (2006).

¹⁵² See PROCON.ORG, *supra* note 11. States that allow philosophical exemptions include Arizona, Arkansas, Colorado, Idaho, Louisiana, Michigan, Minnesota, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, and Wisconsin. *Id.*

of another measles outbreak. Unlike the states with expansive vaccination exemptions, Canada and France exemplify that restricting vaccination exemptions can be used to effectively address measles outbreaks.

F. *Canada and France's Stances on Vaccination Exemptions*

Canada and France are two countries which narrowed their vaccination exemptions to effectively address their own measles outbreaks. The United States should look to the actions taken by these two countries to learn how to effectively address its own measles outbreak. Canada and France have both experienced their own measles outbreaks and have employed two different methods of regulation to contain the outbreaks.¹⁵³

The European Centre for Disease Prevention and Control published a monthly monitoring report indicating that France has had 2,699 cases of measles and rubella between October 2018 and September 2019¹⁵⁴, with about 2,500 cases reported in 2019 alone.¹⁵⁵ The WHO stated that measles had made a "dramatic resurgence" in the European continent due to a rising wave of individuals refusing to be vaccinated.¹⁵⁶ The number of cases in the European region doubled in comparison to the case amounts in 2018.¹⁵⁷ On the other hand, Canada only reported that 113 cases of measles were documented in 2019.¹⁵⁸

Canada's methods of promoting vaccinations focus on educating its population on the benefits of child immunization.¹⁵⁹ Vaccines used in Canada are "approved and licensed by the Bureau of Biologics and Radiopharmaceuticals of the Health Protection Branch [of] Health Canada," and are closely monitored after their approval.¹⁶⁰ Canada monitors its approved childhood vaccinations and, as of this article's release, no long-

¹⁵³ See Tyler Choi, *Measles Outbreak in Canada's British Columbia Province Affects 9*, REUTERS (Feb. 19, 2019); see also Forster, *supra* note 21.

¹⁵⁴ See *Rubella Symptoms and Causes*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/rubella/symptoms-causes/syc-20377310> (last visited Nov. 2, 2020). Rubella is a contagious viral infection often associated with measles, "it is also called German measles or three-day measles." See *id.*

¹⁵⁵ *Monthly Measles and Rubella Monitoring Report*, EUR. CENTRE FOR DISEASE PREVENTION & CONTROL, at 3 (Nov. 2019), <https://www.ecdc.europa.eu/sites/default/files/documents/measles-monthly-report-november-2019.pdf>.

¹⁵⁶ Palko Karasz, *W.H.O. Warns of 'Dramatic' Rise in Measles in Europe*, N.Y. TIMES, (Aug. 29, 2019).

¹⁵⁷ *Id.*

¹⁵⁸ Pub. Health Agency of Can., *Measles and Rubella Weekly Monitoring Report – Week 52*, GOV'T OF CAN. (Jan. 10, 2020), <https://www.canada.ca/en/public-health/services/publications/diseases-conditions/measles-rubella-surveillance/2019/week-52.html>.

¹⁵⁹ See LAW REFORM COMM'N OF SASK., *Vaccination and The Law; Report to the Minister of Justice*, 2009 CanLIIDocs 281, at 7 (Can. Sask.).

¹⁶⁰ See *id.* at 10.

term effects have been reported.¹⁶¹ In terms of child vaccination requirements, “[t]wo Canadian provinces, Ontario and New Brunswick, make childhood vaccinations mandatory for school attendance.”¹⁶² Both of these provinces allow parents to use the religious exemption for the family’s “conscience or religious belief.”¹⁶³ Canada’s common law requires “consent of the patient, or in the case of children, with parental consent.”¹⁶⁴ To give consent, Canada’s provinces required parents to be informed of vaccination benefits.¹⁶⁵ To inform parents, Canada’s provinces use methods ranging from “providing a pamphlet or information sheet with general information about vaccinations, to having a more detailed discussion with the patient or parent.”¹⁶⁶ Canada’s province of Ontario has gone further by requiring parents to meet with a medical professional to be fully educated on the benefits of vaccinations before they can utilize an exemption.¹⁶⁷ Ontario’s Immunization of School Pupils Act, implemented in 1990, states that before a parent can be granted an exemption they must complete “an immunization education session with a medical officer of health or with a medical officer of health’s delegate.”¹⁶⁸ This requirement allows Ontario to ensure that its citizens are educated about the decisions they are making in hopes of clarifying the falsities of the anti-vaccination movement.¹⁶⁹

France has taken a step further in addressing its measles outbreak by making the measles vaccine mandatory and only allowing medical exemptions.¹⁷⁰ France’s immunization policy is drawn up by the Minister of Health who sets the conditions of immunizations, publishes the schedule of vaccinations, and makes the necessary recommendations.¹⁷¹ Vaccinations carried out by the French government are free to its citizens.¹⁷² France has made the measles vaccination obligatory unless the child has a recognized medical exemption.¹⁷³ France’s Public Health Code also holds parents personally liable for meeting these vaccination requirements and mandates that parents must prove compliance for their children to be admitted in any public school, nursery, or other communities of children.¹⁷⁴ After “79 cases of measles were reported in France in the first two months of 2017,”¹⁷⁵ France implemented its new mandatory vaccination requirements into law on

¹⁶¹ *Id.*

¹⁶² *Id.* at 7.

¹⁶³ *See id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See* R.S.O. 1990, c I.1 (Can.).

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ C.S.P. art. L. 3111-2; *see also* Forster, *supra* note 21.

¹⁷¹ *See* C.S.P. art. L. 3111-1.

¹⁷² C.S.P. art. L. 3111-11.

¹⁷³ C.S.P. art. L. 3111-2.

¹⁷⁴ *Id.*

¹⁷⁵ *See* Forster, *supra* note 21.

December 30th, 2017.¹⁷⁶ By bolstering its law, France made it more difficult for its citizens to take advantage of vaccination exemptions and helped ensure the public health and safety of its citizens from future measles outbreaks. The actions of Canada and France exemplify that countries can utilize different methods of regulation to successfully contain outbreaks.¹⁷⁷

III. ANALYSIS

The United States should remove religious and philosophical exemptions to make sure it can address contagious diseases quickly, efficiently, and safely with a verified vaccine. In this section, I will analyze the legal arguments made against state-compelled vaccination requirements and how time and time again U.S. courts have verified states' police power to ensure the safety of their communities by requiring and implementing state-compelled vaccinations.

A. *Legal Arguments Made Against Mandatory Vaccinations Analysis*

Legal positions against state-compelled vaccination laws have unsuccessfully argued that these laws infringe on individual liberties protected under the Due Process Clause,¹⁷⁸ that a child has an absolute right to enter a school even without immunizations,¹⁷⁹ or that compulsory vaccination laws with no religious exemption violate the free exercise clause of the First Amendment.¹⁸⁰ Each of these legal arguments have been struck down in favor of the states' police power to require and implement compulsory vaccination laws.¹⁸¹

In terms of individual liberty under the Due Process Clause, the Supreme Court held in *Jacobson v. Commonwealth of Massachusetts*, that "while this court should guard with firmness every right appertaining to life, liberty, or property . . . the safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect."¹⁸² Here the Supreme Court verified the state's police powers to implement mandatory vaccinations in order to prioritize the health of the entire community over one individual's beliefs.¹⁸³ The Supreme Court extended this sentiment in *Zucht v. King*, finding that a city ordinance that made vaccination a prerequisite to school attendance did not infringe on the family's Fourteenth Amendment rights.¹⁸⁴ The Supreme Court stated that Texas' "ordinances confer not

¹⁷⁶ C.S.P. art. L. 3111-2.

¹⁷⁷ See Choi, *supra* note 153; see also Forster, *supra* note 21.

¹⁷⁸ See *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905).

¹⁷⁹ See *State ex rel. Mack v. Bd. of Educ.*, 204 N.E.2d 86, 90 (Ohio Ct. App. 1963).

¹⁸⁰ See *Wright v. DeWitt Sch. Dist.*, 385 S.W.2d 644, 648 (Ark. 1965).

¹⁸¹ See *Jacobson*, 197 U.S. at 38; see also *Wright*, 385 S.W.2d 644; *State ex rel. Mack*, 204 N.E.2d at 90.

¹⁸² See *Jacobson*, 197 U.S. at 38.

¹⁸³ *Id.*

¹⁸⁴ See *Zucht v. King*, 260 U.S. 174, 177 (1922).

arbitrary power, but only that broad discretion required for the protection of the public health.”¹⁸⁵ This confirmed that Texas may implement these vaccination laws to protect the safety of the community. In these decisions, the Supreme Court deemed it constitutional for the state police powers to require and implement compulsory vaccination laws to ensure the safety of their communities.

State courts have also supported the legal authority of states’ police power to prescribe mandatory vaccination laws. The Ohio Court of Appeals held that “a child does not have an absolute right to enter school without immunization” and that “the school board has authority to make and enforce rules and regulations to secure immunization.”¹⁸⁶ Furthermore, the Arizona Court of Appeals found that its health department had the authority to exclude unvaccinated children from school since “attendance by unimmunized children posed a risk of spreading contagious disease.”¹⁸⁷ Also, in 1979, the Mississippi Supreme Court declared its religious exemption statute unconstitutional because this exemption put the entire school at risk.¹⁸⁸ The Supreme Court of Arkansas, moreover, has held that a state’s compulsory vaccination law with no religious exemption is constitutional and benefits the society as a whole.¹⁸⁹ Therefore, both the Supreme Court of the United States and multiple state court of appeals and state supreme courts have each verified the legal authority of states’ police power to mandate and execute state compulsory vaccination laws to protect their community. Thus, states should utilize this police power to remove unnecessary vaccination exemptions to protect their communities from future outbreaks.

Unlike France, the United States’ success will depend on each state revising its state-specific vaccination exemptions.¹⁹⁰ To create uniformity amongst the states on the types of exemptions allowed, each state would have to change its own vaccination law, rather than one sweeping federal change like what France accomplished when it removed its religious and philosophical exemptions from its public health code.¹⁹¹ Although one may argue that this state-by-state method is ineffective, we have seen states, including New York, utilize their state police power to make direct changes to their vaccination exemptions and successfully address outbreaks in their community.¹⁹² Therefore, state specific legislation is effective in addressing the forms of vaccination exemptions that are permitted.

¹⁸⁵ *Id.*

¹⁸⁶ *State ex rel. Mack v. Bd. of Educ.*, 204 N.E.2d 86, 90 (Ohio Ct. App. 1963).

¹⁸⁷ *Maricopa Cnty. Health Dep’t. v. Harmon*, 750 P.2d 1364, 1369 n.2 (Ariz. 1987).

¹⁸⁸ *Brown v. Stone*, 378 So. 2d 218, 224 (Miss. 1979).

¹⁸⁹ *Wright v. DeWitt Sch. Dist.*, 385 S.W.2d 644, 648 (Ark. 1965).

¹⁹⁰ Center for Disease Control & Prevention, *Requirements and Laws*, (Nov. 15, 2016), <https://www.cdc.gov/vaccines/imz-managers/laws/index.html>.

¹⁹¹ C.S.P. art. L. 3111-1.

¹⁹² U.S. Dep’t of Health & Hum. Servs., *With End of New York Outbreak, United States Keeps Measles Elimination Status*, (Oct. 4, 2019),

Canada has also shown that jurisdiction specific legislation is effective. Like the legislative methods used by the provinces of Canada, the state's police powers allow it to establish and carry out mandatory vaccination requirements.¹⁹³ Although each state in the United States has the police power to curate its own compulsory vaccination law, states differ on the type of exemptions they allow.¹⁹⁴ Each U.S. state has the police power to implement changes similar to Ontario's vaccination law requiring parents to attend education courses with a medical professional before using a religious or philosophical exemption.¹⁹⁵ Although some may argue that requiring each state to individually change their vaccination laws will be cumbersome, Canada has proven that this method is possible and effective in addressing measles outbreaks.¹⁹⁶

We have seen France, and specific provinces in Canada, utilize their full power to effectively protect against measles outbreaks. Therefore, like France and the select provinces in Canada, each state in the U.S. should utilize its constitutionally protected police power to remove unnecessary vaccination exemptions to protect the safety of its communities and prevent future measles outbreaks.

B. *Practical Problem Analysis*

Even though the state's police power to implement compulsory vaccination laws has received significant legal support from both the Supreme Court and state courts around the country, most states still allow religious and philosophical exemptions for its vaccination requirements.¹⁹⁷ One issue with allowing these types of exemptions is the ability of members of the anti-vaccination movement to abuse these exemptions, basing their decisions on unfounded scientific studies and claims.¹⁹⁸ Members of the anti-vaccination movement have also brought their fight to their state legislatures, with about 92 bills being introduced across the country between 2011 and 2017 that would "make it easier to get exemptions from vaccine requirements."¹⁹⁹ Although the majority of these bills "based on misinformation and pseudoscience" are not enacted into law, anti-vaccination groups continue to put on political pressure by helping "draft model state legislation and encourag[ing] people to lobby their state representatives about

<https://www.hhs.gov/about/news/2019/10/04/end-new-york-outbreak-united-states-keeps-measles-elimination-status.html>.

¹⁹³ See Erin Walkinshaw, *Mandatory vaccinations: The Canadian picture*, 183 CAN. MED. ASS'N J. 16 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3216452/>.

¹⁹⁴ See PROCON.ORG, *supra* note 11.

¹⁹⁵ See R.S.O. 1990, c I.1 (Can.).

¹⁹⁶ See Walkinshaw, *supra* note 193.

¹⁹⁷ See PROCON.ORG, *supra* note 11.

¹⁹⁸ See Novak, Comment, *supra* note 82, at 1124-25.

¹⁹⁹ Michelle Lou & Brandon Griggs, *Even with Measles Outbreaks Across the US, At Least 20 States Have Proposed Anti-Vaccination Bills*, CNN, Mar. 6, 2019, <https://www.cnn.com/2019/03/06/health/vaccine-exemption-bills-across-us-trnd/index.html>.

increasing exemptions.”²⁰⁰ These individuals of the anti-vaccination movement take advantage of the exemptions that states have left available and in turn put other children at risk of another dangerous measles outbreak.²⁰¹ Furthermore, states are allowing politics to distract from the direct and real threat of allowing unvaccinated children to attend public schools. Permitting unvaccinated children to attend school disrupts the development of herd immunity and can quickly develop into an epidemic, as seen with the measles outbreak in New York.²⁰² Below, I propose three solutions to these practical problems to prevent further measles outbreaks from happening again in the United States.

C. Solutions

States should utilize at least one or more of the three solutions I propose to prevent future measles outbreaks from taking place. First, states should remove religious and philosophical exemptions from its compulsory vaccination laws and only allow medical exemptions. Second, states that desire to maintain religious and medical exemptions should require individuals to attend an educational course on the actual benefits of vaccines before being granted the exemption. Third, states should impose penalties on families who do not vaccinate their children.

i. Only Allow Medical Exemptions

Each state in the U.S. should follow in the footsteps of France and five U.S. states by eliminating religious and philosophical exemptions.²⁰³ Child vaccinations not only help protect the individual child, but also the children who cannot be vaccinated such as infants or those with compromised immune systems.²⁰⁴ Requiring measles vaccinations develops herd immunity in the community and can protect those who must utilize a medical exemption due to their individualized risk to the vaccine. New York’s recent measles outbreak shows that a small number of individuals choosing to not vaccinate their children, for non-medical reasons, can have significant impacts on the whole community, such as by reducing herd immunity.²⁰⁵

New York addressed its measles outbreak head on by using its police power to remove religious and philosophical exemptions.²⁰⁶ U.S. courts have affirmed the type of police power that New York used, prioritizing the safety of the community against preventable diseases.²⁰⁷ By

²⁰⁰ *Id.*

²⁰¹ See Novak, Comment, *supra* note 82, at 1124-25.

²⁰² See *id.* at 1127.

²⁰³ See Forster, *supra* note 21; Otterman, *supra* note 15.

²⁰⁴ See Chemerinksky & Goodwin, *supra* note 45, at 600.

²⁰⁵ See U.S. Dep’t of Health & Hum. Servs., *supra* note 192.

²⁰⁶ See *id.*

²⁰⁷ See *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

removing religious exemptions, New York reduced the amount of individuals affected by measles from 20 cases per month to zero cases within three months.²⁰⁸ New York successfully ended its measles outbreak and the United States' reinstated its measles elimination status on October 4th 2019.²⁰⁹ By utilizing its state police power to remove religious exemptions from its vaccination law, New York was able to address its measles outbreak head on and ensure the safety of its community. Therefore, D.C. and the remaining forty-five states who allow religious and philosophical exemptions should follow in the steps of New York and utilize their state police power to remove these exemptions and protect their citizens before an outbreak strikes their own communities.

Eliminating religious exemptions does not infringe on individual liberties because states have the police power to prevent an epidemic.²¹⁰ Members of the anti-vaccination movement have lost sight of the true devastation that these vaccinations prevent and have replaced these realities with medical myths and ungrounded fears. Five states in the U.S. have followed France's mandatory vaccination policy by removing religious and philosophical exemptions.²¹¹ Only allowing medical exemptions would help maintain each state's herd immunity and protect those who are too young to get vaccinated or whose immune systems are too weak to handle the vaccination.²¹² New York's success in eliminating its measles outbreak by utilizing its state police power exemplifies the importance of compulsory vaccination laws with limited exemptions. Utilizing state police powers by allowing only medical exemptions is the most effective way of protecting the wellbeing of the communities.

However, if some states still wish to maintain religious exemptions to their vaccination laws, these states should follow the policy of Ontario, Canada – requiring parents to attend educational courses before they can enroll their children in school without vaccinations.²¹³

ii. Required Education on Vaccine Benefits

If a state chooses to maintain religious and philosophical exemptions, it should mandate that parents using these exemptions attend an educational course on the benefits of vaccines before gaining access to the

²⁰⁸ See *Measles*, N.Y.C. HEALTH, <https://www1.nyc.gov/site/doh/health/health-topics/measles.page> (last visited November 20, 2020). "As of June 13, 2019, NY State no longer allows religious exemptions from mandated vaccinations." N.Y.C. DEP'T OF EDUC., *supra* note 139. N.Y. had twenty cases new cases in June 2019, removing the exemption brought new cases to zero by August of 2019. See N.Y.C. HEALTH, *supra* note 208.

²⁰⁹ See N.Y.C. HEALTH, *supra* note 208; N.Y.C. DEP'T OF EDUC., *supra* note 139.

²¹⁰ See *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905); see also *Brown v. Stone*, 378 So. 2d. 218, 224 (Miss. 1979).

²¹¹ See PROCON.ORG, *supra* note 11; see also Forster, *supra* note 21.

²¹² See Chemerinsky & Goodwin, *supra* note 45, at 600.

²¹³ See R.S.O. 1990, c 1.1 (Can.).

exemption. If parents are allowed to endanger not only their child, but the rest of the community by not vaccinating their child, they should be required to attend an education session with a licensed health professional to learn the actual benefits of vaccinations.²¹⁴ States have the police powers to ensure the safety of their communities and can use this power to mandate their citizens to learn the consequences of their decision to not vaccinate their children. As discussed above, a large majority of the fears that fuel the anti-vaccination movement are founded on medical myths or the fraudulent research of a discredited doctor.²¹⁵ Instituting an educational program will allow worrisome parents to be put at ease when deciding to vaccinate their children. This program will play a vital role in making scientific proof of vaccine success even more accessible to parents. Having more parents understand the science behind vaccines and vaccinations is the best way to ensure that decisions to not vaccinate are not based in fear or ignorance.

Essentially, the education program captures parents on the margin who are choosing to not vaccinate their children because they are unaware of the tried and tested benefits of vaccinations. Therefore, these parents need to be educated on the real benefits of vaccinations and the life-threatening risks of choosing not to vaccinate their children.

Requiring educational courses also addresses fears of infringing upon citizen's religious freedoms by investing both resources and time into educating the public on the benefits of vaccines and addressing falsified reports linking vaccines to other ailments. Reeducating the public will allow citizens to realize the significant benefits of the measles vaccine. Substantial time and resources need to be put into educating the American public since the current resurgence of the measles diseases both in the United States and abroad has been linked to anti-vaccination movements. Even if a state wants to allow for more than just a medical exemption, it can fulfill its purpose of preventing disease by mandating that people fully understand the reasons and implications of their vaccination decisions. As explained by the Supreme Court in *Jacobson*, states have a responsibility to ensure the safety of the community.²¹⁶ Therefore, they should fulfill this vital role either by removing the religious and philosophical exemption or by requiring a mandated education of the state's citizens on the benefits of vaccinations.

iii. Penalties

In addition to the first two solutions, states have the third and final option of following New York's lead by issuing penalties to families who do not comply with the state's vaccination requirements.²¹⁷ Implementing financial penalties effectively motivates families to either follow through

²¹⁴ *Id.*

²¹⁵ BOOM & CUNNINGHAM, *supra* note 83, at 5.

²¹⁶ See *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

²¹⁷ See Otterman, *supra* note 15.

with vaccinating their child, or alternatively take the time to get educated about vaccines and choose the best option for their child.²¹⁸ New York has already put this method in place, since it was the epicenter of the recent U.S. measles outbreak, so that it could address the outbreak quickly and effectively.²¹⁹ Instead of financial penalties, states could require that the child not be allowed in public schools until he or she is vaccinated, or the child will have to be home schooled. Each of these penalties allow the child's parents to stick with their strong beliefs against vaccinations while also protecting other children in the community by not compromising herd immunity.

To secure a future where preventable diseases remain eliminated, states must learn from France and Canada and address unfounded anti-vaccination movements by either only allowing medical exemptions, requiring parents to attend educational classes on vaccination requirements before using an exemption, or implementing penalties if a child's vaccinations are not met.²²⁰

IV. CONCLUSION

A 9th century disease that was declared eliminated from the United States almost twenty years ago resurged due to false anti-vaccination studies, vaccination exemption abuse, and government distrust. The United States must learn from Canada, France, and New York, which have all faced measles outbreaks, and each took direct measures to swiftly address it. Each state in the U.S. should utilize at least one of the three proffered solutions to prevent future outbreaks either by (1) only allowing medical exemptions, (2) requiring parents to take educational courses on the benefits of vaccines when attempting to use religious or philosophical exemptions, or (3) imposing penalties for families who do not adhere to the immunization requirements.²²¹ State police power and anti-vaccination sentiments are more important than ever in the face of the current global pandemic. Now that multiple vaccines for COVID-19 have gone through the required verification steps, at a historically faster pace than the process described above, it is crucial that states utilize their police powers to make sure their compulsory vaccination laws will protect the community as a whole. If these solutions are not followed when administering COVID-19 vaccinations, it will prolong both the length and severity of the pandemic, while unnecessarily endangering communities and individuals.

To ensure the safety and security of the public and to put an end to the anti-vaccination movement, it is vital for the United States to reeducate its citizens on the scientifically proven benefits of vaccinations and make changes to each state's vaccination exemptions. This will not only help in

²¹⁸ *See id.*

²¹⁹ *See id.*

²²⁰ *See id.*

²²¹ *See* Novak, Comment, *supra* note 82, at 1107.

ending the current global health crisis, but will also prevent future outbreaks from occurring, or reemerging, in the future.

SHEPHERDING SPACE: HOW PARTICIPATION IN AN OPEN ARCHITECTURE DATA REPOSITORY INFORMS SPACEFARING LIABILITY

Mousa Martin*

I. INTRODUCTION

Per aspera ad astra – “Through hardships to the stars.”

Imagine the year is 2009, and you are employed as a lawyer for a sizeable American satellite owner/operator. Your typical day in the office is not unusual: reviewing pending business transactions, negotiating ongoing contracts, and finalizing applications for launch in conjunction with typical U.S. agency regulatory requirements. Suddenly, your first-generation iPhone rings... the CEO is calling. An overwhelming air of confusion engulfs the conversation. You start to sweat, and you have few immediate answers. Meanwhile, nearly 500 miles above Siberia, at speeds ten-times faster than the fastest bullet, and thirty-four times faster than the speed of sound—for the first time in human history, two manmade satellites have just collided, and one of them belongs to your company.¹

You have read the essential United Nations space treaties, and you know that States Parties (“States”)² to the treaties, including the United States, bear responsibility for all objects launched within their borders.³ You also know that under the Liability Convention there has only ever been one liability claim filed between two signatories, which was settled over thirty years ago, providing no legal precedent.⁴ What you want, and need to know is whether your company and the United States government is liable.

You soon discover that the satellite which collided with yours was of Russian origin and had been decommissioned prior to the collision—effectively floating as space junk.⁵ You find out that your company had not been actively tracking the Russian satellite, but close calls in orbit happen

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¹ The above fact pattern is based on the real-life events of the February 10, 2009 accidental satellite collision between two artificial satellites, Iridium 33 and Cosmos-2251. See Anz-Meador et al., *Analysis and Consequences of the Iridium 33-Cosmos 2251 Collision*, NASA (July 18, 2010); Becky Iannotta, *U.S. Satellite Destroyed in Space Collision*, SPACE NEWS (Feb. 11, 2009), <https://spacenews.com/u-s-satellite-destroyed-in-space-collision/>.

² For readers who are less familiar with international relations, the term “States” in the context of this Article is used to refer to countries (e.g. Afghanistan, Argentina, and Austria) rather than “states” (distinguished through the lower case “s”) in the domestic sense (e.g. Alabama, Alaska, and Arkansas).

³ G.A. Res. 2222 (XXI) at 14 (Dec. 19, 1966).

⁴ Göktuğ Karacaloğlu, *Energy Resources for Space Missions*, SPACE SAFETY MAG. (Jan. 16, 2014), <http://www.spacesafetymagazine.com/aerospace-engineering/nuclear-propulsion/energy-resources-space-missions/> (“This accident is still the first and only instance where the 1972 U.N. Liability Convention was invoked between two signatories”). Because Cosmos-954 was settled, it does not provide precedent.

⁵ See Martha Mejia-Kaiser, *Collision Course: 2009 Iridium-Cosmos Crash*, at 9 (2009).

frequently, over 1000 times a day.⁶ However, your satellite had been launched twelve years prior and did not have active collision avoidance technology implemented in its structure.⁷ Yet it is unclear whether the best available data would have suggested that a collision was imminent because the most reliable tracking software available only predicted a close approach, *not* an imminent collision.⁸ Both satellites conformed with their States' respective launch laws and the Russian satellite was launched with no harmful intention. Given all these considerations, you cannot definitively tell your CEO who is responsible for the accident. You expect litigation and communications with world leaders soon, but for now, your job is done.

This hypothetical is based on a real collision. It was the source of thousands of debris particles and would later be known as the "worst space debris event since China intentionally destroyed one of its aging weather satellites during a 2007 anti-satellite test."⁹ Even with a decade of hindsight, it is not certain where responsibility falls.¹⁰ Neither the United States nor Russia invoked the Liability Convention over this 2009 collision.¹¹ This catastrophic incident still raised a relatively simple legal question—assuming that both States abided by prevailing legal standards, did either actor bear the bulk of responsibility?

Times are changing, and as technology revolutionizes the manners through which we colonize and commercialize space, new challenges are exposed. How do we best utilize the treaties agreed to over half-a-century ago to avoid collisions and address modern disputes?¹² Mainly, how do we most effectively regulate this new 'wild-west' when it is growing at such an

⁶ Glenn Reynolds, *Collision Course: The Need for Better Space Junk Regulations*, POPULAR MECHS. (Oct. 1, 2009), <https://www.popularmechanics.com/space/satellites/a12348/4326022/>.

⁷ See Brian Weeden, *2009 Iridium-Cosmos Collision Fact Sheet*, SECURE WORLD FOUND. (Nov. 10, 2010), https://swfound.org/media/6575/swf_iridium_cosmos_collision_fact_sheet_updated_2012.pdf.

⁸ See T.S. Kelso, *Analysis of the Iridium 33-Cosmos 2251 Collision*, CTR. FOR SPACE STANDARDS & INNOVATION (June 22, 2012), https://www.researchgate.net/profile/TS_Kelso/publication/242543407_Analysis_of_the_Iridium_33Cosmos_2251_Collision/links/0f31753bec32c31d6f000000/Analysis-of-the-Iridium-33Cosmos-2251-Collision.pdf; <http://celestrak.com/events/collision/> (stating that this collision wasn't reported in SOCRATES).

⁹ Iannotta, *supra* note 1.

¹⁰ See James Oberg, *Crash Course*, AD ASTRA, at 18, 20 (Spring 2009) ("It's becoming clear that the dirty little secret of 'collision avoidance' in space is that no matter how hard you try, you cannot reliably predict a collision with any useful advance warning. Even the best tracking and best computers can only calculate the probability of a collision, and for usable reaction times").

¹¹ Karacahoğlu, *supra* note 4. ("This accident is still the first and only instance where the 1972 U.N. Liability Convention was invoked between two signatories").

¹² See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *signed* Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

exponential rate? The United States alone expects to have eighteen times more satellites in orbit—than we do today—by 2024.¹³

Increasingly burdensome requirements for launch and deorbit have not helped to declutter space. Current regulations are insufficient to ensure that both active and inactive satellites, like the Russian Cosmos in 2009, present minimal risk. In an ongoing effort to remain the flag of choice,¹⁴ the United States has initiated efforts to start tracking and exchanging shared data between satellite operators, to ensure the best possible space situational awareness and space traffic management.¹⁵

To this end, data sharing has become the new normal, and soon more commercial and government actors will be required to participate in any future ‘pooling’ of data in what is known as an Open Architecture Data Repository (“OADR”).¹⁶ A trusted OADR will serve as an international platform for space safety data collection and analysis (specifically, conjunction notification warnings). This Article argues that it will be easier to identify State liability once an effective OADR is effectuated and becomes widely adopted. Undoubtedly, there will still be forensic challenges in making causation determinations, complicated by the physics of space orbit. In fact, many of the difficulties witnessed in the Iridium-Cosmos 2009 collision are inherited today. However, an effective OADR will at least assist in making fault liability determinations in conjunction with existing international treaties and evolving best practices.

Participation in the OADR will help to determine and assign liability. The OADR also provides a pivotal tool for maintaining confidence in a secure space industry, and equipping stakeholders with the necessary data for continued safe space operations. Coordination, transparency, security, and wide adoption are all necessary components for the effectiveness of the OADR. But once the OADR becomes widely adopted, it may become the prevailing basis in assessing fault.

¹³ See U.S. DEPT. OF COM., DRIVING SPACE COMMERCE THROUGH EFFECTIVE SPECTRUM POLICY 4 (2019), <https://www.ntia.doc.gov/files/ntia/publications/drivingspacecommerce.pdf> (“[c]urrently, there are over 800 operational American satellites in orbit, and by 2024, that number could exceed 15,000”).

¹⁴ “Flag of choice” is a term often used in international relations, normally associated with admiralty and maritime operations. In the context of this Article, the term refers to ongoing international competition to modernize space launch/operations by fostering more opportune regulatory environments (e.g., reducing tax burdens and easing registration requirements) which promote mutually beneficial relationships and maintain U.S. space leadership.

¹⁵ U.S. DEPT. OF COM., *supra* note 13, at 8.

¹⁶ See Request for Information on Commercial Capabilities in Space Situational Awareness Data and Space Traffic Management Services, 84 Fed. Reg. 14,645 (Apr. 11, 2019) (“commercial entities might currently and in the future provide [information] through an open architecture data repository to the public to enhance the space situational awareness data and the space traffic management services”).

Part II of this Article discusses the prevailing international treaties which govern space operations and identifies key reinforcing sections and shortcomings in those treaties. Additionally, Part II establishes an abbreviated history of data sharing, examines recent changes in the space ecosystem, and provides an essential background on the OADR. Part III of this Article analyzes the inadequacies and deficiencies of international treaties, domestic rules, guidelines, and regulations governing space launch/operations. Part III then applies existing legal structures to evolving technologies to reach conclusions about fault-based liability determinations. Finally, this Article concludes by identifying how implementation of the OADR will change the nature of spacefaring¹⁷.

II. BACKGROUND

A. *Brief Overview of Outer Space Treaties*

Nearly every space law primer begins, justifiably, by emphasizing the five United Nations (“U.N.”) space law treaties and principles. Although they were crafted roughly half-a-century ago, these ubiquitous treaties still largely govern contemporary space activities and operations.¹⁸ Thus, this background section expounds on three of those agreements which are relevant here: the 1967 U.N. Outer Space Treaty, the 1972 U.N. Space Liability Convention, and the 1975 U.N. Registration Convention.

i. The 1967 U.N. Outer Space Treaty

First, the most widely recognized and accepted among these treaties is the 1967 U.N. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (colloquially known as the “Outer Space Treaty” and hereafter referred to as the “OST”).¹⁹ The OST has seventeen Articles.²⁰ Articles I through IV primarily discuss the peaceful sharing of the Earth’s orbit, the Moon, and other celestial bodies.²¹ Article V treats astronauts as envoys of mankind.²² Articles VI through VIII are of particular relevance here. Article VI positions that “States Parties to the Treaty shall bear international responsibility for national activities in outer space . . . whether such activities are carried on by governmental agencies or by non-

¹⁷ Spacefaring is formally defined as “having vehicles capable of traveling beyond the Earth’s atmosphere” or “the action or activity of traveling in space,” although colloquially it tends to refer to actions taken in space by State actors. *See Spacefaring*, MERRIAM-WEBSTER (2020).

¹⁸ *Space Law Treaties and Principles*, UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, <http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties.html>.

¹⁹ G.A. Res. 2222 (XXI) at 13 (Dec. 19, 1966).

²⁰ *Id.*

²¹ *Id.* at 13-14.

²² *Id.* at 14.

governmental entities.”²³ Article VII bolsters this responsibility, adding that launches and procurement of launches within a State territory amount to international liability for damages done to another State Party on the Earth, in air, or in outer space.²⁴ Article VIII conditions that States “on whose registry an object launched into outer space . . . retain jurisdiction and control over such object.”²⁵ While Article VIII only addresses national registration rather than international registration, it is nonetheless highly applicable to this OADR discussion.

In practice, Articles VI through VIII have had huge implications, as governments become potentially liable for even private actions taken within their State’s boundaries, and “accept any potential international governmental responsibility for [private] operations.”²⁶ This is particularly relevant today, as the nature of space launch has dramatically changed. At the time of U.N. treaty-making, spacefaring was mostly a government enterprise with the exception of private sector telecommunication satellites in the geostationary orbit (a circular geosynchronous orbit above Earth’s equator); whereas, today spacefaring has made the major shift to mostly commercialization of space.²⁷ In many analogs, including space, States have been forced to balance exploration rights with restrictions to avoid liability for damages they may cause under these legally binding instruments.²⁸ Consequently, national governments have created comprehensive regulatory regimes addressing rights and responsibilities to supplement international legal frameworks which require authorization, licensing, and supervision of space activities that implicate their liability.²⁹

The remaining OST Articles function to promote interstate cooperation.³⁰ Many of these Articles contain statements that may be particularly relevant as we consider the legal implications of an OADR. These Articles discuss matters including State registries, the corresponding interests of all States in not causing harmful interference or contamination, and a consultation clause on informing the Secretary General of the U.N., as well as the public, “to the greatest extent feasible and practicable, of the nature, conduct, locations and results of such [space] activities.”³¹

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Christopher D. Johnson, *Legal and Regulatory Considerations of Small Satellite Projects*, SECURE WORLD FOUND. 1, https://swfound.org/media/188605/small_satellite_program_guide_-_chapter_5_-_legal_and_regulatory_considerations_by_chris_johnson.pdf.

²⁷ See, e.g., Ginger Chirst, *The Commercialization of Space: Selling the Final Frontier*, INDUST. WEEK (Oct. 31, 2014), <https://www.industryweek.com/transportation/commercialization-space-selling-final-frontier>.

²⁸ Johnson, *supra* note 26, at 2.

²⁹ *Id.* at 2-3.

³⁰ G.A. Res. 2222 (XXI), *supra* note 19, at 14-15.

³¹ *Id.*

ii. The 1972 U.N. Space Liability Convention

The 1972 U.N. Convention on International Liability for Damage Caused by Space Objects (“Liability Convention”) supported a similar liability assessment in accordance with the OST provisions.³² While the Liability Convention substantially added to the OST and “sought to create, define, and illustrate several concepts of legal liability,” it never provided private rights of recovery.³³ The Liability Convention expanded liability rules created in the OST, including enforcement mechanisms and an outline of the modes of collection for damages and indemnification (through diplomatic channels, or if that fails, through a Claims Commission).³⁴ The Liability Convention’s critical shortcoming is its requirement of clear proof of liability, whereby liability only binds a State actor when the cause of damage can be clearly tied with a launching State.³⁵

The Liability Convention forms the basis of liability for (1) damage (2) that is caused by (3) a manmade space object.³⁶ Article II holds that “[a] launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the [E]arth or to aircraft in flight.”³⁷ However, Article III entails that, for damage to a space object elsewhere, a launching State will be liable only if the damage is its fault, which includes the fault of those for whom it is responsible.³⁸ Thus, Article III relates to the focus of this Article and to the OADR being discussed. Articles IV and V make two States jointly and severally liable for damage to a third State, including if two or more States jointly launch a space object.³⁹ This scenario is much more common. Article VI is an exception and exonerates States from absolute liability if damage is wholly or partially resultant from gross negligence.⁴⁰ This Convention and its fault-based liability structure—which generally includes intentional acts and omissions, as well as gross negligence—could later be interpreted to include participation in an OADR as a relevant factor.⁴¹

³² *Id.* at 25.

³³ MORRIS D. FORKOSCH, OUTER SPACE AND LEGAL LIABILITY 69 (1982).

³⁴ G.A. Res. 2777 (XXVI) at 25-27 (Nov. 29, 1971).

³⁵ *Id.* at 26.

³⁶ See Scott Kerr, *Liability for Space Debris Collisions and the Kessler Syndrome (Part I)*, THE SPACE REV. (Dec. 11, 2017), <http://www.thespacereview.com/article/3387/1>.

³⁷ G.A. Res. 2777 (XXVI), *supra* note 34, at 25.

³⁸ *Id.*

³⁹ *Id.* at 25-26.

⁴⁰ *Id.* at 26.

⁴¹ See Heather A Harrison Dinniss, *Cyber Operations in Outer Space* (2017), OUTER SPACE L.: LEGAL POL’Y AND PRAC. 332 (Yanal Abdul Failat & Anel Ferreira-Snyman eds., 2017).

iii. The 1975 U.N. Registration Convention

The final relevant U.N. follow-up agreement⁴² to the OST for purposes of appraising liability was the 1975 U.N. Convention on Registration of Objects Launched into Outer Space ("Registration Convention"), which made international registration of launched space objects mandatory for States Parties.⁴³ The Registration Convention required member States to register spacecraft names, periods, designs, markings, paths (including orbital parameters), nodal periods, inclination, apsis, and missions to assist in identification of State origin/ownership.⁴⁴ This information could then be used to help inform liability assessments under Article VI.⁴⁵ The Secretary-General of the U.N. would maintain and record this Register of furnished information with "full and open access" to the public.⁴⁶

Very importantly, Article VI foresaw the potential relevance of an OADR, by including a provision which stated that Parties could request assistance from other States Parties with better equipped "space monitoring and tracking facilities" to "respond to the greatest extent feasible to a request" for object identification.⁴⁷ This Convention was a significant first step in the free and open sharing of spacefaring data. The next section discusses current attempts at precipitating and reciprocating data sharing.

B. *Commercial Data Sharing and the National Space Council*

One year after the Soviet Union's aggressive launch of the Sputnik satellite,⁴⁸ what is now known as the National Space Council ("the Council") was established under the National Aeronautics and Space Act of 1958.⁴⁹ The Act charged the Council with duties to survey "plans, programs, and accomplishments of all agencies of the United States engaged in such [space] activities."⁵⁰ It also required the Council to "develop a comprehensive program" which could "provide for effective cooperation" to "resolve differences among departments and agencies."⁵¹ Its objectives included the preservation of U.S. leadership in space technology and cooperation with

⁴² There have been other U.N. Resolutions regulating outer space activities, but no follow-up treaties. *See, e.g.*, G.A. Res. 51/122, Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries (1996).

⁴³ G.A. Res. 3235 (XXIX) at 16 (Nov. 12, 1974).

⁴⁴ *Id.* at 16-17.

⁴⁵ *Id.* at 17.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See The Launch of Sputnik, 1957*, U.S. DEP'T OF STATE, <https://20012009.state.gov/r/pa/ho/time/lw/103729.html>.

⁴⁹ *See NASA Statement on National Space Council*, NASA, <https://www.nasa.gov/press-release/nasa-statement-on-national-space-council>.

⁵⁰ *National Aeronautics and Space Act*, *supra* note 49.

⁵¹ *Id.*

other nations.⁵² This Act moved the responsibility for space exploration from primarily military auspices to a civilian agency, the National Aeronautics and Space Administration (“NASA”).⁵³ Several other Acts, such as the Commercial Space Launch Act of 1984,⁵⁴ the Enactment of Title 51—National and Commercial Space Programs,⁵⁵ and the 2015 U.S. Commercial Space Launch Competitiveness Act,⁵⁶ have served to facilitate the move from a primarily government dominated space industry, to a now commercialized space environment (as a majority of U.S. satellites are now commercially owned).⁵⁷ For instance, since 2012, even NASA has contracted with commercial service providers to deliver cargo to the International Space Station, and it no longer owns and operates all of its shuttles.⁵⁸

When the Council was revived in 2017, following a twenty-five year dormancy,⁵⁹ it emphasized the importance of sharing public-private technology and information in this new commercial space enterprise through implementing new space policy directives (“SPDs”).⁶⁰ A large part of the reason the Council was revived was to “coordinate space activities across government departments” and to “resolve policy differences that arise between departments and agencies.”⁶¹ As of October 2019, the Council had released four directives since its revival.⁶² The titles of the directives suitably describe the multiplicity of purposes: SPD-1, Reinventing America’s Human Space Exploration Program; SPD-2, Streamlining Regulations on Commercial Use of Space; SPD-3, National Space Traffic Management Policy; and SPD-4, Establishment of the United States Space Force.⁶³ The directive that garnered the most public attention was SPD-4, which proposed

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Commercial Space Launch Act of 1984*, 51 U.S.C. § 50901 et seq., Pub. L. 98-575 (1984).

⁵⁵ *Enactment of Title 51- National and Commercial Space Programs*, 51 U.S.C. § 50101 et. seq., Pub. L. 111–314 (2010).

⁵⁶ *U.S. Commercial Space Launch Competitiveness Act*, PUB L. 114-90 (2015).

⁵⁷ Name redacted, *Commercial Space: Federal Regulation, Oversight, and Utilization*, CONG. RSCH. SERV. 1, (Nov. 29, 2018), https://www.everycrsreport.com/reports/R45416.html#_Toc531342739National%20Aeronautics%20and%20Space%20Act.

⁵⁸ *Id.*

⁵⁹ Exec. Order No. 13803, 82 FR 31429 (2017).

⁶⁰ Jen Rae Wange, *New Space Policy Directive Calls for Human Expansion Across Solar System*, NASA (Dec. 11, 2017), <https://www.nasa.gov/press-release/new-space-policy-directive-calls-for-human-expansion-across-solar-system>.

⁶¹ Anusuya Datta, *Space Council Likely to Come Up With Revised PNT Policy in a Few Months*, GEOSPATIAL WORLD (Oct. 17, 2020), <https://www.geospatialworld.net/blogs/space-council-likely-to-come-up-with-revised-pnt-policy-in-a-few-months/>.

⁶² *National Space Council Directives*, OFFICE OF SPACE COM. (Oct. 13, 2019), <https://www.space.commerce.gov/policy/national-space-council-directives/>.

⁶³ *Id.*; Note: Three additional directives have been issued since this Article was originally written. Upon initial review, none seem to alter this legal analysis in any substantial way. The only subsequent Trump Administration memorandum which bears any significance is SPD-7, and of that, really only Section 3(b)-(c) regarding space applications for GPS.

establishing the U.S. Space Force as a sixth branch of the United States Armed Forces within the Department of the Air Force.⁶⁴ The U.S. Space Force was officially created with the signing of the National Defense Authorization Act in December 2019, and it has already participated in an inaugural launch.⁶⁵ Though, this Article will be focusing on the impacts of SPD-2 and SPD-3.⁶⁶

SPD-2 and SPD-3 bolstered the movement towards substantial regulatory change. Currently, a massive effort is being undertaken in the commercial space licensing process to make licensing and data sharing simpler, timelier, and more predictable.⁶⁷ Stakeholders have urged for greater interagency consultation and collaboration to remove duplicative efforts, overlap, and conflicting standards and regulations.⁶⁸ In turn, the many agencies responsible for governing space conduct (not least of which include NASA, the Federal Communications Commission, the Department of State, the Department of Defense, the Federal Aviation Administration underneath the Department of Transportation, and the National Oceanic and Atmospheric Administration underneath the Department of Commerce (“Commerce”)), have sometimes competed to decide who will regulate conduct and take the lead on various initiatives, such as developing orbital debris mitigation standards and potentially implementing these in rules.⁶⁹

SPD-2 addressed the multiple agencies that govern U.S. space regulations and directed them to establish or reevaluate rules and regulations affecting commercial use of space.⁷⁰ Less than a month later, SPD-3 became the first comprehensive national space traffic management (“STM”) policy and it was the catalyst for initiatives leading up to establishment of an OADR. The result of the directive to “cooperatively develop a plan for providing basic space situational awareness (“SSA”) data and basic STM services either directly or through a partnership with industry or academia,” has been the gradual transition of SSA data from the military and Department of Defense to Commerce.⁷¹ This directive also outlined how Commerce and the

⁶⁴ Presidential Memorandum on Space Policy Directive-4, Establishment of the United States Space Force (Feb. 19, 2019), <https://www.whitehouse.gov/presidential-actions/text-space-policy-directive-4-establishment-united-states-space-force/> [hereinafter SPD-4].

⁶⁵ Sandra Erwin, *45th Space Wing Prepares for First Launch Under the U.S. Space Force*, SPACE NEWS (Jan. 4, 2020), <https://spacenews.com/45th-space-wing-prepares-for-first-launch-under-the-u-s-space-force/>.

⁶⁶ See Presidential Memorandum on Space Policy Directive-2, Streamlining Regulations On Commercial Use of Space (May 24, 2018), <https://www.whitehouse.gov/presidential-actions/space-policy-directive-2-streamlining-regulations-commercial-use-space/>; see also Todd Harrison, *How Might Space Policy Directive 2 Affect Commercial Space?*, CENTER FOR STRATEGIC AND INT’L STUD. (May 30, 2018), <https://www.csis.org/analysis/how-might-space-policy-directive-2-affect-commercial-space>.

⁶⁷ Cong. Rsch. Serv. R45416, *supra* note 57, at 9.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1-2.

⁷⁰ Harrison, *supra* note 66.

⁷¹ Presidential Memorandum on Space Policy Directive-3, National Space Traffic Management Policy (June 18, 2018), <https://www.whitehouse.gov/presidential-actions/space->

Department of Transportation will work toward developing STM standards and best practices including “technical guidelines, minimum safety standards, behavioral norms, and orbital conjunction prevention protocols related to pre-launch risk assessment and on-orbit collision avoid support services.”⁷² Essentially, SPD-3 set the tenor for sharing timely and actionable SSA data and limiting the impact of orbital debris through a STM framework.

If these terms are confusing, it might help to conceptualize an OADR as providing an analytic service from which regulations may flow. SSA data is used to “inform satellite operators if there is potential for a collision with another passing satellite or piece of debris.”⁷³ The terms STM and SSA are often used conjointly. STM refers to “measures taken to minimize or mitigate the negative impacts of the increasing physical congestion in space,” whereas developing high-fidelity SSA information and sharing it freely can assist with STM which is “the ability to characterize the space environment and activities in space.”⁷⁴

In simplified terms, the data identifying a space object’s location, and tracking and predicting its future location, facilitates the ability to dodge an inactive object or avoid a collision between two active objects.⁷⁵ In reality, the largest problem today is not a coordination problem of where to direct active satellites (unlike in air traffic control of airplanes). Rather, in space there is the constant threat of an active (i.e. functional/working) satellite colliding with inactive (colloquially referred to as “space junk”) debris.⁷⁶ The OADR can help mitigate that problem.

STM can be divided into six components: (1) data sharing, (2) data collection, (3) processing and products (conjunction/collision warnings), combined with (4) oversight, (5) coordination (through regulations, policies,

policy-directive-3-national-space-traffic-management-policy/; see Todd Harrison, *How Does Space Policy Directive 3 Affect Space Traffic Management?*, CENTER FOR STRATEGIC & INT’L STUD. (June 19, 2018), <https://www.csis.org/analysis/how-does-space-policy-directive-3-affect-space-traffic-management>.

⁷² Harrison, *supra* note 66.

⁷³ *Id.*

⁷⁴ CHRISTOPHER D. JOHNSON ED., *Handbook for New Actors in Space*, SECURE WORLD FOUND. 40 (2017).

⁷⁵ See *Challenges to Security In Space*, DEF. INTELL. AGENCY 9 (2019), https://www.dia.mil/Portals/27/Documents/News/Military%20Power%20Publications/Space_Treat_V14_020119_sm.pdf.

⁷⁶ See Bhavya Lal et al., *Global Trends in Space Situational Awareness (SSA) and Space Traffic Management (STM)*, SCI. & TECH. POL’Y INST., at 9 (2018). (“The controlling authority will be responsible for continuously knowing where all objects are in space, and also for instructing at least U.S. licensee satellites (and possibly others, depending on if other nations acquiesce to the controlling system) when and how to move. If properly created and managed, it could result in the safest space environment.” There is a major concern that commercial satellite operators may “hold the U.S. Government liable for directing actions that result in damage or destruction to their assets, or for actions that turn out to be unnecessary.” Although, this assumes the U.S. government would actively manage this active STM control system).

standards, best practices), and (6) external factors (operational realities).⁷⁷ It is an expectation that SSA information will continually advance in precision and transparency as technology and society evolves.⁷⁸

SPD-3 further instructs Commerce to “create an open-source data repository of publicly releasable SSA data and to develop stronger relationships with private organizations to more easily share SSA data.”⁷⁹ However, the Air Force continues to maintain the full authoritative catalogue of space objects.⁸⁰ The sheer transition of SSA data alone indicates a major change in the way that domestic and global space traffic will be managed in the future.⁸¹ Very importantly, this shift to civil coordination, a commercially focused interface, and eventual civil management may make any SSA enterprise substantially more appealing to certain State actors which prefer to cooperate with U.S. businesses and civilian agencies, rather than the U.S. military. This in turn can potentially increase the number of States willing to join as equal partners and contribute/access data freely—particularly if the timeliness and quality of registration of space objects is enhanced.⁸² State-level funding for SSA is increasing at varying paces around the world, seen in States such as Australia, Japan, Poland and Thailand.⁸³ Data processing can now be done by a variety of national/private systems (both open source, and others proprietary) and developments are no longer limited to the “gold standard” set out by the U.S.⁸⁴

⁷⁷ *Id.* at iv.

⁷⁸ *Id.* at vi.

⁷⁹ Harrison, *supra* note 66.

⁸⁰ *Id.*; see also Final Report on the Activities of the National Space Council (Jan. 15, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/01/Final-Report-on-the-Activities-of-the-National-Space-Council-01.15.21.pdf> (“Commerce is establishing a physical presence within the Combined Space Operations Center at Vandenberg Air Force Base in California and using the existing Unified Data Library to build an open-architecture data repository of orbital objects that will be the foundation of a future globally accessible space object catalog”).

⁸¹ See Lal et al., *supra* note 76, at iii. (“Until recently, the United States Department of Defense was the only organization in the world—outside, perhaps, of Russia—to develop high-fidelity space situational awareness (SSA) information. Today, the Department of Defense shares varying levels of this information freely with satellite operators across sectors globally. The Department of Defense system is based on a legacy architecture that originated as part of a missile warning system in an era where there were relatively few objects in space, typically operating in predictable orbits and engaging in predictable activities. Emerging trends in the space environment—where there is growth in the number of objects in space, growth in the number and diversity of operators, increasing diversity of the types of activities in space, and changing satellite technology—would increasingly strain the Department of Defense’s ability to provide actionable SSA services not only for its own needs but also for those of its global partners. As a result, operators increasingly view today’s military SSA system and service as inadequate to achieve safe operations in space. Activity to supplement the Department of Defense’s information—with some efforts to establish independent capabilities—is increasing, both within governments around the world and the private sector”).

⁸² Lal et al., *supra* note 76, at v.

⁸³ *Id.*

⁸⁴ See Lal et al., *supra* note 76, at vi-vii. (mentioning activity in France, Spain and other States. “In the coming years, this innovation—both on the quantity and quality front—would

C. *Introducing Commerce's Open Architecture Data Repository*

The OADR⁸⁵ is one approach to managing objects in our orbital atmosphere and for increasing compliance with the OST. In essence, an OADR is simply a library that will service a cloud-based collection of SSA data, which will then be used to help avoid collisions in space, which in turn helps limit the creation of more space debris.⁸⁶ This Article provides the background on one specific OADR which has a high (perhaps the highest) likelihood of adoption and actualization. It is possible for other data repositories to simultaneously exist with varying levels of credibility and comprehensiveness—and it is quite likely that over time, the market will sort out which specific data repositories will prevail. Ultimately, the body that governs this OADR is of minimal importance for the legal analysis here. Though in the realm of space, what is first often lasts.

SPD-3 precipitated a chain of policy decisions to formalize an OADR that could be used in the foreseeable future by both public and private space satellite operators, and to “lead the world in the development of improved SSA data standards and information sharing.”⁸⁷ Combined with new sensors, this OADR could make unknown conjunctions and collisions avoidable by developing better tracking capabilities and better analytics, therefore better informing expensive satellite maneuvering decisions.⁸⁸ The OADR should be a continuously updated catalog of satellite tracking data, which would include: data integrity measures to ensure accuracy and availability; standards for sufficient quality from diverse sources; safeguarding of sensitive data; owner-operator ephemerides (data used by the GPS receivers to estimate location relative to the satellites and thus position on Earth) to inform orbital location and planned maneuvers;⁸⁹ and a standardized format to enable leveraging of data.⁹⁰

allow for increasingly more (e.g., including covariance information) and better (e.g., smaller error ellipses) SSA information. Given growing capabilities in the private sector, it is also likely that the cost of SSA products could substantially decrease”).

⁸⁵ Other texts will sometimes refer to the OADR by varying names (and with slight, or major variations on meaning). Two other common names for referring to this idea of a data repository include: SSA “unified data library” (UDL), and sometimes colloquially “data lake.” See, e.g., *Spire Global, Inc., Spire and the Luxembourg Space Agency Launch Space Analytics Data Lake*, SPIRE (July 10, 2019), <https://www.globenewswire.com/news-release/2019/07/10/1880742/0/en/Spire-and-the-Luxembourg-Space-Agency-Launch-Space-Analytics-Data-Lake.html>.

⁸⁶ Nathan Strout, *The Commerce Department Is Close to an Agreement for Space Data*, C4IRSNET (June 26, 2019), <https://www.c4isrnet.com/battlefield-tech/space/2019/06/26/the-commerce-department-is-close-to-an-agreement-for-space-data/>.

⁸⁷ Presidential Memorandum on Space Policy Directive-3, *supra* note 71.

⁸⁸ See *id.*

⁸⁹ Mark Dickinson, *A Space Data Association Focus: The Current State of Space Situational Awareness (SSA)*, SATNEWS (Jan. 2019), <http://www.satmagazine.com/story.php?number=1895054050#>. The Space Data Association was a trailblazer in using operator data to support a safe and integrated space environment.

⁹⁰ Presidential Memorandum on Space Policy Directive-3, *supra* note 71.

SPD-3 placed Commerce, a civilian agency, at the helm of administering an OADR.⁹¹ That decision was reaffirmed more recently in a report by the National Academy of Public Administration,⁹² and further, when the Chairman of the Senate Commerce Committee introduced a bill to formally give Commerce STM responsibilities and to move forward with an OADR that would combine both domestic and internationally held SSA data.⁹³ Again, the basic purpose in establishing this OADR was to assist in managing the fidelity of the space operating environment through data integrity and standards to improve SSA data interoperability and enable greater SSA data sharing.⁹⁴ This in turn translates to new and expanded services (i.e. widely enhanced conjunction analyses) which will help satellite operators determine the best course of action to avoid collisions.⁹⁵

Commerce has extensive expertise operating satellites, working with data and analytics across its many agencies and offices, and working with standards and measurements, including cyber security.⁹⁶ Equally, Commerce is well-positioned to maximize the multipronged needs of an effective OADR. This includes creating a more vibrant space ecosystem and marketplace for public/private interactions, facilitating and leveraging commercial capabilities, avoiding collisions like the 2009 Iridium-Cosmos collision, promoting responsible commercial investments and operations, anticipating domestic and global developments, and enabling amicable international participation.⁹⁷ Commerce has a long history of managing major projects, and its Office of Space Commerce, which is spearheading development of the OADR, was first established in 1988 with the mission of fostering economic growth and technological advancement of the U.S. commercial space industry.⁹⁸ Commerce's role will continue to expand as the

⁹¹ *Id.*

⁹² *United States Department of Commerce: Space Traffic Management*, NAT'L ACAD. OF PUBL. ADMIN. (Aug. 19, 2020), <https://www.napawash.org/studies/academy-studies/united-states-department-of-commerce-office-of-space-commerce>.

⁹³ Jeff Foust, *Senate Bill Would Assign Space Traffic Management Work to Commerce Department*, SPACE NEWS (Oct. 22, 2020), <https://spacenews.com/senate-bill-would-assign-space-traffic-management-work-to-commerce-department/>.

⁹⁴ See Alfred B. Anzaldúa, *How Defense and Civil Space Offices Can Work Together to on Space Situational Awareness and Space Commerce*, THE SPACE REV. (May 20, 2019), <https://www.thespacereview.com/article/3715/1>.

⁹⁵ Conjunction analyses are warnings that two space objects might collide with each other. Assuming that satellites have the ability to maneuver, refining these warnings equates to heightened collision avoidance. See Marcia Smith, *Wicker Introduces Bill to Codify Commerce's Role In Space Situational Awareness*, SPACE POL'Y ONLINE (Oct. 21, 2020), <https://spacepolicyonline.com/news/wicker-introduces-bill-to-codify-commerces-role-in-space-situational-awareness/>.

⁹⁶ See Anzaldúa, *supra* note 94.

⁹⁷ See *Mission Statement*, OFFICE OF SPACE COM., <https://www.space.commerce.gov/about/mission/> (last visited Oct. 13, 2019).

⁹⁸ *Id.*; see generally American Space Commerce Free Enterprise Act, H.R. 2809, 115th Cong. (2018); U.S. Commercial Space Launch Competitiveness Act, H.R. 2262, 114th Cong. (2015). The Office of Space Commerce was officially established in 1988, under a slightly different name: the Office of Space Commercialization. In 1996 it was moved under Commerce's Technology Administration. In 2006, yet another Departmental Organization

space economy and global space industry are expected to triple in the next two decades from generating annual revenue of \$350 billion currently, to more than \$1 trillion by 2040.⁹⁹

Historically, the Joint Space Operations Center and the Air Force's 18th Space Control Squadron have tracked orbital satellites and space debris.¹⁰⁰ U.S. Strategic Command even operates an online service, "Space Track," for the purpose of promoting space flight safety as well as protecting the space environment.¹⁰¹ Space Track has long been the authoritative catalogue for tracking all artificial Earth satellites, but one of the problems has been that it operates based on old hardware (the history of the project dates nearly back to Sputnik I) despite expanding SSA data, and there are limits on what software can be run on existing systems because of this old hardware.¹⁰² These various systems molded over time into the Air Force Space Command's "Unified Data Library."¹⁰³ The ongoing strategy is to utilize the immense amounts of data collected and make it more uniform and efficient through a new generation of technology (advanced artificial intelligence and machine learning) in a "super system," which simply was not possible in previous state-of-the-art facilities.¹⁰⁴

There have been recent discussions to open the Air Force's combined military and commercial SSA data 'library' to allied governments—which may serve in many ways as a model for how Commerce can build its mandated OADR.¹⁰⁵ In August of 2019, Commerce finalized an agreement to gain access to the Air Force's SSA data, in which

Order moved it to the National Oceanic and Atmospheric Administration. A 2015 law then renamed the office, codified its policy mandate, created the position of Director, and gave additional functions. In 2018, it was granted yet additional authorities to issue certifications.

⁹⁹ *Space: Investing in the Final Frontier*, MORGAN STANLEY (July 24, 2020), <https://www.morganstanley.com/ideas/investing-in-space>.

¹⁰⁰ See Stephen Clark, *U.S. Military Sensors Track Debris from Indian Anti-Satellite Test*, SPACEFLIGHT NOW (Mar. 27, 2019), <https://spaceflightnow.com/2019/03/27/u-s-military-sensors-track-debris-from-indian-anti-satellite-test/>.

¹⁰¹ See Jeff Foust, *U.S. Air Force Releasing More Data on Orbits of Military Satellites*, SPACENEWS (Dec. 17, 2018), <https://spacenews.com/u-s-air-force-releasing-more-data-on-orbits-of-military-satellites/>; see also Space-Track.org, <https://www.space-track.org/auth/login> (last visited Nov. 9, 2020).

¹⁰² See *SSA Sharing & Orbital Data Requests*, SPACE-TRACK.ORG, <https://www.space-track.org/documentation#odr>; see also United States Strategic Command Public Affairs, *USSTRATCOM Expands SSA Data on Space-Track.org*, AIR FORCE SPACE COMMAND (Oct. 10, 2018), <https://www.afspc.af.mil/News/Article-Display/Article/1658619/usstratcom-expands-ssa-data-on-space-trackorg/>.

¹⁰³ Scott Maucione, *Air Force Space Command Has New Strategy to Harness Data*, FED. NEWS NETWORK (Aug. 27, 2019) (describing a "super system"), <https://federalnewsnetwork.com/air-force/2019/08/air-force-space-command-has-new-strategy-to-harness-data/>.

¹⁰⁴ *Id.*

¹⁰⁵ All participants who have signed up with Space Track have basic SSA data, and those who entered into user agreements with the Air Force have more SSA data. See Theresa Hitchens, *Crider: SSA Data 'Library' Will Open To Allies*, BREAKING DEF. (May 3, 2019), <https://breakingdefense.com/2019/05/crider-ssa-data-library-will-open-to-allies/>.

General Raymond promised to migrate data from Space Command to Commerce (although, there is evidence that this process has been delayed).¹⁰⁶ This data will be used to increase the quality and quantity of available SSA information, give Commerce use of the Unified Digital Library, and support the transition from Space Track.¹⁰⁷ Modernization is imperative given that there are over half-a-million pieces of space junk which could severely damage satellites in orbit, and the U.S. military actively tracks about 23,000 of these larger space debris.¹⁰⁸ Other projects, such as Lockheed Martin's "Space Fence,"¹⁰⁹ will help in providing assured coverage as well as assisting in improving accuracy, consistency, and timeliness in the way users detect, identify and track objects in space.¹¹⁰

III. ANALYSIS

A. *Applying International Treaties to Liability Claims*

The legal question has not yet been answered: How does data sharing fit into and inform existing liability structures, particularly as data repositories evolve and enjoy more widespread adoption? It can be inferred from Article III of the Liability Convention that States face absolute liability for damage caused by space objects on the surface of the Earth or to aircrafts in flight, and fault-based liability for damage caused elsewhere.¹¹¹ "Liability is a requirement to pay compensation. A related but broader legal concept is 'responsibility,' which is a requirement to govern your actions and to be held accountable for your actions and the actions of others imputed to you."¹¹²

Even if liability is clearly imputed by existing treaties, tying responsibility to one State can be difficult — it attaches to all launching States but can be negotiated among the States themselves.¹¹³ Tying causes of damage can still be difficult to determine for forensics reasons. Predominant U.N. space treaties are ineffective in making liability determinations primarily because physics and distance make causation determinations challenging. But evolving technology, such as non-Earth imaging and rendezvous and proximity operations, will enhance causation determinations.

¹⁰⁶ See Aaron Mehta, *Space Command to launch Aug. 29*, DEF.NEWS (Aug. 20, 2019), <https://www.defensenews.com/space/2019/08/20/space-command-to-launch-aug-29/>.

¹⁰⁷ Strout, *supra* note 86.

¹⁰⁸ *Space Debris and Human Spacecraft*, NASA (Sept. 26, 2013), https://www.nasa.gov/mission_pages/station/news/orbital_debris.html; Irene Klotz, *U.S. Air Force Reveals 'Neighborhood Watch' Spy Satellite Program*, REUTERS (Feb. 22, 2014), <https://www.reuters.com/article/us-space-spysatellite/u-s-air-force-reveals-neighborhood-watch-spy-satellite-program-idUSBREA1L0YI20140222>.

¹⁰⁹ *How to Keep Space Safe*, LOCKHEED MARTIN (2020), <https://www.lockheedmartin.com/en-us/products/space-fence.html>.

¹¹⁰ *Id.*

¹¹¹ G.A. Res. 2777 (XXVI) at 25 (Nov. 29, 1971).

¹¹² Christopher D. Johnson et al., *The curious case of the transgressing tardigrades (part I)*, THE SPACE REV. (Aug. 26, 2019), <http://www.thespacereview.com/article/3783/1>.

¹¹³ G.A. Res. 2777, *supra* note 111, at 26.

The OADR will also help address some of the challenges presented by determinations of causation, thus bolstering effectiveness of the international legal regime that governs this inherently international, distant space domain. Supplementing existing treaties with new best practices likely represents the path of least resistance for achieving improved liability. Today's best practices (i.e. participation in the OADR), while not required by law, will inevitably turn into tomorrow's minimally adequate levels of service.¹¹⁴ This is the optimal alternative to replacing treaties, because replacing Cold War treaties like the OST can be challenging and may lead to unintended consequences.¹¹⁵

For instance, the OST "require[s] authorization and continuing supervision" of all activities of non-governmental entities in outer space.¹¹⁶ Most States affix "authorization" through licensing satellites and other space objects.¹¹⁷ Licensing promotes uniform safety requirements and responsibly organizes participants, and also provides for an evolving regime which meets future needs.¹¹⁸ For example, future participation in an OADR might be an added licensing requirement. Consonant with licensing is registration. States are obligated under the Registration Convention (Article II) to establish national registries and are required to place space objects on their national registries.¹¹⁹ States which fail to comply with treaty obligations are in breach of those treaties, which may or may not involve some type of liability under these Conventions.

¹¹⁴ Diane Howard, *A Rose by Any Other Name: Despite What We Call Best Practices or Standards, the Goal is the Same – To Foster Safety and Limit Liability in the Context of Commercial Space*, 62ND INT'L ASTRONAUTICAL CONG. 2011, at 1 (referring to how "former best practices have become the minimum, the reasonable, the ingredients necessary to professional judgment of adequacy or appropriateness").

¹¹⁵ Discarding current but "antiquated" treaties results in an indeterminant scenario which imparts no certainty that better treaties will follow. Instead, it is more likely that rogue actors and bad actors will have a freer rein, because existing treaties carefully consider and balance State interests with private sector concerns.

¹¹⁶ G.A. Res. 2222 (XXI), at 26 (Dec. 19, 1966); see also Michael J. Listner, *Seeing Shadows of Rights: What is the Intent of Congress in HR 2809?*, THE SPACE REV. (May 7, 2018), <https://www.thespacereview.com/article/3489/1>.

¹¹⁷ See, e.g., Michael Davila, *New Regulations on the Licensing of Private Remote Sensing Space Systems*, LMI ADVISORS (2020), <https://www.lmiadvisors.com/new-regulations-on-the-licensing-of-private-remote-sensing-space-systems/>.

¹¹⁸ See, e.g., Federal Communications Commission, *Streamlining Licensing Procedures for Small Satellites*, FED. REG. (July 20, 2020), <https://www.federalregister.gov/documents/2020/07/20/2020-12013/streamlining-licensing-procedures-for-small-satellites>; Department of Commerce, *Licensing of Private Remote Sensing Space Systems*, FED. REG. 49 (May 20, 2020), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-10703.pdf>.

¹¹⁹ G.A. Res. 3235 (XXIX) at 16 (Nov. 12, 1974); JOHNSON, *supra* note 74 ("This ownership is twofold, encompassing jurisdiction and control. Jurisdiction is a legal power to create and enforce laws and to settle claims and is held by the [S]tate. Control is an operational power analogous to command over the space object. Article VIII of the Outer Space Treaty confers these rights").

However, problems with the Registration Convention were multifold. First, it did not require advance registration of projected launches, and in practice, the U.N. is informed only after considerable delay.¹²⁰ Second, some objects are registered multiple times, while others are never registered at all.¹²¹ Third, the information provided to the U.N. is frequently cryptic and of limited use.¹²² Lastly, there are many other challenges to registration such as determining when registration is necessary (whether its date of launch or deployment) and looking at alternatives once international designation numbers in the current system are exhausted.¹²³

There is not always a clear delineation of what programs fall under existing regulatory or legal regimes. Certainly, the OADR and modern developments are without precedent, but existing international treaties do provide a roadmap for legal liability analyses.¹²⁴ Of course, there is the Liability Convention which expanded the OST and set up a tiered regime to adequately manage State liability for space object collisions occurring in outer space, but it is incomplete.¹²⁵ In addition to requiring elements of causation and damage, Article III of the Convention requires proof of fault for liability to be assigned — this is where the OADR can practically make a massive difference.¹²⁶ By assisting with fault determinations, the OADR will provide claimant States a higher likelihood of being compensated.¹²⁷

One problem that exists, however, is that even if the OADR helps with making the quintessential proof of fault determination, the Liability Convention never established a standard of care for space conduct.¹²⁸ According to the Liability Convention (Article III), an actor is only liable if it is at fault for damage to another object; thus, fault informs liability.¹²⁹ Under the international legal system, fault is either equated to an actor's intention; or more often, in situations of negligence, fault flows from duty (the hearthstone of any analysis), breach, causation, and harm.¹³⁰ The catch-22 is that actors rarely/never voluntarily accept fault and proving fault is extremely difficult due the lack of legally binding international space traffic rules.¹³¹ Article IX of the OST plays a large role in SSA/STM liability in

¹²⁰ BIN CHENG, *STUDIES IN INTERNATIONAL SPACE LAW*, Clarendon Press, 474 (1997).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See id.*

¹²⁴ *See* Lal et al., *supra* note 76, at 65-67.

¹²⁵ Joel A. Dennerley, *State Liability for Space Object Collisions: The Proper Interpretation of 'Fault' for the Purposes of International Space Law*, 29 EJIL 281, 282 (2018).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 282-83.

¹²⁹ Mejia-Kaiser, *supra* note 5.

¹³⁰ *See* Dennerley, *supra* note 125, at 283; *see generally* A. CASSESE, *INTERNATIONAL LAW*, 250-51 (2nd ed., 2005); I. BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY*, PART 1, 44 (1983).

¹³¹ Mejia-Kaiser, *supra* note 5.

assessing the duties to use due regard, notify, and consult. This, again, is where the OADR comes into play.

Article III of the OST does provide for the inclusion of customary rules of international law.¹³² Typically fault regimes (in contrast to strict liability) also look to a “psychological element of blameworthiness, intention or negligence,” or in international law, blameworthiness of an act or omission.¹³³ Conceptually, failure to join an OADR certainly could be deemed a blameworthy act or, more likely, omission (for example, the failure to exercise a duty of care).

Even the International Law Commission struggled to define customary rules of State liability over twenty-five plus years.¹³⁴ This Article will not attempt to impart such a definition—but any such definition must further the principles of the OST and the Liability Convention, which includes maintaining a safe, free, and collaborative outer space environment and elaborating on *effective* international rules.¹³⁵ The OADR certainly furthers these objectives, and might one day conform with the international community’s definition of liability to become a component of liability assessment. This is easily envisioned given all that is required of international customary law is “one single constitutive element, namely, the *opinio juris* of States.”¹³⁶

Surely, “fault” as defined here is not immune from the “general rules of international law, such as the Articles on State Responsibility.”¹³⁷ The travaux préparatoires reference the need for flexibility in the face of rapidly changing technological and legal challenges.¹³⁸ Drafters of these treaties considered the potential of technological advancements, as well as how devices (such as the OADR) may inform liability. The Convention seems to recognize that “fault” is logically and naturally equated with ordinary negligence.¹³⁹ Refusal to join the OADR may not be a “wrongful act” in itself (implying actual awareness), but it does involve at least some lapse in the duty of care to prevent harm.¹⁴⁰ Significant parallels can be drawn between

¹³² Dennerley, *supra* note 125, at 289.

¹³³ *Id.* at 288; *see generally* BROWNLIE, *supra* note 130, at 44.

¹³⁴ Dennerley, *supra* note 125, at 289-90.

¹³⁵ *See* FORKOSCH, *supra* note 33, at 72-74.

¹³⁶ In customary international law, *opinio juris* is the second element necessary to establish a legally binding custom. *See* CHENG, *supra* note 120, at 136, 146 (emphasis added) (discussing ‘instant’ international customary laws formed “by means of unanimously adopted resolutions of the General Assembly”).

¹³⁷ Dennerley, *supra* note 125, at 291.

¹³⁸ The travaux préparatoires (preparatory works) are the official records of a negotiation which are often useful in clarifying the intentions of a treaty or other instrument. *See, e.g.*, Comm. on the Peaceful Uses of Outer Space, Verbatim Record of the Twenty-Seventh Meeting, U.N. Doc. A/AC. 105/PV.27 (1964) (discussing, for example, the issues of liability and damages “which involve tremendously complex problems and a wide range of options”).

¹³⁹ *See* FORKOSCH, *supra* note 33, at 80-81.

¹⁴⁰ Dennerley, *supra* note 125, at 298.

this duty of care to prevent harm and vested interests under the OST Articles VII and VIII, which again holds States liable “for all national space activity, whether or not they are actually involved.”¹⁴¹

Signatory States are obliged to uphold the OST, which includes faithful execution of Articles VI through VIII, including “bear[ing] international responsibility for national activities in outer space . . . whether such activities are carried on by governmental agencies or non-governmental entities.”¹⁴² This means that States are liable for activities they did not necessarily participate in fostering. Failing to join an OADR may be an act ignoring that responsibility, which would breach a binding obligation. The ‘intentional’ breach of such obligation would amount to an assumption of fault, “despite the activity itself not being wrongful or prohibited.”¹⁴³ Thus, it can be said that States have elevated requirements as technology evolves where failing to help avoid a collision, when a collision is inevitably endured, is nearly the same as causing that collision. It might be helpful to envision this OADR scenario as a standard traffic accident: A car which recklessly speeds and pays no mind to other vehicles on the road will likely bear more fault through his intentional act/omission (*per se* liability traffic laws aside) than a cautious driver who signals other drivers of his intent to change lanes.

This example is true of international actions too, as seen in the embodiment of a due diligence conduct obligation modelled on the International Court of Justice’s *Corfu Channel* decision.¹⁴⁴ This decision has become customary law and obligates States to exercise good faith in neighborly relations as required under Article 74 of the U.N. Charter¹⁴⁵ to “use their best efforts to try to prevent damage or harm [from] occurring to other States.”¹⁴⁶ Of course, applying this standard to the OADR is purely theoretical; and States do not always maintain actions that are in the best interest of other international actors.¹⁴⁷ What is clear, is that a showing of

¹⁴¹ YANAL ABUL FAILAT, *OUTER SPACE LAW: LEGAL POLICY AND PRACTICE*, 165 (2017).

¹⁴² United Nations Office for Outer Space Affairs, *United Nations Treaties and Principles on Outer Space*, at 5 (2008) (presenting G.A. Res. 2222 (XXI) from December 19, 1966).

¹⁴³ Dennerley, *supra* note 125, at 292-93.

¹⁴⁴ Dennerley, *supra* note 125, at 293-98 (“Another specific due diligence fault standard was established under the Articles on Transboundary Harm. The Articles on Transboundary Harm relate to the management of risks arising from hazardous and ultra-hazardous activities, which are considered activities not prohibited by international law, but involve risks of significant transboundary harm of which space activities are included. These Articles create a duty or obligation of prevention, unlike the *Corfu Channel* obligation, in the context of State liability for transboundary harm . . . This due diligence obligation requires States to create policies designed to prevent significant harm occurring, or at least minimizing the risks associated with their activities . . . Irrespective of which articulation of due diligence is applied to the space activities of launching States, both will lead to the same conclusion that the relevant fault standard is that of constructive knowledge.”).

¹⁴⁵ CHENG, *supra* note 120, at 584.

¹⁴⁶ Dennerley, *supra* note 125, at 294.

¹⁴⁷ *E.g.*, China’s 2007 anti-satellite missile test and India’s 2019 anti-satellite test, both of which created innumerable particles of debris and other space junk and established dangerous

“negligence or lack of due diligence to prevent a space object collision” is made immensely easier when certain States/actors actively avoid collisions through use of and participation in an OADR, while others do not.¹⁴⁸ Even if, for now, application of Article 74 remains untested—it remains a compelling argument in liability claims.

B. *Relating U.S. Regulations to International Participation*

U.S. efforts certainly bear applicability to international regimes. Multilateral data exchange programs already help to facilitate data sharing among partner States and help to address shared challenges.¹⁴⁹ Data policies remain a key component of remote sensing policies, and effective rulemaking may potentially help the U.S. avoid liability by helping to avoid future collisions, and by dealing with congestion problems.¹⁵⁰ Best practices implemented by the U.S. can also have legal statuses (through degrees of formalization, objectivity, and accessibility), thus imputing a legal duty and protecting third parties from negligence.¹⁵¹

Perhaps the primary challenge in expediting data sharing is the dual use of satellite systems for both civil and military applications.¹⁵² Going back decades, “the initial reaction of many countries to data gathering from outer space was one of suspicion, apprehension, fear, and probably even hostility.”¹⁵³ Even today, “[s]uch a complex issue must be addressed politically and legally.”¹⁵⁴ Many nations raise “national security concerns associated with access to potentially sensitive information.”¹⁵⁵ These

precedents. See Carin Zissis, *China's Anti-Satellite Test*, COUNCIL ON FOREIGN REL. (Feb. 22, 2007), <https://www.cfr.org/background/chinas-anti-satellite-test>; see also Kiona N. Smith, *India's Anti-Satellite Missile Test Left a Cloud of Debris and Tension in its Wake*, FORBES (Apr. 5, 2019), <https://www.forbes.com/sites/kionasmith/2019/04/05/indias-anti-satellite-missile-test-left-a-cloud-of-debris-and-tension-in-its-wake/?sh=73ba78368fd1>. Additionally, Project West Ford created debris and controversy over interference with radio. See D.S.G., *Project West Ford: Causes of Failure Still Unknown*, 134 AM. ASS'N FOR ADVANCEMENT SCI. 1680 (1961).

¹⁴⁸ Dennerley, *supra* note 125, at 294.

¹⁴⁹ See Peter Martinez, *The Role of Multilateral Space Diplomacy in Preserving Space Security & Sustainability*, SECURITY WORLD FOUND. 61-68 (Apr. 2019), <https://swfound.org/media/206434/role-of-multilateral-space-diplomacy.pdf>.

¹⁵⁰ See JOHNSON, *supra* note 74, at 78-86 (“[data] policies make most government-acquired remote sensing datasets available for scientific, social, and economic benefit”).

¹⁵¹ Howard, *supra* note 114, at 1, 4-6.

¹⁵² Stephen M. McCall, *Challenges to the United States in Space*, CONG. RSCH. SERV. (Jan. 27, 2020), <https://fas.org/sgp/crs/natsec/IF10337.pdf>.

¹⁵³ CHENG, *supra* note 120, at 585.

¹⁵⁴ Jose Monserrat Filho, *Toward a Collective Space Security*, CONFLICTS IN SPACE AND THE RULE OF LAW 404 (Maria Manoli & Sandy Belle Habchi eds., 2017).

¹⁵⁵ JOHNSON, *supra* note 74, at 87 (discussing India's Remote Sensing Data Policy of 2011 which notes that “specific agreements are necessary for the exchange of data better than 1-meter resolution”); see also Theresa Hitchens, *Intel Community's Secrecy Culture Frustrates DoD Sat Safety Effort*, BREAKING DEF. (Aug. 26, 2019), <https://breakingdefense.com/2019/08/intel-communitys-secrecy-culture-frustrates-dod-sat>

concerns relate back to what components are necessary for inclusion in the OADR to best facilitate widespread adoption—and certainly new regulations must not prohibit companies from maintaining profitability of ventures.

The best way to invite participation in the OADR is regulation of “commercial space activities in a socio-economic manner flexible enough to welcome” a plurality of actors, based on common values of space economy, society, accessibility, and diplomacy.¹⁵⁶ This interdisciplinary approach can help gravitate progress towards “the creation of a socio-economic sustainable legal system to regulate commercial space activities in a uniform way,” taking into account ‘equitable sharing.’¹⁵⁷ An example of a flexible approach is the Space Sustainability Rating system, which incentivizes companies and governments operating satellites to “take all the steps they can to reduce the creation of space debris.”¹⁵⁸ Self-interest in the form of insurance incentives can also act as a hook, incentivizing good behavior, and assuring that standard practices become relevant to the private sector (i.e. rewards for satellite operators to add “beacons” to their spacecraft to more easily track and identify noncompliance; akin to a ‘good driver’ discount).¹⁵⁹ Similarly, international participation in an OADR will likely largely remain voluntary in the foreseeable future, but if the OADR avoids redundancy and provides for greater security then eventually neglecting to join the OADR may constitute negligence in-and-of itself. The international community is already engaging in dialogue on how to innovate, invest, and further collaboration in space to promote international partnerships.¹⁶⁰

New requirements (e.g. requiring domestic actors’ participation in the OADR) are best derived from best practices organically drawn from operational realities.¹⁶¹ In light of technological advances, overarching guidelines may always be further detailed in agency-level policies. However, there is always the looming threat of overzealous policymaking which focuses more on expediency and quantity of untested rules, rather than the effectiveness of practiced rulemaking. Overregulation in that situation

safety-effort/; see generally TOGAF ADM Guidelines & Tech, *Security Architecture and the ADM*, <https://pubs.opengroup.org/architecture/togaf91-doc/arch/chap21.html>.

¹⁵⁶ MARIA MANOLI, MONOGRAPH SERIES V: CONFLICTS IN SPACE AND THE RULE OF LAW 237, 245-46 (Maria Manoli & Sandy Belle Habchi eds., 2017).

¹⁵⁷ *Id.* at 246.

¹⁵⁸ Helen Knight, *A Sustainability Rating for Space Debris*, MIT MEDIA LAB (May 6, 2019), <https://news.mit.edu/2019/space-sustainability-rating-system-mitigate-debris-0506> (referencing comments by Diane Howard).

¹⁵⁹ Jeff Foust, *Incentives and Requirements May be Needed to Enhance Space Sustainability*, SPACE NEWS (Sep. 20, 2019), <https://spacenews.com/incentives-and-requirements-may-be-needed-to-enhance-space-sustainability/> (quoting Chris Kunstadter).

¹⁶⁰ See *Space Enterprise Summit, June 26-27, 2019*, FED. REG. (Apr. 5, 2019), <https://www.federalregister.gov/documents/2019/04/05/2019-06726/space-enterprise-summit-june-26-27-2019>.

¹⁶¹ See Foust, *supra* note 159.

proliferates a less-discussed tragedy of the commons problem—the *underuse* of an essential resource (i.e., space).¹⁶²

All that is necessary to make participation in the OADR a binding requirement on domestic actors is a law passed by Congress, or even simpler, the promulgation or modification of a Commerce regulation requiring civil registration and participation with the OADR in conjunction with other already-existent licensing requirements. The Secretary of Commerce is already responsible for the licensing authority of private remote sensing space systems, and this could be done through policy which specifies procedures or limitations that non-governmental operators must meet to be allowed to operate space remote sensing systems.¹⁶³ The National Oceanic and Atmospheric Administration already requires the sharing of launch, space, and ground segment information.¹⁶⁴ Moreover, Commerce is already involved in an ongoing rulemaking to overhaul its commercial remote sensing licensing process,¹⁶⁵ and the Office of Space Commerce has already completed its Request for Information comment period on Commercial Capabilities in SSA and STM.¹⁶⁶ The international community is unlikely to reach any new treaty agreement in unison anytime soon, and this rulemaking is an excellent example of the gradual proliferation of enforceable national laws. These rules would be based on observable standards, best practices, and would be drawn from stakeholder input. Discourse and alignment with other like-minded States in the promulgation of these laws is persuasive and offers a better chance of creating binding regimes that neither conflict nor speak to national interests, but which do allow States to retain sovereign control.¹⁶⁷

C. *The Future of Space Law and Evolving Environments*

“[T]here are over [two-thousand satellites still] orbiting Earth [that] are no longer functioning.”¹⁶⁸ Hundreds of these satellites will be hurling aimlessly for the decades that it will take them to slowly deorbit, fall back

¹⁶² The more often discussed “tragedy of the commons” problem is when certain States/stakeholders fail to behave responsibly, even while other States/stakeholders execute efficient policy and practice sustainable habits.

¹⁶³ JOHNSON, *supra* note 74, at 84-86 (also discussing Canada’s Remote Sensing Space Systems Act of 2005 which “details the procedure by which an operational license may be cancelled or temporarily revoked when it is determined to be ‘injurious to national security’ . . . [or] ‘inconsistent with Canada’s international obligations’”).

¹⁶⁴ See John Leslie, *NOAA’s New Deep Space Solar Monitoring Satellite Launches*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN. (Feb. 11, 2015), <https://www.noaa.gov/media-release/noaa-s-new-deep-space-solar-monitoring-satellite-launches>.

¹⁶⁵ *Secretary Ross Remarks to ACCRES*, OFFICE OF SPACE COM. (June 4, 2019), <https://www.space.commerce.gov/secretary-ross-remarks-to-accre/>.

¹⁶⁶ See *RFI on Commercial Capabilities in SSA and STM*, OFFICE OF SPACE COM. (Apr. 11, 2019), <https://www.space.commerce.gov/rfi-on-commercial-capabilities-in-ssa-and-stm/>.

¹⁶⁷ See generally Howard, *supra* note 114.

¹⁶⁸ FAILAT, *supra* note 141, at 332.

into Earth's atmosphere, and hopefully, burn up upon reentry.¹⁶⁹ Both private and government actors are tracking these space objects hoping to avoid a repeat of 2009¹⁷⁰ and endeavoring to prevent the Kessler syndrome (the theoretical phenomenon where space debris make low Earth orbit uninhabitable as random collisions between debris virtually infinitely perpetuate).¹⁷¹ This evolving discussion around debris mitigation will inform OADR developments. What is certain is that the modern foundations of space law were "neither designed nor developed to operate in the current multi-sectored space environment."¹⁷²

There are ongoing inter-agency discussions about the release of new space authorization programs and guidelines. Domestically, notice and comment rulemaking is currently in the process of producing standards which could be applied to such an OADR. The results of these rulemaking processes may result in a dramatic shift in how we track and share data, how we respond to satellite orbital changes, and how we assess and assign fault liability. This liability would be based upon which satellite operators either failed to comply, coordinate, or participate in the OADR.

Ensuring effective international rules and procedures concerning liability for damage caused by space objects and prompt payment under the Liability Convention has remained a key priority of the U.N. Committee on Peaceful Uses of Outer Space.¹⁷³ Indeed, Article 26 of the Liability Convention avails itself, "at any time after the Convention has been in force for five years" of a simple manner for convening a conference of States Parties to review (and subsequently amend) the Convention, to address some of the shortcomings mentioned.¹⁷⁴ The Committee is otherwise drawing up

¹⁶⁹ See Anusuya Datta, *How Many Satellites Orbit Earth and Why Space Traffic Management is Crucial*, GEOSPATIAL WORLD (Jan. 20, 2019), <https://www.geospatialworld.net/blogs/do-you-know-how-many-satellites-earth/>.

¹⁷⁰ It should go without saying that the Iridium-Cosmos incident was not the only instance of space collisions. Other examples include the 2007 Chinese anti-satellite missile test and the 2011/2012 collisions between inactive NASA and German satellites and an inactive Russian probe. See *supra* note 147.

¹⁷¹ For example, two large pieces of space junk, "each about the weight of a compact car" nearly collided recently, which would have resulted in "a cloud of debris that would jeopardize other satellites and spacecraft for decades." See Dan Falk, *2 Large Pieces of Space Junk Nearly Collided in 'High Risk' Situation*, NAT'L GEOGRAPHIC (Oct. 15, 2020), <https://www.nationalgeographic.com/science/2020/10/two-large-pieces-of-space-junk-have-a-high-risk-of-colliding/>.

¹⁷² FAILAT, *supra* note 141, at 176.

¹⁷³ See Edward F. Hennessey, *Liability for Damage Caused by the Accidental Operation of a Strategic Defense Initiative System*, 21 CORNELL INT. L. J. 317 at 319-20 n.12 (Issue 2, 1988) ("In a speech before the U.N. General Assembly, U.S. Secretary of State John Foster Dulles proposed the creation of a committee 'to prepare for a fruitful program on international cooperation in the peaceful uses of outer space'").

¹⁷⁴ G.A. Res. 2777 (XXVI) (1971); see also FORKOSCH, *supra* note 33, at 191 ("[t]he analyses of [these] Treaties must result in at least one consensus, namely, that the latter document requires certain necessary amendments").

best practice guidelines to govern this final frontier.¹⁷⁵ Other entities have supported the mission of studying and proposing national space legislation.¹⁷⁶ This includes the International Law Association, assisted by its Space Law Committee, and the release of its Model Law on National Space Legislation in 2012 (premised on voluntary adoption by States).¹⁷⁷

Moreover, the U.N. General Assembly Resolution 68/74 proposed provisions that would relate to the OADR, such as recommendation Six, which states “domestic and international registration of space objects should be provided for in national space laws.”¹⁷⁸ Recommendation Six further says, “a State should establish a national register maintained by a competent national registry.”¹⁷⁹ Lastly, it recommended formally defining liability, and expanding upon the Liability Convention regime.¹⁸⁰ Bridging the gap between implementation and effective regulation requires flexibility of regulations and protection of State interests and stability.¹⁸¹ But ultimately, maintaining a safe space environment, and the future of STM, depend upon the successful implementation of an effective and widely adopted OADR.

In this less centralized world and in this highly technical setting, how the OADR is viewed and utilized will also inform how it is applied in liability analyses. If joining an OADR becomes a “best practice” and is included in rulemaking and incorporated into various statutes, for the purposes of liability analysis, participation will be the same as a formal standard,¹⁸² which will also help to inform the international dialogue.

The Guidelines for the Long-term Sustainability of Outer Space Activities reiterated the OST (Article III) and established principles for States to voluntarily ensure implementation of guidelines when developing and conducting space activities.¹⁸³ Numerous States have since built upon these principals by promulgating domestic space laws. Several guidelines regarding safety of space operations relate directly to the OADR and SSA. These include guidelines to promote the collection, sharing, and dissemination of space debris monitoring information, perform conjunction

¹⁷⁵ Johnny Wood, *The Countries with the Most Satellites in Space*, WORLD ECON. F. (Mar. 4, 2019), <https://www.weforum.org/agenda/2019/03/chart-of-the-day-the-countries-with-the-most-satellites-in-space/>.

¹⁷⁶ See FAILAT, *supra* note 141, at 21.

¹⁷⁷ *Id.* at 22.

¹⁷⁸ *Id.* at 22-24.

¹⁷⁹ *Id.* at 24.

¹⁸⁰ *Id.* at 25.

¹⁸¹ *Id.* at 25-26.

¹⁸² See Howard, *supra* note 114.

¹⁸³ United Nations, *Guidelines for the Long-term Sustainability of Outer Space Activities*, COMM. ON THE PEACEFUL USES OF OUTER SPACE (June 27, 2018), https://www.unoosa.org/res/oosadoc/data/documents/2018/aac_1052018crp/aac_1052018crp_2_0_0_html/AC105_2018_CRP20E.pdf.

assessment during all orbital phases of controlled flight, and develop practical approaches for pre-launch conjunction assessment.¹⁸⁴

IV. CONCLUSION

Just as satellite imagery processing has shifted from light tables to artificial intelligence, accelerating and deepening our knowledge of activities here on Earth,¹⁸⁵ the OADR will fundamentally change the modes of STM. These technological changes may inevitably outpace the basic requirements of existing international treaties. On the one hand, while not much of international outer space treaty-based law has changed over the past several decades, an upsurge in commercial utilization and settlement of space may lead to imminent changes in the ways we govern the use of our planet's outer space orbit. There have also been numerous States which have promulgated domestic space laws as well as several important international soft laws and guidelines. For a large majority of international actors, establishing a collective space security system remains the preferable mode of collective action, rather than opting for an arbitrary, unilateral approach.¹⁸⁶

At minimum, the OADR will provide claimant States a higher likelihood of being compensated as it assists with making fault determinations; and soon the OADR might even become a component of liability assessment. Refusal to join the OADR likely involves at least some lapse in a duty of care to prevent harm. My hope is that this Article illuminates several steps not only in the formation of an OADR and considerations in how it fits into existing legal structures, but also a glance into early/future legal applications and liability assessments, as the OADR becomes the standardized norm for global satellite operations.

¹⁸⁴ *Id.*

¹⁸⁵ *The Emerging Space Environment: Operational, Technical, and Policy Challenges: Hearing Before the Subcomm. on Aviation and Space of the S. Comm. On Commerce, Science, and Transportation*, 116th Cong. (May 14, 2019) (statement of Kevin O'Connell, Director of the Office of Space Commerce).

¹⁸⁶ See MANOLI, *supra* note 156, at 404.