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THE CASE FOR ARBITRAL INSTITUTIONS TO PLAY A ROLE IN MITIGATING UNETHICAL CONDUCT BY PARTY COUNSEL IN INTERNATIONAL ARBITRATION

Jarred Pinkston [*]

Abstract

If international arbitration suffers from unethical conduct by party counsel to such a degree that action is called for, arbitral institutions can, and arguably, should heed the call. The author proposes a rubric for institutions to consider when developing a system to mitigate unethical conduct by party counsel. The rubric seeks to efficiently allocate the means of sanctioning party counsel and the responsibility to do so between arbitrators and arbitral institutions. Different wrongs require different remedies (misdemeanors v. felonies approach). Institutions can make available a range of remedies for unethical conduct that no other stakeholder in the arbitral process can. Moreover, institutions can prevent party counsel from exploiting the autonomous nature of international arbitration to routinely engage in unethical conduct (micro v. macro approach).

[*] My utmost thanks to Stephan Wilske of Gleiss Lutz in Stuttgart, Christian Koller of the University of Vienna, and Jarred Klorfein of Paul Weiss in Washington D.C. for their helpful comments.

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INTRODUCTION

International arbitration has four active players: parties, party counsel, arbitrators and arbitral institutions. All are key stakeholders in the arbitral process and each has their own incentives and disincentives to maintain the integrity of the arbitral process generally or in individual arbitrations.[1] Domestic courts, domestic bar associations, governments and associations such as the Chartered Institute of Arbitrators and the International Bar Association are secondary stakeholders. With regard to the issue of ethics in international arbitration, one stakeholder plays an inordinate role: party counsel. Party counsel generally sits in the driver's seat in developing a case and the tactics to win that case. Due the diversity and flexibility built into international arbitration, the arbitral process (i.e., the other stakeholders) has yet to develop a reliable scheme for mitigating unethical conduct by party counsel.

Three underlying dynamics lead to the conclusion that arbitral institutions can and, in their own self-interest, should take on a greater role, albeit one complementary to arbitrators, in mitigating unethical conduct by party counsel. First, unethical conduct by party counsel, whether as a singular event (micro level) or when viewed in the aggregate (macro level), has the potential to undermine the effectiveness and ultimately the desirability of arbitration to the detriment of all stakeholders. Crude tools exist to address unethical conduct in an individual arbitration. But, a pattern of unethical conduct, seeking to exploit the autonomous nature of a pending arbitration, poses a greater and unique risk. No tools exist to address this problem. Only arbitral institutions can reliably address unethical behavior that presents itself on the macro level (i.e., across multiple arbitrations). Other stakeholders may have incentives to prevent unethical conduct, but those incentives to do not extend beyond a pending arbitration, which can lead to risk aversion behavior (e.g., arbitrators permitting questionable conduct slide in the hope of maintaining good will with party counsel who may have appointed them) or risk taking (e.g., party counsel thinking that, if a particular arbitration appears lost, why not try a questionable tactic).

Second, arbitral institutions are the stakeholders best suited to address serious unethical conduct ("felonies") by party counsel in international arbitration. A serious breach of ethical standards requires a serious sanction. Arbitral institutions can strengthen the fortitude of arbitrators, who often make a living off of the good will of the parties who appointed them, and provide institutional knowledge and experience. At the same time, arbitral institutions can seek to protect the integrity of

[1] This article focuses on international commercial arbitration rather than investment arbitration. Thus, arbitration in this article refers to international commercial arbitration. Investment arbitration implicates to a greater degree the public interest in comparison to commercial arbitration, which focuses on the concerns of the business community, and, therefore, may require a different analysis. However, in principle, no reason exists why the points made in this article should not extend to investment arbitration. *See* Stephan Wilske, et al., *International Investment Treaty Arbitration and International Commercial Arbitration – Conceptual Difference or Only a "Status Thing"?*, 1(2) CONTEMP. ASIA ARB. J. 213 (2008). In addition, domestic arbitration does not raise the same regulatory hurdles as the parties and counsel will come from and be regulated by the same system.

the arbitral process (generally) by directly addressing serious instances of unethical conduct.

Third, arbitral institutions serve as the hub in an arbitral "hub and spokes" system. As the hub, arbitration institutions are the stakeholder best positioned to mitigate a pattern of opportunistic and serious unethical conduct. This article speaks in terms of "mitigating" unethical conduct because the goal of regulating unethical conduct in arbitration is not to punish such conduct but rather to prevent and reduce unethical conduct in order to promote the desirability of arbitration. This involves balancing different concerns and not just the unconditional goal of punishing bad behavior.

Many have already made the case for ethical standards for party counsel in international arbitration.[2] I do not address the substantive elements of an ethical code but rather I – assuming such a code is advisable and necessary – suggest a rubric for determining which stakeholder can best address categories of unethical conduct and suggest measures arbitral institutions could take. Arbitral institutions can provide the international arbitral system with a wide range of new and additional mechanisms to deter undesirable conduct.

I. DOES ARBITRATION EVEN SUFFER FROM UNETHICAL CONDUCT? A PRELIMINARY PROPOSAL

A. *The Need for Empirical Information on the Pervasiveness of Unethical Conduct*

Based on the relish and frequency that stories of unethical conduct are told and retold, one could easily conclude that international arbitration suffers from an insurmountable plague of unethical conduct.[3] Stories ranging from murder with a grenade launcher to waylay arbitral proceedings,[4] to "politically sensitive cases in

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[2] R. Doak Bishop & Margrete Stevens, *Advocacy and Ethics in International Arbitration: The Compelling Need for a Code of Ethics in International Arbitration: Transparency*, *Integrity and Legitimacy*, 15 ARBITRATION ADVOCACY IN CHANGING TIMES, ICCA CONGRESS SERIES, 2010 RIO, 383, 391 (Albert Jan van den Berg ed., Kluwer Law International 2011); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 2324–25 (Wolters Kluwer, 2d ed. 2009); Detlev Vagts, *The International Legal Profession: A Need for* More *Governance?*, 90 A.J.I.L. 250, 261(1996) ("As early as 1971, Professor Michael Reisman suggested there was urgent need for an international code of legal ethics[.]") (referencing MICHAEL REISMAN, NULLITY AND REVISION 116–17 (1971)); Günther Horvath, *Guerrilla Tactics in Arbitration, an Ethical Battle: Is there Need for a Universal Code of Ethics?, in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 297 (Klausegger et al. eds., 2011); Catherine Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341 (2002); John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L.J. 673 (1992); Malini Majumdar, *Ethics in the International Arena: The Need For Clarification*, 8 GEO. J. LEGAL ETHICS 439 (1995).

[3] Stephan Wilske, *Arbitration Guerrillas at the Gate – Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough, in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION, 315 (Klausegger et al. eds., 2011) ("[W]ar stories about arbitration 'guerilla' tactics and strategies have always fascinated crowds at conferences and arbitrators in deliberation rooms.").

[4] Vladimir Khvalei, *Guerilla Tactics in International Arbitration: The Russian View, in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 335 (Klausegger et al. eds., 2011) (discussing the

which a key witness had disappeared or jumped out of a window"[5] are inherently interesting to tell and repeat. As a result, the term "guerilla tactics" has worked its way into the common arbitral vernacular[6] and no conference on arbitration is complete today without some discussion of ethics. Entire books are devoted to the topic.[7] It is as the Swiss (a culture not known for hyperbole) say a "hot topic."[8] However, the more mundane questionable conduct – such as a Respondent's failure to pay the advance on costs for tactical reasons or the serendipitous illness that befalls a key witness the day before a hearing – ultimately sap the vitality out of the arbitral process to a greater degree than attention grabbing acts.

Just as campfire stories do not prove the pervasiveness of ghosts, anecdotal stories of unethical conduct do not establish a pervasive problem with unethical conduct in international arbitration. I am not persuaded that arbitration suffers unmanageable ethical problems based on anecdotal evidence. Empirical proof is required that international arbitration actually suffers from unethical conduct to such a degree that the current ad hoc system of remedies (case by case) insufficiently addresses the sporadic unethical flare up.

Efforts have been made to ascertain the pervasiveness of unethical conduct.[9] Edna Sussman and Solomon Ebere, for example, sent questionnaires to practitioners worldwide asking them whether: (a) they have experienced unethical conduct ("guerilla tactics"); and (b) to describe what tactics they experienced.[10] Sussman and Ebere received 81 responses, of those responses 68% indicated that they had experienced unethical conduct. At first glance this would indicate arbitration suffers from a significant amount of unethical conduct. The reality is muddled. The study found on one hand that the "international arbitration bar is perhaps, generally speaking, a quite civilized and ethical bar," while also finding that "[o]ne must accordingly conclude that arbitration tactics are an issue that requires serious exploration."[11]

Ultimately such efforts will fall short because two problems exist to establishing whether arbitration suffers from unethical conduct to the extent necessary to prompt action: (1) definitional; and (2) confidential. The first problem is that no common

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Tomkneft case); *see also* Abba Kolo, *Witness Intimidation and Other Related Abuses in Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal*, 26(1) ARBITRATION INTERNATIONAL 43, 47-52 (2010).

[5] Douglas Thomas, *Getting to grips with guerrilla tactics*, GLOBAL ARBITRATION REVIEW (2015) (another example: "Neil Kaplan QC; who was prosecuted in Thailand at the instigation of a party after he signed an arbitration award in Bangkok Airport without having obtained a Thai work permit").

[6] Horvath, *supra* note 3; Wilske, *supra* note 4; Khvalei, *supra* note 5.

[7] Günther Horvath & Stephan Wilske, GUERILLA TACTICS IN INTERNATIONAL ARBITRATION (Wolters Kluwer 2013).

[8] Elliott Geisinger, *President's Message Counsel Ethics in International Arbitration – Could One Take Things a Step Further?*, 32 ASA BULLETIN 3 (2014) ("[T]he least one can say of the IBA Guidelines on Party Representation and of the newly adopted LCIA Arbitration Rules is that they have made the issue of party representations and counsel ethics a genuine 'hot topic' in international arbitration.").

[9] Stephan Wilske, *Sanctions Against Counsel in International Arbitration – Possible, Desirable or Conceptual Confusion?*, 8(2) CONTEMP. ASIA ARB. J. 141, 144-145 (2015) (summarizing other attempts to ascertain the degree of unethical conduct in international arbitration).

[10] Edna Sussman & Solomon Ebere, *All's Fair in Love and War - Or Is It? The Call for Ethical Standards for Counsel in International Arbitration*, 22 AM. REV. INT'L ARB. 611 (2011).

[11] *Id*. at 612-613.

definition of what constitutes unethical conduct exists.[12] A wide range of legal cultures/systems are active in international arbitration and each brings it own concept of what the rules of the road should be in prosecuting/defending cases in international arbitration. Without a common definition of unethical conduct, where does one begin to evaluate whether international arbitration suffers from unethical conduct to the degree necessary to warrant affirmative action by the stakeholders in the arbitral process? The abstract question of whether one has experienced unethical conduct does not get to the heart of the matter. One established practitioner defined guerilla tactics as:

> [S]trategies employed by parties to arbitration proceedings that are ethical violations, involve criminal acts, or are ethically borderline sharp practices. Guerilla tactics range from completely illegal and inappropriate, such as witness intimidation and phone tapping, to the merely sly, such as ambushing the opposing party with new evidence or ex parte communications with arbitrators. Distinguishing the criminal from the sly is straightforward; however the absence of enforceable ethical standards in international arbitration makes it difficult to separate creative tactics from breaches of conduct […] Guerilla tactics may not always be ethical and/or procedural violations, but they are almost always a hindrance to the arbitral process.[13]

Therein lays a useful, working definition of what could constitute unethical conduct. The term "unethical conduct" in international arbitration simply connotes whether a party seeks to unduly waylay arbitral proceeding or to gain an unfair advantage vis-à-vis an opponent. Until a universally acceptable standard of ethical conduct is established, this rough, working definition, will suffice for the purposes of this article.

The second problem in determining whether arbitration suffers an affliction of unethical conduct is that no empirical data exists due to the intrinsically confidential nature of the process. The confidentiality of international arbitration is often referenced as a key advantage of international arbitration. By definition, confidentiality hampers the collection of empirical data in international arbitration. Some institutions publish awards and these awards can provide glimpses of information on the scope of unethical conduct. However, the number of awards published remains insufficient to draw any firm conclusions as to the degree of unethical conduct in comparison to the number of international arbitrations that take place.

In addition, arbitral awards will not always red flag unethical conduct as arbitrators may wish to sidestep such issues. Arbitrators may wish to avoid expressly

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[12] *Id.* at 612 (The authors "did not define guerilla tactics"); *see also* Douglas Thomas, *Getting to grips with guerrilla tactics*, GLOBAL ARBITRATION REVIEW (2015) (Michael Moser defined guerilla tactics as "unusual, unconventional tactics designed to delay and obstruct proceedings . . . . So elusive is the definition one might need to resort to the famous obscenity standard enunciated by the US Supreme Court: "I know it when I see it.").

[13] Horvath, *supra* note 3.

addressing such issues for a wide range of reasons, not the least of which is the lack of a universal understanding as to what actually constitutes unethical conduct. When confronted with a legal gray area like the applicable ethical standard and an arbitrator's authority to apply such standards, and concerns about the enforcement of an award in domestic courts, arbitrators have justifiable grounds to avoid ruling expressly on ethical issues. That is not to say that unethical conduct will not affect the ultimate decision in an award, but it may do so in indirect ways that makes it difficult to rely solely on the text of an award in determining whether unethical conduct has taken place. In short, experienced arbitrators know how to treat and subtly punish unethical behavior without ever expressly taking up the issue.

Furthermore, studies that rely on self-reporting will suffer from selective reporting that may skew the statistical analysis. For example, those engaging in such practices might not be eager to flag their own unethical conduct or that of others engaging in the exact same conduct. Regardless, any attempt to establish the scale of unethical conduct will fail to provide reliable results without a clear overview of what transpires in a wide range of cases.

B. *How to Obtain Empirical Information on the Pervasiveness of Unethical Conduct*

Arbitral institutions are ideally suited to determine the degree of unethical conduct in international arbitration and whether action is called for to mitigate it. Arbitral institutions are not subject to the confidentiality concerns that make it difficult for third parties to have an overview of all cases pending under a particular set of rules. Arbitral institutions (particularly the gold standard institutions) actively monitor all cases pending under their rules. Parties and arbitrators must provide the institution with copies of all submission, exhibits and correspondences. Since institutions have access to the full file, they can make an independent determination of whether party counsel departed from a tested standard. Institutions can also retroactively review a case file for unethical conduct well after the issuance of an award rather than relying on arbitrators or the parties to identify ethical issues.

Institutions not only have a bird's eye view of all developments in cases conducted under their rules, they are in direct contact with the parties and arbitrator during the case. If an institution desires clarification on an issue, it can obtain it upon request. This provides a means for an institution to flesh out an issue to determine whether unethical conduct has indeed (or likely) taken place. Moreover, an institution can speak with an arbitrator directly to obtain their candid analysis of conduct that has taken place in an arbitration. Arbitrators presumably would speak more candidly about suspected unethical conduct if not called upon to sanction such conduct in a formal manner, such an in an award or cost assessment order. The fact that such conversations (could also be written) would remain confidential can only improve the willingness of arbitrators to give their frank views on whether they believe unethical conduct has taken place.

In addition to no confidentiality concerns, arbitral institutions can unilaterally resolve the definitional problem inherent in determining the pervasiveness of unethical conduct. As discussed below, a number of sources or bases exist to

establish a particular code of ethical conduct. An arbitral institution contemplating the task of investigating the degree of unethical conduct can simply choose the applicable standard and then determine in how many cases party counsel departed from the applied standard. Naturally a chicken or the egg situation will arise. If the standard does not actually apply to party counsel, no reason exists for party counsel to adhere to the given standard. That, however, is not the question. The question is: to what degree does party counsel engage in conduct detrimental to the arbitral process to the disadvantage of their opponent in relation to the given baseline standard.

In short, an arbitral institution can choose a standard, collect evidence of violations of that standard from monitored cases, and use its own evaluation process to determine whether a violation has taken place. The consolidation of the investigative task with one entity will reduce the amount of subjectiveness in the process. Such a top down approach might prove anathema to the decentralized, organic nature of arbitration but no other approach can produce reliable empirical evidence.

Arbitral institutions can also pool their efforts to generate a more statistically robust overview of the issue. Different arbitral institutions tend to attract different users (from different regions, different types of disputes and so on) of their services. By working together arbitral institutions could provide a much better overview of the degree of unethical conduct worldwide. The starting point of any such collaboration would be a joint understanding of a particular set of ethical rules. For example, the IBA rules on party representation in international arbitration can likely generate a great deal of consensus between different arbitral institutions.[14]

The arbitral community should remain skeptical about the need for arbitral institutions to take on an expanded role in the arbitral process without clear evidence that a pervasive problem exists. During the Hong Kong Arbitration Week in 2014, an informal poll was taken of the audience:

> The session concluded with a poll of audience members, with 43 per cent concluding that tribunals ought to deal with complaints against counsel at first instance. 29 per cent believed that complaints should go to a local bar association, and 16 per cent to an arbitral institution. Only 12 per cent backed the idea of a global body to enforce ethical conduct.[15]

The foregoing proposals *assume* unethical conduct by party counsel presents a clear and substantial problem for international arbitration.

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[14] SWISS ARBITRATION ASSOCIATION, IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION: COMMENTS AND RECOMMENDATIONS BY THE BOARD OF THE SWISS ARBITRATION ASSOCIATION (Apr. 4, 2015) [hereinafter Contra ASA Position Paper], *available at* http://www.arbitration-ch.org/pages/en/publications/conference-and-position-papers/index.html ("[T]he ASA Board has serious reservations about the [IBA] Guidelines."); *President's Message Counsel Ethics in International Arbitration – Could One Take Things a Step Further?*, 32 ASA BULLETIN 3 (2014).

[15] Sebastian Perry, *Should institutions police counsel ethics?*, GLOBAL ARBITRATION REVIEW (2014) (emphasis added).

II. HOW THE WILD WEST WAS WON: CURRENT FRAMEWORK FOR ADDRESSING UNETHICAL CONDUCT AND PERCOLATING PLANS TO MITIGATE UNETHICAL CONDUCT

A. *The Current Disordered Scheme for Mitigating Unethical Conduct*

"It is characteristic of many legal professions in their earlier years that they feel no need for formal rules and institutions to guide and control the behavior of judges and lawyers".[16] This unregulated, embryonic void in international arbitration has variously been called a "legal waste land",[17] legal "vacuum",[18] and "ethical free-for-all".[19] I prefer to consider ethics in international arbitration the "Wild West" of the legal world[20] because it connotes that from disarray will come (eventually) order. Currently no orderly means exist to cohesively blend the ethical rules applicable to:[21] counsel from country A, counsel from country B, and the *lex arbitri*.[22]

When it comes to ethical issues, the question is often not "who is the sheriff in town" but rather "whether there is a sheriff at all." Or more apropos to the current situation, which of the sources of power/authority can dictate the resolution of a given issue or dispute generally. In the Wild West, sheriffs, state authorities, federal authorities, militias, spontaneous posses, land owners, Indian tribes, criminals, common people and so on, sought to influence the resolution of disputes touching upon their prerogatives. In many instances a clear hierarchy did not exist and simple force prevailed. When turning to international arbitration, arbitral tribunals, parties, party counsel, party counsel's applicable attorney regulatory authority institutions (e.g., bar association, Rechtsanwaltskammer Kammer, Chambre Allemande des Avocats …), courts at the seat of arbitration, courts from the parties' home countries, courts hearing enforcement proceedings, and national governments (depending on the case), all have a reason and limited ability to address unethical conduct. The fact that so many players can potentially have an incentive and means to play a role in addressing unethical attorney conduct and lack of a clear hierarchy can counter-intuitively lead to inaction rather than to direct conflict: it is someone else's problem.

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[16] Detlev Vagts, *The International Legal Profession: A Need for More Governance?*, 90 A.J.I.L. 250, 261 (1996).

[17] Catherine Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341 (2002).

[18] Vagts, *supra* note 17, at 260.

[19] Catherine Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1, 2 (2003).

[20] The Wild West analogy refers to the period of time from April 30, 1803, when the United States made the Louisiana Purchase, to Feb. 14, 1912, when Arizona became the last continental U.S. state to be admitted to union.

[21] Ignacio Madalena, *LONDON: Common and civil law approaches to ethics*, GLOBAL ARBITRATION REVIEW (2012); Valentine Chessa, *ROME: Representing Parties*, GLOBAL ARBITRATION REVIEW (2014).

[22] "The law governing how an arbitration is to be conducted and the relationship between the arbitration and the courts." *Lex arbitri*, BLACK'S LAW DICTIONARY (10th ed. 2014).

The elegance and practicality of international arbitration lies in its ability to transcend borders and – to a certain extent – domestic legal regimes (the lack of a legal regime and corresponding opportunity certainly played a role in enticing some to the Wild West). The lack of a central authority provides international arbitration with significant (the required) flexibility to address the myriad of fluid issues that can arise in the context of a global economy that no longer recognizes national borders. However, strength in one context can be a weakness in another.

The decentralized, organic nature of international arbitration has allowed it to evolve with the globalization of the world economy. The organic nature of arbitration has clearly benefited it during its maturation process. The (fairly) standardized form of international arbitration practiced around the world today is a recent development. The roots of modern day international arbitration sprouted from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") of 1958. The New York Convention sought and successfully achieved a means of recognizing and enforcing arbitration agreements and awards across borders. The New York Convention did not achieve this overnight. In the 1950s, six countries ratified/acceded/succeeded to the Convention;[23] 28 countries in the 1960s,[24] 20 countries in 1970s,[25] 25 countries in 1980s,[26] 41 countries in 1990s[27] and 26 countries in the 21st century.[28] Today there are 156 signatory nations.

A convention that aligns the economic interests of Soviet Russia, apartheid South Africa, Denmark, Augusto Pinochet's Chile, the United States and modern day Islamic Iran is a rare example of a truly international consensus. The New York Convention has brought an element of consistency and uniformity to international

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[23] The New York Convention was opened for signature in 1958 and 24 countries originally signed. A total of 6 countries ratified/acceded/succeeded to the Convention in the 1950s: Egypt, France, Israel, Morocco, Syrian Arab Republic, and Thailand. *See Contracting States*, NEW YORK ARBITRATION CONVENTION, http://www.newyorkconvention.org/countries (last visited May 8, 2016).

[24] *Id*. Austria, Belarus (signatory), Bulgaria (signatory), Cambodia, Central African Republic, Ecuador (signatory), Finland (signatory), Germany (signatory), Ghana, Greece, Hungary, India (signatory), Italy, Japan, Madagascar, Netherlands (signatory), Niger, Norway, Philippines (signatory), Poland (signatory), Romania, Russian Federation (signatory), Sri Lanka (signatory), Switzerland (signatory), Tanzania, Trinidad and Tobago, Tunisia, and Ukraine (signatory).

[25] *Id*. Australia, Belgium (signatory), Benin, Botswana, Chile, Colombia, Cuba, Denmark, Holy See, Jordan (signatory), Kuwait, Mexico, Nigeria, Republic of Korea, San Marino, South Africa, Spain, Sweden (signatory), United Kingdom of Great Britain and Northern Ireland, and the United States of America.

[26] *Id*. Algeria, Antigua and Barbuda, Argentina (signatory), Bahrain, Burkina Faso, Cameroon, Canada, China, Costa Rica (signatory), Djibouti, Dominica, Guatemala, Haiti, Indonesia, Ireland, Kenya, Lesotho, Luxembourg (signatory), Malaysia, Monaco (signatory), New Zealand, Panama, Peru, Singapore, and Uruguay.

[27] *Id*. Armenia, Bangladesh, Barbados, Bolivia, Bosnia and Herzegovina, Brunei Darussalam, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, El Salvador (signatory), Estonia, Georgia, Guinea, Kazakhstan, Kyrgyzstan, Lao, Latvia, Lebanon, Lithuania, Mali, Mauritania, Mauritius, Mongolia, Mozambique, Nepal, Oman, Paraguay, Portugal, Moldova, Saudi Arabia, Senegal, Slovakia, Slovenia, the former Yugoslav Republic of Macedonia, Turkey, Uganda, Uzbekistan, Venezuela, Viet Nam, and Zimbabwe.

[28] *Id*. Afghanistan, Albania, Andorra, Azerbaijan, Bahamas, Bhutan, Brazil, Burundi, Comoros, Cook Islands, Democratic Republic of the Congo, Dominican Republic, Fiji, Gabon, Guyana, Honduras, Iceland, Iran, Jamaica, Liberia, Liechtenstein, Malta, Marshall Islands, Montenegro, Myanmar, Nicaragua, Pakistan (signatory), Qatar, Rwanda, Sao Tome and Principe, Serbia, St. Vincent and the Grenadines, State of Palestine, Tajikistan, United Arab Emirates, and Zambia.

arbitration as it has had a moderating effect on the more divergent approaches to international arbitration existing in the world.[29] The wide acceptance of the New York Convention parallels woman and children moving to the Wild West to join the initial prospectors, hunters and malcontents who first moved into the Wild West in that they too provided a moderating influence.

The UNCITRAL model law and arbitration rules provide additional normative value. The Model Law (or "the great flattener" of differences between countries) was an attempt by the United Nations to provide guidance to countries so as to promote uniformity of arbitral laws and arbitral practice around the world.[30] Today many counties tout themselves as model law countries to some degree. Even those countries that have not directly embraced the UNCITRIAL model law are often viewed in relation to how they diverge from the model law.[31] Certain "best practices" in international arbitration have also developed in tandem with the convergence of arbitral law.[32] The UNCITRAL Model Law and arbitral rules mirror riding circuit judges in the Wild West.[33] They have strong normative value when applicable but those rules / laws do not always apply and gaps remain (particularly with regards to attorney conduct); similar to when a riding judge was in another location. Moreover, just like riding judges, UNCITRAL has not directly taken up the issue of attorney regulation.

Internationally respected (non-governmental) institutions – such as the International Bar Association ("IBA") – also play a normative role in the international arbitration process. These institutions have the ability to create and convey clear norms to the other stakeholders in the arbitral process; e.g., the "IBA Rules on the Taking of Evidence in International Arbitration", the "IBA Guidelines on Party Representation in International Arbitration", "IBA Rules of Ethics for Arbitrators."[34] However, they lack a clear and reliable means of enforcement, particularly the IBA Guidelines on Party Representation in International Arbitration. The proclamations of these institutions parallel churches in the Wild West, which told (or cajoled) people how they should behave but lacked the means of compelling them to behave.

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[29] REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 1.212 (Blackaby et al., 2009) ("The New York Convention inspired this process of harmonization").

[30] *See* GEROLD ZEILER & BARBARA STEINDL, THE NEW AUSTRIAN ARBITRATION LAW 5 (Neuer Wissenschaftler Verlag, 2006).

[31] INTERNATIONAL COMMERCIAL ARBITRATION: A HANDBOOK (Stephan Balthasar ed. 2016) ("providing an orientation on the arbitration landscape, identifying, on the basis of the UNCITRAL Model Law, common principles as well as divergences between the various jurisdictions").

[32] Irene Welser and Giovanni De Berti, *Best Practices in Arbitration: A Selection of Established and Future Best Practices*, AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 79 (Klausegger et al. eds., 2010).

[33] "In the U.S., the act, once undertaken by a judge, of traveling within a judicial district (or circuit) to facilitate the hearing of cases. The practice was largely abandoned with the establishment of permanent courthouses and laws requiring parties to appear before a sitting judge." *Circuit Riding*, DICTIONARY BRITANNICA, http://www.britannica.com/topic/circuit-riding (last visited May 8, 2016). When the judge was not in a particular location no one could hear a case.

[34] *See* Catherine Rogers, *The Vocation of International Arbitrators*, 20 AM. U.J. INT'L L. 959, 980–84 (2005).

Certain arbitral institutions publish arbitral awards.[35] Even non-published awards have a normative effect.[36] These awards have normative value as they communicate to members of the arbitral community how their colleagues in the community have addressed certain issues. The development of a more uniform arbitral scheme through the use of published awards juxtaposes to the development of means of communication in the Wild West; stagecoaches gave way to the telegraph, which gave way to the telephone, which gave way to the internet.

These advances in the development of international arbitral practice, however, can only go so far with regard to party counsel conduct. These problems will not subside so long as party counsel may have an incentive to work to undermine the process and the means to do so. A strong case can be made that party counsel owes a greater duty to "zealously and robustly present his or her client's position"[37] than they do to maintaining the integrity of the arbitral process. In order to overcome this dynamic, structural changes are called for, including enforcement mechanisms.

B. *The Arbitrator as Sheriff*

Arbitrators serve as the "sheriff" (i.e., enforcement mechanism) in mitigating unethical conduct by counsel by default and by design. When arbitrators address ethical issues by default it is a "weak sheriff model." When the arbitral system envisions a clear role for arbitrators in addressing unethical conduct and empowers arbitrators to combat unethical conduct, it is a "strong sheriff model." The LCIA provides the best example of the strong sheriff model to date.

Arbitrators have the responsibility to issue an enforceable award.[38] A key element of an enforceable award is that the parties had a fair opportunity to present their case (universally recognized standard of due process). Unethical conduct undermines due process and can endanger the viability of an award. When unethical conduct rises to this level, arbitrators must, by default, take precautions or actions to protect the integrity of the arbitral award. Arbitrators have this responsibility by default because no other stakeholder in the arbitral process has the means to ensure that an award ultimately proves enforceable.

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[35] *Selected Arbitral Awards* VIENNA INTERNATIONAL ARBITRAL CENTRE (2015); SIGVARD JARVIN & YVES DERAINS, COLLECTION OF ICC ARBITRAL AWARDS, 1974–85; RECUIL DES SENTENCES ARBITRALES DE LA CCI (Kluwer 1st, 1998); 1 ASA BULLETIN 1 (2010) (containing "[a]bitral awards and orders under various auspices including ICC; ICSID and the Swiss Chambers of Commerce ('Swiss Rules')").

[36] Rogers, *supra* note 35, at 999-1000 ("Even in the absence of a formal system of stare decisis, and despite the confidential and "private nature of international arbitration, arbitration proceedings generate procedural rules and practices, and to a lesser extent substantive rules, that serve as precedent for future arbitrations and beyond.").

[37] GARY BORN, WILMERHALE, LEGAL REPRESENTATION IN ARBITRATION 2 (July 14, 2014), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/legal-representation-in-arbitration-gary-born-14-July-2014.pdf.

[38] Günther J. Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, 18 J.INT'L ARB. 2, 135–158 (2001).

At the same time the arbitrators' mandate remains circumscribed by the terms of their appointment (i.e., party agreement, the applicable arbitral rules, the applicable substantive law or the *lex arbitri*). Such terms often remain unclear or conflicting. This muddle gives rise to the ad hoc, case by case decisions taken by arbitrators with regard to ethical issues: "to allow tribunals to fashion their own – perhaps idiosyncratic – solutions is far from ideal as it would abandon all aspirations towards uniform solutions."[39]

The current "idiosyncratic" scheme does have some benefit in that it protects the flexibility of the arbitrators and parties to tailor an arbitration to their needs. However, to custom tailor new ethical rules in every arbitration fails to promote efficiency or predictability as it takes effort to reinvent the wheel. A well drafted "Procedural Order Number One" can accomplish much but such orders open up unnecessary debate and often remain silent as to enforcement mechanisms for violations of procedure.[40] If enforcement is addressed it is directed to the parties and not party counsel. Controversial provisions are left out. Moreover, vague references to the arbitrators taking the *parties*' conduct into consideration when assessing costs generally fails to compel *party counsel* to stop and evaluate their actions before acting questionably. Such cost "assessments are deficient to the extent that they are indirect, they do not fully address the problems and ultimately target the parties, as opposed to counsel"[41] and ultimately do not say more than what the applicable arbitral rules may already allow (e.g., ICC Rule 37).

The weak sheriff model suffers from a number of shortcomings:

> The problem with the current exercise of these de facto sanction powers is that they violate the most fundamental notions of due process and fundamental fairness. These informal techniques amount to the imposition of sanctions for unarticulated violations of unknown rules and without any opportunity to be heard. In addition, these clandestine techniques for responding to perceived attorney conduct may sanction an innocent party. Clients may be made to pay substantive awards and costs and fees even when the misconduct belongs wholly to the attorney.
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> With this understanding of the current state of affairs, it becomes clear that the debate over an arbitrator sanction power is not so much about whether to endow arbitrators with a new power; it is

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[39] R. Doak Bishop & Margrete Stevens, *Advocacy and Ethics in International Arbitration: The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, *in* 15 ARBITRATION ADVOCACY IN CHANGING TIMES, ICCA CONGRESS SERIES 391 (Kluwer Law International, Albert Jan van den Berg ed., 2011).

[40] Christian Dorda & Jarred Pinkston, *Properly Setting the Table in International Arbitration: Drafting a Robust Procedural Order No. 1*, GLOBAL WISDOM ON BUSINESS TRANSACTIONS, INTERNATIONAL LAW AND DISPUTE RESOLUTION - FESTSCHRIFT FÜR GERHARD WEGEN ZUM 65 (Geburtstag, C.H. Beck, 2015).

[41] Bishop & Stevens, *supra* note 39.

> about whether to acknowledge, validate, and provide formal protections against arbitrators' use of existing powers.[42]

To remedy the lack of clear guidance on ethical standards; lack of clear enforcement tools; lack of uniformity in decisions; and misaligned incentives; commentators and a few arbitral institutions have sought to strengthen the role of arbitrators by creating clear guidelines and expressly giving arbitrators the authority to sanction unethical conduct: the strong sheriff model.

The leading advocate and commentator on the strong sheriff model is Catherine Rogers. In a series of articles that culminated in a book,[43] Rogers has developed the intellectual framework of this model.[44] Rogers begins with the premise that "the contents of any ethical code for international commercial arbitration must be tailored to the procedural arrangements that govern the conduct of arbitrations"[45] and, as result, arbitral institutions should formulate and incorporate ethical standards into their arbitral rules.[46] Party counsel must agree to be personally bound by these ethical standards or "[a]rbitral rules could be amended to require that parties ensure that their attorneys follow this procedure – even if that means parties must replace counsel who are unwilling to accept these obligations."[47] Arbitral institutions should empower arbitrators to enforce these ethical standards via published sanction awards (i.e., an arbitral award fining a specific attorney who engaged in unethical conduct).[48] Before the issuance of such a sanction award, the arbitrators should "conduct a factual investigation and provide the accused attorney with an opportunity to be heard."[49]

Commentators such as Rogers have made progress in moving the debate. Although arbitral institutions and their rules, to date, have generally not played a significant role in regulating unethical conduct, they are moving in that direction. The LCIA appears to be the trendsetter in this regard as it has annexed a code of conduct to its arbitral rules and expressly empowered arbitrators to enforce the code. Although Professor Rogers' has quite exhaustively addressed the issue of ethics in

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[42] Catherine Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L. L. 1, 56 (2003).

[43] Catherine Rogers, ETHICS IN INTERNATIONAL ARBITRATION (Oxford University Press 2014); *see* Carrie Menkel-Meadow*, Ethical Ordering in Transnational Legal Practice? A Review of Catherine Roger's ETHICS IN INTERNATIONAL ARBITRATION*, 29 GEO. J. LEGAL ETHICS 207 (2016) (book review).

[44] Catherine Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341 (2002); Rogers, *supra* note 42, at 1; Catherine Rogers*, International Arbitration Needs Enforceable Conduct Rules*, 21 Alternatives to High Cost Litigation, 97 (2003); Catherine Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. INT'L L. REV. 53 (2005); Catherine Rogers, *The Ethics of Advocacy in International Arbitration*, PENN STATE LEGAL STUDIES RES. PAPER NO. 18-2010 (2010) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559012 (last visited May 8, 2016).

[45] Rogers, *supra* note 42, at 26.

[46] *Id*. at 26–27. In addition, parties should still have the ability to modify contractually the applicable ethical standards. *Id*. at 29.

[47] *Id*. at 34.

[48] *Id*. at 29–34. This would mean that "[s]anction awards would have to be made enforceable under the New York Convention." *Id*. at 38.

[49] *Id*. at 35.

international arbitration, she has not "specif[ied] how actual enforcement of ethical rules and standards can be productively shared by arbitration panels, institutions, national, regional and international courts."[50] This article seeks to flesh out how arbitrators and institutions can "productively" work together to enforce ethical standards.

Arbitrators have the most important role to play in mitigating unethical conduct. However, for the reasons subsequently elaborated, arbitrators and the international arbitral process would benefit if arbitral institutions took measures (complementary to arbitrators) to help mitigate unethical conduct. To maintain the Wild West analogy, local sheriffs benefited from the resources that only a state government could provide (i.e., a central authority) and the entire process benefited when a permanent entity could intervene when a troublemaker skipped from town to town, outside the jurisdiction of any one sheriff (i.e., unethical conduct that only presents itself over multiple arbitrations). Moreover, situations could arise when the local land baron holds too much sway over the local salaried sheriff. In the arbitration context, this could mean that a large international law firm has appointed an arbitrator and the arbitrator wishes not to lose the good will of the hand that feeds him or her by sanctioning unethical counsel; or a young arbitrator lacks the requisite fortitude to sanction his or her elders.

The next step in the process is for international arbitration to seek statehood (full sovereignty must wait). Statehood entails the responsibility to address the remaining gaps in the arbitral system with regard to ethical standards applicable to counsel.

> The international arbitration system needs to be able to police itself. Public confidence is an essential element of the system, and as one commentator has noted, if that confidence is lost, it could take decades to rebuild.[51]

To police itself, international arbitration needs not only ground rules on attorney conduct but also effective means of enforcing such rules. Arbitral institutions can play a key role in ushering international arbitration into a more firmly grounded phase of its development.

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[50] Menkel-Meadow, *supra* note 43, at 246.
[51] Bishop & Stevens, *supra* note 2, at 387.

III. THE THREE UNDERLYING DYNAMICS THAT LEAD TO THE CONCLUSION THAT ARBITRAL INSTITUTIONS CAN AND SHOULD PLAY A ROLE IN MITIGATING UNETHICAL CONDUCT

A. *The Distinction Between Micro and Macro Level Problems with Unethical Conduct*

1. Definition of Micro and Macro Levels in International Arbitration

Arbitration is an autonomous process. In principle, no legal relationship exists between two separate arbitrations (e.g., "There is no system of binding precedents in international arbitration").[52] An arbitrator's mandate begins and ends with a pending arbitration. An attorney may very well exploit such a gap by engaging in unethical conduct.[53] If the only sanction for unethical conduct is limited the pending arbitration, and that sanction is (likely) quite mild, a rationale attorney may conclude that little downside exists to engaging in unethical conduct in a subsequent arbitration. A pattern of unethical behavior might have a cumulative and pernicious effect on international arbitration.

In the abstract, sanctions have three primary goals: punish bad behavior, compensate one party for the bad behavior of another party, and to prevent future bad behavior. An arbitrator driven process can achieve the goals of punishing and compensating for bad behavior. But, it may ultimately fail to prevent future bad behavior if each instance of unethical behavior is treated like a discrete event and not a pattern of behavior. An escalation of sanctions provides an invaluable tool to combat a pattern of bad behavior.

Arbitral institutions enjoy, as the hub in the arbitral system, a privileged position and a degree of permanence in the arbitral process. Institutions see repeat parties, counsel and arbitrators. Depending on the institution, they often monitor the process and can interject themselves to assist the parties when needed (e.g., arbitrator challenge). This monitoring function is currently limited to individual, pending arbitrations. I believe arbitral institutions can easily expand their current role of monitoring individual arbitrations to encompass a wider view of the arbitral process. An institution can draw connections between past unethical behavior and current unethical behavior to create remedies that prevent future unethical behavior. As used in this article, the micro approach is an approach to mitigating unethical attorney conduct limited to a pending arbitration. The macro approach focuses on drawing connections between past unethical behavior and current behavior in order to fashion a more effective approach to mitigating unethical attorney conduct.

The micro v. macro dynamic is a key consideration in determining whether arbitral institutions should play a role in mitigating unethical conduct by party

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[52] REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 1.116 (Blackaby et al. eds., 2015).

[53] Sam Luttrell, *Opportunities for Australian Arbitration Practitioners in the "Global Financial Crisis"*, 75 INT'L ARB. MEDITATION & DISP. MGMT, 415 (2009) (discussing how Australian attorneys can excel in the Black Arts of waylaying an arbitration); *see* Stephan Wilske, *supra* note 4, at 316–17.

counsel. Arbitral institutions are the only stakeholders in the arbitral process who can address unethical behavior on the macro level.[54] I posit that the mitigation of unethical conduct on a macro level will greatly assist arbitrators in fulfilling their mandate, while leaving them the flexibility to address issues specific to a pending arbitration. It can prevent unethical behavior in the first place and provide arbitrators with an additional case management tool.

2. The Power of Character Evidence and its Utility in Mitigating Unethical Conduct in International Arbitration

The fear of others knowing about past misdeeds remains a powerful tool for influencing behavior because it creates the concern that future actions are (perhaps unfairly) evaluated within the prism of past actions (i.e., based on the general (propensity) character of the individual).[55] The U.S. common law legal system provides a clear example of this. The U.S. system separates determinations of fact and law; judges determine the law, while juries generally determine the facts. The U.S. system generally circumscribes the use of character evidence for its ability to influence juries and has developed detailed rules of evidence to limit what evidence juries can hear.[56] Those limitations do not carry over to arbitration.

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[54] The Chartered Institute of Arbitrator ("CIArb") is another stakeholder in the arbitral process with limited means and motivation to mitigate unethical conduct. CIArb "investigates, and where necessary, facilitates the discipline, suspension and/or expulsion of any member through an independent and impartial system of disciplinary proceedings." *Professional Conduct Announcements*, CHARTERED INSTITUTE OF ARBITRATOR http://www.ciarb.org/about/who-we-are/professional-conduct-committee/professional-conduct-announcements/2016/01/06/andriy-astapov (last visited May 8, 2016). *See* subsequent discussion of the Andriy Astapov. *Id.* CIArb certainly has a useful role to play in mitigating unethical conduct. However, such a system is a second best option to institutions because: (1) CIArb only sanctions members of the institution; (2) CIArb has no overview of pending matters, which can give rise to confidentiality concerns and places the onus on parties to pursue sanctions against an attorney outside of the pending matter (i.e., they must initiate a second, independent proceeding); (3) parties or their counsel may have no interest beyond their own pending matter (e.g., no willingness to bear additional costs and time commitment); (4) sanctions are limited to punishing an attorney (most severe sanction is to "expel the member from CIArb") and provide no economic incentive for a party to prosecute a claim against an attorney; (5) other than harming the offending attorney's reputation, CIArb's sanctions do not prevent the attorney from acting unethically again.

[55] *See* FED. R. EVID. 404(1), Notes of Advisory Committee on Proposed Rules (quoting Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), CAL. L. REVISION COMM'N, REP., REC. & STUDIES, 657–58 (1964)):

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

The trier of fact in the U.S. legal system is generally a jury of lay people.

[56] *E.g.*, FED. R. EVID. 404(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."); Certain limited exceptions exist to this general rule. However, only in criminal cases because in civil cases "evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait." *Id*. (Committee Notes on Rules—2006 Amendment). The U.S. rule built upon the principle developed in England over centuries that "recognizing that the use of such evidence violated the right to due process of guaranteed by the Magna Carta"; Colin Miller, EVIDENCE: PROPENSITY

International arbitration practice resembles the civil law inquisitorial approach of judges making both legal and factual determinations. Civil law systems generally put faith in their judges to properly evaluate all evidence. In Austria, as one example of the civil law approach to evaluating evidence, judges can freely evaluate evidence in civil proceedings ("*freie Beweiswürdigung*") (*see* ZIVILPROZESSORDNUNG [ZPO] [Civil Procedure Statute] § 272(1)).[57] This includes all elements of the proceedings such as the pleadings of the parties, their behavior during the proceedings, and their personal impression.[58] Evidence of past criminal acts is even admissible in civil proceedings.[59] The concept of *freie Beweiswürdigung* also extends throughout Asia.[60]

Arbitrators and institutions, when addressing unethical conduct by party counsel, have the discretion to freely evaluate all evidence. This should include evidence of previous acts of unethical conduct by party counsel. Such evidence can also have normative value. If attorneys know past unethical conduct can come back to haunt them in other contexts, they will more likely conform their current behavior to the applicable standard. Character evidence, drawn from previous instances of unethical conduct, provides a valuable tool for mitigating unethical conduct (see discussion below about the power of the permanent record) and this tool can only be accessed from a macro approach to addressing unethical conduct.

3. Distinguishing between Actions of Counsel and Parties

Drawing a distinction between the wishes of parties and the actions of their counsel is a difficult task in an individual arbitration. As Richard Kreindler observed:

> Certainly counsel are deemed to be represent the party, and the party is deemed to be speaking and acting through its counsel (although engaging counsel is generally not a strict requirement in

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CHARACTER EVIDENCE (RULE 404) 2 (Cali eLangdell Press, 2013) (discussing the historical background of the rule in England up to the United States adopting the rule).

[57] Germany applies the same rule (*see* Zivilprozessordnung [ZPO][Code of Civil Procedure], § 286, https://dejure.org/gesetze/ZPO/286.html).

[58] *See* LGS Mar. 9, 2003, 21 R 234/03 p and LGL Apr. 30 2003, 15 R 70/03 z EFSlg 105.841, https://rdb.manz.at/document/rdb.tso.EN0411302688.

[59] LGS Aug. 7, 1996 ZIK 1997, 66, https://rdb.manz.at/document/rdb.tso.CEzik199700027.

[60] *E.g.*, Korea, ARBITRATION LAW OF KOREA: PRACTICE AND PROCEDURE, BAE, KIM & LEE LLC INTERNATIONAL ARBITRATION AND LITIGATION GROUP (Juris Publishing 2011) ("[J]udges are permitted unfettered discretion in weighing and evaluating evidence[.]"); Taiwan:

> One of the criticisms people in Taiwan often have against judges is that they follow the principle of free evaluation of evidence, or 自由心證 in Chinese. It is one of the fundamental principles in civil law legal traditions and comes from the German concept of freien Beweiswürdigung by way of Japan when East Asian countries were modernizing their legal systems in the late 1800s and early 1900s. In Taiwan, it is enshrined in Code of Civil Procedure Article 222 and Code of Criminal Procedure Article 155.

TAIWAN LAW BLOG, http://taiwanlawblog.co/2015/12/24/what-is-the-principle-of-free-evaluation-of-evidence-%E8%87%AA%E7%94%B1%E5%BF%83%E8%AD%89/ (last visited May 8, 2016).

> international arbitration). Where an arbitral tribunal seeks court assistance to combat guerilla tactics, it may not be able to distinguish or care to distinguish between tactics of counsel and tactics of the party behind it. Presumptively, counsel engaged in such tactics is doing so at the behest of the party and pursuant to its expressed or implied wish. Thus on one level there may be no difference or no difference worth making.[61]

With the ability to observe party counsel's behavior across different arbitrations, institutions and arbitrators can identify patterns of conduct and more readily attribute such conduct to party counsel.

B. *The Distinction Between Misdemeanors and Felonies with Unethical Conduct*

1. Definition of Misdemeanors and Felonies

Different forms of unethical behavior in international arbitration deserve different levels of opprobrium and punishment. The common law, in the realm of criminal law, created a convenient distinction between minor crimes and more serious crimes: misdemeanors[62] v. felonies.[63] This distinction can provide an easy way to conceptualize an important dynamic in international arbitration: a clear distinction exists between violating well established ethical principles and the procedural rules created by an arbitrator in the context of a pending arbitration.

Where the international arbitration community, or a subset of that community (like an arbitral institution), has reached a (near) consensus, it follows that the principles arising from that consensus rise to the level of an expected standard for ethical conduct by party counsel in an international arbitration based in that community. When this article refers to "felonies," it refers to principles of such importance that they have been codified in some manner. Although no binding worldwide consensus exists with regard to ethical conduct, the IBA Guidelines on Party Representation in International Arbitration provide a prime example of a base line for expectations with regard to party counsel conduct ("IBA Guidelines").[64] The "Arbitration Committee [of the IBA that approved the IBA Guidelines] has over 2,600 members from 115 countries."[65] The IBA Guidelines are brief, addressing such

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[61] Richard H. Kreindler, *The Role of State Courts in Assisting Arbitral Tribunals Confronted with Guerrilla Tactics*, *in* 28 GUERRILLA TACTICS IN INT'L ARB., 102 (International Arbitration Law Library, Stephan Wilske and Günther J. Horvath eds.).

[62] "A crime that is less serious than a felony and is usu. punishable by a fine, penalty, forfeiture or confinement (usu. for a brief term) . . . ." *Misdemeanors*, Black's Law Dictionary (10th ed. 2014).

[63] "A serious crime usu. punishable by imprisonment for more than one year or by death." *Felonies*, Black's Law Dictionary (10th ed. 2014).

[64] For a summary of the process that led to the IBA Guidelines on Party Representation in International Arbitration, *see* Tom Cummins, *The IBA Guidelines on Party Representation in International Arbitration –Leveling a Playing Field?*, 30 ARB. INT'L 3, 430–32 (2014).

[65] Int'l Bar Ass'n, IBA Guidelines on Party Representation in International Arbitration iv (Int'l Bar Ass'n 2013).

issues as "communications with arbitrators," "submissions to the arbitral tribunal," "information exchange and disclosure," and "witnesses and experts." Such brevity can likely be attributed to the narrow grounds for finding consensus from such a diverse group of lawyers. As a subset of arbitration practitioners becomes smaller, a greater degree of consensus may be found. For example, the primary users of the Vienna International Arbitration Rules will likely reach a greater degree of consensus on what constitutes ethical behavior than the drafters of the IBA Guidelines.[66]

The IBA Guidelines only provide a starting point for determining what constitutes such principles and does not exclude other principles arising to the same level; nor should the more mundane principles in the IBA Guidelines rise to the level of a felony. The concept of codification also extends to any ethical rules enacted by an individual arbitration institution. For the purposes of this article, the concept of felonies equates to well-established (i.e., codified in writing) ethical principles that the violation of which would seriously undermine the integrity of the arbitral process.

International arbitration, founded upon procedural flexibility, does not lend itself well to the codification. Arbitrators should and, often do, use the flexibility built into the process to tailor an arbitration to the nuances of the pending dispute. A procedural order number one issued by an arbitrator, setting out many procedural elements of a pending arbitration, provides a clear example of the tailoring process.[67] Ad hoc decisions by an arbitrator and party procedural agreements provide other examples. Moreover, arbitrators retain a great deal of discretion to refine and revise the procedural structure of the arbitration as it proceeds. The violation of such rules (like missing a deadline or submitting an exhibit at a late stage without arbitrator permission) is of lesser gravity than a felony and requires a significantly milder sanction. Violations of procedural rules created for a pending arbitration are referred to as misdemeanors (or in German *Bagatelle*). However, "the benefits of arbitrator discretion are overrated; flexibility is not an unalloyed good; and arbitration's malleability often comes at an unjustifiable price."[68]

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[66] In this context, I will take the opportunity to disagree with the following position of ASA:

> Initiatives by individual associations like the IBA or arbitration institutions like the LCIA generate a risk of fragmentation between different – and potentially contradictory – "rules" or "codes". This in turn would likely undermine the very legitimacy of the rules/codes that may be adopted, since offending counsel could point to differences to argue that there is no international consensus.

Geisinger, *supra* note 8, at 453. Diversity in international arbitration remains one of its greatest strengths; *see* Jarred Pinkston, *VIENNA: The road to predictability*, GLOBAL ARB. REV. (2016) ("the arbitration community is not a closed shop and it must accept that it is hard to create a monolithic international arbitration culture" argued Emmanuelle Cabrol of Herbert Smith Freehills in Paris); An "international consensus" is irrelevant to the regulatory approach advocated here. A range of arbitral institutions exist and each can craft an approach to regulating unethical conduct that takes into consideration the unique characteristics of its customer base; thereby promoting diversity in international arbitration. "[W]hat is needed is not a single code applied uniformly to all international arbitrations, but multiple codes that can be calibrated to the specific rules, traditions, and features of particular arbitration proceedings." Rogers, *supra* note 42, at 26.

[67] Dorda & Pinkston, *supra* note 40.

[68] *See* William W. Park, *The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 INT'L ARB. 3, 301 (2003).

The distinction between misdemeanors and felonies give rise to an important consideration, which makes relying solely on arbitrators to regulate party counsel conduct less than ideal. With the increasing severity of the unethical conduct, the sanction should correspondingly increase. Arbitrators for very practical reasons may prove reluctant to escalate sanctions beyond a mild slap on the wrist because "while judges do not seek more work, arbitrators generally do."[69]

Arbitration is in many ways a popularity contest in respect to obtaining appointments to serve as arbitrator.[70] Regardless of how that popularity was won (competence, marketing, transference of good will from working with a respected firm or arbitrator . . .) arbitrators want to get appointed again and creating waves by sanctioning counsel can potentially harm their popularity. Smart arbitrators may simply ignore questionable conduct or sanction unethical conduct subtly in an award rather than addressing the problem expressly. Although the arbitrators may reach a good result for the pending arbitration, it does little to prevent unethical conduct as counsel was not put on notice of or directly sanctioned for their unethical behavior. Moreover, party counsel can merrily continue, intentionally or obliviously, with such conduct in other proceedings.

An additional concern of arbitrators is that any action taken against counsel might endanger the final award. "Tribunals might also be reluctant to discipline one side's counsel for fear of exposing their eventual award to a challenge for alleged partiality."[71] I have argued elsewhere that the fear of a challenge to an arbitral award, based on an arbitrator playing a non-passive role in the development of a case, remains greatly exaggerated.[72] Regardless if such fears are exaggerated, the fear alone may prevent arbitrators from directly addressing unethical conduct.[73] Not to mention that a logical disconnect would exist in the situation where an institution, like the ICC, rules on an arbitrator challenge but then the arbitrator has the task of sanctioning an obviously meritless challenge whose purpose was to delay. Moreover, the sanctioning of certain questionable conduct, like a groundless challenge to an arbitrator, can give rise to a greater perception of partiality. Of concern to all stakeholders in the arbitral process is the fact that arbitrators sanctioning unethical conduct "may cloud the arbitrators' view of the merits of the dispute and give rise to

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[69] Vagts, *supra* note 2, at 258.

[70] Rogers, *supra* note 34, at 972 ("[T]oo much discretion is vested in arbitrators' exercise of their judgment at a time they have at a time they have a heightened self-interest in being retained."). In theory, popularity should play a secondary role in obtaining appointments when appointed by an institution. However, arbitral institutions may be reluctant to appointment arbitrators from whom the parties shy from.

[71] Perry, *supra* note 15, at 16.

[72] Veit Öhlberger & Jarred Pinkston, *Iura Novit Curia and the Non-Passive Arbitrator: A Question of Efficiency, Cultural Blinders and Misplaced Concerns About Impartiality*, *in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION, 101–17 (Klausegger et al. eds., 2016); *see also* Alison Ross, *Everyone shall behave like ladies and gentlemen*, GLOBAL ARB. REV. (2015) ("No tribunal need fear that expressing a view on the conduct of lawyers in an arbitration would be seen as non-neutral or prejudicial or that it would risk vacatur of the award.").

[73] Thomas, *supra* note 5:

> [Doug] Jones also referred to an arbitration in which he and co-arbitrators were sued by a party following a procedural order. The same party later challenged the tribunal on the grounds that, having been sued, they were no longer independent and impartial.

doubts about their independence."[74] An arbitral institution taking the lead in addressing serious cases of unethical conduct reduces this risk.

2. The Need for a Codified Framework for Distinguishing between Misdemeanors and Felonies

Before arbitrators or institutions can attempt to mitigate unethical conduct, one must know what constitutes unethical conduct.[75] Arbitral institutions have a clear role to play in establishing basic ground rules for party counsel. Currently, without a clear framework provided by the applicable arbitral rules, arbitrators must fumble in the dark to craft adequate ethical rules to see the arbitration to the fruition of an enforceable, final arbitral award. Without a clear basis to proceed, arbitrators will first seek to sidestep ethical issues and only take them up when the situation mandates that they must (for the reasons outlined above, such as the desire to maintain good will within the arbitral community). If an arbitrator has a sound framework to work with from the outset of the arbitration, it would give them, in addition to substantive guidance, the confidence and mandate to directly address ethical issues.

Arbitral intuitions have begun to recognize that they can provide arbitrators and the parties with a useful service if they establish certain ethical ground rules. The LCIA has, to its credit, created ethical rules for arbitrators to apply.[76] The IBA has created ethical guidelines for party representation. These rules provide a shortcut for arbitrators that cannot rely upon a framework provided by the applicable arbitral rules. However, without some indication of intent by the parties that they wished the guidelines to apply in some mandatory manner, they can only inform the arbitrator and strengthen his or her fortitude but unfortunately cannot provide a sound legal basis for taking *strong* action against unethical conduct.

> With the introduction of the IBA and the LCIA guidelines, we are seeing evolutionary steps in the development of a uniform code of conduct for counsel in international arbitration, or a number of applicable codes. Other arbitral institutions may well follow the trend set by the LCIA and introduce their own codes of conduct, and many would argue that they would be wise to do so.[77]

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[74] Douglas Thomson, *ASA to hold global ethics summit in Geneva,* GLOBAL ARB. REV. (2015) (position of Elliott Geisinger president of ASA).

[75] Perry, *supra* note 15 ("Hilary Heilbron QC of Brick Court Chambers in London suggested that it was valuable to have ethical guidelines set down on paper so that parties and their counsel, particularly those from different cultural backgrounds with limited exposure to arbitration, can know 'what's expected of them.'").

[76] *Contra* Perry, *supra* note 15 (Michael Schneider criticizing the IBA and LCIA guidelines because "they will create more opportunities to waste time and money on procedural skirmishes.").

[77] Sapna Jhangiani, *How far do the new LCIA guidelines for parties' legal representatives and the IBA guidelines on party representation go?* KLUWER ARBITRATION BLOG, http://kluwerarbitrationblog.com/2014/05/21/how-far-do-the-new-lcia-guidelines-for-parties-legal-representatives-and-the-iba-guidelines-on-party-representation-go/, (last visited May 8, 2016).

I express no opinion on what the parameters of any ethical rules should be or who should promulgate such rules.[78] I simply make the case that arbitral institutions can help the arbitral process by providing a framework for addressing unethical conduct, rather than leaving it to the currently unstructured, ad hoc process in place. Moreover, a framework created by an institution is essential to developing the distinction between misdemeanors and felonies. Party counsel should know what constitutes a felony before facing a severe sanction.

The parameters of any such rules could encompass a wide range of issues, all of which deserve in-depth thought and analysis as to how these issues should be addressed in international arbitration. With regard to substantive standards, national rules of professional conduct for lawyers generally regulate: (a) the quality of representation (including requirement of "zealous" or competent representation of client interests and the definition of legal malpractice); (b) conflict of interests; (c) compensation (including requiring disclosure of fee arrangement to the client, the permissibility (or impermissibility) of contingent or conditional fee arrangements, and permissible rates); (d) confidentiality; (e) attorney-client privilege; (f) relations with other counsel and courts; and (g) publicity and advertising.[79]

An arbitral institution doubtfully has an interest in regulating all of the above issues. Institutions should focus on ethical issues germane to creating a fair playing field and those that may promote efficiency. This means that institutions should address ethical rules directly related to issues of procedure. Examples include a failure to comply with a document production order or clear delaying tactics or *ex parte* contact with an arbitrator.

One distinction warrants consideration independent of any applicable ethical rules implemented by an arbitral institution: the procedural rules established by an arbitrator (e.g., in a procedural order number one) and parties require a different analysis. Arbitrators and parties play a key role in crafting an arbitral process suited to the particular needs of a dispute. Ethical rules should not snuff out this cornerstone of arbitration. An arbitrator remains best suited to enforce such arbitration specific procedural rules. Arbitral institutions should not seek to insert themselves into an ongoing arbitration to try and impose their concept of ethical, well-functioning arbitral proceedings upon the parties and arbitrator. But, as commentators have argued, a strong case exists for applying certain, well established, uniform standards to key (common) issues in international arbitration. Because felonies constitute a graver misdeed, tougher sanctions to prevent them are called for.[80]

A clean line cannot be drawn between protecting the flexibility of a fairly autonomous process and providing helpful, if not essential, rules of the road to the process. This leads to two considerations in creating an ethical regulatory scheme. Arbitral institutions might consider having opt-out measures to any rules. To make such measure viable, it would naturally require all parties to agree on such a measure.

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[78] *See* Margaret Moses, *Ethics in International Arbitration: Traps for the Unwary*, 10 LOY. U. CHICAGO INT'L L. REV. 73 (discussing the issues involved with finding a consensus on just one issue, witness preparation, in international arbitration).

[79] BORN, *supra* note 2, at 2306.

[80] Joanne Lau, *HONG KONG: How to control Counsel*, GLOBAL ARB. REV. (2015) ("[Sheila] Ahuja questioned whether lapses in counsel conduct should be given degrees of severity, with the most serious breaches referred to a disciplinary body.").

It would remain an open question as to whether the arbitrator must also agree to opt out of such rules as an arbitrator has different obligations, such as protecting the integrity of the process and to issue an enforceable award. In addition, any ethical standards promulgated by an arbitral institution should contain a mechanism for an attorney, subject to a particular restraint in their home jurisdiction, to petition to get out of any conflicting rules.

3. The Need for Express and Differentiated Sanctions for Misdemeanors and Felonies

Whether arbitrators can currently sanction party counsel generally for unethical conduct remains a muddled issue.

> Of course, where an arbitral tribunal assumes such power to impose monetary sanctions upon counsel the eminent dogmatical question is whether counsel of a party is insofar personally bound by decision of an arbitral tribunal. However, this question can be answered in the affirmative as counsel of record is certainly no stranger to the arbitration and is sometimes even addressed by arbitration rules. At least [Stephan Wilske] would consider that it is part of the inherent powers of an arbitral tribunal in preserving the integrity of its own process to sanction counsel in appropriate circumstances and that counsel by participating in such arbitration submits to and accepts the inherent powers of the arbitral tribunal.[81]

Although some arbitrators have concluded that they have the authority to sanction unethical conduct, "[m]ost tribunals conclude, however, that they lack the authority to discipline or impose sanctions on legal counsel (as opposed to parties) who engage in misconduct."[82]

An academic debate about whether arbitrators can sanction counsel each time an issue arises in an individual arbitration undermines efficiency and predictability. "Sanctions give tribunals more explicit tools to regulate procedures and enable arbitrations to be run more effectively and efficiently."[83] In any regulatory scheme lawyers will attempt to exploit any grey area to their client's advantage. Arbitral institutions can remove ambiguity and fortify an arbitrator's resolution to combat unethical conduct by expressly empowering arbitrators to craft and apply sanctions directly against party counsel.

In addition to promulgating clear ethical rules, institutions can greatly assist arbitrators and parties by providing arbitrators with a catch all authority to establish ethical standards for the arbitration without reference to any national law or standard. If an arbitrator must conduct a legal analysis of various domestic laws and attorney regulations, which may conflict, it could invite confusion and chaos on certain issues.

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[81] Wilske, *supra* note 3, at 328–29; *see also* Vagts, *supra* note 2, at 253; ROSS, *supra* note 72 (position of David Rivkin, president of the IBA).

[82] BORN, *supra* note 2, at 2316.

[83] LAU, *supra* note 80 (argued Van Haersolte-van Hof).

By giving arbitrators the freedom to craft procedure and correspondingly applicable ethical standards, free from reference to a specific standard, institutions will give arbitrators greater discretion to address unethical conduct, which is similar to of the approach of some institutions like the ICC with regard to procedural rules. Art. 19 of the ICC Rules mandates that the "proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties, or failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."

With regard to felonies requiring serious sanctions, whether applied by an arbitrator or institution, such sanctions should be expressly outlined in the applicable rule in order to put party counsel on notice of the gravitas of the situation. For example, CIArb has the following sanctions for members of that institution:[84]

The Disciplinary Tribunal may impose one of the following sanctions:

(1) reprimand or warn the member as to their future conduct;

(2) suspend the member from membership of CIArb for a period not exceeding twelve months;

(3) in the case of a member having chartered status, to withdraw that status without limit of time or for a specific period;

(4) expel the member from CIArb;

(5) make an appropriate order for costs (the order will be made in accordance with paragraph 8.6 of CIArb's Schedule to the By-laws).[85]

The sanction of expelling a member is sufficiently serious that counsel should be put on notice of its potential applicability. LCIA Rule 18.6 provides another example of clear sanctions and a catch all provision:

> In the event of a complaint by one party against another party's legal representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that legal representative a reasonable opportunity to answer the complaint, whether or not the legal representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the legal representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.4(i) and (ii).

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[84] *See CIArb Shows Policing Potential by Expelling Ukrainian Lawyer*, Global Arbitration Review (2016) (discussing the application of those sanctions in the context of a specific case).

[85] CHARTERED INSTITUTE OF ARBITRATORS, HOW CIARB INVESTIGATES COMPLAINTS OF MISCONDUCT AGAINST ITS MEMBERS 3, http://www.ciarb.org/docs/default-source/default-document-library/complaints-booklet1.pdf?sfvrsn=4 (last visited May 8, 2016).

4. Brief Rebuttal to Abstract Objections to Additional Rules

Many arguments have been made against greater regulation in the field of arbitration. The most frequent are:

> [I]t tramples on the principles of party autonomy; that too many rules risks "killing the patient"; and that the diversity of legal cultures in arbitration makes the implementation of a unified set of ethical standards impossible.[86]

The arguments relating to party autonomy and diversity deserve a rebuttal when discussing an arbitral institution creating and implementing rules for attorney conduct. With regard to individual party autonomy, it should not be viewed in the abstract but at a particular stage of the contractual relationship and subsequent dispute. In the context of arbitral rules (and appending ethical rules), party autonomy should interject itself in two distinct stages.

The first stage is when parties agree to a particular set of rules. The principle of party autonomy (in the context of contractual agreement) should be at its strongest at the beginning of a contractual relationship when the parties have a closer alignment of joint intent.[87] The goal of arbitral institutions should be to align their arbitral rules with the parties' joint understanding of a fair and efficient process. If arbitral institutions structure their ethical standards by applying a "veil of ignorance" methodology (i.e., creating a process all parties can agree is fair before a dispute arises), they can offer a unified product (combination of procedural and ethical rules) that removes many gaps in the arbitral process and provide the parties with a clear opportunity to exercise party autonomy. Party autonomy at this stage is an all or nothing proposition; the totality of particular set of arbitral rules vs. a different set of rules. Adding layers of additional rules does not change this dynamic.

An arbitral institution can promote party autonomy by compelling parties to make a clear choice between different arbitral rules. Different arbitral rules can offer a sliding scale of detail with regard to ethical standards: from ad hoc decision making with regard to ethical standards; to vanilla international arbitration rules seeking the widest common denominator; to strong regional institutional arbitration with highly detailed ethical rules reflecting the culture of the region. When parties choose a point on that sliding scale they jointly make a clear determination as to the kind of arbitration they wish to have. If some arbitral institutions offer more detailed ethical standards to remove gaps in the arbitral process and parties choose to arbitrate under those rules, party autonomy remains venerated.

The argument that more rules undermines party autonomy argument undervalues the detrimental effect of inertia to the arbitral process and proves overly

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[86] Sebastian Perry, *Minds Meet Over Regulation*, GLOBAL ARBITRATION REVIEW (2013) (quoting Sundaresh Menon).

[87] *See* Tony Cole, *Authority and Contemporary International Arbitration*, 70 LA. L. REV. 801, 804-805 (2010) ("[A] dispute resolution mechanism initially designed to be invoked post-dispute, between parties who both wished to arbitrate, is now being applied in a far broader range of situations, usually involving a pre-dispute arbitration agreement, and often involving one party that does not wish to arbitrate at all. This change means that the characteristics that previously resulted in parties to an arbitration accepting and voluntarily abiding by the award delivered by the arbitrator rarely exist now.").

optimistic about parties' ability or willingness to remedy problems arising after a dispute arisen. As the champagne clause of the contract (added after the completion of tough negotiations about substantive provisions and right before the uncorking of celebratory beverage), arbitration clauses generally do not receive adequate consideration.[88] One should not confuse a dereliction to address an issue at the contracting stage or after a dispute has arisen with an exercise of party autonomy.[89]

The second stage of evaluating party autonomy is in the context of a pending dispute. Party autonomy is a joint endeavor in arbitration and alignment of intent will often prove elusive (to gain or establish) after a dispute has actually arisen. Parties seldom have the incentive to reach consensus on many issues in the context of a pending dispute and if they fail to do so, a decision will often fall to the arbitrator who generally plays a gap-filling role under the discretionary standards contained in most arbitral rules. I fail to see how leaving issues open, waiting until the parties cannot reach agreement and then presenting the issue to an arbitrator under a discretionary standard promotes party autonomy.

Once a dispute is pending, with the ground rules set, the issue arises to what degree the parties should have the ability to change those ground rules, assuming they can reach agreement on an issue. If arbitration is founded upon party autonomy, it follows that parties in theory should have the ability to change those rules, including ethical standards applicable to the arbitration.[90] The issue becomes how far institutions will allow parties to deviate from these rules.

Arbitration is a "creature of contract."[91] If an entire attorney regulatory scheme is solely based on contract, to what extent can parties contractually agree to deviate from such a scheme? The concept of freedom of contract runs strong in most legal jurisdictions. It remains unclear as to what extent arbitral institutions can limit the parties' contractual freedom to opt out of such a system. Obviously arbitral institutions can structure their rules so that they will not administer arbitrations that do not follow certain grounds rules. ICC Rule 19 is a prime example.[92] This provision creates a hierarchy of: non-derogable rules of the ICC, rules the parties agree upon, and rules "the arbitral tribunal may settle on."

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[88] Jarred Pinkston, *The Case for a Continental European Arbitral Institution to Limit Document Production*, *in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 87, 108 (Klausegger et al. eds., 2011).

[89] PARK, *supra* note 68, at 296 ("Usually arbitration clauses will be 'cut and paste' jobs by transactional lawyers who have little relish for questions about evidence and briefing schedules. The corporate lawyers who write contracts are out of touch with the procedural mishaps that occur during arbitration, and generally remain in the dark about how their arbitration clauses play out during litigation. This absence of well-informed reflection about the consequences of the arbitration clause inhibits rationale decision-making, which creates a market failure. Only after the dispute arises, when the transaction has gone sour, does the importance of rules hit home.").

[90] ROGERS, *supra* note 42, at 42–46.

[91] *Republic of Kaz. v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).

[92] International Chamber of Commerce [ICC] Rules of Arbitration, art. 19 (Jan. 1, 2012), https://community.icann.org/download/attachments/56985803/ICC%20Rules%20of%20Arbitration.pdf?version=1&modificationDate=1464877740000&api=v2 ("The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.").

> Insofar as the ICC, by issuing its Rules, can be said to make an offer to the public to administer arbitrations in accordance therewith, the ICC can reasonably also take the position that it is not obligated to administer cases where the parties have made alternations of the Rules that the Rules do not contemplate.[93]

Not all arbitral institutions impose the primacy of their rules and such a laissez faire approach would prove incompatible with an arbitral institution attempting to mitigate unethical attorney conduct.[94] An arbitral institution declining to hear a case because the parties attempted to opt out is a second rate approach as it could push parties out of arbitration subject to higher ethical standards to: ad hoc arbitration; arbitral institutions lacking the ambition to reduce unethical conduct; or the courts.

This academic question frames the practical reality that parties should hopefully gravitate to respected institutions with high ethical standards instead of to "back alley" institutions relying on their lack of concern with regard to ethical standards. If one begins with the assumption that ethical behavior is generally a good thing, it is hard to imagine a party to a contract negotiation or pending dispute being receptive to their counter party's proposal to actively avoid ethical standards of party counsel in arbitration. Two scenarios could make such a situation realistic. *First*, the ethical rules imposed by arbitral institutions prove too limiting to the parties' freedom to present their case as they see fit. *Second*, the increased costs of administering ethical rules outweigh the perceived value. Arbitral institutions should, therefore, take a light brush approach to implementing any ethical scheme. Any ethical rules should seek to create the minimum standard necessary to guarantee a fair playing field between the parties; with perhaps a few minor changes to promote the overall efficiency of the process. Arbitral institutions should start slow and ratchet up the stringency of the rules overtime as experience dictates.

With regard to more rules killing diversity, the approach advocated herein will moderately impinge diversity, if diversity is defined as the chaos arising from no joint understanding of the applicable ethical rules. However, it will remain limited to diversity under individual arbitral rules and will promote diversity between different sets of arbitral rules. The ICC can take one approach and the ICDR another with regard to mitigating unethical conduct. This concern is one reason that I do not support the ASA approach to creating a Global Ethics Council, as I discuss below.

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[93] Yves Derains & Eric Schwartz, A GUIDE TO THE ICC RULES OF ARBITRATION 7–8 (2005).

[94] London Court of International Arbitration [LCIA]) Arbitration Rules, art. 14.2 (Oct. 1, 2014), ("The parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal. They are encouraged to do so in consultation with the Arbitral Tribunal and consistent with the Arbitral Tribunal's general duties under the Arbitration Agreement."); International Centre for Dispute Resolution [ICDR] International Dispute Resolution Procedures, art. 1.1 (Jan. 1, 2014), https://www.icdr.org/icdr/faces/i_search/i_rule/i_rule_detail?doc=ADRSTAGE2025301 ("[T]he arbitration shall take place in accordance with these Rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing . . .").

C. *Arbitral Institutions' Unique Position Allows Them to Serve as the Hub in a "Hub and Spokes" Arbitral System*

Arbitrators should remain the "first port of call" in mitigating unethical conduct by party counsel.[95] However, arbitrators do not play the same systematic role institutions do and, therefore, cannot effectively address all aspects of unethical conduct.

1. A Spoke in the Arbitral System Cannot Provide an Even Playing Field

A natural inclination is to look to state courts and organizations (e.g., bar organizations) tasked with regulating attorney conduct for guidance and assistance in mitigating unethical conduct in international arbitration. For a wide range of reasons, such an approach will remain unsatisfactory as they cannot provide the same central role for all stakeholders in the arbitral process that an arbitral institution can. The most obvious reason is that one need not even be an attorney to practice international arbitration.[96] It follows that organizations that regulate attorney conduct will not effectively regulate the conduct of non-attorneys.[97]

Second, looking to national organizations (e.g., bar associations) will create an uneven playing field.[98] This uneven playing field can give rise to numerous problems in creating a fair process for all parties. The party counsel subject to the lowest ethical standard will gain an advantage.

Third, most organizations have limited interest in regulating attorney conduct that takes place outside its jurisdiction: following the general rule of "out of sight, out of mind." Even if an organization were inclined to attempt to enforce its ethical standard upon attorneys entering its jurisdiction or attorneys admitted in that jurisdiction but practicing in another, the question becomes one of balancing competing ethical standards. To use my own example, I am admitted to practice law in New York, New Jersey and as a solicitor in England and Wales, yet I practiced international arbitration in Vienna, Austria (where I was not admitted to practice law) for nearly eight years. I participated in arbitrations throughout Europe under many different laws. Which ethical standard should I have looked to? What should I have done if standards conflicted? How should a domestic bar association analyze and

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[95] Perry, *supra* note 18 (quoting Hilary Heilbron QC). *See also* discussion *supra* p. 19 (discussing Catherine Roger's approach to addressing unethical conduct).

[96] COMM. ON PROF. RESP. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, RECOMMENDATION AND REP. OF THE RIGHTS OF NON-NEW YORK LAWYERS TO REPRESENT PARTIES IN INT'L AND INTERSTATE ARB. IN NEW YORK, 49 REC. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 47, 47-48 (1991); *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, at **7 (Cal. 1998) (noting under a Californian statute in "international disputes" that a "person assisting or representing a party need not be a member of the legal profession or licensed to practice law in California.").

[97] If a domestic legal provision on the unauthorized practice of law were extended to international arbitration, domestic organizations could potentially regulate such conduct. However, international arbitration is a fluid process that will quickly steer clear of jurisdictions imposing such a problematic rule; with California providing example A.

[98] Moses, *supra* note 78.

resolve such a conflict? I do not have an answer because "[t]here is no clear answer." [99] Any organization seeking to impose its ethical standard on the international arbitral process will run into this same conundrum. A ground-up approach (i.e., coming from the domestic level) will invariably give rise to thornier issues than the ones the ethical standards initially sought to address.

> [T]he efficacy of such enforcement mechanism is questionable in the context of international arbitration, where distance, confidentiality and complexity will often result in local bar authorities being unaware of misconduct, ill-suited to assessing complex, atypical issues and reluctant to sanction counsel in unfamiliar circumstances.[100]

Fourth, courts will often only play a role in international arbitration when called upon to set aside an award or enforce an award. The grounds under most domestic arbitration laws for setting aside an award and the grounds for refusing enforcement under the New York Convention are quite limited. In such a context, it remains unclear to what extent a court can impose ethical standards upon counsel that represented the parties in the arbitration. Moreover, counsel may likely reside in another jurisdiction. Some legal jurisdictions, like the United States, impose personal jurisdiction requirements. Counsel in an arbitration may never set foot in the United States, even if ostensibly the arbitration was seated in the United States (hearings can be held anywhere). Ultimately, any court involvement focusing on the award will focus on the parties and not the party counsel responsible for the unethical conduct.

Arbitrators, parties, and national entities certainly have a role to play but all three suffer from the same shortcoming: they only serve as spokes in the arbitral system. This makes it less than ideal to rely on them to mitigate unethical conduct by party counsel. Arbitral institutions play a unique role in the arbitral systems role and have the strongest incentive to protect the integrity of the system.

2. Only Arbitral Institutions, as the Hub in the Arbitral system, Have the Ability to Provide an Even Playing Field via Arbitral Rules

The path to implement an ethical code of conduct is clear and already outlined above. Commentators have called upon arbitral institutions to annex ethical rules of conduct to their arbitral rules. Thus, when parties agree to a certain set of arbitral rules they would simultaneously agree to compel their counsel to agree to the application of a particular code of conduct.[101] Arbitral institutions are the only stakeholders in the process that can do this uniformly. The LCIA has gone so far to as actually implement such a scheme. I agree that this is the most feasible approach

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[99] Chessa, *supra* note 21.

[100] BORN, *supra* note 2, at 2315.

[101] *E.g.*, London Court of International Arbitration, *supra* note 94, at art. 18.5 ("Each party shall ensure that all its legal representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. In permitting any legal representative so to appear, a party shall thereby represent that the legal representative has agreed to such compliance.").

and this article breaks no new ground in this regard. This article simply goes one step further and advocates for institutions to play a role in applying those rules.

3. Arbitral Institutions Have a Greater Incentive to Protect the Integrity of the Arbitral Process than Other Stakeholders

Courts might espouse a pro-arbitration policy in order to lighten their docket; parties might rave about the benefits of arbitration like confidentially and flexibility; party counsel might like the handsome financial rewards and intellectual challenge of international arbitration; bar associations might like to promote arbitration for reasons of prestige: they all, however, have alternative options to international arbitration and arbitral institutions do not. If parties lose faith in the international arbitration process, trustworthy and respected courts remain open throughout the world. Courts can increase their case load. Party counsel can put back on their litigator hat and relearn rules of evidence and procedure. Bar associations can focus on their primary task of protecting society from unscrupulous attorneys appearing before local courts. Arbitral institutions can see their revenue decrease and even go out of business.

Courts are the direct competitors of arbitration in the dispute resolution business and, because of the well-defined attorney regulatory scheme, they do not suffer from the same regulatory gaps that affect international arbitration. If you appear as an attorney before a court, you will follow that court's ethical rules. Predictability and reliability have value and appeal to parties stung by questionable conduct or tactics.

Although the other stakeholders have an incentive to promote ethical conduct and the integrity of the arbitral process, that incentive does not rise to the existential level facing arbitral institutions. Institutions should have every reason to increase the desirability of arbitration and that should extend to reducing unethical conduct that undermines the process.

4. No Confidentiality Concerns

Confidentially is touted as one of the key advantages of arbitration and, as a result, parties to an arbitration are often subject to confidentially obligations. Other than arbitrators, no other stakeholder in the arbitral process enjoys an unfettered overview of a pending arbitration and the possibility to address unethical conduct. Arbitral institutions generally sit as benevolent overseers of arbitrations conducted under their rules. Most institutions require the parties and arbitrator to provide copies of all correspondences and submissions. Some intuitions play an even more active role by scrutinizing awards and hearing challenges to arbitrators.[102] Therefore, arbitral institutions already play an active role in pending disputes and confidentially concerns do not apply (see above discussion on obtaining empirical evidence of unethical conduct).

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[102] *See* International Chamber of Commerce [ICC] Rules of Arbitration, Art. 33 (Jan. 1, 2012), https://community.icann.org/download/attachments/56985803/ICC%20Rules%20of%20Arbitration.pdf?version=1&modificationDate=1464877740000&api=v2 ("Scrutiny of the Award by the Court.").

Confidentially might also prevent other stakeholders in the arbitral process from even learning of unethical conduct, much less having a sufficient basis to establish and sanction unethical conduct.[103] For example, "[r]eporting counsel to national bar associations for serious ethical breaches is likely to be complicated given the confidentiality requirements often attached to arbitration."[104] Such a situation gives rise to an interesting question. Often exemptions exist to confidentially obligations in order to allow a party to present information to the extent required by law but do those exemptions extend to attempts to sanction party counsel of an opposing party? Such questions are avoided by arbitral institutions playing a role in mitigating unethical conduct.

5. The Power of Permanence: the Dreaded Permanent Record

All U.S. students are taught to fear incurring blemishes on their "permanent record;" a record of misdeeds that would supposedly haunt them for the rest of their lives.[105] Permanence provides a unique power to arbitral institutions. Institutions can act as repositories of information on party counsel's past conduct. As discussed and argued above, character evidence is a powerful tool. Assuming arbitrators and institutions can use character evidence, the question becomes where do they obtain such information reliably? The only realistic answer to that question is arbitral institutions as they have full access to previous proceedings and a means of archiving that information.

Another element of permanence is that arbitral institutions can develop expertise in addressing unethical conduct. Seeing and addressing an ethical problem for the 40th time is fundamentally different than addressing it once. Arbitrators are often put in such a situation.

6. Sensitivity to the Interests of All Stakeholders: Ability to Balance Competing Concerns

Arbitral institutions have no inherent interest in favoring one particular stakeholder in the arbitral process over another or a particular approach to arbitration. When creating a scheme for mitigating unethical conduct, institutions can balance the concerns of all stakeholders in the process, particularly parties. Alternatively stated, arbitral institutions have no reason to address unethical conduct for its own sake; institutions should only address unethical conduct to create a better service for parties, their counsel and arbitrators. This can mean taking a light or heaving approach to regulating questionable conduct in response to their needs.

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[103] Lau, *supra* note 80 ("Van Haersollte-van Hof thought that the confidentiality of proceedings provides another reason why sanctions should not be so extensive as to allow tribunals to refer counsel to ethical bodies outside of the arbitration.").

[104] Madalena, *supra* note 21.

[105] *Permanent Record*, URBAN DICTIONARY: http://www.urbandictionary.com/define.php?term=permanent+record (last visited May 8, 2016).

7. Competitive Advantage Vis-à-Vis Other Institutions

An arbitral institution can gain a competitive advantage over other institutions by differentiating itself with regard to reducing unethical conduct by party counsel. Catherine Rogers said it well in the context of ethical standards for arbitrators:

> The LCIA, AAA, and a few other institutions that have taken on strong formal commitments to ensure quality and monitor arbitrators may reflect a developing regulatory competition among arbitral institutions. Adoption of formal mechanisms to regulate arbitrators may signal to the market their uniquely rigorous commitments to ethical conduct and quality assurance, echoing the signaling function that some scholars have argued exists in securities markets.
>
> This competition among institutions will more likely result in a race-to-the-top as opposed to a race-to-the-bottom, as was produced by the nearly frantic competition among national arbitral sites. While the market for national arbitral sites seems to have largely self-corrected, there are significant differences in the incentives for national sites and institutions, which suggest a race to the bottom is unlikely. In the context of choosing a situs, parties might prefer national contexts that promise minimal interference with the arbitration proceedings or award. That same preference for non-interference by situs courts, however, may provide an even stronger need for institutions that provide enhanced reliability and procedural protections.[106]

8. The Economic Incentives behind Sanctioning Unethical Conduct Favor Institutions

Arbitrators are either generally paid per hour of work (e.g., the LCIA system) or a lump sum reflecting the amount in dispute and the disputes complexity (e.g., the ICC). Neither approach provides the right incentive to arbitrators to regulate unethical conduct. The lump sum approach would discourage arbitrators from taking action because such an approach encourages arbitrators to work efficiently. Each extra hour of work does not lead to greater compensation. Arbitrators would, therefore, have a financial incentive to avoid directly addressing unethical conduct. Arbitrators might logically conclude that they can indirectly and more efficiently address such conduct in the final awarding of costs. As previously discussed, indirectly addressing unethical conduct does little address the instigator of that conduct: party counsel.

The hourly method of payment has the opposite shortcoming in that encourages arbitrators to be overly thorough. Each extra hour of work leads to greater compensation. In such a system, arbitrators have an incentive to more deeply delve

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[106] Rogers, *supra* note 34, at 1013–14.

into every issue, which would include addressing unethical conduct. Minor ethical problems could hypothetically be blown out of proportion even if parties did not perceive a significant problem.

IV. POTENTIAL AVENUES AVAILABLE TO ARBITRAL INSTITUTIONS TO MITIGATE UNETHICAL CONDUCT BY PARTY COUNSEL

The following matrix identifies, under the reasoning of this article, who should take the lead in addressing unethical conduct by party counsel based upon the nature of the conduct.

	Micro (individual arbitration)	**Macro (persistent unethical conduct)**
Misdemeanor (rules specific to the pending arbitration)	Arbitrator	Arbitrator
Felony (widely accepted principles are violated)	Arbitrator and Institution	Institution

A range of commentators have made blanket statements that arbitral intuitions should take measures to enforce ethical standards.[107] However, commentators remain vague as to the remedies that should be available to institutions. Some commentators have concluded: "The institutions seems ill suited to accept the enforcement role. The arbitrators can impose sanctions, where authorized, in the arbitral award; the institutions can just send a bill.[108]

I believe that such a conclusion is much too narrow. A wide range of options exist for institutions to mitigate unethical conduct and that a certain amount of creativity is called for. 109 I do not advocate for anyone or combination of approaches. The following proposals should serve as a starting point of discussion of potential avenues for arbitral institutions to explore in their attempt to mitigate unethical conduct.

D. *Misdemeanor / Micro Level: A Minor Ethical Violation in an Individual Arbitration*

The misdemeanor / micro constellation of unethical conduct is the prototypical situation for an arbitrator to address alone without the assistance of an institution. Other than providing arbitrators with clear remedies/sanctions, institutions should

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[107] Horvath, *supra* note 2; BORN, *supra* note 2, at 2325; Vagts, *supra* note 2, at 251; Perry, *supra* note 15; Chessa, *supra* note 21 ("Nassib Ziade, CEO of the Bahrain Chamber of Dispute Resolution called on arbitration institutions to issue still more ethical regulation [. . . institutions] need powers to perform this policing role"); Lau, *supra* note 80 (position of Michael Hwang).

[108] Edna Sussman & Solomon Ebere, *All's Fair in Love and War - Or Is It? The Call for Ethical Standards for Counsel in International Arbitration*, 22 AM. REV. INT'L ARB. 611, 622 (2011).

[109] Wilske, *supra* note 9, at 166-171 (discussing various options for sanctions).

not play a role in addressing such conduct. Arbitrators should address such situations as they see fit, e.g., indirectly through a decision on costs against the party or directly against an offending attorney. Institutions, at most, should put a note in the offending attorney's permanent record after an arbitrator takes some kind of action.

E. *Felony / Micro: A Serious Ethical Violation in an Individual Arbitration*

The felony / micro constellation of unethical conduct is a situation where either an arbitrator or an institution can take the lead. When the arbitrator takes the lead (acting as a strong sheriff), institutions can support them by:

- Having a framework in place (including clear sanctions) for addressing unethical conduct.
- Providing a sounding board: for example, the ICC Secretariat is available to answer questions from arbitrators and provide guidance on procedural matters. Such guidance can also extend to how arbitrators or the institution have addressed similar situations in the past.
- Providing access to the attorney's permanent record: arbitrators can use the information to evaluate the attorney's current conduct in the context of past conduct.
- Providing a means for arbitrators to outsource the responsibility to resolve the matter to institutions. For the reasons outlined above arbitrators may wish to avoid directly addressing unethical conduct. Arbitrators could have the ability to refer matters to institutions secretly/confidentially or formally (i.e., with notice to the parties).[110] If secretly/confidentially, institutions can simply give the impression that they are taking up the issue on their own prerogative, thereby inoculating the arbitrator from blowback from the matter.

When the institution takes the lead, they can either do so on their own initiative or upon request from the arbitrator or parties. Institutions can:

- Conduct factual inquiries.[111]
- Issue cost sanctions directly against the attorney.[112]

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[110] Horvath, *supra* note 2 ("There is [currently] no established procedure for lodging complaints against counsel with arbitral institutions.").

[111] Annalise Nelson, *The LCIA Arbitrator digests: An interview with William (Rusty) Park*, KLUWER ARBITRATION BLOG (Nov. 23, 2011), http://kluwerarbitrationblog.com/2011/11/23/the-lcia-arbitrator-challenge-digests-an-interview-with-william-rusty-park/ (If institutions are competent to conduct in depth factual inquires with regard to arbitrator challenges it follows they are similarly competent to conduct factual inquires with regard to attorney conduct. CIArb already conducts factual inquiries, with hearing, to determine whether unethical conduct has taken place: "[t]he [LCIA Arbitrator] digests illustrate the highly fact-dependent nature of [arbitrator] challenges, which can be quite time consuming to hear. In one challenge the LCIA received a total of nine binders from the parties, and held a day-long hearing which led to twenty-page opinion explaining [the LCIA's decision]."); *CIArb Shows Policing Potential, supra* note 85.

[112] Rogers, *supra* note 19, at 29.

- Write a not nice letter to the offending attorney.[113]
- Name and shame an attorney (see below).

Under either an arbitrator or institution driven process, any sanction should be noted in the attorney's permanent record.

F. *Misdemeanors/Macro Level: A Pattern of Mildly Unethical Behavior Across Arbitrations*

The misdemeanor/macro constellation of unethical conduct mirrors the misdemeanor/micro constellation in that the arbitrator remains in the driver's seat for sanctioning unethical attorney conduct. The only distinction is that institutions can make an attorney's permanent record available to the arbitrator.

G. *Felonies/Macro Level: A Pattern of Serious Unethical Behavior Across Arbitrations*

The felonies/macro constellation of unethical conduct should fall primarily within the providence of an institution. Arbitrators, if they wish to take the responsibility upon themselves, may sanction the acts taken in the pending arbitration. But, those sanctions should be limited in scope to that particular act as arbitrators have no business sanctioning conduct committed in other arbitrations. A clear distinction exists in evaluating an act in the context of previous acts and sanctioning those previous acts.

The more severe sanctions should remain within the providence of institutions. In addition to the obvious sanction of fining an attorney, an institution could suspend or ban an attorney:

> [I]nstitutions should bear the responsibility of enforcing ethical standards – and could consider banning misbehaving counsel from appearing in cases before them for a certain period of time. The threat of such sanctions . . . could persuade lawyers and law firms to "police themselves.[114]

Such a severe remedy gives rise to a broad range of issues outside the scope of this article, like the right to counsel.[115]

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[113] *See* London Court of International Arbitration, *supra* note 94, at art. 18.6 (a tribunal may issue "(i) a written reprimand; (ii) a written caution as to future conduct in the arbitration."); CHARTERED INSTITUTE OF ARBITRATORS, *supra* note 86 ("reprimand or warn the member as to their future conduct").

[114] Perry, *supra* note 15 (quoting Ben Yap partner at C&G Law in Manila); *see also* Ross, *supra* note 73 (position of David Rivkin, president of the IBA).

[115] *E.g.*, ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE STATUTE] §594(3), http://www.viac.eu/de/recht/83-recht/gesetze/196-oe-schiedsrecht-zpo-idf-2013-neu (Austria) ("Die Parteien können sich durch Personen ihrer Wahl vertreten oder beraten lassen. Dieses Recht kann nicht ausgeschlossen oder eingeschränkt werden." [Parties can be represented or advised by persons of their choosing. This right cannot be excluded or restricted]. Whether such provisions can be worked around remains an open question); Lau, *supra* note 81 (The Hong Kong International Arbitration Center

An institution could publically name and shame an attorney.[116] The following rationale was applied to bad arbitrators and could also apply to problematic party counsel:

> Finally, arbitral institutions may also benefit from more publicly available information about arbitrators. Currently, if an arbitral institution knows about serious past misconduct by an arbitrator, it has limited options. It can avoid appointing that person when it acts as an appointing authority or remove it from its list of arbitrators (if it is an institution that maintains such a list). An institution cannot, generally, advise parties about this information as the parties select the arbitrators who will preside in their case. An arbitral institution, nevertheless, suffers when it administers an arbitration that goes awry because of arbitrator misconduct or ineffectiveness. With increasing competition among them, arbitral institutions may welcome the opportunity to reduce appointments of ineffectual arbitrators through increased publicly available information.[117]

Institutions can shift the risk presented by a repeatedly unethical attorney to prospective clients. For example, a rule could state that if a party engages an attorney who has been named and shamed by that institution, the party must pay an additional advance on costs to cover the event where the attorney once again engages in such conduct. The market would likely be merciless to an attorney in that situation.

Institutions can work with other institutions. The ASA is working on such an approach.[118] The ASA hopes to create a "Global Ethics Council," comprised of different arbitral institutions, "responsible for examining claims of counsel misconduct and empowered to impose a range of sanctions".[119] Although I do not agree with such an approach as it will unduly hamper flexibility and diversity in international arbitration,[120] I do believe institutions can work together to a lesser degree, e.g., they can share information on past unethical conduct committed in arbitrations under their rules (sharing access to permanent records).

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determined the right to counsel cannot be worked around: banning counsel "could not be reconciled with a party's fundamental right to be represented by a lawyer of its own choice").

[116] *Contra* Lau, *supra* note 80 ("Sanctions give tribunals more explicit tools to regulate procedures and enable arbitrations to be run more effectively and efficiently, argued van Haersolte-van Hof, but she doubted the LCIA would be publishing many decisions in which counsel have been sanctioned. In her native jurisdiction (the Netherlands) there is no "naming and shaming" and sanctions would not be public.").

[117] Catherine Rogers, *The International Arbitrator Information Project: An Idea Whose Time Has Come*, KLUWER ARBITRATION BLOG (Aug, 9, 2012), http://kluwerarbitrationblog.com/blog/2012/08/09/the-international-arbitrator-information-project-an-idea-whose-time-has-come/.

[118] Geisinger, *supra* note 8, at 455; Elliot Geisinger, *"Soft Law" and Hard Questions: ASA'S Initiative in the Debate on Counsel Ethics in International Arbitration*, ASA SPEC. SERIES NO. 37, 17-32 (2015).

[119] Thomas, *supra* note 75 (position of Elliott Geisinger president of ASA).

[120] *See* Ross, *supra* note 72 (David Rivkin, President of the IBA, "regarded the creation of a Global Arbitration Ethics Council staffed by representatives of arbitral institutions and organisations as a 'step too far'".); *see also* Wilske, *supra* note 9, at 164-66 (2015).

Institutions can have a policy of referring unethical conduct to the local bar association where a sanctioned attorney comes from. Institutions can also proactively seek to build relationships with local bar associations. In turn, local bar associations could agree to consider violations of the ethical codes applied by international arbitral institutions as unethical conduct under their national regime and punish the offending attorney accordingly. Arbitral institutions could (lobby) also work with bar associations to get them to agree that domestic provisions on attorney conduct should not automatically extend to international arbitration when an institution provides ethical standards.

Institutions can target law firms that regularly employ troublesome attorneys. A troublesome gap in any proposed regulatory scheme is the reality that parties are generally represented by law firms and not just individual counsel. If an attorney has a problematic track record, nothing would preclude them from working behind the scenes of a law firm. A senior attorney can also attempt to hide behind the actions of a junior. A recent Chartered Institute of Arbitrators' Disciplinary Tribunal ruled against Andrei Astapov (managing partner of the firm in question) who contended "he had been misled by one of his own [junior] colleagues."[121] The tribunal rejected the argument and found Mr. Astapov "must be held responsible for statements made in his own name as well as on behalf of his firm."[122] Many of the proposals made in this article focus on sanctioning individual attorneys and have limited relevance when speaking of attorneys who are not counsel of record but still play a key role. Institutions can craft sanctions for firms with a clear track record of engaging in unethical conduct.

CONCLUSION

If arbitration suffers from unethical conduct by party counsel to such a degree that action is called for, arbitral institutions can, and arguably, should heed the call. "It would probably be best if arbitral institutions and arbitral tribunal's coordinate their efforts to make sure any ethical issues are tackled within the arbitration arena. . . ."[123] I have proposed a rubric (misdemeanors v. felonies and micro v. macro) for institutions and arbitrator to coordinate their efforts to mitigate unethical conduct by party counsel.

Different wrongs require different remedies. Institutions can make available a range of remedies that no other stakeholder in the arbitral process can. Moreover, institutions can prevent party counsel from exploiting the autonomous nature of international arbitration to routinely engage in unethical conduct.

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[121] In the Matter of the Chartered Institute of Arbitrator's Disciplinary Tribunal Between Chartered Institute of Arbitrators and Andriy Astapov, Decision of the Trib., at § 5.1 (July 20, 2015), http://www.ciarb.org/docs/default-source/Professional-Conduct/tribunal-final-decision-andriy-astapov-july-2015.pdf?sfvrsn=0.

[122] *Id*. at § 6.23.

[123] Wilske, *supra* note 9, at 172-73 (2015).


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AN ALTERNATIVE APPROACH OF TRANSFERABLE DEVELOPMENT RIGHTS SYSTEMS

Patrick John Warren[*]

Abstract

In the rising sea level and increasing number of devastating storm surges, the changing climate causes damage to coastal property throughout the United States. Transferrable development rights systems are one of several initiatives pursued to mitigate damage to coastal property. Unfortunately, transferrable development rights systems have not realized their potential in protecting these damage-prone areas. Similarly, cap-and-trade systems did not realize their potential in reducing the emission of greenhouse gases when first introduced. Over time, mechanics of cap-and-trade systems developed. Eventually, cap-and-trade systems proved to be successful in reducing the emission of greenhouse gases. The successful elements of cap-and-trade systems could and should be implemented into the struggling transferrable development rights systems. In doing so, transferrable development rights systems will learn from the mistakes of early cap-and-trade systems and recognize their true capability in mitigating further damage caused by the rising sea level and increasing number of devastating storm surges.

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INTRODUCTION

Coastal properties are increasingly becoming susceptible to climate induced damage. The changing climate is, among other things, allowing both the sea level to rise and is increasing the likelihood of severe storms and their subsequent storm surges.[1] The rising sea level and increasing number of devastating storm surges has continued to destroy coastal properties throughout the United States.[2] Interestingly, "[m]ore than 5,790 square miles and more than $1 trillion of property and structures are at risk of inundation from sea level rise . . . ."[3]

In 2012, following the arrival of Hurricane Sandy, Governor Andrew Cuomo of New York, jokingly, yet somewhat truthfully, revealed to President Barack Obama, after assessing the damage impaired upon the state by Hurricane Sandy, that "[we have] a 100-year flood every two years now."[4] Cuomo made this remark with the New York City flooding caused by Hurricane Irene and Tropical Storm Lee firmly in mind. Like New York City, most of the United States coast has been harmed by the continually rising sea level and increasing occurrences of extremely costly natural disasters.

Despite the continually rising sea level and increasing number of natural disasters affecting United States coastlines, the initial reaction of many coastal property owners and local governments is to rebuild or fortify the infrastructure most susceptible to these natural developments. Unfortunately, these reactions lead to a higher likelihood of future destruction from the continually rising sea level and future coastal storms. This is because these efforts to rebuild and fortify continue to be tested by the ever-changing climate.[5] Instead of rebuilding or fortifying, property owners and local governments should focus their attention on mitigating future losses from the rising sea level and future devastating storms. This, however, is much easier said than done.

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[1] *See Evaluating the Effects of Future Sea Level Rise and Storm Surges Along U.S. Coastlines*, NATIONAL CENTER FOR ATMOSPHERIC RESEARCH, https://ncar.ucar.edu/press/evaluating-the-effects-of-future-sea-level-rise-and-storm-surges-along-us-coastlines ("[T]he impacts of a higher average temperature have far more discernable impacts to those living along U.S. coastlines where changes caused by rising sea levels resulting from warming climate have appreciable consequences. Among these effects are increasingly dramatic storm surges that, combines with higher water levels, are increasing risk of damage to coastal infrastructure, society, and economies").

[2] *See id*. (evaluating the effects of future sea level rise and storm surges across U.S. coastlines).

[3] *See* Joshua Ulan Galperin & Zaheer Hadi Tajani, *Resilience and Raisins: Partial Takings and Coastal Climate Change Adaptation*, 46 ENVTL. L. REP. 10123, 10124 (2016).

[4] *Cuomo: 'Extreme Weather' Needs New Reality*, UPI (Oct. 30, 2012), http://www.upi.com/Top_News/US/2012/10/30/Cuomo-Extreme-weather-needs-new-reality/46541351634041/ (New York Governor Andrew Cuomo discussing the need to cope with the "new reality of extreme weather events").

[5] *See* Jan Ellen Spiegel, *CT's Repeat Flood Damage Dilemma: Move Out or Rebuild?*, THE CT MIRROR (Oct. 9, 2015), http://ctmirror.org/2015/10/09/cts-repeat-flood-damage-dilemma-move-out-or-rebuild/ [hereinafter *Move Out or Rebuild?*] (discussing of the continuing trend of rebuilding homes damaged by hurricanes and tropical storms while maintaining the expectation that another, similar storm may pose another threat in the future).

Because coastal property is often the most expensive and sought-after property in an area,[6] owners of coastal property are reluctant to move elsewhere;[7] especially with so much doubt that our climate is changing at all.[8] Alternatively, these threatened coastal areas often provide local governments with most of their tax revenues. These tax revenues are based on the property values which, as highlighted earlier, are often highest on the coast. Consequently, these highly taxable coastal properties are some of the most prone to devastation caused by rising sea levels, hurricanes, and tropical storms.[9] Thus, there is substantial interest to remain within these valuable and vulnerable locations from both property owners and local governments alike.[10] In order to avail additional damage from sea level rise and natural disasters, these individuals will need to either relocate or fortify their existing properties. Unfortunately, if these individuals relocate, they will either abandon their property and realize a loss for their entire property value, or the more likely option, sell their property to another daredevil property owner who will then be subject to the wrath of Mother Nature. Furthermore, local governments will need to seek alternative tax revenue streams to accommodate for an inland retreat among property owners. Fortunately, there may be an optimal solution for property owners and local governments to utilize in the wake of our threatening climate changes.

The Supreme Court, in *Penn Central Transportation Co. v. City of New York*, may have established the best approach to avoid future damages of coastal properties from the rising sea level and increasing occurrence of natural disasters.[11] In the

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[6] *See* Julie Zeveloff, *Here's How Much Value a Waterfront Location Can Add to Your Home*, BUSINESS INSIDER (Aug. 21, 2012), http://www.businessinsider.com/how-much-value-a-waterfront-location-can-add-to-your-home-2012-8 [hereinafter *Valuable Waterfront Locations*]; *see generally* Alex Johnson, *Waterfront Properties Worth 60 Per Cent More Than Similar Homes Inland*, INDEPENDENT (July 29, 2014), http://www.independent.co.uk/property/waterfront-properties-worth-60-per-cent-more-than-similar-homes-inland-9634926.html.

[7] *See* Spiegel, *supra* note 5 (asking a woman who saw nine feet of water dumped into her home during Hurricane Sandy whether she would consider leaving, which prompted the immediate and emphatic response: "No, I like it here."); *see also A Tale of Two Storms: Rebuilding After the U.S. and Japanese Disasters*, KNOWLEDGE @ WHARTON (Oct. 3, 2013), http://knowledge.wharton.upenn.edu/article/tale-two-storms-rebuilding-u-s-japanese-disasters/ ("Abandoning coastal property, no matter how it may be threatened by future natural disasters, is difficult for people worldwide").

[8] *See,* Jason Taylor, *'Global Warming the Greatest Scam in History' Claims Founder of Weather Channel*, EXPRESS (June 9, 2015), http://www.express.co.uk/news/clarifications-corrections/526191/Climate-change-is-a-lie-global-warming-not-real-claims-weather-channel-founder.

[9] *See Coastal Hazards*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (July 27, 2015), http://oceanservice.noaa.gov/hazards/natural-hazards/ (discussing the threats presented to those who live along the coast by sea level rise and coastal storms, among others).

[10] Ryan McNeill, et. al., *As the Seas Rise, a Slow-Motion Disaster Gnaws at America's Shores*, REUTERS (Sept. 4, 2014), http://www.reuters.com/investigates/special-report/waters-edge-the-crisis-of-rising-sea-levels/ (discussing the government's reaction to problems presented by coastal flooding); *see also* Dr. Tim Doggett, *The Growing Value of U.S. Coastal Property at Risk*, AIR CURRENTS (Apr. 23, 2015), http://www.air-worldwide.com/Publications/AIR-Currents/2015/The-Growing-Value-of-U-S--Coastal-Property-at-Risk/ (discussing the growing number and value of coastal properties and how the rising sea level and increased damage caused by hurricane storm surges is creating a substantial risk for these properties).

[11] *See generally Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) [hereinafter *Penn Central*].

landmark takings case, the Court found a New York City ordinance which called for the preservation of historic landmarks within the city, and subsequently prevented many alterations or developments of the limited number of historic landmarks, to be an acceptable exercise of power.[12] In doing so, the Court found that restricting a developer from building an office building above the Grand Central Station train terminal did not constitute as a regulatory taking.[13] This reasoning, among other things, relied on the permission for the transfer of developmental rights from historic landmark property owners to nearby property owners who have already developed their properties to their developmental capacities.[14] Thus, the Court found that New York City did not need to justly compensate historic landmark property owners for restricting the development of these historic landmarks because these property owners can instead sell their unused developmental rights.[15] This is because the "Court has held that if a land-use restriction deprives landowners of all reasonable use of their land or if landowners cannot realize a reasonable economic return on their investment in the land, then the restriction results in a 'taking' for which landowners must be provided just compensation."[16] In *Penn Central*, the ordinance did not deprive the owner of Grand Central Station all reasonable use of his land or of his ability to realize an economic return on his initial investment. In fact, the ordinance allowed the owner of Grand Central Station to sell his unused and unusable developmental rights.

Since the landmark decision in *Penn Central*,[17] municipalities and states alike have attempted to implement replica transferable development rights (TDR) systems to preserve certain areas and further develop others.[18] The purpose of this paper is to analyze how a TDR system can be successfully implemented to reduce the potential harms to coastal communities posed by the rising sea level, severe coastal storms, and their violent storm surges in the United States. In doing so, an analysis of the different reactions to climate change will be presented. Thereafter, an explanation of TDR systems will be offered. Next, a view into numerous cap-and-trade systems will be explored with the intention of replicating successful parts of cap-and-trade systems into a proposed TDR system. Finally, a proposed TDR

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[12] *Id*. at 136 ("[T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions").

[13] *Id*. at 138 ("[W]e conclude that the application of New York City's Landmarks Law has not affected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.").

[14] *Id*. at 137 ("[Penn Central Transportation Co.'s] ability to use [the air] rights has not been abrogated; [the City of New York] made transferable to at least eight parcels in the vicinity of the Terminal, one of two of which have been found suitable for construction of new office buildings.").

[15] *See id*.

[16] Dennis J. McEleney, *Using Transferable Development Rights to Preserve Vanishing Landscapes and Landmarks*, 83 ILL. B.J. 634, 635 (1995) (citing *Penn Central*, at 136).

[17] *See Penn Central*, *supra* note 11.

[18] *Barancik v. Cty. of Marin*, 872 F.2d 834, 837 (9th Cir. 1988) (finding that a TDR system is "rationally related to the overall purpose of preserving agriculture in the area").

system will be offered which implements certain qualities of several cap-and-trade systems with considerations for the challenges which lie ahead of implementing such a revolutionary platform.

I. RESPONSES TO CLIMATE CHANGE

There are three unique responses to minimize the effects of climate change: climate resilience, climate adaptation, and climate mitigation.

A. *Climate Resilience*

The "[c]limate-resilien[ce] … framework takes a "development-first" approach…."[19] This approach often does not provide for a sustainable, ever-lasting result. Traditionally, this method centers around "hard construction approaches such as vertical concrete, metal, or wood break-walls, gabions, and rip rap."[20] Unfortunately, this development-first approach does not always protect the threatened areas which it is designed to protect.[21] In fact, such undertakings actually threaten adjacent areas as they do not absorb the force of storms; instead, these hard structures shift the force to another area, which usually results in erosion problems in front of the "fix" and elsewhere.[22] "Climate-resilient pathways integrate current and evolving understandings of climate change consequences and conventional and alternative development pathways to meet the goals of sustainable development."[23] Alternatively, a soft construction approach can be undertaken. Rather than the erection of a stonewall-like structure, soft construction approaches typically entail introducing natural barriers, such as a wetland area or an oyster bed.[24] Although both

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[19] *Climate-Resilient Development: A Framework for Understanding and Addressing Climate Change*, US AID (March 2014), http://pdf.usaid.gov/pdf_docs/pbaaa245.pdf [hereinafter *Climate-Resilient Development*].

[20] *Shoreline Stabilization: Ecological Importance of Natural Shorelines and Proper Shoreline Stabilization*, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, http://www.dec.ny.gov/permits/50534.html [hereinafter *Shoreline Stabilization*] (internal quotation marks omitted).

[21] *Climate-Resilient Development*, *supra* note 19, at 8.

[22] Jan Ellen Spiegel, *Connecticut's Trouble with Seawalls*, THE CT MIRROR (Aug. 21, 2013), http://ctmirror.org/2013/08/21/connecticuts-trouble-seawalls/ ("Put up a seawall and the energy pattern becomes reflective. Waves that hit a wall are magnified, sending energy up and down. The waves dig at the base of the wall in particular, a process known as scouring, that can cause even larger waves and more erosion to the point that the wall collapses. Walls also prevent that sideways movement of sediment that would normally replenish a beach. Throw in higher water levels from sea level rise and/or storms and the dynamic gets even more potent. As sea levels rise the natural tendency of a shoreline is to migrate landward. But if there's a seawall, the beach has nowhere to go. So it just goes away."); *see also Shoreline Stabilization*, *supra* note 20.

[23] FATIMA DENTON ET AL., CLIMATE-RESILIENT PATHWAYS: ADAPTATION, MITIGATION, AND SUSTAINABLE DEVELOPMENT (2012), https://docs.google.com/file/d/0B3J65opoNdSuc1Y5clVNaDZBaEE/edit.

[24] KARA E. REEVE & RYAN KINGSTON, NAT'L WILDLIFE FED'N, GREEN WORKS FOR CLIMATE RESILIENCE: A GUIDE TO COMMUNITY PLANNING FOR CLIMATE CHANGE, (2014) (discussing the ability of natural infrastructure, such as sand dunes, shorelines, and oyster beds, and their ability to protect

hard and soft construction effectively protects areas in the same manner, soft approaches absorb some of the force caused by storms instead of merely shifting it downstream. On the other hand, soft construction does not provide as much protection to a specific area as hard construction.

B. *Climate Adaptation*

There are many ways to implement a climate adaptation system but overall, the different adaptation systems employ the same reasoning within their use. Climate adaptation procedures involve careful and calculated steps which people take to adapt to their changing environments.[25] This approach differs from a climate resilience approach because there, parties affirmatively erect protective edifices or restructure their properties so they may continue enjoying their property in its current use. Climate adaptation, on the other hand, provides for an evaluation of the changing climate. In doing so, a response is developed which may involve an abandonment of the threatened area or a restriction on an activity in an area which increases the likelihood of damage. "Analogues of past climate change contrast with scenarios derived from climate model experiments in the search for adaptation insights."[26] Thus, affected property owners or local governments assess the changing climactic impacts and respond by using their properties in a different manner. In short, adaptation involves efforts by property owners undertaken to limit one's own vulnerability to climate change impacts through various measures, while not necessarily dealing with the underlying cause of those impacts.[27]

C. *Climate Mitigation*

A climate "[m]itigation [response] involves reducing the magnitude of climate change itself . . . ."[28] This approach includes using new technologies, making older equipment more energy efficient, or changing management practices.[29] Mitigation thus involves affirmative attempts to reduce the cause of a destructive climate phenomenon. Unfortunately, however, this approach does not altogether avail the potential devastating effects of such an event.[30]

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communities from sea level rise and storm surges, without the negative effects that man-made structures such as seawalls, levees, or revetments cause).

[25] *See* NAT'L PARK SERVICE, CLIMATE CHANGE RESPONSE STRATEGY 14 (2014), http://www.nature.nps.gov/climatechange/docs/NPS_CCRS.pdf ("Adaptation planning and implementation will require collaboration and coordinated actions among and across many jurisdictions").

[26] W. NEIL ADGER ET AL., ADAPTATION TO CLIMATE CHANGE IN THE DEVELOPING WORLD 179, 187 (2003).

[27] *See* Michael Mann & Brian Gaudel, *Adaptation vs. Mitigation*, PENN STATE UNIVERSITY (2015), https://www.e-education.psu.edu/meteo469/node/175.

[28] *See id*.

[29] *See Climate Change Mitigation*, U.N. ENVT. PROGRAMME, http://www.unep.org/climatechange/mitigation/.

[30] *See* Doggett, *supra* note 10.

Cap-and-trade systems are given the most attention.[31] This is because they have had great success in reducing the overall emissions of greenhouse gases,[32] water pollution,[33] and the damage caused by acid rain.[34] Although cap-and-trade systems are normally implemented to curb pollution,[35] there may be significant aspects to a cap-and-trade system which can be similarly successful in a climate adaptation system, specifically, a TDR system. Interestingly, aspects of a climate resilience approach may also be necessary to complement a TDR system which incorporates cap-and-trade characteristics. To investigate this idea further, it is first necessary to provide an explanation of TDR systems, an analysis of why they may be the correct tool to address the problems of the rising sea level, coastal storms, and threatening storm surges, and insights into why TDR systems have not yet found the success which many anticipate and desire.

II. WHAT IS A TRANSFERABLE DEVELOPMENT RIGHTS SYSTEM?

A TDR system is a land use technique arising under land use regulations which allows property owners in designated areas to sell the unused developmental rights of their properties to property owners in other specific areas. Sellers in the Sending Zones are compensated for the rights to further develop their properties up to the zoning requirements,[36] while purchasers of the unused developmental rights are allowed to build their properties in excess of the existing local zoning ordinances.[37] In their use, TDR systems allow for the preservation of natural, agricultural, and

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[31] *See How Cap and Trade Works*, ENVT'L DEF. FUND, https://www.edf.org/climate/how-cap-and-trade-works ("Cap and trade is the most environmentally and economically sensible approach to controlling greenhouse gas emissions, the primary driver of global warming").

[32] Robert N. Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENVT'L L. REV. 293, 298 (2008) [hereinafter *Meaningful Cap-and-Trade*] ("A cap-and-trade system limits the aggregate emissions of a group of regulated sources by creating a limited number of tradable emission allowances and requiring each firm to surrender a quantity of allowances equal to its own emissions").

[33] *See* Jessica Palombo, *Can a Version of Cap-and-Trade Reduce Water Pollution? Florida Hopes So*, WFSU (Aug. 20, 2014), http://news.wfsu.org/post/can-version-cap-and-trade-reduce-water-pollution-florida-hopes-so (reporting on the cap-and-trade system currently utilized in Jacksonville, FL to improve water quality).

[34] *See* Steve Richey, *The Pros and Cons of Cap and Trade*, STEVE RICHEY (Nov. 15, 2010), http://www.steverichey.com/writing-samples/climate-change/the-pros-and-cons-of-cap-and-trade/ (discussing the vastly successful Acid Rain Program which "sought to reduce the damage caused by acid rain . . . by creating a cap and trade system for sulfur dioxide and nitrogen oxide emissions").

[35] *See* Richard Conniff, *The Political History of Cap and Trade*, SMITHSONIAN MAG. (Aug. 2009), http://www.smithsonianmag.com/air/the-political-history-of-cap-and-trade-34711212/?no-ist (discussing the history of cap-and-trade systems their intended usage to "clean[] up the world-by working with human nature instead of against it") ("The basic premise of cap-and-trade is that government doesn't tell polluters how to clean up their act. Instead, it simply imposes a cap on emissions").

[36] *See* Joseph D. Stinson, *Transferring Development Rights: Purpose, Problems, and Prospects in New York*, 17 PACE L. REV. 319, 327 (1996) [hereinafter *TDRs in NY*] (discussing TDR systems applicability to preserving historic landmarks).

[37] *See* John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L. J. 75, 76-77 (1973) [hereinafter *Development Rights Transfer*]; *see also* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION § 3:56 (2015 ed.).

historic areas and simultaneously promote direct growth in areas where it is desired.[38] "A TDR plan attempts to compensate owners for the restriction on their development rights, without cost to the city, by allowing them to sell any unused development rights to the owner of other sites."[39] This is possible because a marketplace is created for purchasers to acquire additional developmental rights for their properties from sellers who wish to capitalize on their unused developmental capabilities.[40] Moreover, when landowners in such devastation prone areas sell their development rights, they assure that potential damages from natural disasters will likely be less than if the coastal property owner developed the property to the maximum allowable capacity.[41]

III. DO TRANSFERABLE DEVELOPMENT RIGHTS SYSTEMS WORK?

Traditionally, TDR systems have not been effective tools for preserving open space.[42] This is because there are many challenges which impede upon TDR systems' ability to achieve its goals. TDR systems are difficult to implement due to the multiple political divisions which have an input regarding their use within a particular location.[43] Additionally, TDR systems do not reduce the need for zoning, they can be complex to administer, and may require substantial investment in community education systems for the public.[44] Furthermore, "although the permanency of TDR systems can be an advantage, it may also be a liability, since a community's land use needs change over time."[45] Yet, TDR systems continue to be implemented throughout the country.[46] Despite their continued use, TDR systems continue to fail. Because TDR systems continue to produce underwhelming results, this article will present an alternative approach for TDR systems to follow. This alternative approach could provide drastically different results.

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[38] *See* Costonis, *supra* note 37; *see also* J.B. Ruhl, *Agriculture and Ecosystem Services: Strategies for State and Local Governments*, 17 N.Y.U. ENVT'L. L. J. 424, 438 (2008) (discussing a proposed TDR system for preserving agricultural land); *see also* Stinson, *supra* note 36.

[39] McEleney, *supra* note 16.

[40] Depending on the structure of the TDR system, purchasers can either purchase development rights directly from the seller, as seen in *Penn Central*, in an auction, or to a bank which maintains ownership of the development rights until a purchaser is found.

[41] If a coastal home valued at $300,000 has the potential for further development, which will increase the property value to $500,000, a TDR system will incentivize the landowner from selling the development rights to a purchaser, and keeping his property value constant. Therefore, if a storm surge completely destroyed the home in question, the property loss will remain at $300,000 instead of potentially being $500,000.

[42] Ari D. Bruening, *The TDR Siren Song: The Problems with Transferable Development Rights Programs and How to Fix Them*, 23 J. LAND USE & ENVT'L L. 423, 424 (2008) [hereinafter *The TDR Siren Song*].

[43] *See id*. at n.32 (discussing political opposition to "densifying" neighborhoods).

[44] Jason Hanly-Forde et al., *Transfer of Development Rights Programs*, CORNELL U., http://www.mildredwarner.org/gov-restructuring/privatization/tdr [hereinafter *TDR Programs*] (discussing the challenges TDRs may face from communities and local governments).

[45] *See id*.

[46] *See* Bruening, *supra* note 42, at 424 ("Recent years have seen a remarkable proliferation of TDR schemes, but there is no indication that these programs are seeing any more success than previous schemes").

Cap-and-trade systems bear significant similarities to TDR systems. Since cap-and-trade systems have largely been successful in decreasing the number of greenhouse gases in the atmosphere, and TDR systems are intended to decrease the number of developmental rights in a sensitive area, various aspects of cap-and-trade systems will be explored to identify potential characteristics which may be beneficial for a proposed TDR system. Prior to identifying attractive cap-and-trade provisions, a brief explanation of cap-and-trade systems will first be presented. Thereafter, several cap-and-trade systems will be explored to identify aspects of such cap-and-trade systems which can be implemented in a TDR system.

IV. WHAT IS A CAP-AND-TRADE SYSTEM?

Cap-and-trade systems have typically been implemented to reduce the emission of greenhouse gases in the atmosphere.[47] In doing so, cap-and-trade schemes have limited the total number of greenhouse gas emissions that a polluter may emit.[48] If the polluter is unable to adhere to these limits, he can purchase an allowance to pollute the additional quantity in excess of the cap.[49] The excessive polluter is able to purchase these allowances from other polluters who are not emitting up to the emissions limit.[50] Cap-and-trade systems therefore make it economically advantageous for polluters who do not pollute up to their regulated thresholds because they can then sell the rights for their additional emitting capabilities to others.[51]

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[47] *See* J. Scott Childs, *Continental Cap-and-Trade: Canada, the United States, and Climate Change Partnership in North America*, 32 HOUS. J. INT'L L. 393, 398 (2010) ("Since his inauguration as President in January of 2009, Obama has maintained a policy of pursuing cap-and-trade to reduce carbon emissions by 80%"); *see generally* Ann E. Carlson, *Designing Effective Climate Policy: Cap-and-Trade and Complementary Policies*, 49 HARV. J. ON LEGIS. 207 (2012) (discussing the broad usage of cap-and-trade systems); *see also* Staving, *supra* note 32, at 298.

[48] *See generally* Richard Schmalensee & Robert N. Stavins, *Lessons Learned from Three Decades of Experience with Cap-and-Trade* (The Rev. of Envt'l Econ. & Pol'y, Working Paper No. RWP 15-069, 2015) [hereinafter *Lessons Learned*].

[49] *See id*. at 2 (discussing the various cap-and-trade systems which have been implemented over the past three decades).

[50] For example, if there was a cap on carbon dioxide emissions of 100 tons per year (t/p/y), ABC Electric emits 120 t/p/y of carbon dioxide, and XYZ Electric emits 80 t/p/y of carbon dioxide, then ABC can purchase an allowance for 20 t/p/y of carbon dioxide from XYZ instead of reducing their emissions to meet the cap. In doing so, the overall effect of the cap is still met as the net emissions remains at 200 t/p/y of carbon dioxide. However, after the sale of the allowance, XYZ will only able to emit 80 t/p/y unless it purchases an allowance from another emitter.

[51] *See* Ann E. Carlson, *Designing Effective Climate Policy: Cap-and-Trade and Complementary Policies*, 49 HARV. J. ON LEGIS. 207, 209 (2012) [hereinafter *Designing Effective Climate Policy*] ("Emitters may meet their allocated amount in one of three ways. They may use all of their allowances. They may cut their pollution to levels below the amount they have been allocated and trade/sell the excess allowances to those who need them. Or they may pollute in excess of the amount of allowances allocated and make up the difference by purchasing allowances from those emitters who don't need all of theirs").

V. TYPES OF CAP-AND-TRADE SYSTEMS

Although cap-and-trade systems are generally used to regulate pollutants,[52] they can be utilized for a variety of purposes.[53] Through their wide usage, cap-and-trade systems have been altered to successfully regulate different substances and the same substances in different geographical areas. Because there are various aspects in different cap-and-trade systems which may be beneficial to a TDR system, insight into several of the most notable cap-and-trade systems will next be presented. Throughout the following descriptions of these cap-and-trade systems, attractive aspects of each system will be highlighted with a view into their transferability into a TDR system.

A. *Kyoto Protocol*

"The Kyoto Protocol is an international agreement linked to the United Nations Framework Convention on Climate Change, which commits its parties by setting internationally binding emission reduction targets."[54] This groundbreaking agreement "entered into force on [February 16, 2005] after States accounting for over 55% of global emissions of [greenhouse gases] had ratified it."[55] The Kyoto Protocol is interesting because it recognized that the developed countries of the world are principally responsible for the greenhouse gas emissions in the atmosphere. This is because the developed nations became "developed" by emitting incredible amounts of greenhouse gases while establishing themselves economically. Thus, because developed countries contributed to the global greenhouse gas problem disproportionately more than their developing counterparts, the Kyoto Protocol treats both groups differently. Unfortunately, this difference in treatment ultimately prevented the Kyoto Protocol from universal adoption among its negotiating parties.

The United States, after intense involvement in the negotiation process, realized that the Kyoto Protocol would overly burden the United States. Because the United States would be overly burdened in relation to other negotiating parties, it did not become a signatory party and did not implement the agreement. The United States made this decision because, if it became a signatory, it would have to reduce its carbon dioxide emissions while developing countries like China and India would not be required to reduce their carbon dioxide emissions, and in turn, would not curb their economic development efforts.[56] The United States believed this to be significant because, under the Kyoto Protocol, India, whose greenhouse gas

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[52] *See* David M. Driesen, *Capping Carbon*, 40 ENVTL. L. 1, 23 (2010); *see also* Carlson, *supra* note 47 ("Cap-and-trade [systems] to reduce greenhouse gas emissions are burgeoning around the world").

[53] *See Lessons Learned*, *supra* note 48; *see also* Gregory W. Blount, *Cap and Trade for Water Conservation*, 24 NAT. RESOURCES & ENV'T 53 (2009).

[54] *Kyoto Protocol*, U.N. http://unfccc.int/kyoto_protocol/items/2830.php.

[55] Petra Lea Láncos, *Flexibility and Legitimacy - the Emissions Trading System Under the Kyoto Protocol*, 9 GERMAN L.J. 1625, 1628 (2008).

[56] *See* Cass R. Sunstein, *Of Montreal and Kyoto: A Take of Two Protocols*, 31 HARV. ENVTL. L. REV. 1, 5 (2007).

emissions exceeded Germany's; South Korea, whose greenhouse gas emissions exceeded France's; and China, whose greenhouse gas emissions was second only to the United States, would not be controlled by the Kyoto Protocol due to the fact that they would be classed as developing nations.[57]

Russia, on the other hand, found that it would greatly benefit from the provisions agreed upon in the Kyoto Protocol and became instrumental in the agreement becoming effective. Although the Kyoto Protocol restricted Russia in its emissions capabilities because it is a "developed" country, Russia became a signatory to the Kyoto Protocol because it provided Russia with enormous emissions allowances. This is because the Kyoto Protocol based Russia's allowable cap on 1990 greenhouse gas emissions levels.[58] Russia easily could abide by their 1990 emission levels because the 1990 emission levels predated the post-Soviet economic collapse which saw Russia's greenhouse gas emissions drop by twenty-five percent.[59] In short, the Kyoto Protocol established a cap for Russia based upon a period where Russia emitted twenty-five percent more emissions than their total emissions at the time that Russia enacted the Kyoto Protocol.[60] Therefore, upon ratification, Russia immediately possessed a substantial number of emissions allowances which it then sold to nations having trouble complying with their respective caps.

Irrespective of the differing opinions on the Kyoto Protocol, there are several aspects of the agreement which deserve special attention. First, the Kyoto Protocol allows for "flexibility mechanisms" to be used by developed countries to reduce their share of carbon emissions.[61] These flexible mechanisms allow developed countries to engage in emissions trading systems, joint implementation agreements, and clean development mechanisms to comply with their emissions caps.

"The [emissions trading system] permits developed States to cooperate with developing countries, promoting technology transfer and at the same time providing an economically appealing common framework for collectively meeting Kyoto commitments."[62] Through emissions trading systems, developed nations are able to sell their unused emissions capabilities to other nations who emit above their

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[57] *See id*. at 5; *see also Each Country's Share of CO2 Emissions*, UNION OF CONCERNED SCIENTISTS (Nov. 18, 2014), http://www.ucsusa.org/global_warming/science_and_impacts/science/each-countrys-share-of-co2.html#.VzzOfE-trTo (showing how China has passed the United States as the top emitter of greenhouse gases throughout the world since enactment of the Kyoto Protocol).

[58] Jessica E. Tipton, *Why did Russia Ratify the Kyoto Protocol? Why the Wait? An Analysis of the Environmental, Economic, and Political Debates*, 20 SLAVONIC. 67, 68 (2008) [hereinafter *Why Did Russia Ratify The Kyoto Protocol?*] ("Russia was obliged to keep its emissions at or below 1990 levels, an easy target considering that the post-Soviet economic collapse had caused [greenhouse gas] emissions to drop twenty-five percent below that level. Russia was also allowed a further five percent leeway in recognition of its vast forests known as 'carbon sinks' for their ability to absorb emissions. Therefore, Russia initially envisaged considerable economic gains from selling surplus quotas abroad and from foreign investment via joint implementation projects").

[59] *See id*.

[60] *See id.*

[61] Jana von Stein, *The International Law and Politics of Climate Change: Ratification of the United Nations Framework Convention and the Kyoto Protocol*, 52 J. OF CONFLICT RESOL. 243, 249 (2008) [hereinafter *Ratification of the Kyoto Protocol*] (discussing the flexibility mechanisms at hand for developed countries in the Kyoto Protocol).

[62] Láncos, *supra* note 55.

respective cap.[63] In doing so, the overall goals of a cap-and-trade are achieved while providing developed countries with flexibility in attaining their cap commitments. The emissions trading system provides incentives for investments in clean, more efficient technology among developed nations because they can then sell any unused emission allowances resulting from the more efficient technologies to other nations.[64]

Joint implementation projects promote "investment by companies in the industrial countries in carbon mitigation in the developing countries."[65] Furthermore, these projects encourage countries and companies to invest in greenhouse gas emission reductions in developing countries. In return, these investing entities receive carbon emission reduction credits which satisfy their obligations under the Kyoto Protocol.[66]

The clean development mechanism is a "vehicle for translating emissions reduction efforts in developing countries into credits that can be used to offset capped emissions elsewhere."[67] The Kyoto Protocol created the clean development mechanism to provide additional flexibility for developed countries to meet their specified emissions targets.[68] It is a market-based approach which allows developed countries to purchase emissions credits from emission reduction projects carried out in developing nations.[69] Interestingly, this mechanism now represents the second-largest market of carbon-denominated assets throughout the world.[70] Over 6,200 clean development mechanism projects have been approved, resulting in over one billion offset credits.[71] Due to the widespread use of the clean development

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[63] *See International Emissions Trading*, U.N. (2014), http://unfccc.int/kyoto_protocol/mechanisms/emissions_trading/items/2731.php (explaining international emissions trading); *see generally* Tipton, *supra* note 61, at 68.

[64] *See Non-Paper on Principles, Modalities, Rules and Guidelines for an International Emissions Trading Regime*, MINISTRY OF BUSINESS INNOVATION & EMPLOYMENT (June 3, 1998), http://www.med.govt.nz/upload/24427/umbrellagroup.pdf ("Through emissions trading, a market price for emissions abatement will emerge which reflects the marginal cost of emissions abatement across all market participants. When participants have exhausted the opportunities available for domestic emission reductions ... they can elect to purchase the requisite 'assigned amounts' from other Parties (or entities). In this way, the environmental benefits are achieved, irrespective of where the reductions take place, and at a lower cost than if trading was not available." The rationale of the system is that investing in clean technology may prove to be cheaper in the long run than purchasing emission allowances, and at the same time the surplus allowances may be sold for a high market price to Parties over-emitting and otherwise not meeting their reduction commitments").

[65] Richard L. Ottinger & Mindy Jayne, *Global Climate Change Kyoto Protocol Implementation: Legal Frameworks for Implementing Clean Energy Solutions*, 18 PACE ENVTL. L. REV. 19, 84 (2000) (discussing Joint Implementation projects).

[66] *Id*. at 85.

[67] Richard G. Newell, et al., *Carbon Markets 15 Years after Kyoto: Lessons Learned, New Challenges*, 27 J. ECON. PERSP. 123, 128 (2013).

[68] *Id*.

[69] *See* Michael Wara, *Measuring the Clean Development Mechanism's Performance and Potential*, 55 UCLA L. REV. 1759, 1770 (2008) ("The CDM is a market-based approach to the problem of global warming. It allows buyers, who may be Annex B parties or firms within Annex B nations, to purchase credits from emission reduction projects carried out in non-Annex B nations").

[70] *See* Hyungna Oh & Minsoo Cho, *Carbon Markets*, KDI, at 13 (May 15, 2013), http://www.kdi.re.kr/upload/9876/20130516_06.pdf (discussing presentation on carbon markets).

[71] Newell, *supra* note 67, at 129.

mechanism, along with the utilization of the joint implementation and emissions trading system, many countries expressed their preference for linking their domestic cap-and-trade policies with other countries.[72]

The three flexible mechanisms introduced in the Kyoto Protocol have valuable qualities that may translate well into a TDR system in the United States. Like the flexible mechanisms used in the Kyoto Protocol, a TDR system could allow for developmental rights sharing and collaborative efforts among the parties of a TDR system. For example, the Gold Coast of Connecticut, "the densest concentration of wealth in the entire country,"[73] is home to some of the priciest coastal homes in the United States. Because the costs of these developmental rights would be extravagant, a TDR system which implements an emissions trading influenced mechanism could allow developmental rights to be purchased from nearby, cheaper areas at a lesser cost. In effect, if a state-wide requirement for a reduction in coastal developmental rights existed, the unused rights in less expensive areas, such as West Haven, CT could be purchased by property owners in more expensive areas, such as Greenwich, CT. This would allow the wealthy Fairfield County town to fall into compliance with its coastal developmental rights reduction requirements. In doing so, cheaper coastlines would be preserved and Receiving Zones would develop at a more reasonable cost.

Initially, this does not change the fact that expensive coastlines would remain susceptible to damage from sea level rise or storm surges. Yet, as cheaper coastline areas sell their developmental rights, more coastal areas will be able to absorb force. In doing so, a resilience approach may be concurrently undertaken to protect the expensive coastal areas and reflect force onto the force absorbent, cheaper coastal areas. This blended approach could replicate the joint implementation or clean development mechanisms of the Kyoto Protocol which acknowledge what investment developed countries make in developed or developing countries as emissions allowance credits. If such a replication occurred, the erection of either hard or soft structures funded by wealthy coastal areas for implementation in other wealthy coastal areas or less-wealthy coastal areas would be encouraged. The net amount of protected coastline would increase at a reduced cost.

The incorporation of the three flexible mechanisms into a TDR system could successfully be incorporated into a TDR system. Below, such proposed incorporation will be further expanded. Before such incorporation is expanded upon, additional successful cap-and-trade systems will be explored whose characteristics may similarly be incorporated.

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[72] MATTHEW RANSON & ROBERT N. STAVINS, LINKAGE OF GREENHOUSE GAS EMISSIONS TRADING SYSTEMS: LEARNING FROM EXPERIENCE 2 (2013) (discussing the economic and political benefits that linkage provides to nations when trading emissions allowances).

[73] Paul Harris, *Connecticut's Wealth Gold Coast: Where Life is Good, If You Can Afford It*, THE GUARDIAN (Feb. 15, 2013), http://www.theguardian.com/world/2013/feb/15/connecticut-gold-coast-life-afford (discussing "the richest stretch of land in America").

B. *Regional Greenhouse Gas Initiative*

The Regional Greenhouse Gas Initiative (RGGI) became "the first [mandatory cap-and-trade] market-based regulatory program in the United States to reduce greenhouse gas emissions,"[74] regulating "CO_2 emissions from power plants sized at or over twenty-five megawatts."[75] RGGI was born through a collaborative effort of a bipartisan group of governors from seven northeastern U.S. states.[76] Each of the seven signatory states adopted the provisions of RGGI "through legislative or executive action followed by administrative rulemaking."[77] Currently, however, nine states complete the make-up of RGGI; Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont.[78] Additionally, RGGI is observed by Pennsylvania and three Canadian provinces; New Brunswick, Ontario, and Quebec.

A memorandum of understanding (MOU) by the seven original signatory states declared the goals of RGGI. This memorandum explained their intention to "establish themselves and their industries as world leaders in the creation, development, and deployment of carbon emission control technologies, renewable energy supplies, . . . energy-efficient technologies, [and] demand-side management practices,"[79] "to address global climate change . . . and [to] do their fair share in addressing their contribution to the collective [CO_2 emissions] problem."[80] The center piece of RGGI "was the proposal to establish a mandatory cap on emissions from electric generation of at least 25 percent below 1990 levels by 2010. . . ."[81] Furthermore, some particularly crucial aspects of RGGI are the establishment of an auction of CO_2 emission allowances and the permission for interstate emissions trading.[82]

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[74] *See generally* Regional Greenhouse Gas Initiative, https://www.rggi.org/ [hereinafter RGGI].

[75] Eleanor Stein, *Regional Initiatives to Reduce Greenhouse Gas Emissions*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW (Michael B. Gerrard & Jody Freeman eds., 2nd ed. 2014) [hereinafter *Regional Initiatives*].

[76] *See* RGGI, *supra* note 74.

[77] *See* STEIN, *supra* note 75.

[78] *See* RGGI, *supra* note 74; *see also* Mireya Navarro, *Christie Pulls New Jersey from 10-State Climate Initiative*, N.Y. TIMES (May 26, 2011), http://www.nytimes.com/2011/05/27/nyregion/christie-pulls-nj-from-greenhouse-gas-coalition.html?_r=0 (explaining New Jersey Governor Chris Christie's decision for the state, an original member of RGGI, to exit RGGI).

[79] *See generally* Regional Greenhouse Gas Initiative, Memorandum of Understanding 1 (2005), http://rggi.org/docs/mou_final_12_20_05.pdf.

[80] *Id*.

[81] *See* STEIN, *supra* note 75; *see also* Bruce R. Huber, *How Did RGGI Do It? Political Economy and Emissions Auctions*, 40 ECOLOGY L.Q. 59, 83 (2013) [hereinafter *How Did RGGI Do It?*] (referencing Memorandum from the RGGI Staff Working Group to the RGGI Agency Heads); *Revised Staff Working Group Package Proposal*, REGIONAL GREENHOUSE GAS INITIATIVE, at 2 (Aug. 24, 2005), http://rggi.org/docs/rggi_proposal_8_24_05.pdf (explaining that "the Working Group's proposal that 5 percent be allocated to a regional Strategic Carbon Fund, and that "all states agree to propose—for legislative and/or regulatory approval—that 20 percent of the allowances will be allocated for a public benefit purpose").

[82] Huber, *supra* note 81, at 86.

At the start, the cap equaled to the total number of CO_2 allowances issued by RGGI states in a year.[83] Moreover, each allowance authorized the holder to emit one ton of CO_2.[84] In establishing the initial cap, RGGI took the average historical power plant emissions from 2000 through 2004 and adjusted them for anticipated emission increases.[85] Once RGGI established the initial cap, states began to be bound by the restrictions of RGGI, beginning with the first compliance period in February 2013.[86] Thereafter, RGGI reduced the region-wide emissions from 165 million tons of CO_2 to 91 million tons of CO_2.[87] Furthermore, this cap would continue declining by 2.5 percent annually. To comply with the annually declining cap, each RGGI member can choose its method of reducing its carbon budget.[88]

It is important to note, that unlike the Clean Air Act Title IV acid rain cap-and-trade system which loosely influenced RGGI, RGGI did not distribute allowances to grandfathered sources within the region.[89] Instead, RGGI requires power plants to purchase emissions allowances at an auction.[90] Thereafter, the costs of the purchase of emissions allowances are then passed onto consumers through increases in electricity prices.[91] Luckily, however, the "signatory states agreed that 25 percent of the allowances would be allocated for a consumer benefit or strategic energy purpose, such as promoting energy efficiency or mitigating ratepayer impact."[92] Incidentally, the continued investment in clean energy has resulted in a significant decrease in consumers' electric bills.[93]

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[83] *See The RGGI CO2 Cap*, REGIONAL GREENHOUSE GAS INITIATIVE, http://www.rggi.org/design/overview/cap [hereinafter *RGGI CO2*]; *s*ee *also* Stein, *supra* note 75.

[84] *See RGGI CO2*, *supra* note 83; *see also* Stein, *supra* note 75.

[85] *See* STEIN, *supra* note 75, at 276.

[86] *Id.*

[87] *See id.* (initially, RGGI set the cap at 188 million tons of CO2 per year for the ten member states, however, upon New Jersey's exit in 2011, RGGI reduced the cap to 165 million tons of CO2).

[88] *See* Alice Kaswan, *A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in A Federal System*, 85 DENV. U. L. REV. 791, 817 (2008) ("[T]he states [have] considerable discretion in the politically sensitive determination of how to allocate allowances. While [the MOU] requires the states to auction a minimum of 25 percent of the allowances and to allocate the proceeds to a "consumer benefit or strategic energy purpose," the MOU does not otherwise appear to place constraints on the states' allocation rules and implicitly gives them the discretion to determine whether to auction or distribute the remaining 75 percent of their allowances. The states also retain permitting authority.").

[89] *See* Huber, *supra* note 81, at 88 (discussing RGGI and its alternative approach to grandfathering).

[90] *See id.*

[91] Michael Kerstetter, Commentary, *Nation's First Active Climate Change Program Continues with Regional Greenhouse Gas Initiative*, 29 ANDREWS UTIL. INDUS. LITIG. REP. 1, 7 (2009) ("Critics argue that the program will increase the cost of electricity").

[92] *See* STEIN, *supra* note 75.

[93] *See* Paul J. Hibbard, et. al., *The Economic Impacts of the Regional Greenhouse Gas Initiative on Nine Northeast and Mid-Atlantic States*, ANALYSIS GROUP, at 7 *available at* http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/analysis_group_rggi_report_july_2015.pdf [hereinafter *Economic Impacts of RGGI*] (discussing the impact of the initial increases in electric bills for consumers and how the increased costs' reinvestment has led to lower electricity bills in the long-term, acting as a down payment of sorts); *see also* Samantha Page, *The Northeast's Electricity Bills Have Dropped $460 Million Since They Started Paying for Carbon*, THINK PROGRESS, Jul. 14, 2015, http://thinkprogress.org/climate/2015/07/14/3680269/rggi-boosts-economy-lowers-carbon/ [hereinafter *Northeast's Electricity Bill Drops*] (discussing the Analysis Group report).

Another important aspect of RGGI is the reserve price for allowances. Any unsold allowances can be resold at a later auction.[94] However, if an allowance is not sold for three years at an auction, it is permanently retired.[95] These capabilities, in addition to RGGI's ability to reduce the cap, allow the cap-and-trade system to maintain the price for emissions allowances by affecting their quantity, and in turn their demand. Thus, in January 2014, RGGI greatly reduced the emissions cap to generate more money through higher prices for emissions allowances and to simultaneously reduce the emissions of CO_2 significantly. Without such a decision, the demand and prices of allowances would have remained low. Fortuitously, states could add an additional $11.6 billion in value to their economies and generate over 82,000 job years for employment by resetting the cap at present emissions levels and continuing to invest in energy efficiency.[96] As stated earlier, these investments made in energy efficiency significantly reduced energy consumption and the consumers' energy bills.[97]

Like the Kyoto Protocol,[98] RGGI is far from perfect.[99] RGGI set too large of an initial cap, which resulted in the price of each allowance to remain relatively low.[100] With a proposed TDR system, developmental rights can be traded in a similar manner to the emissions allowances in RGGI. Instead of investments being made in green technology, investments can instead be made in resilience structures like sea walls, jetties, or wetlands. In doing so, coast lines would be preserved through the sale of developmental rights and fortifications which will protect existing coastal areas while shifting the force crashing onto the newly erected resilience structures from the existing coastal areas onto the anticipated vacant coastal areas where developmental rights have been sold.

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[94] *See* Schmalensee & Stavins, *supra* note 51, at 19 (discussing RGGI's auction and retirement scheme).

[95] Shelly Welton, *RGGI Decides to Retire Unused Allowances*, CLIMATE L. BLOG (Feb. 7, 2012), http://blogs.law.columbia.edu/climatechange/2012/02/07/rggi-decides-to-retire-unused-allowances/ (discussing the RGGI's decision to retire unused allowances).

[96] *See* STEIN, *supra* note 75, at 281.

[97] *See* Hibbard, *supra* note 93, at 41 ("Although CO2 allowances tend to raise electricity prices in the near term, there is also a lowering of prices over time primarily because the states invest so much of the allowance proceeds on energy efficiency programs."); *see also* Page, *supra* note 93.

[98] *See* Sunstein, *supra* note 56, at 44-48.

[99] *See* Institute for Energy Research, *RGGI: A Faulty Model for "Successful" Cap-and-Trade*, CANADA FREE PRESS (Dec. 15, 2015), http://canadafreepress.com/article/rggi-a-faulty-model-for-successful-cap-and-trade (discussing the inherent problems with RGGI).

[100] *See* Brooks Miner, *The Cap Matters Most in Cap-And-Trade Markets*, FIVETHIRTYEIGHT (June 2, 2014), http://fivethirtyeight.com/features/the-cap-matters-most-in-cap-and-trade-markets/ (discussing the importance in having a restrictive cap and how it is necessary for a cap-and-trade to have a mechanism in place to lower the cap if an unexpected event affects the energy market); *see generally* Stein, *supra* note 75, at 281 (discussing the allowance prices); *see also* Robert Stavins, *Low Prices a Problem? Making Sense of Misleading Talk About Cap-and-Trade in Europe and the USA*, ROBERT STAVINS BLOG (Apr. 25, 2012), http://www.robertstavinsblog.org/2012/04/25/low-prices-a-problem-making-sense-of-misleading-talk-about-cap-and-trade-in-europe-and-the-usa/; *but see* Gloria Gonzalez, *RGGI Roads Back to Life with Record Carbon Prices*, ECOSYSTEM MARKETPLACE (Mar. 13, 2014), http://www.ecosystemmarketplace.com/articles/rggi-roars-back-to-life-with-record-carbon-prices/ (discussing the factors which have contributed for an increased demand and price for RGGI emissions allowances).

Alternatively, along with a yearly reduction in the amount of developmental rights, the reinvestment of revenues generated from the auction into the purchase of additional developmental rights will increase the demand, and subsequently the price, of developmental rights. This will provide coastal property owners with a greater incentive to sell their developmental rights because they will generate greater revenues for the sale of their developmental rights when unused rights are retired or sold. Eventually, as the number of developmental rights decreases, the demand for these rights will rise. Therefore, coastal property owners will steadily become more reluctant to hold onto their developmental rights as they become more attractive due to the declining number of purchasable developmental rights.

One dilemma which arises when developmental rights can be sold is the question of whether a coastal property will be more valuable and marketable with all its developmental rights available for a subsequent purchaser to utilize, or whether a coastal property owner will be better off selling the unused rights in a transaction separate from a sale of the coastal property. This could potentially worsen with developmental rights reductions occurring each year. This is because developmental rights will continue to increase in value as their availability decreases. Therefore, property owners could become reluctant to part with their unused developmental rights, hoping that they will generate a greater return in the future if other property owners sold their developmental rights. On the other hand, property owners may be incentivized to cash in on their developmental rights if they did not expect the future value of these developmental rights to increase.

Alternatively, to incentivize property owners to sell their unused developmental rights instead of holding them, governments could provide additional incentives for property owners to part with their developmental capabilities, such as a tax incentive. Simultaneously, this will allow for greater revenues to be generated through the sale of developmental rights, which could in turn, contribute to the purchase of additional developmental rights or the development of coastal climate resilience projects to protect developed, threatened coastal areas.

C. *AB-32*

In 2006, California Governor Arnold Schwarzenegger, a "pro-business Republican,"[101] signed into law AB-32, also commonly known as "the California Global Warming Solutions Act of 2006."[102] The law did not require the use of a cap-and-trade; instead it set out to reduce emissions of greenhouse gases to 1990 levels

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[101] *See* John Pomfret, *Schwarzenegger Remakes Himself as Environmentalist*, WASH. POST (Dec. 23, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/12/22/AR2006122201476.html ("Calling himself a "sane Republican," [Governor Schwarzenegger] said his pro-business philosophy and fiscal conservatism shield him from accusations of being "the tree hugger, the crazy guy out there who wants to live on the moon and talk about the spirits and all this holistic stuff").

[102] Kimberly Cobo, *California Global Warming Solutions Act of 2006: Meaningfully Decreasing Greenhouse Gas Emissions or Merely A Set of Empty Promises?*, 41 LOY. L.A. L. REV. 447, 447 (2007) [hereinafter *CA Global Warming Solutions Act of 2006*].

by 2020.[103] The California Air Resources Board (CARB) was responsible for implementing a strategy which would allow California to meet the goals set out in AB-32.[104] In doing so, CARB was required to report regulations and create a plan which detailed how it was going to meet its 2020 target.[105] Eventually, CARB determined that a cap-and-trade approach would be the best tool to achieve its goal and would formally start the cap-and-trade system on January 1, 2012.[106]

The cap-and-trade system instated by CARB provided for three compliance periods. The first compliance period, which began on January 1, 2013, applied the cap only upon major industrial facilities, electric utilities, CO_2 suppliers, and petroleum and natural gas facilities.[107] The second compliance period, which began on January 1, 2015, extended the cap over fuel suppliers and all importers of electricity.[108] Finally, in the third compliance period, which begins on January 1, 2018, the cap will cover the remaining greenhouse gas emitters.[109]

There are some notable characteristics to California's cap-and-trade system.[110] Through the use of an auction, California encourages the sale of emissions allowances in a similar manner to RGGI with a continually decreasing cap and an allowance reserve.[111] Interestingly, participants in the California cap-and-trade are subject to a limit of the number of allowances that they can hold at one time. The system also limits the number of allowances which can be purchased at a single auction.[112] These holding and purchase requirements ensure that a competitive marketplace for developmental rights exists. Without such initiatives, a single entity would be free to purchase an unregulated amount of allowances and could effectively influence the market for developmental rights. Essentially, this reduces the

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[103] *See Climate Change, Sustainable Development, and Ecosystems 2007 Annual Report*, 2007 ABA ENV'T ENERGY, & RESOURCES L. YEAR IN REV. 29, 39 (2007).

[104] *See* Cobo, *supra* note 102, at 455 ("The heart of AB-32 mandates that CARB set a goal for the state's total greenhouse gas emissions, based on the levels of greenhouse gases that Californians emitted back in 1990").

[105] *See id*. at 456 ("One of the first things addressed . . . is that CARB must adopt a plan indicating how emission reductions will be achieved from significant greenhouse gas sources via regulations, market mechanisms, and other actions by January 1, 2009") (internal quotations omitted).

[106] Lesley K. McAllister, *Regional Initiatives to Reduce Greenhouse Gas Emissions*, GLOBAL CLIMATE CHANGE AND U.S. LAW 358 (Michael B. Gerrard & Jody Freeman eds., 2nd ed. 2014).

[107] *Id*.

[108] *Id*.

[109] California Air Resources Board, *Guidance Document*, April 2013, *available at* http://www.arb.ca.gov/cc/capandtrade/guidance/20130419%20Guidance%20Document%20Ch%203%20posting.pdf.

[110] *See* Steven Ferry, *Courts Cap the "Trade": Regulation of Competitive Markets When Courts Overturn State and Federal Cap-and-Trade Regulation*, 117 W. VA. L. REV. 681, 710 (2014) (discussing the auction used by California's cap-and-trade system).

[111] *See* ENVT'L DEF. FUND, CALIFORNIA: AN EMISSIONS TRADING CASE STUDY, at 13. https://www.edf.org/sites/default/files/california-case-study-may2015.pdf (discussing the Auction Price Controls used to regulate the price for emissions allowance prices).

[112] Todd Schatzki & Robert N. Stavins, Analysis Group, Inc., *Three Lingering Design Issues Affecting Market Performance in California's GHG Cap-and-Trade Program*, at 1-2.

opportunity for collusion or creating a monopoly of allowances because it restricts entities from controlling a large enough share to manipulate allowance prices.[113]

Another crucial aspect of the California cap-and-trade system is the offset system. The offset system allows for emission reductions from sources outside the cap to substitute for reductions from sources under the cap. This is similar to the clean development mechanism introduced in the Kyoto Protocol.[114]

A TDR system can greatly benefit from all three of these important aspects of the California cap-and-trade system. If a TDR system incorporated a similar allowance reserve, the price for developmental rights could be maintained within a specific range. Although it should not be expected that developmental rights of coastal properties should decrease to a shockingly low level, this can come in handy to ensure that they remain competitive and attractive for coastal property owners to pursue, acting as a limit for the price a developmental right can reach. In doing so, the allowance reserve could potentially become an important mechanism to ensure that Receiving Zones can purchase developmental rights.

The offset system replicates the earlier proposed idea that developmental rights can be purchased from other areas to replace developmental rights from more expensive areas. Although this does not sufficiently address the problems posed by the rising sea level, coastal storms, and dangerous storm surges, it does provide some relief by ultimately removing developmental capabilities from the coastline. Additionally, as stated earlier, the purchase and sale of these developmental rights will generate further revenues which could then be used to purchase additional developmental rights or fund coastal resilience schemes designed to protect the threatened areas.

Finally, the holding and auction purchase limits are very attractive for a TDR system. These would ensure that a single entity could not create a monopoly for developmental rights, nor could a small group collude with one another to gain an unfair market share. In doing so, the holding and auction purchase limits could effectively force coastal property owners into selling their developmental capabilities. This would mean that the overall number of unused developmental rights continues to decrease, while increasing the value of others. This will provide further incentives for coastal property owners to part with their unused developmental rights.

D. *Paris Agreement*

On December 12, 2015, representatives of 195 countries adopted the language of the Paris Agreement.[115] On April 22, 2016, countries began signing and ratifying

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[113] *See* JEAN-PHILIPPE BRISSON, OUTSTANDING DESIGN FLAWS IN CALIFORNIA'S CAP-AND-TRADE PROGRAM, at 2 (discussing the holding and purchase limits in California's cap-and-trade system).

[114] *See* Newell, *supra* note 67, at 128.

[115] *See* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, 27 U.N.T.S. 7 d. [hereinafter *Paris Agreement*]; *see also Paris Agreement*, E.U., May 17, 2016, http://ec.europa.eu/clima/policies/international/negotiations/paris/index_en.htm [hereinafter *Paris E.U.*].

the Paris Agreement.[116] The Paris Agreement became the first-ever universal, legally binding global climate deal. The Paris Agreement principally deals with greenhouse gas emission mitigation, adaptation, and financing methods.[117] The agreement is due to enter into force in 2020.[118] The purpose of the Paris Agreement is to "hold[] the increase in global average temperature to well below 2 degrees C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees C above pre-industrial levels."[119]

One of the most welcomed aspects of the Paris Agreement is that it leaves substantial leeway to the parties to decide the ample methods of achieving their goals.[120] In doing so, the Paris Agreement does not rely on targets and timetables like Kyoto; instead it takes a "bottom-up" approach which allows countries to match their contributions to their circumstances.[121] Parties are required to submit their nationally determined contributions every five years.[122] These submissions are meant to provide information on what each party intends to do to tackle climate change. Additionally, the Paris Agreement requires countries to report the support it provides and receives from other parties to the Paris Agreement. Also, instead of a "hard" target like other emissions reduction initiatives, the Paris Agreement instead attempts to reach its "highest possible ambition."[123] This uncalculated target acts as a figurative goal for parties to continually attempt to further reduce their emissions. In doing so, the parties are asked to "aim to reach global peaking of [greenhouse gas] emissions as soon as possible" and to undertake and communicate "ambitious efforts" to achieve the purpose of the agreement.[124] Lastly, the Paris Agreement calls on nations to establish a new collective quantified goal by 2020 of at least a $100 billion a year.[125] The Paris Agreement implemented this collective quantified goal to help provide the most vulnerable nations with better access to climate finance and balance overall climate finance between adaptation and mitigation, among other things.[126]

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[116] *See Paris Agreement*, *supra* note 115; *see also Paris E.U.*, *supra* note 115.

[117] *See Paris Agreement*, *supra* note 115; *see also Paris E.U.*, *supra* note 115.

[118] *See Paris Agreement*, *supra* note 115; *see also Paris E.U.*, *supra* note 115.

[119] *See Paris Agreement*, *supra* note 115; *see also Paris E.U.*, *supra* note 115.

[120] *See* Justin Worland, *What to Know About the Histories 'Paris Agreement' on Climate Change*, TIME (Dec. 12, 2015) http://time.com/4146764/paris-agreement-climate-cop-21/ ("The agreement gives countries considerable leeway in determining how to cut their emissions bus mandates that they report transparently on those efforts. Every five years nations will be required to assess their progress towards meeting their climate commitments and submit new plans to strengthen them.").

[121] *See* Daniel Esty, *A Bottom-Up Approach to Clean Energy*, U.S. NEWS (Dec. 18, 2015) http://www.usnews.com/debate-club/is-the-paris-climate-agreement-a-good-strategy/a-bottom-up-approach-to-clean-energy (describing the Paris Agreement's bottom-up approach to address climate change).

[122] *Paris Agreement*, *supra* note 115, art. 23; *see also Paris E.U.*, *supra* note 115.

[123] *Paris Agreement*, *supra* note 115, art. 4 para. 3; *see also Paris E.U.*, *supra* note 115.

[124] *Paris Agreement*, *supra* note 115, art. 3; *see also Paris E.U.*, *supra* note 115.

[125] *Paris Agreement*, *supra* note 115, at 54; *see also Paris E.U.*, *supra* note 115.

[126] *See* Kathleen Mogelgaard, et al., *What Does the Paris Agreement Mean for Climate Resilience and Adaptation?*, WORLD RES. INST. (Dec. 23, 2015) http://www.wri.org/blog/2015/12/what-does-paris-agreement-mean-climate-resilience-and-adaptation (discussing the efforts of the collective quantified goal for adaptation finance in the Paris Agreement).

A TDR system could benefit from a similar collective target to that of the Paris Agreement. This could allow members to put forward their best effort to keep the area of coastal properties from developing or expanding. In doing so, a reporting requirement would be sufficient for member parties to be aware of the efforts undertaken by other member parties, similar to that in the Paris Agreement. Additionally, the collective quantified goal will further ensure that the number of developmental rights will be reduced. Although this would essentially be a collective eminent domain initiative, members to a TDR system would be encouraged to contribute to a fund which will then be utilized for the purchase of coastal developmental rights. Thus, the aspirational goal of the system will become more likely to be met, member parties will be aware of the contributions of one another, and members who are having trouble reaching their targets will benefit by the collective quantified fund to purchase developmental rights in the future.

VI. CAN A TDR SYSTEM SUCCESSFULLY MODEL A CAP-AND-TRADE SYSTEM?[127]

Throughout this paper, several important aspects of cap-and-trade systems have been highlighted and light has been shed on their use in a proposed TDR system. Hereinafter, several of these aspects will be further explored, with a view to incorporate them into a capable TDR system.[128]

Before addressing the details of the proposed system, it is first important to describe the area to be covered by TDR Proposal. Because cap-and-trade systems should be federal,[129] a federal TDR system will first be analyzed. Although only thirty states within the United States are on the coast,[130] a TDR system intended to protect the coast could succeed as a national initiative. In doing so, states would be permitted to purchase developmental rights from other states, instead of being restricted to the number of developmental rights currently on hand within their borders. Additionally, a national TDR system would provide a more comprehensive bidding process as property owners who are outside the coastal states would benefit from the ability to purchase developmental rights from the coastal areas. If all fifty states were parties to a national TDR system, and the developmental rights from coastal areas were the only developmental rights available for purchase at the auction, there would be an increased demand for developmental rights than if only the coastal states were parties to the system. This is because there would be a substantially greater number of available purchasers for developmental rights and a constant number of purchasable developmental rights available within the system.

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[127] Juliet Howland, *Not All Carbon Credits Are Created Equal: The Constitution and the Cost of Regional Cap-and-Trade Market Linkage*, 27 UCLA J. ENVTL. L. & POL'Y 413 (2009); Steven Ferrey, *Courts Cap the "Trade": Regulation of Competitive Markets When Courts Overturn State and Federal Cap-and-Trade Regulation*, 117 W. VA. L. REV. 681(2014).

[128] The forthcoming proposed TDR will be referred to as "TDR Proposal."

[129] *See* Joseph MacDougald, *Why Climate Law Must Be Federal: The Clash Between Commerce Clause Jurisprudence and State Greenhouse Gas Trading Systems*, 40 CONN. L. REV. 1431, 1450 (2008) [hereinafter *Why Climate Law Must Be Federal*].

[130] Including states bordering the Great Lakes.

On the other hand, if a national system were to be employed, there would be an anticipated dormant Commerce Clause challenge to TDR Proposal if it did not allow for the developmental rights from non-coastal states to be sold at the auction. This is because the developmental rights from non-coastal states would be restricted solely because of their origin, and such restriction is unconstitutional.[131] Due to the fact that developmental rights from non-coastal states would need to be accepted in such a system, the effectiveness of a national system effectively will be impeded by leakage and an attributable decrease in demand for developmental rights.[132] Furthermore, the decreased demand would result in a lower purchase price for the developmental rights. Unfortunately, this appears to be an inevitable aspect for a constitutional national TDR system.[133]

To avoid a potential leakage problem in a national TDR system, the developmental rights of non-coastal states must be permitted in the sale of developmental rights and be regulated under a cap in the same matter that the developmental rights in coastal states are sold. This will decrease the demand for coastal developmental rights, but will further the utility of a national TDR system because the developmental rights from coastal states will not be uncompetitive compared to the uncapped non-coastal state developmental rights.

Yet, a nation-wide system will present some obstacles regarding the transferability of developmental rights between states, as well as the loss of tax revenues from a Sending Zone in one state to a Receiving Zone in another state. Despite these obstacles, however, a detailed federal act could clarify the path for transferring developmental rights between states and address how tax revenues will be replaced by the state where developmental rights have been sold. For example, a provision which requires that the portion of tax revenues historically generated from the value of the property with developmental rights could continue to be paid to the state from where the developmental rights have been sold. With such provision, if a developmental right is sold from a property owner in Florida to a property owner in South Carolina, the tax revenues which are attributable to the unused developmental right could remain payable to Florida, either directly from the purchaser or from South Carolina once property taxes are collected. This ensures that states will not be deprived of their historic tax revenues from the sale of developmental rights from their state to other states.

Additionally, if a national TDR system was utilized, and developmental rights from non-coastal states were purchasable, the amount of developmental rights purchased from the coast would be severely curtailed. Thus, the goal of TDR

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[131] *See Philadelphia v. City of New Jersey*, 437 U.S. 617, 632-33 (1978) (holding that a state may not restrict the imports of another state unless there is some reason, apart from origin, to treat them differently); *see also Maine v. Taylor*, 47 U.S. 131, 145 (1986) (holding that import restrictions which to ban the introduction of harmful bacteria are permissible); *see also West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 211-12 (1994) (holding that the combined effect of several regulations which are discriminatory to out-of-state producers is unconstitutional).

[132] *See* MacDougald, *Why Climate Law Must Be Federal*, *supra* note 129, at 1437 ("Leakage is the purchase of energy that originates from an uncapped, extra-regional source.").

[133] *See Philadelphia*, 437 U.S. at 632-33; *see also Taylor*, 47 U.S. at 145; *see also West Lynn Creamery, Inc.*, 512 U.S. at 211-12.

Proposal would be significantly burdened because the coastal developmental rights would likely remain more expensive than non-coastal developmental rights given their generally greater value.[134] However, due to this anticipated result, purchase requirements, similar to those in the California cap-and-trade system,[135] could require a certain number of coastal developmental rights to be purchased at a given auction. Furthermore, a reducing cap, in conjunction with this purchase requirement could continually ensure a demand for coastal developmental rights, thereby assuring that the goals of the TDR Proposal are being met.

In addition to a national system, a TDR system may be implemented as a regional, or even coastal system.[136] Similar to RGGI and a national system which does not cap developmental rights of non-coastal states, unfortunately, a regional approach would be subject to the leakage problem. Leakage, as indicated earlier, would hinder the demand for coastal developmental rights because rights originating from an area outside of the developmental rights cap would not be regulated in the same manner as developmental rights under the controlled cap.[137] For example, if states under a cap agreed to a reserve price, and developmental rights could not fall below the reserve price, then leakage would occur if a state outside of the cap sold their developmental rights into a state under the cap for a price below the reserve amount. Alternatively, if the developmental rights of non-coastal states were not allowed to be purchased within the regional TDR system, the TDR system would be susceptible to, and likely fail from, a dormant Commerce Clause challenge. Thus, a regional approach would only be constitutional if it were subject to the leakage problem which currently affects many emissions cap-and-trade systems.[138]

Lastly, the TDR Proposal could be implemented on a state by state basis. This, however, would present significant challenges due to greatly different political outlooks on climate change and the different effects sea level rise, storm, and storm surges have upon coastal areas.[139] Furthermore, the transferability between states of

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[134] *See* Zeveloff, *Valuable Waterfront Locations*, *supra* note 6; *see generally* Johnson, *Waterfront Properties Worth 60 Per Cent More Than Similar Homes Inland*, *supra* note 6.

[135] *See* Brisson, *Outstanding Design Flaws in California's Cap-and-Trade Program*, *supra* note 113, at 2.

[136] Although they would differ in size, the application of a regional system would reflect a system which engulfs an entire coast and will therefore be explored simultaneously.

[137] *See generally* MacDougald, *Why Climate Law Must Be Federal*, *supra* note 129, at 1437.

[138] *See* Michael P. Vandenbergh & Mark A. Cohen, *Climate Change Governance: Boundaries and Leakage*, 18 N.Y.U. ENVT'L. L.J. 221, 239 (2010) ("[T]he leakage problem . . . has become a significant obstacle to adopting carbon emission reduction plans."); *see also* Huber, *How Did RGGI Do It?*, *supra* note 83, at 79 (discussing the leakage problem which is a concern for many RGGI officials).

[139] *See* Michael D. Lemonick, *The Secret of Sea Level Rise: It Will Vary Greatly by Region*, YALE (Mar. 22, 2010), http://e360.yale.edu/feature/the_secret_of_sea_level_rise_it_will_vary_greatly_by_region/2255/ (discussing the many factors which affect sea level rise and how their impact is felt differently throughout the world); *see also* Melanie Fitzpatrick, *What Accounts for the Varying Rates of Sea Level Rise in Different Locations?*, UNION OF CONCERNED SCIENTISTS (June 2013), http://www.ucsusa.org/publications/ask/2013/sea-level-rise.html#.Vzy1vlQrIQU ("As the oceans warm globally, currents in many places can shift, resulting in changes that either tend to pull water away from the shore or pull it in. Along the East Coast, changes in the path and strength of ocean currents are contributing to faster-than-average sea level rise."); *see also Is Sea Level the Same All Across the Ocean?*,

developmental rights would be more easily regulated by a supervisory authority, such as the federal government or a regional board, than individual states who agree to transfer developmental rights amongst one another. This is because the developmental rights among different states have significantly different purposes and values. Thus, because a series of state or regional TDR systems would be difficult to implement and regulate, have the potential for dormant Commerce Clause and Compact Clause challenges,[140] and their use would dwarf in comparison to the effectiveness of a national TDR system, only a national TDR system will be further explored.

Because cap-and-trade systems are primarily implemented using an auctioning scheme, and many TDR systems have been following a similar structure, it is critical to explore whether there are other aspects of a cap-and-trade system to be followed when drawing up a potential TDR system. Because "[t]he effectiveness of a cap-and-trade [system] depends largely on a meaningful cap,"[141] a TDR system resembling a cap-and-trade system will likely also be largely dependent upon a meaningful cap of developmental rights. Thus, like the initial cap in RGGI,[142] TDR Proposal should set its first cap on developmental rights at the amount of developmental rights currently owned by Sending Zone property owners. This will ensure a steady transition into a TDR system because Sending Zone property owners will not be immediately faced with pressure to sell their developmental rights, nor will governments initially be required to pay just compensation for developmental rights to ensure they meet their cap restrictions.

The Paris Agreement provides its parties with immense flexibility in attaining the overall goal of preserving the global temperature to below 2 degrees Celcius below pre-industrial levels. Such a flexible "soft cap" would be beneficial in TDR Proposal. This is because the Paris Agreement is initially attempting to keep the global temperature from heating up to a certain threshold and TDR Proposal would similarly be implemented to keep the potential damage from rising sea levels and storm surges from exceeding a certain threshold. Therefore, a calculation of the capable destruction currently present from the rising sea level, coastal storms, and storm surges could be the initial target for TDR Proposal. Members to a TDR system would accept a flexible system in a more positive light because, like the Paris Agreement, it would leave the members and subject property owners with a greater

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NAT'L OCEAN SERV, http://oceanservice.noaa.gov/facts/globalsl.html (providing a map which identifies the different rates of sea level change throughout the world).

[140] *See* MacDougald, *Why Climate Law Must Be Federal*, *supra* note 129, at 1437 ("Leakage is the purchase of energy that originates from an uncapped, extra-regional source."); s*ee also Philadelphia*, *supra* note 131; *see also Maine*, *supra* note 131; *see also West Lynn Creamery, Inc.*, *supra* note 131; *see also The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958 (2007) ("The Regional Greenhouse Gas Initiative (RGGI), an effort by ten northeastern states to reduce carbon dioxide emissions from power plants in the region, is an interstate agreement that some have suggested may violate the Compact Clause.").

[141] *See* STEIN, *supra* note 75.

[142] *See RGGI CO2*, *supra* note 83.

sense of control over their developmental rights and the pathway toward compliance in relation to a stricter approach which draws out a firm path to follow.[143]

On the other hand, with a national initiative, a soft cap would not be necessary because states would be required to abide by the federal statute or regulation which authorized the national TDR system. In doing so, a hard cap could be introduced which allocates the current number of unused developmental rights in Sending Zones to be preserved. In effect, each state would have a cap which would be set by factoring in the number of unused developmental rights and the potential damage from sea level rise, coastal storms, and storm surges. Thereafter, a yearly percentage reduction could be required for each state. The combined caps of each of the states would compromise of the national cap. This hard cap more closely resembles that of the Kyoto Protocol and would similarly encourage the utilization of flexible mechanisms among the states.[144]

The effect that flexible mechanisms have within the Kyoto Protocol is based upon the different classifications between members. Here, however, all the states would be deemed to be "developed." Therefore, the clean development mechanism and joint implementation mechanism would be virtually the same tools. On the other hand, if areas were split among a threatened and non-threatened framework, the three flexible mechanisms could be identically implemented into TDR Proposal. For convenience purposes, all states will be considered to be "developed" and will not be divided upon a threatened and non-threatened framework. Thus, the clean development mechanism and joint implementation systems will be collectively referred to as a flexible mechanism. Furthermore, because there are less opportunities for investment in emission reduction technologies and sinks, the emissions trading system will similarly be included within the "flexible mechanism" term. Thus, for the purposes of TDR Proposal, "flexible mechanism" describes a mechanism which allows interstate investment in climate resilience projects or the purchase from developmental rights from other states.

A flexible mechanism would continue to reduce the amount of potential damage from sea level rise, coastal storms, and storm surges because the overall number of threatened areas would continue to decrease, although disproportionately depending upon where the developmental rights were purchased from. This would likely be done because the developmental rights in some states are cheaper than others. However, in doing so, the purchase price for the developmental rights would rise due

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[143] *See* Amanda Shore, *A Sense of Autonomy is Motivation for Employee Engagement*, HERD WISDOM (Aug. 6, 2015), http://www.herdwisdom.com/blog/a-sense-of-autonomy-is-motivation-for-employee-engagement/ (discussing the benefits of providing employee's with options to choose from, even if some options are not particularly attractive, instead of orders because the feeling of choice leaves employees with a sense of autonomy); *see also* Sue Grossman, *Offering Children Choices: Encouraging Autonomy and Learning While Minimizing Conflicts*, EARLY CHILDHOOD NEWS, http://www.earlychildhoodnews.com/earlychildhood/article_view.aspx?ArticleID=607 ("All human beings need to feel as if they have control over themselves and their lives."); *but see* Richard M. Ryan and Edward L. Deci, *Self-Regulation and the Problem of Human Autonomy: Does Psychology Need Choice, Self-Determination, and Will?*, 74 J. OF PERSONALITY 1557, 2006 ("[A]n excessive number of options can be daunting and wasteful of energy . . . and not all choice enhances freedom.") (internal citations omitted).

[144] *See* von Stein, *supra* note 61, at 249 (discussing the flexibility mechanisms at hand for developed countries in the Kyoto Protocol).

to the increase in demand from the out-of-state purchaser. Therefore, sending states would see the value of their developmental rights increase.

Alternatively, a flexible mechanism could increase collaboration among similarly situated states.[145] This is because states in similar areas are directly impacted by the actions of their neighbors. For example, Connecticut and New York could reduce the number of unused development rights on Long Island Sound as part of an agreed upon plan which would encourage the preservation of some threatened areas while also allowing for the economy of the overall area to prosper. Specifically, if Bridgeport, CT and Port Jefferson, NY, which are connected by a ferry service, maintained their unused developmental rights as part of a plan to develop both of the cities in the future and promote economic development between the two, both Connecticut and New York could choose to purchase the developmental rights from an otherwise unprofitable and threatened coastal area, such as New London, CT or Staten Island, NY.[146] Without such a collaborative effort, New York may decide to sell the developmental rights from Port Jefferson, NY, which would have a direct, negative economic impact upon Bridgeport, CT, and develop another area which does not have a spillover economic effect on the Nutmeg State.

Investment projects in TDR Proposal would be in the form of climate resilience projects. This would allow states to meet their cap by building preservation structures within their state and elsewhere. Additionally, in providing states with the opportunity to achieve some cap reduction with the construction of hard or soft resilience structures, flexible mechanism inspired projects among states would become increasingly more prevalent. This is because states will be able to plan with one another where to purchase developmental rights, and decide where to erect force shifting structures. If successful, resilience structures will shift the force away from already developed areas onto recently vacated areas whose developmental rights have already been sold. It will be important, however, that this mechanism is not the sole tool utilized to achieve compliance under the cap, instead of reducing the number of developmental rights. Luckily, a restriction can easily be put in place to limit the use of alternative methods to purchasing developmental rights.

Although a restriction to alternative cap compliance methods may be burdensome in some instances, a reinvestment scheme can ease this burden similar to the practice in RGGI.[147] Thus, the revenues generated from the sale of developmental rights can be reinvested for the purchase of even more developmental rights in the future. This will reduce the economic impact that a decreasing cap and

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[145] *Id.*

[146] *See* Spencer Allan Brooks, *Southeastern Connecticut Economy Gets Low Marks in National Report*, FOX 61 (Apr. 7, 2015), http://fox61.com/2015/04/07/southeastern-connecticut-economy-gets-low-marks-in-national-report/ (discussing a national study whose "goal was to identify which cities across America [were] emerging as front-runners . . . for economic development possibilities" and Southeastern Connecticut's horrible ranking); *see also* Crystal Gammon, *Why Hurricane Sandy Hit Staten Island So Hard*, LIVE SCI. (Nov. 7, 2012), http://www.livescience.com/24616-hurricane-sandy-staten-island-effects.html (discussing Staten Island, NY resident's inability to avoid the flooding and damage from Hurricane Sandy); *see also* Zak Koeske, *Staten Island Among Worst Counties to Grow Up Poor, Study Finds*, SI LIVE, http://www.silive.com/news/index.ssf/2015/06/staten_island_among_worst_plac.html (discussing Staten Island, NY's bleak opportunities for the poor pulling themselves out of poverty).

[147] *See generally* Hibbard, *supra* note 93; *see also* Page, *supra* note 93.

restriction on alternative cap compliance mechanisms presents because the reinvestment of funds generated from past sales of developmental rights into the subsequent purchase of additional developmental capabilities will alleviate the costs of compliance. On the other hand, if a state is not exhausting its alternative approaches to cap compliance, the revenues from past sales can also be used to protect already existing coastlines through further resilience efforts. If this were the case, the potential damage from the rising sea level, coastal storms, and storm surges would be reduced, meeting the goals of TDR Proposal.

A price ceiling for developmental rights at the auction will be welcomed in TDR Proposal. This will effectively keep the price for developmental rights competitive. Furthermore, this will likely also keep any one state, or an area of states, from being exploited by others for their developmental rights while the exploiting states retain all their developmental capabilities. Specifically, a state whose property values are cheap compared to those in the rest of the nation, will benefit from a price cap because they will be less likely to have all their developmental rights purchased prior to those in a state whose properties are more valuable and developmental rights more expensive. Additionally, this will allow the less valuable state to attain their cap reduction requirements by artificially keeping the price of the expensive property values constant due to the restriction on the demand for these rights. This is because the less valuable state will continue to be able to purchase the developmental rights in their state because a restriction on the demand for these developmental rights will be in place. This will further preserve their purchase price. Furthermore, less valuable states will not completely forgo their ability to develop Sending Zones in the future because limits will ensure that outside purchasers will not purchase all the developmental rights in one state before purchasing a single developmental right in another. In short, states with high property values will not be able to exploit states with lower property values by purchasing all the developmental rights in the states with more affordable property and developmental rights.

The holding and auction purchase limits similarly address the issue of states being exploited by others. As seen in the California cap-and-trade system,[148] if purchasers were prohibited from purchasing a certain number of developmental rights at any one auction, or from any one state, a competitive marketplace would be maintained. Additionally, such limits would reduce the opportunity for collusion or create a monopoly because any single property owner or state would be forbidden from controlling a market share of developmental rights large enough to manipulate the market price for the remaining developmental rights.

CONCLUSION

TDR systems continue to face challenges. Because there has been great success in the utilization of cap-and-trade systems in reducing the emissions of greenhouse gases, TDR systems should consider incorporating several of the successful traits which some cap-and-trade models employ. Specifically, the flexible mechanisms introduced in the Kyoto Protocol, the yearly cap reduction and reinvestment of

[148] *See* ENVT'L DEF. FUND, *supra* note 111, at 13; *see also* Schatzki & Stavins, *supra* note 112, at 1–2.

profits in RGGI, the auction restrictions and offset system in the California cap-and-trade system, and the flexible target and reporting requirements of the Paris Agreement provide a great starting point for a new TDR system to be implemented on a national scale, and effectively reduce the potential devastation posed by rising sea levels and harmful storm surges. As the climate continues to change, governments will need to react, and incorporating proven systems into a TDR system to preserve an extremely susceptible area is a great place to begin this necessary reaction.


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FIFA'S BAN ON THIRD-PARTY OWNERSHIP CALLS "FOUL" ON MAJOR LEAGUE SOCCER

*Patrick John Warren**

Abstract

The debate on the impact of third-party ownership on in the soccer industry is extremely divisive. Proponents argue that investment from third-parties helps smaller sized soccer organizations compete with their larger and more financially powerful counterparts. Opponents argue that the third-party ownership is equivalent to modern day slavery. In late 2014, FIFA sided with opponents of the practice and announced the passage of a regulation which effectively bans third-party investors' involvement in the transfer of a professional soccer player between professional soccer clubs. In doing so, FIFA passed a regulation which calls into question the business model undertaken by Major League Soccer. Nevertheless, Major League Soccer has continued to operate in a manner that runs counter to FIFA's ban on third-party ownership.

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INTRODUCTION

On December 22, 2014, Federation International de Football Association (FIFA) sent Circular 1464 to its members,[1] announcing the approval of Article 18ter of FIFA's Regulations on the Status and Transfer of Players (FIFA's Regulations). FIFA enacted this regulation to ban the practice of third-party ownership of soccer players' economic rights (TPO).[2] Article 18ter of FIFA's Regulations states:

> No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned rights in relation to a future transfer or transfer compensation.[3]

This new regulation has had,[4] and will continue to have,[5] a resounding ripple effect throughout the world due to the globalization of the transfer market for professional soccer players and the financial environments in which many soccer associations operate. This new regulation requires a complete restructuring of the premier professional soccer league in the United States,[6] Major League Soccer (MLS). The purpose of this paper is to explain how FIFA's ban on TPO collides with the interests of MLS and what MLS should do in response to the announcement. In doing so, first, a brief explanation of the professional soccer industry structure will be presented. Second, a brief explanation of a typical soccer player transfer will be

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[1] Letter from Jerome Valcke, Secretary General of FIFA, to FIFA Members, Circular 1464 (Dec. 24, 2014), *available at* http://www.fifa.com/mm/document/affederation/administration/02/49/57/42/tpocircular1464_en_neutral.pdf (announced the new FIFA regulation which banned third-party ownership of a soccer players' economic rights).

[2] FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION [FIFA], *Regulations on the Status and Transfer of Players*, art.18ter, (2015) http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsstatusandtransfer_2015_e_v051015_neutral.pdf [hereinafter FIFA, *Regulations on the Status and Transfer of Players*] (FIFA attempted to ban TPO by enacting Article 18bis to FIFA's Regulations, but since it did not have the desired effect, FIFA enacted the more restrictive Article 18ter).

[3] *See id*.

[4] Mariana Rosignoli, *What are the Early Effects of the TPO Ban in Brazil?* LAW IN SPORT, (Aug. 14, 2015), http://www.lawinsport.com/articles/item/what-are-the-early-effects-of-the-tpo-ban-in-brazil (provides a background history of TPO agreements in Brazil and the effect the ban has had since its inception); *see also* Neeraj Thomas, *The Future of Third Party Ownership and Influence in Football Following FC Seraing Case*, LAWYERISSUE (Mar. 15, 2016), http://www.lawyerissue.com/the-future-of-third-party-ownership-and-influence-in-football-following-the-fc-seraing-case/ (discussing the controversial case involving Doyen Sports Group, a third-party investor, and FC Seraing, a soccer club, which arose after the introduction of Article 18ter).

[5] *See* Sam Borden, *A Contentious Source of Income is Set Up to Dry: FIFA will Ban Third Party Ownership in May*, N.Y. TIMES (Jan. 1, 2015), http://www.nytimes.com/2015/01/02/sports/soccer/fifa-will-ban-third-party-ownership-in-may.html?_r=1 (explaining what TPO is and how the ban of TPO agreements will influence players, teams, and investors).

[6] In addition to the United States, Major League Soccer is also the premier professional soccer league in Canada.

presented. Third, an explanation of TPO and the fears which lead FIFA to enact the ban will be presented, along with examples highlighting the advantages and disadvantages of the use of TPO agreements. Fourth, a history of the formation of Major League Soccer will be presented. Fifth, an analysis of the structure of Major League Soccer will be presented. Sixth, an explanation detailing why FIFA's TPO ban will cause the structure of MLS to crumble will be presented. Finally, a proposal for MLS to follow will be offered in light of the anticompetitive practices currently utilized by the league and FIFA's ban on TPO will be presented.

I. THE STRUCTURE OF THE PROFESSIONAL SOCCER INDUSTRY

FIFA is an association governed by Swiss law.[7] FIFA has 211 member associations.[8] Each of these member associations oversees the leagues registered with that association in which professional soccer clubs compete.[9] Professional soccer players are contracted to a soccer club and are registered with the association which manages the league in which the soccer club competes.[10] Each association determines its league structure, but the league structure must simultaneously comply with FIFA's governing regulations.[11] For example, an association determines the dates of its registration periods. Registration periods are the periods within a year in which players are registered with an association, which is a prerequisite before that player can play for the soccer club within the association's league.[12] Such registration periods must comply with Article 6 of FIFA Regulations on the Status and Transfer of Players, which states there may be two registration periods within a year.[13] The first registration period, which may not exceed twelve weeks, "shall begin after the completion of the season and shall normally end before the new season starts."[14] The second registration period, which may not exceed four weeks, "shall normally occur in the middle of the season. . . ."[15]

II. TRANSFERRING A PLAYER BETWEEN SOCCER CLUBS

Typically, the transfer of a soccer player between clubs is a relatively straightforward transaction. A selling club and a purchasing club agree on a fee which compensates the selling club for the value of the player's existing contract to the selling club.[16] Upon an agreed transfer fee between clubs, the purchasing club

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[7] *Who We Are*, FIFA, http://www.fifa.com/about-fifa/who-we-are/index.html (last visited Mar. 11, 2017).

[8] *Id*.

[9] FIFA, *Regulations on the Status and Transfer of Players*, *supra* note 2, at art. 20.1.

[10] *Id*. at art. 14.1(a).

[11] *Id.* at art. 6.2.

[12] *Id.* at art. 6.1.

[13] *Id*.

[14] *Id.* at art. 6.2.

[15] *Id*.

[16] Andi Thomas, *The European Soccer Transfer Market, Explained*, SB NATION (July 28, 2014 11:02 AM), http://www.sbnation.com/soccer/2014/7/28/5923187/transfer-window-soccer-europe-explained (discussing how a transfer works).

begins to negotiate an employment contract with the player.[17] If the player and purchasing club agree on an employment contract, the player's existing contract with the selling club is terminated, the selling club receives the transfer fee agreed upon between both the selling club and the purchasing club, the player signs the employment contract with the purchasing club, and the player registers with the association that manages the league in which the purchasing club competes during that association's registration period.[18] TPO complicates the transfer of a soccer player by introducing an additional party to the transaction.

III. THIRD-PARTY OWNERSHIP

TPO is the practice in which an individual, group of investors, or business organization offers a cash amount to a soccer club in exchange for a percentage of future transfer fees received by a soccer club for a particular player.[19] Due to the incredible sums of money being spent on soccer players worldwide,[20] this high-risk high-reward practice has steadily grown over the last several decades.[21] FIFA, however, ended this practice, as it feared that third-party investors would generate enough power to interfere with the contractual rights of clubs and players.[22] Another worry was that third-party investors would artificially inflate the market price for players involved in TPO agreements by interfering with a player's freedom of movement by pressuring players to transfer to, or strongly advocating players to transfer to, a particular club in which the third-party owner had an interest.[23] Additionally, there were great concerns that the integrity of the sport would come into question if third-party investors had an interest in multiple players who were

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[17] *See id*.

[18] *See id*.

[19] Johan Lindholm, *Can I Please have a Slice of Ronaldo? The Legality of FIFA's Ban on Third-Party Ownership Under European Union Law*, 15 INT'L. SPORTS L.J., 137 (June 27, 2015).

[20] Anthony Chapman, *TOP POG: Top 10 most expensive transfers: As Paul Pogba closes in on £105m Manchester United switch, here's some more pricey players,* THE SUN (July 21, 2016 12:17 PM), https://www.thesun.co.uk/sport/football/1479592/top-10-most-expensive-transfers-as-paul-pogba-closes-in-on-105m-manchester-united-switch-heres-some-more-pricey-players/; *see also* Paul Tomkins, *The 100 Most Expensive PL Players (After Inflation)*, THE TOMKINS TIMES (July 23, 2015), https://tomkinstimes.com/2015/07/the-100-most-expensive-pl-players-after-inflation/ (inflation adjusted list of the most expensive transfers of soccer players purchased by English Premier League Clubs; some players appear on the list more than once if they commanded multiple transfer fees in different transactions among the top 100 inflation adjusted figures); *see also* Aaron Flanagan, *Leaked Anthony Martial 'Transfer Documents' Claim to Show True Cost of Man United Deal – Including Ballon d'Or Clause*, MIRROR (Jan. 20, 2016 7:04 AM), http://www.mirror.co.uk/sport/football/news/leaked-anthony-martial-transfer-documents-7203482 (details of Anthony Martial's transfer from AS Monaco to Manchester United); *see also* Chris Smith, *Neymar Ranks Ninth On List Of Soccer's Most Expensive Player Transfers*, FORBES (June 5, 2013 2:17 PM), http://www.forbes.com/sites/chrissmith/2013/06/05/neymar-ranks-ninth-on-list-of-soccers-most-expensive-player-transfers/ (discussion about the most expensive soccer player transfers up until 2013).

[21] *See* Lindholm, *supra* note 19, at 140 (discussion about whether TPO violated the ban on players being registered for two or more clubs at the same time arose in mid-2000s).

[22] FIFPro Communications Department, *FIFPro Versus Third Party Ownership (*Mar. 28, 2014), *available at* http://www.fifpro.org/en/news/fifpro-versus-third-party-ownership [hereinafter *FIFPro Announcement*].

[23] *Id.*

competing against one another.[24] Finally, FIFA was keen on keeping the money spent on player transfers within the soccer industry, rather than being paid out to third-party investors.[25]

Prior to the ban, soccer clubs and third-party investors widely used TPO throughout the world.[26] Particularly, in Brazil, clubs and third-party investors created an enormous amount of TPO agreements due to the high demand for Brazilian soccer players and the inability of Brazilian soccer clubs to financially compete with their European counterparts. Between January 2011 and June 2014, about 2,000 soccer players employed by Brazilian soccer clubs were involved in transfers which included a TPO agreement.[27] Clubs began to utilize TPO agreements to fund the salaries of their star players. These agreements enabled clubs to employ their players for a longer period rather than being pressured to sell their players to the initial highest, often European,[28] bidder.

Brazilian superstar Neymar attracted one of the highest transfer fees commanded for the transfer of a soccer player.[29] Prior to his transfer, Neymar rightfully earned fame with a series of impressive performances while playing for his Brazilian club team, Santos FC, and eventually with the Brazilian national team, the most successful national soccer team in the world.[30] It did not take long before Neymar began attracting interest from the wealthiest and most respected soccer teams in the world,[31] including Manchester United F.C., Chelsea F.C., Real Madrid C.F., and his eventual employer, FC Barcelona.[32] Because Neymar continued to attract significant interest in his abilities, Santos sold about 45% of Neymar's economic rights to third parties in order to pay Neymar a salary competitive to those offered in Europe.[33] In doing so, Neymar remained contracted to Santos; he

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[24] *Id.*

[25] *See* Lindholm, *supra* note 19, at 142.

[26] *See* Rosignoli, *supra* note 4.

[27] Manuel Veth, *Third Party Ownership and Traffic Sports*, FUTEBOLCIDADE (Apr. 2, 2015 12:52 AM), http://futebolcidade.com/third-party-ownership-and-traffic-sports/ (explaining the popularity of TPO agreements in Brazil and of Traffic Sports, a sports marketing company which uses TPO agreements as a major part of its business strategy).

[28] *See generally Europe's most significant Brazilian imports*, UEFA (Jan. 1, 2016), http://www.uefa.com/uefachampionsleague/news/newsid=2204443.html (list of the most influential Brazilian soccer players who played in Europe).

[29] *See Neymar Appears in Court Over Barcelona Transfer*, ESPN (Feb. 2, 2016), http://www.espnfc.us/barcelona/story/2799385/neymar-appears-in-court-over-barcelona-transfer (discussing the tax evasion case surrounding Neymar's transfer from Santos to Barcelona) [hereinafter *Neymar Appears in Court*].

[30] Lindholm, *supra* note 19, at 137.

[31] *See generally* DELOITTE, TOP OF THE TABLE: FOOTBALL MONEY LEAGUE (2016) (report which profiles the world's highest earning and most popular soccer clubs).

[32] *See* Jason Le Miere, *Neymar Transfer News: Barcelona, Manchester United, Real Madrid And Chelsea Target Unsure Over Future*, INT'L BUS. TIMES (Jan. 29, 2013, 5:19 PM), http://www.ibtimes.com/neymar-transfer-news-barcelona-manchester-united-real-madrid-chelsea-target-unsure-over-future (talking about the potential suitors interested in acquiring Neymar's services prior to his eventual transfer from Santos FC to Barcelona).

[33] *See* Samindra Kunti, *In Brazil it is Transfer Business as Usual, Despite TPO Ban,* INSIDE WORLD FOOTBALL (Aug. 18, 2015), http://www.insideworldfootball.com/world-football/south-america/17672-

continued to develop as a player, and his future transfer value continued to rise. Eventually, in 2013, Santos transferred Neymar to Barcelona for an impressive sum, believed to be within a range of $70 to $100 million.[34] All of the third-party investors who had an interest in Neymar's economic rights received a portion of the hefty transfer fee.[35]

Alternatively, in Europe, TPO agreements generally were viewed unfavorably due to a concern that their use removes significant power from soccer clubs.[36] One of the most infamous instances of a club losing power to a third-party owner occurred in the transfer of the Argentine striker Carlos Tevez from West Ham United to Manchester United.[37] There, Media Sports Investment (MSI) created a TPO agreement when Tevez transferred to West Ham United. As part of the agreed upon transfer, MSI retained ownership of all Tevez's economic rights and allowed West Ham United to register Tevez as their player with the English Football Association.[38] The issue arose when Tevez attracted significant interest from Manchester United after just one season at West Ham United. MSI ardently pushed for the completion of Tevez's potential transfer to Manchester United because the value of MSI's investment in Tevez would increase significantly.[39] West Ham United refused to release the registration of Tevez which Manchester United needed to finalize the transfer. MSI then filed High Court Proceedings against West Ham United.[40]

Shortly thereafter, the High Court ruled in MSI's favor and forced West Ham United to release Tevez's registration, which enabled Manchester United to complete the Argentinian's transfer.[41] The lack of power West Ham United had in the process left many fearful about the influence TPO agreements can have if a club wishes to

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in-brazil-it-is-transfer-business-as-usual-despite-tpo-ban (discussion about the development of Neymar's TPO agreement).

[34] *See* Associated Press, *Neymar Appears in Court*, *supra* note 29; *see also* Leander Schaerlaeckens, *The Far-Reaching Effects of FIFA's Ban on Third-Party Ownership*, YAHOO! SPORTS, (Apr. 30, 2015, 2:00 PM) http://sports.yahoo.com/blogs/soccer-fc-yahoo/the-far-reaching-effects-of-fifa-s-ban-on-third-party-ownership-180032566.html (discussion about how Barcelona reported a "$70-odd million transfer …. [however,] reports [show] that the transfer sum was more like $100 million….").

[35] *See* Lindholm, *supra* note 19, at 138.

[36] *See* Lindholm, *supra* note 19, at 145 (discussing undue influence of third-party investors over clubs and players).

[37] *See* Andy Brassell, *Third-Party Ownership Here to Stay*, ESPN (Aug. 12, 2014), http://www.espnfc.us/blog/espn-fc-united-blog/68/post/1981324/andy-brassell-like-it-or-not-third-party-ownership-in-football-is-here-to-stay (following Manchester City's expensive acquisition of Eliaquim Mangala, a player subject to a TPO agreement, the article discusses how TPO agreements have had an impact on the English Premier League).

[38] *See id*.

[39] *See Carlos Tevez Timeline: What Happened, and When*, METRO (Mar. 16, 2009, 10:59 AM), http://metro.co.uk/2009/03/16/carlos-tevez-timeline-what-happened-and-when-544277/ (timeline of Tevez's influence on relationship between Tevez and West Ham).

[40] *See id*.

[41] *See* Graeme Bailey, *MSI Take Hammers to High Court*, SKY SPORTS (June 24, 2007), http://www.skysports.com/football/news/11667/2621735/msi-take-hammers-to-high-court (discussing the legal dispute surrounding Carlos Tevez's transfer from West Ham United to Manchester United which involved Media Sports Investments, a third-party investor in Carlos Tevez's rights).

retain the services of their best performing players,[42] yet the practice continued.[43] After years of weighing the advantages against the disadvantages of TPO agreements, FIFA exercised its authority and banned third parties from becoming involved in the transfer of a soccer player from one club to another.[44] In doing so, FIFA enacted a regulation that will have a unique impact in the United States due to the unorthodox structure of MLS.

IV. THE FORMATION AND STRUCTURE OF MAJOR LEAGUE SOCCER

Since its inception, MLS and MLS clubs have operated differently from other soccer organizations throughout the world. The use of TPO in MLS is no different in this respect.[45] A brief history of the founding of MLS is required to understand the development of the league structure, and why MLS is different from other professional soccer leagues throughout the world and other professional sports leagues within the United States.

Soccer was a popular sport in the United States before the formation of MLS.[46] The fact that world renowned superstars, such as Franz Beckenbauer, George Best, Johan Cruyff, Giorgio Chinaglia, Eusiebo, and Pele, all once grazed American soil with their fancy footwork in the North American Soccer League (NASL) proved the popularity of soccer in the United States at that time.[47] Unfortunately, the structure of the NASL, which consisted of a lack of centralized control of the league and contained great disparities in financial resources between the league's teams, did not

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[42] *See* David Conn, *Why the Premier League Banned 'Third-Party Ownership' of Players*, THE GUARDIAN (Jan. 30, 2014), http://www.theguardian.com/football/2014/jan/30/why-premier-league-banned-third-party-ownership-players (discussing TPO agreements in the wake of the Carlos Tevez and Javier Mascherano transfers from West Ham United).

[43] *See generally* Letter from FIFA to its Members, *supra* note 1 (TPO continued until FIFA explicitly outlawed the practice); *see generally* Andy Brassell, *Third-Party Ownership Here to Stay*, *supra* note 37 (discussing Eliaguim Mangala's transfer to Manchester City, an English Premier League club, which involved a TPO agreement); *see also* Veth, *supra* note 27 (discussing the wide use of TPO agreements in Brazil, even after other leagues, like the English Premier League, had banned the utilization of the practice).

[44] *See* Letter from FIFA to its Members, *supra* note 1.

[45] *See* Andrew Visnovsky, *Major League Soccer and FIFA's Third Party Ownership Ban. What You Need to Know*, (Jan. 25, 2015), https://andrewvisnovsky.wordpress.com/2015/01/25/major-league-soccer-and-fifas-third-party-ownership-ban-what-you-need-to-know/ (explaining how MLS is a single-entity which owns the rights of MLS players, the functionality of a TPO agreement, and how Article 18ter cause a number of issues to arise for MLS).

[46] *See* ESPN Stats and Information, *Pele at the New York Cosmos: Five things to know*, ESPN (Jun. 15, 2015), http://www.espnfc.us/blog/five-aside/77/post/2476374/pele-at-the-new-york-cosmos-five-things-to-know ("By the time he retired in 1977, average attendance for the league had almost doubled from 7,642 to 123,558.") (discussing Pele's transfer to New York Cosmos and his first game for the team which attracted ten million viewers to a live broadcast hosted by CBS); *see also NASL 1968-1984: A review of the Golden Era*, NASL http://www.nasl.com/a-review-of-the-golden-era [hereinafter *NASL Golden Era*] (discussing the record crowds NASL matches attracted to the stadium, which averaged 40,000 spectators per game for three years).

[47] *See* Bryan A. Green, *Can Major League Soccer survive another antitrust challenge? Emerging threats to its single entity treatment*, 4 INT. SPORTS L.J. 79, 81 (2009); *see also NASL Golden Era*, *supra* note 46 (discussing many of the international superstar soccer players who plied their trade in NASL).

provide a sustainable foundation for the future.[48] Due to these hardships, in 1985, the NASL folded after sixteen seasons and the United States again lacked a professional soccer league.[49] FIFA did not see the lack of a professional soccer league in the country as a problem when it had awarded the United States the opportunity to host the 1994 World Cup.[50] In fact, the bid that the United States Soccer Federation (USSF) proposed to FIFA in order to secure rights to host the 1994 World Cup included a promise to establish a bona fide top division professional soccer league in the United States.[51] With the failures of the defunct NASL firmly in the minds of the USSF President, Alan Rothenberg, and his assistant Mark Abbott, they undertook a unique approach to establish a professional soccer league in the United States once again.[52]

Due to the lack of a centralized league structure in the NASL and the increasing number of antitrust challenges against other professional sports leagues in the United States, Rothenberg and Abbott wanted to organize the league as a single-entity which owned all of the teams, player contracts, broadcasting rights, intellectual property rights, and merchandise and concession revenues.[53] MLS had difficulty attracting outside investors until entrepreneur Phil Anschutz expressed interest. Anschutz accompanied his interest with one specific condition. He made clear that "he wanted that guy who did the bicycle kick at the World Cup [Marcelo Balbao] for his team in Colorado."[54] Eventually, MLS recruited Balbao from Mexico to continue his professional soccer career in Colorado.[55] This was the first, and certainly not the last, instance where the league decided where players will play in MLS. After MLS met Anschutz's demand, other entrepreneurs committed significant funds for the creation of MLS.[56] Eventually, in February 1995, several independent investors established MLS. They registered MLS in Delaware as a limited liability company and determined that it would be governed by a management committee, known as the Board of Governors.[57]

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[48] *See* Diana C. Taylor, *Aimed at the Goal?: The Sustainability of Major League Soccer's Structure*, 9 WILLAMETTE SPORTS L.J. 1, 2 (2011).

[49] *See id.*

[50] Joseph Lennarz, *Growing Pains: Why Major League Soccer's Steady Rise Will Bring Structure Changes in 2015*, 16 U. DEN. SPORTS & ENT. L.J. 137, 141 (2014).

[51] *Id*. at 141.

[52] *See id*.

[53] *Id*. at 142.

[54] Alexander Abnos, *The Birth of a League*, SPORTS ILLUSTRATED (2015), http://www.si.com/longform/2015/mls/ (quotes recorded by Grant Wahl and Brian Straus, compiled by Alexander Abnos, about the birth and beginnings of MLS).

[55] *See Marcelo Balboa: How One of the Nation's Greatest Defenders Modernized the Position*, U.S. SOCCER (Sept. 27, 2013), http://www.ussoccer.com/stories/2014/03/17/12/37/130927-hispanic-heritage-marcelo-balboa (discussing Marcelo Balbao arrived in Colorado from the Mexican soccer league).

[56] *See id.*

[57] *See Fraser v. Major League Soccer*, 284 F.3d 47, 53 (1st Cir. 2002) (discussing MLS formation and ownership).

V. MAJOR LEAGUE SOCCER'S SINGLE-ENTITY STATUS

The single-entity structure Rothenberg and Abbott sought to establish came under question when MLS players brought a class action suit against MLS, the owners, and USSF, asserting antitrust violations of the Clayton and Sherman Acts in *Fraser v. Major League Soccer* [hereinafter *Fraser I*].[58] These complaints alleged that the defendants agreed to not compete for player services, conspired to impose anticompetitive transfer fees upon its players, exercised monopoly power, and that the combination of the owners' assets in MLS substantially lessened competition and tended to create monopoly.[59] In *Fraser I*, the District Court held that MLS and its owners comprised of a single-entity, therefore they could not conspire to violate the Clayton or Sherman Acts.[60] Additionally, the court held that MLS did not reduce competition because an active market for professional soccer players did not exist in the United States prior to MLS's formation.[61]

In the appeal of *Fraser v. Major League Soccer* [hereinafter *Fraser II*], the Court of Appeals reviewed the role of the owners in MLS and found that "MLS and its [owners] comprise a hybrid agreement, somewhere between a single company … and a cooperative arrangement between existing competitors."[62] Despite this clarification, the *Fraser II* court declined to definitively answer the question of which classification MLS shall be considered under – a single-entity or a cooperative arrangement – because "the case would have lost at trial based on the jury's rejection of plaintiff's own market definition."[63] Because the players failed to prove a relevant market, as a matter of law, the First Circuit Court of Appeals decided that the District Court properly ruled in favor of the defendants.[64] Thus, MLS maintained its asserted single-entity status and secured a position outside the reach of the Sherman Act.[65]

VI. IS MAJOR LEAGUE SOCCER STILL A SINGLE-ENTITY?

Unlike the National Football League (NFL) and the National Basketball Association (NBA),[66] MLS earned recognition as a single-entity. Such recognition precluded MLS from being the subject of violation of section 1 of the Sherman Act.[67] It is important to note that the ruling, which recognized MLS as a single-entity, analyzed the business practices employed by MLS prior to the Designated Player

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[58] *Fraser v. Major League Soccer*, 97 F.Supp.2d 130, 131 (Mass. Dist. Ct. 2000).

[59] *Id.* at 131.

[60] *Id.* at 139-42.

[61] *Id.* at 140-41.

[62] *Fraser II*, 284 F.3d at 57.

[63] *Id*. at 59.

[64] *Id*. at 71.

[65] Hank Stebbins, *Blind Draw: How Major League Soccer's Single Entity Structure and Unique Rules Have Impacted Soccer in the United States*, 13 Willamette Sports L.J. 1, 17 (2015).

[66] *See Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 93 F.3d 593, 598-99 (7th Cir. 1996) (the Seventh Circuit ruled that the NBA is a single-entity under broadcasting rights, but the league is a joint venture regarding player transfers).

[67] *Fraser I*, 97 F.Supp.2d at 139.

Rule and the subsequent transfer of David Beckham.[68] MLS adopted the Designated Player Rule in 2006.[69] This rule allowed each MLS club to sign one "designated player" whose salary could exceed the league salary cap of $400,000.[70] The difference between the league salary cap and the designated player salary is to be covered by the MLS club or its owner.[71] In the $250 million deal which secured Beckham's transfer to the Los Angeles Galaxy, Anschutz Entertainment Group (AEG), the investor-operator of the LA Galaxy, bore the responsibility of compensating Beckham for the portion of his contract which exceeded the MLS mandated salary cap.[72]

MLS passed the Designated Player Rule with some restrictions.[73] In an attempt to avoid teams in large markets, like Los Angeles and New York City, from maintaining an advantage over their small market counterparts, like Kansas City and Columbus, MLS allowed each MLS club to sign one designated player.[74] However, clubs may trade their designated player slot to another MLS club, yet no MLS club is permitted to hold more than two designated players.[75] The Designated Player Rule cuts directly against the theory of the single-entity enterprise because it allows MLS clubs to compete amongst each other for designated players.[76] Such competition between MLS clubs weakens MLS's defense against claims that the league is a joint

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[68] *See* Tim Bezbatchenko, *Bend it for Beckham: A look at Major League Soccer and its Single Entity Defense to Antitrust Liability After the Designated Player Rule*, 76 U. CIN. L. REV. 611 (2008).

[69] *Id.* at 612; *see also* ESPN Staff, *MLS Oks 'Beckham Rule' to Attract Superstar Players*, ESPN, (Nov. 11, 2006), http://www.espnfc.us/story/391320/mls-oks-beckham-rule-to-attract-superstar-players (discussing the Designated Player Rule and how it allowed MLS "to sign high-profile players such as David Beckham, Ronaldo or Luis Figo…."); *see also* Bobby McMahon, *Has The "Beckham Rule" Worked for MLS?*, FORBES (Aug. 5, 2012), http://www.forbes.com/sites/bobbymcmahon/2012/08/05/has-the-beckham-rule-worked-for-mls/#4d741887d970 (discussing the effects of the Designated Player Rule on MLS) (note that Bobby McMahon indicates that MLS adopted the Designated Player Rule in 2007, however, the MLS announced the Designated Player Rule in 2006, and it became applicable for the 2007 MLS season); *see also* Chris Nee, *MLS Considering "Beckham Rule" Change?*, SOCCERLENS (Aug. 7, 2009), http://soccerlens.com/mls-considering-beckham-rule-change/32965/ (discussing David Beckham's arrival in MLS in 2007).

[70] Bezbatchenko, *supra* note 68, at 612; *see also* ESPN Staff, *supra* note 69 (stating that MLS will be responsible for all players' salaries up to $400,000 and the remainder will be covered by the team).

[71] *Id.*

[72] Bezbatchenko, *supra* note 68, at 633.

[73] Some restrictions of the Designated Player Rule have evolved since MLS created the rule, but the concept of the rule, rather than the specific details of the rule, pose the biggest threat to MLS's single-entity status. Therefore, a description of the developments of the rule is not necessary for the purpose of this argument; *see* Nee, *supra* note 69 (discussing an amendment to the Designated Player Rule); *see also* Ryan Rosenblatt, *MLS Keeps Changing its Rules for the Galaxy, and that's not a Bad Thing*, FUSION (Jul. 6, 2015), http://fusion.net/story/161370/mls-rule-change-galaxy-core-player/ (discussing the Designated Player Rule and how it helped the whole of the MLS before explaining that when an attractive world renowned soccer player, like Giovanni dos Santos, wants to move to MLS, the league needs to find a way for him to sign with the Galaxy to ensure that he will actually come to the league).

[74] *See* Bezbatchenko, *supra* note 68, at 633; *see also* ESPN Staff, *supra* note 69 (discussing the Designated Player Rule).

[75] Robert M. Bernhard, *MLS' Designated Player Rule: Has David Beckham Single-Handedly Destroyed Major League Soccer's Single-Entity Antitrust Defense?*, 18 MARQ. SPORTS L. REV. 413, 428 (2008).

[76] Bezbatchenko, *supra* note 68, at 633.

venture rather than a single-entity, therefore subjecting MLS to antitrust liability under section 1 of the Sherman Act.[77]

Clint Dempsey's transfer from Tottenham Hotspur F.C. to MLS under the Designated Player Rule displayed this competition between MLS clubs and MLS's arbitrary involvement in transfer dealings. MLS covered all the expenses of the transfer.[78] In doing so, MLS overlooked the Portland Timbers, the team next in line to receive the services of a designated player entering the league, and sent Dempsey to the Seattle Sounders.[79] This is a prime example of diverging interests between MLS and the owners of the Portland Timbers because the Portland Timbers were keen on landing the American. Due to the different interests between MLS and the Portland Timbers, MLS's single-entity defense took another significant hit. Furthermore, the involvement of MLS in Dempsey's transfer provides a clear example of the restraint of free movement of a soccer player, one of the complaints asserted in *Fraser I* and an action which FIFA outlawed with its ban on TPO.[80]

In 2015, Manchester City F.C. and the New York Yankees formed a partnership and created New York City FC (NYCFC).[81] The introduction of NYCFC to MLS continued to weaken the league's single-entity defense due to the differences in interests between NYCFC owners and MLS. Many speculated that Manchester City intended to use NYCFC to market their brand in the United States along with using the MLS club as a minor-league team of sorts, with the intention of developing their younger players.[82] Indeed, Manchester City began to use NYCFC as a feeder club for talent when they secured the loan move of England star Frank Lampard. NYCFC signed Lampard as a designated player. Prior to NYCFC's first soccer match, NYCFC loaned Lampard to Manchester City.[83] Normally, this is a risky venture because the owner of an MLS team bears the responsibility of compensating the designated player if he is hurt while on loan away from the MLS, as occurred when Beckham tore his Achilles' tendon while on loan at AC Milan in 2010 during the MLS offseason.[84] Prior to the expiration of the loan, Manchester City influenced NYCFC to allow Frank Lampard to continue playing with Manchester City past the original loan agreement of five months and until the end of the Barclays Premier

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[77] *See id. at* 635-36.

[78] Tyler A. Coppage, *Taking the Training Wheels Off Mls: Why the Single Entity Antitrust Exemption Should No Longer Apply*, 25 MARQ. SPORTS L. REV. 545, 556 (2015) (discussing Dempsey's transfer to MLS).

[79] *Id.*

[80] *See Fraser I*, 97 F.Supp.2d at 131; *see also FIFPro Announcement*, *supra* note 22.

[81] Coppage, *supra* note 78, at 546.

[82] *See* David Hirshey, *Live from New York, it's Man City Jr.!*, ESPN (Jan. 6. 2015), http://www.espnfc.us/blog/kicking-and-screaming/63/post/2229073/nycfc-claim-autonomy-but-look-like-man-city-farm-team-david-hirshey (discussing NYCFC's beginnings and its link to Manchester City).

[83] *See* Ryan Wallerson, *Rift Forms Between NYCFC and Man City Fans*, WALL ST. J. (Apr. 15, 2015), http://www.wsj.com/articles/rift-forms-between-nycfc-and-man-city-fans-1429145514.

[84] *See* Bezbatchenko, *supra* note 68, at 612; *see also* Matt Lawton*, David Beckham in Tears as Cruel Achilles Injury in AC Milan Win Wrecks World Cup Dream*, DAILY MAIL (Mar. 15, 2010), http://www.dailymail.co.uk/sport/football/article-1257985/David-Beckham-Achilles-injury-AC-Milan-win-wrecks-World-Cup-dream.html.

League season.[85] The extension conflicted with the beginning of the MLS season, meaning NYCFC began their inaugural campaign without one of their best players.[86] This arrangement is another example of the growing trend of diverging interests between MLS and MLS club owners. This is because designated players attract fans for both home and away games of the club which employs the designated player, MLS and the clubs scheduled to play NYCFC missed opportunities for sell-out crowds in games involving NYCFC due to Lampard's absence.[87] Simply put, the owners of NYCFC put their interests above the interests of MLS and other MLS owners. This supports the growing trend that MLS and MLS owners are developing diverging interests, which are weakening MLS's single-entity status.

Considering the recent developments of the structure of MLS, the league is likely to no longer have antitrust immunity under the single-entity defense in the event that another antitrust allegation arises.[88] If a suit similar to *Fraser I* is filed against MLS, it will be important for the plaintiffs to establish a relevant market and MLS's power within that market, something the plaintiffs in *Fraser I* could not accomplish.[89] Today, establishing the relevant market and MLS's influence over that market will be much easier than in the days of *Fraser I* due to the continued and sustained growth MLS has endured and the league's ability to attract talented players.[90] The recent transfers of Sebastian Giovinco and Michael Bradley best exemplify MLS's enhanced influence upon the market.

The transfers of Sebastian Giovinco and Michael Bradley broke away from a trend firmly established by the designated players who first entered MLS. Nearly all the initial designated players were "past their prime" when making the move to American soil.[91] In fact, many began mocking the league, claiming that it resembled

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[85] *See* Guardian Sport, *Frank Lampard: I Signed Commitment with NYCFC, not Manchester City*, THE GUARDIAN (Jan. 9, 2015), http://www.theguardian.com/football/2015/jan/09/frank-lampard-manchester-city-nycfc; *see generally* Graham Ruthven, *MLS Preview: Houston Hot in Attack but League Must Fix its Broken Schedule*, THE GUARDIAN (Mar. 25, 2016), http://www.theguardian.com/football/blog/2016/mar/25/mls-preview-houston-international-break?CMP=edit_2221 (discussing how NYCFC is getting used to playing without Frank Lampard, beginning with his arrival in the United States).

[86] *See* Wallerson, *supra* note 83.

[87] *See David Beckham: He came, he sold, he conquered the USA*, USA TODAY (Dec. 2, 2012), http://www.usatoday.com/story/sports/mls/2012/12/02/david-beckham-future-major-league-soccer/1741355/ (David Beckham's appeal directly influenced the growing attendance for MLS matches); *see also* Shahan Ahmed, *Andrea Pirlo Could Have the Same Impact in MLS as David Beckham*, YAHOO! SPORTS (July 6, 2015, 5:21 PM), http://sports.yahoo.com/blogs/soccer-fc-yahoo/andrea-pirlo-could-have-the-same-impact-in-mls-as-david-beckham-212107980.html (discussing whether Andrea Pirlo would have the same marketability as Beckham due to his good looks, coolness, and famous beard).

[88] *See* Bernhard, *supra* note 75, at 431; *see also* Bezbatchenko, *supra* note 68, at 642.

[89] *Fraser I*, 97 F.Supp.2d at 140-141.

[90] *See* Coppage, *supra* note 78, at 555; *see* Jamie Goldberg, *Major League Soccer on the rise: MLS' reputation improves with influx of talent, big-name stars*, THE OREGONIAN (Aug. 5, 2015, 10:06 AM), http://www.oregonlive.com/mls/index.ssf/2015/08/major_league_soccers_reputatio.html____(discussing how MLS is attracting quality players who are not passed their peak playing years and how such ability is a reflection of the growing interest and quality of soccer in the United States).

[91] *See* Coppage, *supra* note 78, at 561 (MLS is enhancing their influence on the global market); *see also* Mike Cardillo, *Perception that MLS is Retirement Home for European Stars Still Doesn't Fit Reality*, THE BIG LEAD (Jan. 8, 2015, 11:30 AM), http://thebiglead.com/2015/01/08/steven-gerrard-perception-

a retirement home of sorts for players seeking one last opportunity to play professional soccer.[92] Giovinco broke this trend. At the time of his transfer, Giovinco, an Italian soccer player in the prime of his career, left Juventus F.C. of Serie A, Italy's most successful soccer club, to join Toronto F.C. in MLS.[93] Coincidentally, the transfer also made Giovinco the highest paid Italian soccer player world-wide.[94] In Giovinco, MLS, for the first time, attracted the services of a world-renowned soccer player from one of the top soccer leagues in the world prior to the peak of his career. This transfer proved to be significant because it altered MLS's trend of recruiting aging veteran players.

In 2013, shortly after Giovinco's arrival to MLS, Michael Bradley also chose to leave Serie A for a career in MLS when he transferred from A.S. Roma to Toronto F.C.[95] Despite being a great coup for MLS, Jurgen Klinsmann, the United States Men's National Soccer team coach at the time, opposed the transfer when he boldly stated that he wanted his players in the more talented European leagues.[96] Regardless of Klinsmann's opinion, Bradley left the European giants for the newly formed Toronto soccer club,[97] whilst becoming the highest paid American soccer player.[98]

The transfers of Giovinco and Bradley clearly portray the power that MLS has steadily acquired on the global soccer market,[99] an important aspect for successfully asserting an antitrust case against the league.[100] Additionally, the league's ability to pay premium salaries to designated players means the league has also become a

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that-mls-is-retirement-home-for-european-stars-still-doesnt-fit-reality/ (MLS has a history of attracting veteran players past their prime; *see also* Thue Nhi Nguyen, *MLS No Longer 'Just a Retirement League' as it Enters 21st Season*, LOS ANGELES DAILY NEWS (Jan. 19, 2016, 4:39 PM), http://www.dailynews.com/sports/20160119/mls-no-longer-just-a-retirement-league-as-it-enters-21st-season (discussing the strides MLS has made in attracting quality players who are not passed their peak before joining the MLS and how programs like targeted allocation money has helped clubs invest in areas of their squad instead of solely focusing on attracting a designated player).

[92] *See* Cardillo, *supra* note 91; *see also* Nguyen, *supra* note 91 (discussing how Kaka decided to join MLS over other opportunities).

[93] *See* ESPN Staff, *Juventus' Sebastian Giovinco Signs Deal with Toronto FC, Reports Say*, ESPN (Jan. 17, 2015), http://www.espnfc.us/story/2250365/juventus-sebastian-giovinco-signs-deal-with-toronto-fc-reports-say.

[94] *See* Billy Haisley, *Toronto Will Make Sebastian Giovinco World's Highest-Paid Italian Player*, SCREAMER (Jan. 20, 2015, 11:49 AM), http://screamer.deadspin.com/toronto-will-make-sebastian-giovinco-worlds-highest-pai-1680624459 (discussing Giovinco's move to MLS).

[95] *See* Nate Scott, *Why would Michael Bradley leave a great European team for a bad MLS team?*, USA TODAY (Jan. 9, 2014, 12:56 PM), http://ftw.usatoday.com/2014/01/michael-bradley-toronto-f-c-transfer-mls (discussing Bradley's move back to MLS).

[96] *See id.*

[97] *See Toronto FC – our brief history and bright future*, TORONTO FC, http://www.torontofc.ca/club/history (last visited Mar. 25, 2017) [http://web.archive.org/web/20150627140918/http://www.torontofc.ca/club/history] (founded in 2005, Toronto F.C., began playing in MLS in 2007).

[98] *See 2015 MLS Player Salaries: July 15, 2015: By Club*, https://www.mlsplayers.org/images/July%2015,%202015%20Salary%20Information%20-%20By%20Club.pdf (last visited Mar. 25, 2017).

[99] *See* Goldberg, *supra* note 90 (discussing the MLS's strides in attracting more quality players from around the world, who years prior, would have not been attracted to the MLS project).

[100] *See Fraser II*, 284 F.3d at 53.

financially competitive organization.[101] As the league continues to develop, its ability to attract more talented players will only continue,[102] thus, weakening MLS's defense against antitrust litigation.

In addition to MLS's weakened defense due to the league's growing influence over the global market for soccer players, MLS will likely fail to defend itself in another antitrust lawsuit due to the disparity between the salaries of designated players and other players within MLS.[103] As evidenced by the transfer of Clint Dempsey, MLS and the owners of the Seattle Sounders have conspired to restrain the free movement of soccer players and continued the trend of diverging interests between MLS and MLS team owners.[104] Therefore, many of the claims asserted in *Fraser I* would now be provable,[105] should a plaintiff assert them against MLS and its owners today. If such a suit arises, MLS will be forced to adjust the structure of the league and grant each MLS team the economic rights of their soccer players. The result of another antitrust lawsuit will then establish MLS as a cooperative venture, thus, affirmatively treating the league as a third-party organization in any player transfers between clubs.[106] Due to the drastic changes in which MLS operates from the time of *Fraser II* and the present day and the continuous growth of the league,[107] MLS will no longer be considered a cooperative venture rather than a single-entity should another antitrust lawsuit arise.[108]

VII. THE STRUCTURE OF MAJOR LEAGUE SOCCER VIOLATES ARTICLE 18TER

In creating contracts with MLS players, MLS violates Article 18ter. Under FIFA's Regulations, a third-party is "a party other than the two clubs transferring a

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[101] *See id*; *see generally* Goldberg, *supra* note 90.

[102] *See* Goldberg, *supra* note 90 (discussing David Beckham's transfer to MLS and how other players are increasingly becoming interest in MLS); *see also* Scott French, *LA Galaxy's Robbie Keane: "We Needed a Shakeup" After Disappointing 2015*, MLS SOCCER (Jan. 21, 2016, 12:14 PM), http://www.mlssoccer.com/post/2016/01/21/la-galaxy-players-say-they-needed-shakeup-after-2015-believe-new-signings-will (discussing how the quality of the LA Galaxy squad will improve if some of the players LA Galaxy are being linked with actually join the club); *see also* J. Smallwood, *MLS becoming a destination for top players*, PHILLY.COM (Feb. 3, 2015, 3:01 AM), http://articles.philly.com/2015-02-03/sports/58716261_1_mls-cup-mls-player-don-garber (discussing MLS's ability to attract a higher caliber of player now than in the past).

[103] *See* Matthew J. Jakobsze, *Kicking "Single-Entity" to the Sidelines: Reevaluating the Competitive Reality of Major League Soccer After American Needle and the 2010 Collective Bargaining Agreement*, 31 N. ILL. U.L. REV. 131, 162, 171 (2010) (MLS cannot assert antitrust liability forever, given the changing landscape of the league) (Designated Player Rule encourages competition among league owners); *see also* Bernhard, *supra* note 75, at 432 (Designated Player Rule changed the landscape of MLS and could transform MLS into a global powerhouse).

[104] *See* Coppage, *supra* note 78, at 556 (discussing MLS's involvement in Dempsey's transfer and how it differs from Beckham's transfer to MLS).

[105] *Fraser I*, 97 F.Supp.2d at 131.

[106] *See* Jakobsze, *supra* note 103, at 162 (MLS will not always be a single-entity); *see also* FIFA, *Regulations on the Status and Transfer of Players*, *supra* note 2, at art. 18ter.

[107] Stebbins, *supra* note 65, at 35 ("The idea that the league's survival trumps fairness will decline as the league continues to grow.").

[108] *See* Bernhard, *supra* note 75, at 431; *see also* Bezbatchenko, *supra* note 65, at 642.

player from one to the other . . . with which the player has been registered."[109] Because MLS is a party other than the two clubs transferring a player from one to the other, MLS is violating FIFA's ban on TPO.[110]

Furthermore, the structure in which MLS operates contradicts the desired transfer activity sought by FIFA. FIFA banned TPO because it feared that third-parties would generate enough power to interfere with the contractual rights of clubs and players. MLS's involvement in transfer dealings sees the league use its power to interfere with clubs and players' ability to create contracts which are in each of their best interests because MLS retains control on how new players enter the league and at which clubs designated players can play.

MLS's structure artificially affects the market price for players because it restricts the mobility of players in the market place. MLS's ownership structure provides a rigid framework for clubs to operate because they lose flexibility in controlling the shape and development of their teams. If a player is entering MLS and demands a certain wage, pursuant to the Designated Player Rule, MLS controls which club that player may be transferred to within the league. In doing so, MLS is restricting the mobility of players, who, for example, may prefer to play for the Chicago Fire, but are instead transferred to the New England Revolution.[111] FIFA banned TPO, among other reasons, to prevent such reduced mobility of players.

The manner in which MLS holds the contracts of its players prevents MLS clubs from retaining the entire transfer sum received in the sale of the player. In January 2016, when NY Red Bulls sold Matt Miazga to Chelsea, MLS retained 25% of the $5 million transfer fee received for the young defender.[112] This distribution of the transfer fee is exactly what Article 18ter seeks to eliminate from transfer activity. In Miazga's case, NY Red Bulls could not retain the whole of the transfer fee and reinvest it within its squad. Similarly, TPO agreements do not allow a selling club to retain the whole of the transfer fee and reinvest it within its squad. Because the involvement of MLS in the transfer of MLS players mirrors that of the involvement of third-party investors in TPO, FIFA is likely to be just as concerned with MLS's influence in the transfer of MLS players as FIFA is concerned with the influence of third-party investors in TPO.

MLS has hidden behind its single-entity status to operate in this unconventional manner. "Fans, operators, and players have gone along with the league's rules and subsequent lack of regard for those rules due to the difficulty soccer leagues have

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[109] *See* Letter from FIFA to its Members, *supra* note 1, at 2 (defining a third-party).

[110] FIFA, *Regulations on the Status and Transfer of Players*, *supra* note 2, at art. 18ter.

[111] *See* Stebbins, *supra* note 65, at 34-35 (discussing MLS's arbitrary method for assigning designated players) ("The type of arbitrary assignment evidenced with the Dempsey and Jones signings may make the league susceptible to a lawsuit brought by a disgruntled operator.").

[112] *See Report: New York Red Bulls to sell Matt Miazga to Chelsea*, SPORTS ILLUSTRATED (Jan. 27, 2016), http://www.si.com/planet-futbol/2016/01/27/matt-miazga-chelsea-transfer-red-bulls-mls-usmnt ("Red Bulls are entitled to 75% of the transfer fee (MLS gets the remaining 25%), as opposed to the standard two-thirds."); *see also* MLS Press Box, 2016 MLS Player Rules and Regulations Summary (Feb. 1, 2017, 11:00 AM) http://www.mlssoccer.com/league/official-rules/mls-roster-rules-and-regulations (MLS clubs typically receive between one-fourth and two-thirds of the transfer fee revenue from transactions).

had establishing themselves in the United States."[113] However, there is currently no exception for single-entity leagues to utilize the practices undertaken by MLS in light of the announcement of Article 18ter. Unless FIFA creates an unprecedented exception to Article 18ter for MLS, the MLS clubs and players are subject to disciplinary measures by FIFA under Article 18ter.[114]

If MLS relinquishes ownership of the employment contracts of the players competing in MLS,[115] it would fall into compliance with FIFA's transfer regulations. Currently, it is unclear whether FIFA would make an exception in issuing Article 18ter violation penalties given the current MLS structure is recognized as a single-entity in the United States. Yet, because the league's single-entity status could easily be overturned considering the developments of the league since the decision in *Fraser II*, the foundation upon which FIFA could make an exception is severely unstable. Thus, transferring ownership of the employment contracts of MLS players to MLS clubs will avoid the possibility that FIFA may issue disciplinary sanctions upon MLS and its players and will remove the possibility of another antitrust challenge to MLS's centralized control.[116]

CONCLUSION

Since its inception, MLS has conducted its league in an unorthodox manner. MLS was justified in this approach in the *Fraser I* and *Fraser II* decisions. Upon the establishment of the league's single-entity status, MLS grew confident in its business practices of directly contracting with players. However, FIFA has now enacted a regulation which prohibits the behavior which MLS has long practiced. Despite the lack of an exception for leagues such as MLS to operate in a manner contrary to the goals of Article 18ter, MLS maintains that the TPO ban does not affect the league due to its single-entity status. Unfortunately for MLS, there is no such exemption and such single-entity status is extremely vulnerable to reclassification. To avoid disciplinary action pursuant to Article 18ter, MLS must amend its league structure to allow for individual MLS clubs to contract with their players, rather than having the league so heavily involved. Granted, FIFA may, at a later date, draw up an exception for MLS to utilize, but without such exception, MLS remains noncompliant with Article 18ter, and subject to disciplinary action by professional soccer's highest governing body.

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[113] Stebbins, *supra* note 65, at 35.

[114] FIFA, *Regulations on the Status and Transfer of Players*, *supra* note 2, at art. 18ter no. 6 ("The FIFA Disciplinary Committee may impose disciplinary measures on clubs or players that do not observe the obligations set out in this article.").

[115] Omar Hafez Ayad, *Take the Training Wheels Off the League: Major League Soccer's Dysfunctional Relationship with the International Soccer Transfer System*, 10 VAND. J. ENT. & TECH. L. 413, 442 (2008) (discussing the difference between MLS transfer policy and European and FIFA transfer policies).

[116] FIFA, *Regulations on the Status and Transfer of Players*, *supra* note 2, art. 18ter no. 6 ("The FIFA Disciplinary Committee may impose disciplinary measures on clubs or players that do not observe the obligations set out in this article.").


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SYMPOSIUM TRANSCRIPTION

On April 7, 2017, the Connecticut Journal of International Law hosted its annual Symposium at the University of Connecticut School of Law. Our symposium, entitled "A Continent Divided: Nationalism and the European Union," focused on the impact of increased nationalist sentiment in the European Union and featured three panels of distinguished international scholars and lawyers.

Two panelists opted to submit articles in lieu of publishing their Symposium remarks. These articles are printed in the subsequent pages and are followed by the transcribed presentations by our other panelists.


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THE SOCIAL EXPERIENCE OF THE EURO

Jeffrey Atik[*]

Abstract

The recent wave of nationalism in Europe - most clearly marked by Brexit - menaces the European Union and its institutions, including the Euro. As Europe heals from the loss of Great Britain, the Euro may serve as a continuing occasion for the construction of a European identity that will moderate receptivity to nationalist appeals. This essay examines the experience of the Euro as contributing to the formation of a European identity. Social experience, including negative social experience, with the Euro forges commonalities that unite as well as divide. The Euro remains territorially incomplete, its restricted zone of use signals incompleteness and doubt concerning the execution of the broader EU project. The Euro Crisis developed distinctly across differing Member States; the social experience of the Euro through the crisis breaks according to national lines. Going forward, revitalization and reformation of the Euro may assist European Union citizens in breaking clear of the more divisive consequences arising from their lingering attachments to nationalism.

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INTRODUCTION

The rise of nationalism across Europe has placed severe strains on the European Union institutions - and the European Union itself. Brexit is the most prominent instance of the rejection of the European solution and the return to the national, as Great Britain removes itself completely from the EU. But nationalist and Eurosceptic movements can be found throughout the EU territory - from newer adherents (Hungary)[1] to peripheral states (Greece)[2] to core states such as Germany and France. Almost every EU member state features a political party having as a principal platform the taking leave of the EU and the restoration of national autonomy. Upcoming elections, particularly the May 7, 2017 presidential election in France where nationalist Marine Le Pen is one of two run-off candidates, should reveal whether the European Union will hang together.[3]

Brexit will not directly affect the composition of the Eurozone - that part of the EU territory where the Euro serves as currency - as the United Kingdom had never abandoned the pound sterling.[4] Indeed, one can wonder whether Brexit would have occurred had the U.K. adopted the Euro. Certainly, Britain's continuing maintenance of the national currency throughout its period of EU membership now simplifies the execution of Brexit. And the British departure might create new pressures on Denmark and Sweden,[5] as well as various new Member States to adopt the Euro.[6] One can imagine a post-Brexit Europe less tolerant of *à la carte* monetary choices, where the Euro serves as the exclusive currency throughout the EU territory, eliminating the messy Eurozone as a space apart within the broader EU.

The suppression of nationalist impulses by a commandeering Brussels serves as a cause for political complaint: following the European path has required the surrender of familiar national ways. Many traditionalists across Europe see their countries as less 'their countries,' less formed of their kind, and more European

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[1] Viktor Orbán, the current prime minister of Hungary, is described as a 'soft Eurosceptic.' As noted by various speakers at the April 7, 2017 *A Continent Divided* conference at The University of Connecticut School of Law, Orbán's government is placing pressure on Central European University on nationalist grounds. Symposium, *A Continent Divided: Nationalism and the European Union*, 32 Conn. J. Int'l L. (2017).

[2] *Syriza's Win: Greece Turns, Europe Wobbles*, THE ECONOMIST, Jan. 26, 2015, http://www.economist.com/news/europe/21640746-syrizas-victory-blow-european-austerity-it-may-also-be-blow-europe-greece-turns-and.

[3] I am assuming that candidate Emmanuel Macron will prevail in the Presidential election – and that France will remain both in the European Union and the Eurozone. Candidate Le Pen has called for 'Frexit:' the abandonment by France of its use of the Euro and France's departure from the EU. It is difficult to imagine any continuing viability of the Euro in the event of Frexit.

[4] *See generally* Paul Craig, *The United Kingdom, the European Union and Sovereignty*, in SOVEREIGNTY AND THE LAW: DOMESTIC, EUROPEAN, AND INTERNATIONAL PERSPECTIVES 165-185 (RAWLINGS, YOUNG, AND LEYLAND EDS. 2013).

[5] Denmark and Sweden are two longstanding Member States of the European Union (that is, they participated in the Maastricht Treaty) which declined to adopt the Euro. Both Denmark and Sweden have maintained national currencies. Denmark, like the Union Kingdom, negotiated an opt-out from the mandate to adopt the Euro. The position of Sweden is more equivocal.

[6] Among the post-Maastricht entrants, some Member States have adopted the Euro: Austria, Finland, Slovenia, Cyprus, Malta, Slovakia, Estonia, Latvia, and Lithuania. Others have not: Bulgaria, Croatia, Czech Republic, Hungary, Poland, and Romania.

(understood as more cosmopolitan). The arrival of unfamiliar faces - EU citizens exercising internal movement from other parts of Europe and refugees from distant lands - trigger nationalist political and social responses that veer from grudging tolerance to racial hatred.

The Euro itself has been a source of unhappiness in many quarters - and a target for emergent nationalists. The 2009 European sovereign debt crisis ("Euro Crisis"),[7] which rocked both the Eurozone and the broader European Union, preceded Brexit and the current surge in nationalist sentiment. The Euro Crisis exposed national fault lines. In the recriminations following the collapse of the Greek economy, the Germans played the prudent Ants to the Greek's profligate Grasshoppers.[8] These stresses, sourced in the economic linkages created by the adoption of the common currency,[9] contributed to the spike in popular nationalist sentiment.

This essay examines the Euro as a cultural institution - as opposed to a monetary or economic institution - and the role the Euro has served and may continue to serve in contributing to the construction of a common European identity.[10] And, as the Euro displaces (indeed annihilates) the prior national currency, continuing exercise of the Euro within Europe may serve to mitigate the current flare-up of nationalist loyalties. Europeans experience the Euro in their everyday lives, as they spend, as they save, as they dream. This experience in turn colors their perceptions of their world and of themselves.[11]

I. THE EURO AND CONSTRUCTION OF A EUROPEAN IDENTITY

The Euro was established to achieve a set of economic goals: the reduction of transaction costs in intra-European trade, enhancement of price transparency, the elimination of intra-European exchange risk.[12] And the Euro was thought to be vehicle for the promotion of a new European identity,[13] an everyday touchstone to the new status of European citizenship. The Euro has created a new set of experiences and has colored familiar experiences; it impresses itself on the consciousness of those who touch it, chiefly those Europeans who reside within the Eurozone.

The architects of the European Monetary System (EMS) anticipated that the Euro would serve as an institution around which a European consciousness could be built. The Euro (at least in its material forms) functions like the EU flag or the EU

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[7] *See generally* Philip R. Lane, *The European Sovereign Debt Crisis*, 26 J. ECON. PERSPECTIVES 49 (2012) (overview of the Euro Crisis).

[8] *See generally* Tayyab Mahmud*, Is It Greek or déjà Vu All over Again?: Neoliberalism and Winners and Losers of International Debt Crises*, 42 LOY. U. CHI. L.J. 629 (20111).

[9] *See* Jeffery Atik, *From 'No Bailout' to the European Stability Mechanism*, 39 FORDHAM INT'L L.J. 1201 (2016).

[10] *See* Thomas Risse, *The Euro between National and European Identity*, 10 J. EUR. PUB. POL'Y 487 (2003).

[11] *See generally* Viviana A. Zelizer, THE SOCIAL MEANING OF MONEY: "SPECIAL MONIES," 95 AM. J. SOC. 342 (1989).

[12] European Union, *The Euro*, at *Purpose of the Euro*, https://europa.eu/european-union/about-eu/money/euro_en#purpose_of_the_euro (last visited Apr. 27, 2017).

[13] Eric Helleiner, *One Money, One People? Political Identity and the Euro* (TITEP, Working Paper 01/6); *see also* Eric Helleiner, *National Currencies and National Identities*, 41 AMERICAN BEHAV. SCI. 1409 (1998).

passport to construct a new identity that plays on commonplace nationalist expectations. That is, when we see flags or passports or money, we have been acculturated to expect national sponsorship behind them. The European Union thus displaces the traditional nation-state in presenting itself through these symbols and institutions. If not precisely declaring itself to be a state, by using flags, passports and especially the Euro, the European Union is, at a minimum, asserting that it functions as a state for various intents and purposes. The European Union, one is to understand, at a minimum resembles a state.

But notice the peculiarly assertive case of the Euro. The EU flag often flies alongside the traditional flags of the EU Member States. The national and European flags co-exist in their coordinated claim for a distributed allegiance.[14] The EU passport is formally issued by the respective Member States: while a European passport prominently features "European Union" on its harmonized cover, it also bears the name of the issuing member state acting on behalf of its national. The EU passport in fact overstates the EU character of the document. A passport requests the admission of an issuing state's nationals into another state's territory; it is only secondarily evidence of nationality (and in the case of EU passports, evidence of the bearer's status as an EU citizen as well).[15] Through flags and passports, the EU and the relevant EU member state co-occupy a space in the EU citizen's imagination that had been previously occupied by the state alone.

The Euro - for those EU member states adopting its use - eliminates national money. There are no alternative currencies that survive in the Eurozone: no francs, no Deutschmarks, no lira. In the realm of currency, the European Union has entirely eliminated the Eurozone Member State from its prior place. The European Union steps into the shoes of the eclipsed nation, taking on the national role. And yes - it is true that Euro banknotes are strictly speaking issued by the Eurosystem,[16] which includes the respective Member State central banks. It is also true that Euro coins (as opposed to Euro banknotes) continue to display national iconography; but these are vestigial incidents of nationality.

The original EMS design has not been achieved. The Euro remains the currency for most but not all of the territory of the European Union, and this incomplete adoption has limited the ability of the European Union to displace national identities through the daily use of money. The incomplete territorial adoption of the Euro has introduced a perceptible incoherency; this too forms part of the social experience of the Euro.

The Euro is a strange beast: it is of course not a national currency (as are virtually

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[14] Marine Le Pen would not have it so. She demanded French television channel TF1 remove the EU flag from its studio. *See* Cynthia Kroft*, Marine Le Pen Demanded EU flag Be Removed for TV Interview,* POLITICO (Apr. 19, 2017), http://www.politico.eu/article/marine-le-pen-demanded-eu-flag-be-removed-for-tv-interview/.

[15] *See generally* Pablo Cristóbal Jiménez Lobiera, *EU Citizenship and Political Identity: The Demos and Telos Problems*, 18 EUR. L.J. 504 (2012).

[16] The Eurosystem consists of the ECB and the national central banks for those EU Member States adopting the Euro. EUR. CENT. BANK, *The Mission of the Eurosystem*, https://www.ecb.europa.eu/ecb/orga/escb/html/mission_eurosys.en.html.

all other contemporary currencies). The Euro is not sponsored by a particular sovereign, and its use is not confined to the territory of a particular state. Nor is the Euro a cosmopolitan currency, untethered from the state, a form of monetary institution practiced in the past and re-imagined by Marx. The Euro falls somewhere in between, but it is clearly modeled on national currencies, with the distinction that the European Union steps into the vacated role of the nation-state.

The now familiar institution of territorial national currency arose within the past two centuries; in these times, the establishment of national money has contributed to the formation of a national identity.[17] And so the Euro might contribute to the construction of a European identity that would (at least somewhat) displace pre-existing national identities as the Euro itself displaces the prior national currencies. Can a French person feel evermore as fully French when the Euro has replaced the franc?

The adoption and use of the Euro has both constructive and destructive social effects. The Euro likely has contributed to a growing sense of European identity, notwithstanding its non-adoption in large swaths of the EU territory and the fissures revealed by the Euro Crisis. The introduction of the Euro has withdrawn traditional authority from the participating member states, and so works to diminish the prevailing sense of nationality, particularly within the Eurozone.

Keith Hart observes that since classical times, coins have had two sides - one side reflects the quantitative aspects of the coin (its metal content and its unit value), the other the face of the sovereign (today more generally the 'face' of the State).[18] Hart uses the familiar two-sidedness of coins and banknotes to emphasize both the public and private characterizations of money. These 'two faces' also characterize opposing visions of the social nature of money, including the Euro.

The Euro functions as do other contemporary moneys in the private sphere: it is a medium of exchange, a measure of value, a standard of credit, and a store of value. And the Euro functions to express essential relationships between the individual and the state: it measures taxes due the state and benefits flowing from the state (pensions, unemployment compensation, budgets for the provision of government services, etc.) Public obligations in the Eurozone are Euro-denominated obligations, though the relevant Member State remains the site of these obligation.

The use of currency alone is unlikely to instill a very strong sense of identity. Rather, a currency can contribute, along with other institutions, to build an identity. The European Union has deployed a series of identity-building institutions: EU-harmonized passports, an EU flag, direct elections for EU parliamentarians. But other familiar tools from the box of nation-building have been renounced: there is no EU army, there will be no common EU language. The European Union continues to operate through the agency of its member states; it is remote from the European populace. As such, the use of the Euro is one of the most palpable experiences of EU belonging.

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[17] For the North American experience, *see* Eric Helleiner, *Historicizing Territorial Currencies: Monetary Space and the Nation-State in North America*, 14 POL. GEOGRAPHY. 35 (1999).

[18] Keith Hart, *Heads or Tails? Two Sides of a Coin*, 21 MAN 637 (1986).

II. THE (MATERIAL) FORMS OF THE EURO: ICONOGRAPHY

A Euro coin or a Euro-denominated note is not a Euro: to borrow from Magritte,[19] *ceci n'est pas un Euro*. Rather, a coin or a note is (largely) a representation of a grander idea: a relational complex involving the bearer, any transactional counterparty, the European Central Bank, and broader society. Yet these representations, these tokens, these instantiations of "Euro-ness" do function: a Euro coin or note can buy a newspaper or a baguette, whereas one cannot smoke Magritte's "*pipe*."

The iconography of Euro banknotes and coins is deliberately crafted. Consistent with historical national practices, Euro banknotes are central bank obligations. Euro banknotes are issued by the European Central Bank; they evidence the ECB's obligation to satisfy the bearer with a Euro's value (this circular notion underlies all modern money). While the Euro banknotes' engagement formally rests upon the ECB, the ECB in turn is both an agent of the European Union and an institution of the European Union (the ECB does enjoy independence from the EU's political organs and from the various Member States).[20] Euro coins, on the other hand, are produced by national treasuries. Both the Euro banknotes (of course) and the Euro coins have only token intrinsic value.

The first-generation Euro banknotes include images of windows and gateways on the obverse and bridges on the reverse. These images then are arrayed according to various eras in European development (e.g classical for €5, Romanesque for €10, and so on, up through the modern period, which is displayed on the €500 banknote, popularly known as 'bin Ladens').[21] To the extent the European Union appears on the notes, it does so through a small EU flag printed on the obverse and a map image of the EU territory on the reverse (including the member states that avoided adoption of the Euro). The European Central Bank appears on the notes in the form of a series of abbreviations, corresponding to the ECB's name in various EU languages. The note iconography celebrates European art and engineering, and Europe's grand history. The images of doorways and bridges suggest passage over and through - ways of communication. While the representations have been drawn from real sites, they have been abstracted to reduce their specificity; The Rialto becomes a generic bridge. In the end, the images are disappointingly banal.

Perhaps the greatest visual novelty of the Euro banknote is the erased iconography of the prior national paper money. There are no nationalist slogans, no depictions of national monuments and sacred sites. National heroes have disappeared. And most absent of all are the monarchs. This may not be a trivial point: monarchist insistence on preserving the Queen's image may have contributed to the reluctance of the United Kingdom to adopt the Euro.

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[19] Magritte's painting of a pipe declares itself "*Ceci n'est pas un pipe"* (This is not a pipe). René Magritte, *The Treachery of Images (This is Not a Pipe)* (1929), Los Angeles County Museum of Art.

[20] Case C-11/00, *Comm'n v. European Central Bank*, 2003 ECR I-7147.

[21] The European Central Bank announced it would phase out the €500 'bin Ladens.' Jon Henley, *€500 'Bin Laden' Banknotes to be Axed*, THE GUARDIAN (May 4, 2016), https://www.theguardian.com/business/2016/may/04/500-euro-banknote-could-be-scrapped-crime.

Euro coins are more various - and retain more national flavor. Here there is found a 'common side' (that is, a side that bears uniform EU iconography) and a 'national side', which is an expression of the minting member state. The 'common side' of the Euro coin is relatively plain. The coin's nominal value is stated (together with "Euro cent" or "Euro") and a map of the EU territory together with the 12-stars drawn from the EU flag appear. Variety is found on the 'national side', where each minting Member State enjoys latitude of discretion. There have been a number of amusing controversies,[22] as various Member States issue their respective versions of Euro coins. The largest Euro coin has a value of €2. National expression has been confined to *petite monnaie*.

Euro iconography follows national experience with coins and banknotes. The European Union is identified, promoted and modestly celebrated. In their plainness, Euro banknotes advance the common heritage, rather than the more peculiar, elaborate and characteristic imagery found on the prior national banknotes. While the Euro may be 'stronger' in a monetary sense to many displaced Member State national currencies now abandoned, it is hard to maintain that the Euro is stronger in conveying visual messaging than were its varying national predecessors. And the images of those lost national banknotes continue to resonate in the minds of many (generally older) Europeans. Their memories of these images, which in many cases are more vibrant and more stirring,[23] continue to exert a tug away from the European identity back toward the national.

III. THE GERMAN-AS-A-COMMON-LANGUAGE THOUGHT EXPERIMENT

Investigations into the social character of money often invoke an analogy to language.[24] Like words, money forms intelligible signs. Money, like language, is a critical medium of social exchange. Money, like language, is constitutive of identity: the particular kind of money we use, in part, makes us who we are. And money, like language, is both stable and unstable over space and time.

Consider for a moment the self-evidently doomed proposition of adopting a common language for the European Union that would sweep national languages aside, much as the Euro has eliminated the franc. The Romans, after all, made considerable progress in imposing linguistic unification along Europe-wide lines in earlier times (though local languages co-existed with Latin and dominated Latin in daily use). Why did the European Union not press for adoption of a common language - as an even more ambitious assault on pre-existing national allegiances?

The idea is not so farfetched: the local languages of Paris and Madrid were imposed on the newly-built nations of France and Spain. And using language to create a social identity is not an abandoned practice: China currently imposes

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[22] Debora MacKenzie, *Euro Coin Accused of Unfair Flipping*, NEW SCIENTIST (Jan 4. 2002), https://www.newscientist.com/article/dn1748-euro-coin-accused-of-unfair-flipping/.

[23] A writer for the website Neat Designs argues that the now-abandoned Netherlands Guilder was the most beautiful banknote. NEAT DESIGNS, *World's 25 Most Beautifully Designed Banknotes* (Feb. 17, 2012), http://neatdesigns.net/worlds-25-most-beautifully-designed-banknotes/.

[24] *See* MARC SHELL, MONEY, LANGUAGE, AND THOUGHT (1993).

Mandarin as the national language - though Mandarin had not been widely spoken in many parts of China.

Of course a language cannot be newly fabricated as easily as a currency might be—a thoroughly artificial Euro-wide language would be infeasible. But perhaps German could have been a candidate to serve as a common Euro language: German literature is an important repository for both national and Europe-wide expression and aspiration.

Even were an eventual agreement reached as to *which* language to use (which would embitter many), the abandonment of national languages would be fiercely resisted. Europe is moving toward greater recognition of language rights: Catalans and Friesians wish to speak their own languages within their national solutions as well as within the European Union. We know that imposing a particular existing European language as the common EU language would be experienced as an exercise of power, privileging some over others. Those EU citizens not speaking this 'Euro language' from birth would be at an economic disadvantage - and their social identities (constructed around their native language) would be depreciated.

Imagine if the European Union were to impose a particular national language - say German—by simply relabeling it "Euro". One could hardly mask the historic national origin of such a Euro language, whatever it might be called. This Euro language would be strange to some (indeed most), but would be warmly familiar to Germans. Without probing too deeply into the specificities of German nationalism, one could imagine a German easily expanding his or her self-identity as a German to the broader European, aided by the reassurance of a comfortable Euro *sprache*.

The European Union of course has elected to go in the opposite linguistic direction. Given that there is (and cannot be and will not be) a single common Euro language, the EU policy has been to embrace all the national languages.[25] And hence the legions of translators engaged in making EU law and regulation intelligible throughout the EU territory. The insistence on a common money then seems surprising, given that the European Union is resigned to the inevitable co-existence of so many languages and their inhibiting effect on the formation of a European identity.

The conventional account of the establishment of the Euro resembles an origin myth. The Euro is a creature of a particular political moment (culminating in the 1992 Maastricht Treaty);[26] it results from the joint determination of the various European member states (including those member states which subsequently declined to adopt it). The Euro is of course artificial, at least at the moment of its creation, but all currencies are artificial.

The Euro was not a freshly-born currency; it did not arise from the mists. In some very real sense, the Euro is the continuity of the prior German currency - the

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[25] Michele Gazzola, *Managing Multilingualism in the European Union: Language Policy Evaluation for the European Parliament*, 5 LANGUAGE POL'Y 395 (2006).

[26] *See* Treaty on European Union, July 29, 1992, 1992 O.J. (C. 191/1).

former *Deutsche Mark* - now applied throughout the Eurozone.[27] The Euro's German origins may be masked—but its consistent German character shines forth. The defining characteristic of the Euro (which it shares with the *Deutsche Mark*) is its resolute commitment to price stability. And this objective is constitutionally hardwired into the Euro.[28]

The obsession with price stability (as a sole monetary objective) is peculiarly German. It arose from the German experience of hyperinflation in the early 1920s[29]—but in some sense gained force as an explanation for the success of the German economy (*Wirtschaftswunder*) in recovering from the destruction of WWII. German monetary management is admired by Germans with pride and by others (such as the Italians) with envy. If the Euro is, in an important sense, a re-badged *Deutsche Mark*, and if it performs according to the familiar patterns of the *Deutsche Mark*, then it will be socially experienced quite differently by a German than by a Greek.

IV. THE SOCIAL EXPERIENCE OF THE EURO

The Euro has given rise to a new set of shared social experiences. These common-place experiences (to the degree their commonality is recognized) may contribute to the construction of a shared European sense of identity. The form of these experiences (for the most part) replicate long-standing practices of European citizens utilizing their prior national currencies: buying things, paying taxes. The use of checks, banknotes and credit cards continues as before throughout the Eurozone, following familiar transactional patterns, with the Euro replacing the prior national currency.

Novel transactional technologies (involving the Euro) have created new monetary experiences that have no prior counterpart involving the abandoned national currencies. Paying a highway toll using a transponder, for example, may be an exclusively "Euro-experience;" the combination of new technology and new money will help an Italian to forget hours-long weekend queues on the *autostrada* as well as the *lira*.

Ordinary transactions involving coin and banknotes are sufficiently commonplace, even today, to generate substantial direct Euro-denominated experiences. Every time one removes a €5 note from a billfold in order to buy a sandwich or a beer, one experiences the Euro. One touches the formal representation, the object; one sees its iconography, one mentally contemplates the value-equivalence between this token of abstract '€5-ness' and the purchased object.

But our social experience of a currency involves more than actual transactions;

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[27] *See* Robert Hetzel, *German Monetary History in the Second Half of the Twentieth Century: From the Deutsche Mark to the Euro*, 88 FED. RES. BANK RICHMOND ECON. Q. 29 (2002).

[28] Article 127(1) of the Treaty on the Functioning of the European Union provides that the "primary objective" of the European System of Central Banks in governing the Euro shall be "to maintain prices stability." This strong anti-inflationary bias was intended to follow traditional German hard monetary policies.

[29] *See generally* ANTHONY MCELLIGOTT, SHORT OXFORD HISTORY OF GERMANY: WEIMAR GERMANY (2009).

it also includes potential transactions: the trips we haven't taken, the fashionable clothes that don't fit, even the jewels or yachts that our beyond our financial reach. All these imagined encounters fill out our relationship with the Euro. For every automobile we might buy, to give an occasional but salient consumer experience, there are many more we try on, each one engaging our imaginations in a transactional experience involving (and measured by) currency, even if only one of these considered choices is ultimately executed.

The Euro's reach - both actual and imaginary - is considerably more territorially extensive than were the respective reach of the predecessor national currencies. The contemporary currency space of the Euro includes all those EU member states comprising the Eurozone (and to a limited degree beyond). Now this active space is broader than the space in which most people's daily experiences extend. A Parisian making a stroll across the city and stopping in a café will not directly appreciate the Euro's enhanced range as compared to that of the former franc. But should this Parisian jump on a train for Brussels or Amsterdam or Frankfurt, she will now have a markedly different experience from what she would have experienced prior to the Euro's adoption. Indeed it is perhaps better to describe her journey as including a series of important non-experiences: the avoidance of the money exchange and the far greater cognitive ease of negotiating taxi fares and hotel rates. These differences are striking - and are directly experienced (or fantasized) by the participant. It is hard to imagine an everyday experience that the Euro has made more difficult than what had been the case prior to its adoption.

Let me now introduce the notion of a *shared Euro experience*: two individuals, one in Madrid, the other in Dublin, each buy a newspaper and then sit and have a coffee. The coffee will likely differ (or not, if they both go to Starbucks). The newspapers will have different content and will be published in different languages. But their respective transactional experiences (and consumption experiences) will have greater commonality if they each pay for their papers and their coffees in Euros. This greater commonality exists regardless of whether it is acknowledged by the two individuals. A coffee purchased with Euros is experientially different than a coffee purchased with pesetas or Irish pounds. The introduction of the Euro has meaningfully increased the sharing across Europe of much ordinary experience.[30] And this is not trivial, for money (like language) affects how we see the world.

Now consider the emergence of networks that can amplify the experiential commonalities created by the Euro. Here now we will suppose that the two individuals, one in Madrid and one in Dublin, indeed go to Starbucks for their respective coffees. The commonalities compound in this case: Starbucks and

[30] This is not to suggest that the Starbucks' prices are equalized across the Eurozone. A recent Starbucks *grande latte* price study by *Thrillist* showed dollar prices of $5.90 in Brussels, $5.28 in Berlin, $4.94 in Amsterdam, $4.84 in Paris, $4.34 in Madrid, $4.00 in Athens, and $3.95 in Dublin. Outside the Eurozone, Starbucks charged $4.59 in London (in sterling equivalent, of course). Becky Pemberton, *How much would YOU pay for a caffeine fix on holiday? The price of a Starbucks latte in 30 countries revealed (and you'll need deep pockets if you're off to Zurich)*, DAILY MAIL (March 3, 2016), http://www.dailymail.co.uk/travel/travel_news/article-3473320/How-pay-caffeine-fix-holiday-price-Starbucks-latte-30-countries-revealed-ll-need-deep-pockets-Zurich.html.

payment in euros is a more common experience than local-coffeeshop-coffee purchased in Euros - and is a more common experience than Starbucks coffees purchased in national currency. To the extent Europeans transact (in Euros) with counterparties (like Starbucks) which have a trans-European scope, the common experience is heightened.

Consider IKEA (there is irony here, as IKEA is Swedish, and presumably keeps its accounts in Swedish crowns). A young couple planning to decorate an apartment will encounter identical furnishings with the same strange Swedish names - and identical Euro-denominated pricing—whether they reside in Turin or Antwerp. Decorating involves both actual transactions as well as a far greater number of imagined transactions—as the designer works through the various combinations of styles, sizes, colors and prices. And the dreamer actively engages with the Euro throughout this process.

IKEA is an important node in the Euro social experience network - as it serves to link a vast number of fantasists and consumers. The IKEA furnishing experience is an increasingly common European experience; I made an Airbnb tour through Europe recently and noted the presence of IKEA products (like the ones in my home in Los Angeles!) in several EU member states, which gave those apartments a rather post-national air. But what the apartment owners in Hamburg and Strasbourg shared in furnishing their respective apartment had a greater degree of commonality than either had with what I experience in California, in that their owners (and not I) had Euro-denominated experiences. Going to IKEA, for a European, is Euro affirming.

The accumulation of Euro-denominated social experiences creates more and more commonalities - but it remains to be determined how the layering of more common social experiences might contribute to the construction of this strange, post-national self-awareness of being a 'European citizen.' At the least, by rendering more common experiences that had been differentiated (by the use of disparate national currencies), the Euro should destabilize national identities.

Now consider the 'other face' of the Euro coin - the holder's relationship with the State. Two retired school teachers - one in Stuttgart, the other in Lisbon - receive monthly pension payments denominated in Euros. The amount of their respective pensions will likely differ (as will have their respective earnings during the period of their employment), but the expression of the obligations of the State will share the commonality of the Euro. Of course the pension obligations here described remain obligations of the two member states, Germany and Portugal; they are not obligations of the European Union. But they are public obligations. The social experience of the Euro is not exclusively transactional.

One uses currency to measure one's social position – in at least two important dimensions. First, one measures oneself against one's neighbor (as morally suspect as that might be). We compare salaries, cost of homes, cost of education of children, and cost of ski vacations to measure how we stand. To engage in these reflections in Euros is identity forming – I may belong to the class that purchases a €40,000 automobile; I am distinct from those who purchase €20,000 cars and those (beyond my dreams) who purchase €80,000 cars. The status measure here is a complex of the

afforded automobiles and the Euro itself. Moreover, we position ourselves as we track through life: what is our patrimony? How much have I managed to save? Five hundred million *lire* may sound like a lot; €258,228.16 less so. There is more at work than a simple conversion rate (these two amounts are equivalent). The Euro amount registers Euro savings, and the prospects for an ample or frugal Euro-denominated retirement.

There is a dissonance, however, from the continued experience of Europeans with non-Euro currencies. There is reduced experiential sharing between a British national and a Eurozone counterpart; the British national has his nationality confirmed every time he reaches for a pound from his pocket. Without touching Euros, the European Union is more remote from his consciousness. He sees a world denominated in terms of pounds and pence (thankfully, the shilling has gone to the wayside). He is—all else equal—less a European in his own self-image. This maintained distance likely eased Brexit.

And consider the Eurozone national who has visited London. The difference between the Eurozone and the United Kingdom is marked at immigration where there is a perfunctory document control for EU nationals (but that is yet another story[31]), and is quickly compounded by the necessity to draw unfamiliar money from an automatic teller or to visit a currency exchange. The visitor from the Eurozone then faces the bewildering world of pounds. Pounds sterling are sufficiently close in value to Euros at current exchange values to entice spending, but may result in an underestimation of how much more expensive things are in London. Moreover, she experiences her status as a foreigner more intensely than she would by visiting another Eurozone country.

And knowing, as she must, that the United Kingdom belongs to the European Union, she would then perceive (cognitively here) the Euro's failure of promise. Britain's decision not to adopt the Euro not only weakened the possibility of U.K. nationals to develop a European identity through the engaged use of the Euro. It also weakened the identity-forming potential of the Euro for Eurozone nationals. Throughout the post-Euro adoption phase of the United Kingdom's EU membership, British diffidence was rendered palpable by Great Britain's clinging to the pound sterling.

The Eurozone visitor to London directly experiences the fissures that divide the United Kingdom (and Denmark and Sweden) from the Eurozone. Fractional identities may be successfully maintained; one can be both Bavarian and German perhaps, or both *Quebeçois* and Canadian, and an outsider can comprehend such odd self-contradicting identities. (Note the English have tolerated the continued presence of Scottish banknotes within the United Kingdom.) One can understand the poorly formed European identity of the non-Euro spending British national. The Eurozone visitor to London shares less with him (as included in her European self-identity) than she does with a Parisian or a Berliner.

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[31] The United Kingdom never entered the Schengen agreements, which generally eliminate border controls with respect to intra-EU movement of persons. As such, the United Kingdom requires all entrants (including UK nationals) to queue on arrival for controls.

European identity remains more an identity *à faire* than a robust identity. It is more vulnerable to the corrosion of incompleteness. The particular dissonance of the Euro's failed territorial reach would remind the Eurozone-national visitor to London (and going forward, visitors to Copenhagen and Stockholm) of the precariousness of the Euro's survival - and suggests that the European Union is similarly fragile. One does not build self-identity on what one perceives to be a temporary foundation. The smoke and mirror of the formation of national identity involves myths of permanence that are at odds with history (the Fascists promoted an ahistorical direct continuity between Rome and the young Italian Republic).[32] The message of the social experience of the non-use of the Euro, that is, the experience of continued use of member state national currency (even by a Eurozone national) induces a doubting hesitation to transfer allegiance to the EU level.

V. THE SOCIAL EXPERIENCE OF THE EURO IN CRISIS

But all is not well with the Euro - and this was so prior to the prospect of Brexit. These disappointments also form part of the social experience of the Euro.[33] The Euro Crisis generated a set of extremely varied experiences, many of which were distributed along Member State lines. A common experience is not necessarily experienced in the same way; indeed certain shared experiences provoke sharply divided meanings and perceptions. Consider the fans of two opposing teams viewing a sporting match; they both watch the same events unfold on the same field. But when the match ends, each set of fans will record profoundly different experiences (and will derive different meanings) from these events, depending in major part on the fate met by their respective teams in the outcome. Common experiences can involve the distribution of disparate meaning; as such, they may divide as well as unite.

Modern national money has generally enjoyed exclusivity within the national territory. And if this national money is not convertible according to some objective standard (such as fixed exchange with a rare metal or a benchmark currency), its value (for both internal and external purposes) may be controlled by the state. At the other extreme, the value of a fully convertible national currency (in a world of floating exchange rates) is set by the market. In either scenario, those persons located within that national currency area experience an economic 'common fate.' Again, this does not mean there will not be winners and losers, rich and poor, within a currency area. But the fate of one's currency area is a general condition that will determine, to a large degree, one's economic situation. The economic performance of a national currency then is like the weather; it is a generalized experience. And like the common weather, there is very little most individuals can do about the dynamics of currency exchange, credit shocks and deteriorating economic conditions that affect everyone.

Recall the common experience of Germans during the hyperinflation of the early 1920s. No doubt some Germans fared better than others during this time, but all were

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[32] Andrea Giardina, *The Fascist Myth of Romanity,* 22 ESTUDOS AVANÇADOS 55 (2008).

[33] *See* Philomila Tsoukala, *Narratives of the European Crisis and the Future of (Social) Europe*, 48 TEXAS INT'L L.J. 241 (2013).

challenged by the melting value of the mark. The 'common fate' aspect of a national currency may be an important element in generating a national feeling. A common currency generates broader common experiences: booms and busts. And perhaps it creates a kind of involuntary solidarity: if we're all in this together, well then, we're all in this together. The bleeding *Papiermark* of the 1920s may have induced a feeling of German nationalism as effectively as the miracle *Deustche Mark* of the 1950s.

The Euro crisis - and the doubts about the continuing viability of the Euro[34]—placed into doubt whether the population of the Eurozone does in fact experiences a 'common fate.' Indeed, there seems to have been winners and losers in the Euro crisis; sober (if not exuberant) Germans and severely depressed Spaniards and Irish as the crisis played out. The crisis was a shared social experience writ large, but it was also a distributive experience: to be a Greek civil servant or a Spanish student seeking entry-level employment is an experience that does not correspond to that of the German civil servant or the German student seeking employment. The contrast between Spanish and German youth unemployment during the height of the Euro Crisis was staggering: in 2014 German youth unemployment was 7.7% and Spanish youth unemployment was 53.2%.[35]

The relevant social experiences of the Euro often involve the state. Greek public pensions that are slashed in the name of austerity are Euro-denominated pensions; the experienced loss is a Euro-denominated loss. Foreclosures on a Spanish apartment are Euro-denominated foreclosures; one can even speak of Euro-denominated homelessness. The failures of peripheral states to meet basic social needs during the Euro Crisis (mandated by austerity conditions) are Euro-denominated failures: that is, they are experienced both as a failure of the Member State and as a failure of the Euro.

Over time people experience a currency as good money or bad money, based on their experiences with it. The Euro Crisis perversely generated experiences with the Euro that were good or bad depending in no small part on the Member State in which an individual resides. Such disparate experiences likely counteract any identity-building effect from the adoption of the Euro.

CONCLUSION

Brexit necessitates a shift to the project of establishing a European identity. Going forward, to be a European (understood as a EU citizen) no longer includes also being British. And this simplifies the project. As the Eurozone more accurately maps onto the broader EU territory (notwithstanding the non-adoption by eight continuing EU Member States), the positive contribution of Euro social experience to the construction of a European identity should be enhanced. Once the United

[34] Famously, Paul Krugman, Nobel laureate and columnist for the *New York Times*, warned of the inevitable collapse of the Euro. *See* Paul Krugman*, Euro Zone Death Trip*, N.Y. TIMES (Sept. 25, 2011), http://www.nytimes.com/2011/09/26/opinion/euro-zone-death-trip.html.

[35] Nicole Goebel, *Germany Has Lowest Youth Unemployment in EU*, DEUTSCHE WELLE (Nov. 8, 2015), http://www.dw.com/en/germany-has-lowest-youth-unemployment-in-eu/a-18640125.

Kingdom exits, the non-adopters will be peripheral: Scandinavian (Denmark and Sweden) or former Eastern bloc. The Eurozone may contain the long-standing Europeans to which the more recently admitted Eastern Member States may aspire. For many of the former-Eastern bloc Member States, the question (as a matter of formal stance, if not political and economic reality) is when they will adopt the Euro, not if.

If an important goal of the implementation of the Euro as the common currency for most of Europe was the construction of a European identity, has the series of disappointments inflicted by and impacting the Euro contributed to the current spate of nationalism? Greece suffered as much as any Member State during the Euro Crisis, and current polls demonstrate that Greek public remains profoundly anti-Euro and Eurosceptic. The Germans weathered the Euro Crisis rather well and remain fond of the Euro (though perhaps not as fond as they are of their beloved *Deutsche Mark*), and German nationalism, for the moment, seems better tamed than its counterparts in most other Member States.

Contemporary European nationalism is in part nostalgic. It represents the search for a restoration of a status that perhaps never existed, when European nations were less diverse (if not homogenous) in cultural practices. The Euro marks a present and perhaps a future, but it also inevitably recalls a past, where national currencies circulated, where European life was led differently.

The Euro Crisis has had a lingering effect. While the imminent peril of sovereign defaults has passed, there is still considerable economic distress is many European peripheral states. Day-to-day life is not much better in Greece or Spain than it had been in the darkest hours of the Euro Crisis. Tragically, the refugee crisis has hit some of the very same Member States that greatly suffered from the Euro Crisis; Greece in particular.

How do we assess the Euro project in terms of the construction of European identity, when we see that identity under attack from one zone to another throughout Europe? It is conceivable that the move to nationalism would be even stronger in the absence of eighteen years of Euro experience. As the rise of nationalism now confronts France – part of the core of the European Union – we shall soon see whether sixty years of European cooperation, including fifteen years of daily use of the Euro, will hold. In the end, there are a great many forces more powerful than the appeal of a common money that will determine the ongoing prospects of the European Union. Building a functioning, attractive European identity will be important in any case, and the everyday experience of the Euro (assuming it is positive) will help build it.


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CONSTITUTIONAL CRISIS AND INSTITUTIONAL REFORM: THE EUROPEAN UNION AT THE CROSSROAD

Federico Fabbrini[*]

Abstract

The European Union (EU) has recently faced a plurality of crises, which have exposed its limited effectiveness and legitimacy. The article seeks to investigate the structural reasons of the EU weaknesses, and to consider appropriate proposals for constitutional reform that would allow the European integration project to move forward. As such the article advances three interconnected claims. First, the article claims that the EU has failed to successfully address the recent challenges facing it because of its current institutional power-structure, based on intergovernmentalism. Second, as a result of the problematic nature of the current EU system of governance, the article claims that broad institutional reforms are needed to endow the EU with a form of government, which is democratically legitimated and endowed with the executive capacity to act effectively. Third, the article maintains that the opportunity to change the EU institutional architecture is offered by the decision of the United Kingdom (UK) to withdraw from the EU: while the reforms in the EU system of governance spelled out above are far-reaching, Brexit increases the urge—and at the same time creates the possibility—to structurally improve the EU institutional architecture.

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INTRODUCTION

In the last decade, the European Union (EU) has faced a plurality of crises. Since 2008, the economic and financial crisis, generally known as the Euro-crisis, has challenged the functioning of Europe's Economic and Monetary Union (EMU), to the point of threatening the unity of the single currency. In the past several last years, the EU has also faced a dramatic migration crisis, triggered by mass dislocation of people in Northern African and the Middle East. Moreover, the EU has encountered internal and external pressures, with national security and foreign affairs calling into question the cohesion of the EU member states, and their common resolve against international threats. Last but not least, in June 2016 the United Kingdom (UK) voted to leave the EU, exposing in more-explicit-than-ever form the disintegrative pulls at play in the EU. While these crises are diverse, they have all revealed the inability of the EU to deal with unforeseen events, highlighting the executive deficit that currently characterizes Europe's system of governance. The purpose of this article is to investigate the structural reasons of the EU institutional weaknesses and to consider appropriate proposals for constitutional reform that would allow the European integration project to move forward. As such this article advances three interconnected claims.

First, this article claims that the EU has failed to successfully address the recent challenges facing it because of its current institutional power-structure, which is deeply unsatisfactory. The architecture of governance in the field of economic affairs, home affairs, and foreign affairs, is premised on a continuing intergovernmental negotiation between member states. In fact, intergovernmentalism has expanded in the EU following the Euro-crisis and migration-crisis, as evidenced by the rise of the European Council as the center of decision-making in almost all EU policies, including trade. The European Council is composed of heads of state and governments of the EU member states: national leaders are democratically elected in their home states, and they have a mandate to represent and protect the national interests. Nevertheless, experience has shown that a Union of national democracies is poised to place states against each other, as the electoral mandate that each national leader has may conflict with the mandate that other presidents or prime ministers have received. In this context, as the Greek crisis has patently made clear, tensions between member states are assured to emerge—and ultimately dynamics of domination by larger, more powerful states over smaller, less powerful ones are bound to entrench.

Second, as a result of the problematic nature of the current EU system of governance, this article claims that broad institutional reforms are needed to endow the EU with an effective and legitimate form of government. In particular, the main weakness of the EU institutional architecture relates to the executive power: the EU currently lacks an executive power which has the vigor and the legitimacy to act in the interest of the Union as a whole. While a Union of national democracies is unable to integrate the interests of several state electoral processes running in parallel, a European democratic Union should feature an institutional authority which is popularly chosen by the peoples of Europe and directly responsible to them. In this context, I suggest that the creation of a President of the EU, to be elected by the EU

citizens in the EU member states, would offer a way to channel popular preferences from across the EU toward the same electoral office and simultaneously create a forum for the contestation of EU policies. In a pluralist Union, a system of separation of powers appears to be the most appropriate to balance inter-state interests, and a presidency (elected through a mechanism that tempers majoritarian with federal concerns) has potential to remedy the legitimacy gaps currently undermining decision-making in the EU.

Third, this article maintains that the opportunity to change the EU institutional architecture is offered by the decision of the UK to withdraw from the EU: while the reforms in the EU system of governance spelled out above are far-reaching, Brexit increases the urge—and at the same time creates the possibility—to structurally improve the form of government of the EU, so as to enhance its efficacy and legitimacy. In fact, Brexit represents a wake-up call for the EU, as it challenges the integration paradigm dominating the process of European unification since March 1957. Signaling the potential unraveling of the EU, the triggering of the withdrawal negotiations by the British government on March 29, 2017 should be used as an opportunity to engage in a thorough soul-searching within the EU, and to prepare those constitutional changes which will be necessary to adapt Europe to a Union at 27 member states. In this context, treaty amendments necessitated by Brexit should address the legitimacy gap exposed by Europe's crises through appropriate institutional reforms. Dynamics of disintegration inevitably arise in a Union incapable of properly governing itself: therefore, no chance should be wasted to redefine the nature of the cooperation between EU member states and their citizens through a constitutional pact that better compounds their interests.

This article is structured as follows. Section 2 discusses the problems of intergovernmentalism, underlining how a system of executive decision-making premised on the continuing negotiations between heads of state and government of the EU member states is unable to deliver effective decisions, and is poised to produce outcomes which are perceived as illegitimate by some of the players. Section 3 provides evidence of this by discussing the Greek drama that unfolded in the context of the Euro-crisis: in particular, attention is given here to the events that occurred in the summer of 2015 leading to a potential Grexit (Greece expulsion from the Eurozone). On that basis, section 4 moves to advance a proposal for overhauling executive authority in the EU through the establishment of a new office—the President of the EU. Here, I explain how such office could be elected, and how it would function within a reformed system of separation of powers in the EU. In the awareness that creating such a new institution would represent a relevant break with the current regime, section 5 discusses the possibility, if any, of reforming the EU constitutional system along these lines and suggests that Brexit represents an opportunity to achieve this result. With the UK leaving the EU, the remaining EU member states will need to revise the EU treaties to adapt to the reality of a Union at 27. Section 6 thus concludes by suggesting that the EU institutional architecture can be fixed through reflection and choice.[1]

[1] *See* THE FEDERALIST NO. 1 (Alexander Hamilton).

I. THE PROBLEM OF INTERGOVERNMENTALISM

Recent crises—notably the Euro- and migration-crises—have unearthed and accelerated a major shift in the form of governance of the EU: the rise of intergovernmentalism. Institutions such as the European Council—which groups heads of state and government of the EU member states together with the President of the European Commission, under the leadership of a semi-permanent European Council President[2]—have come to acquire a leading function in the EU decision-making structure.[3] According to Uwe Puetter, the centrality of the European Council in EU governance generally, and in EMU specifically, is not a haphazard development.[4] Rather, it is the result of a deliberate institutional choice made at the time of the Maastricht Treaty of 1992. When the EU member states decided to transfer at the EU level a number of competences, including in the field of economic policy and migration, they resisted delegating powers to the European Commission and other supranational bodies, and rather created an intergovernmental framework in which they could remain in control of decision-making.[5] As Puetter explained, while post-Maastricht "policy interdependencies have grown, member state governments have resisted the further transfer of formal competences to the EU level and did not follow the model of the Community method."[6]

Be that as it may, since the beginning of the Euro-crisis the European Council has become "ever mightier."[7] Meeting with great frequency,[8] the European Council has emerged as the institution regularly involved in deciding the agenda of the EU and its member states across the board.[9] In the field of economic governance in particular, the European Council has turned into the leading EU institution, and "economic governance occupies 50-65 % of the total time the heads [of states and governments] spend debating within the European Council."[10] But the role of the European Council has emerged as crucial also in other areas of EU law—from

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[2] *See* Consolidated Version of the Treaty on European Union art. 15, 2012 O.J. (C 326) 23 [hereinafter TEU].

[3] *See also* WHAT FORM OF GOVERNMENT FOR THE EUROPEAN UNION AND THE EUROZONE? (Federico Fabbrini et al. eds., 2015).

[4] *See* UWE PUETTER, THE EUROPEAN COUNCIL AND THE COUNCIL: NEW INTERGOVERNMENTALISM AND INSTITUTIONAL CHANGE 68 (2014).

[5] *Id.* at 17.

[6] Uwe Puetter, *Europe's Deliberative Intergovernmentalism: The Role of the Council and the European Council in EU Economic Governance*, 19 J. EUR. PUB. POL'Y 161, 161 (2012).

[7] *An Ever Mighty European Council—Some Recent Institutional Developments*, 46 COMMON MKT. L. REV. 1383, 1383 (2009).

[8] *See* Dieter Smeets & Marco Zimmerman, *Did the EU Summits Succeed in Convincing the Markets during the Recent Crisis?,* 51 J. COMMON MKT. STUD. 1158, 1160 (2013).

[9] *See* FREDERIC EGGERMONT, THE CHANGING ROLE OF THE EUROPEAN COUNCIL IN THE INSTITUTIONAL FRAMEWORK OF THE EUROPEAN UNION (2012).

[10] Uwe Puetter, The European Council—the New Center of EU Politics, 16 EUR. POL'Y ANAL. 1 (2013).

migration[11] to foreign affairs,[12] from internal security[13] to trade.[14] In fact, the European Council has increasingly sidelined—one would be tempted to say: cannibalized—other EU institutions, including the European Commission and the Council. Hence, while the EU treaties grant to the European Commission exclusive authority to conduct the EU commercial policy,[15] the European Council has acquired a crucial role in endorsing and shaping EU trade agreements.[16] And while the EU treaties grant legislative power to the Council[17] (as opposed to the European Council, which should instead exercise executive powers[18]), it has come to be the rule for the Council to shift high-level legislative files to the European Council for consideration and negotiation.[19]

The rise of the European Council as the power-house of the EU institutional structure has been noticed by many—and criticized by most. As Sergio Fabbrini

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[11] *See* Statement of the EU Heads of State and Government (Mar. 7, 2016), http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/ (setting out a deal with Turkey to stem migration flows across the East Mediterranean Sea); European Council Conclusions (Mar. 18, 2016) (EUCO 12/16), http://data.consilium.europa.eu/doc/document/ST-12-2016-INIT/en/pdf (outlining implementation of the EU-Turkey deal); Malta Declaration by the Members of the European Council on the External Aspects of Migration (February 3, 2017) (PRESS 43/17), http://www.consilium.europa.eu/press-releases-pdf/2017/2/47244654402_en.pdf (addressing the problems posed by migration through the central Mediterranean route and developing a strategy to address that).

[12] *See generally* Statement by the Heads of State and Government on Ukraine (Mar. 6, 2014), http://www.consilium.europa.eu/en/press/press-releases/2014/03/pdf/Statement-of-the-Heads-of-State-or-Government-on-Ukraine,-Brussels,-6-March-2014/ (calling for a cease-fire in Ukraine); European Council Conclusions (Mar. 21, 2014) (EUCO 7/1/14), https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/141749.pdf; European Council Conclusions (July 16, 2014) (EUCO 147/14), http://data.consilium.europa.eu/doc/document/ST-147-2014-INIT/en/pdf; European Council Conclusions (Dec. 18, 2014) (EUCO 237/14), https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/146411.pdf; European Council Conclusions (Mar. 20, 2015) (EUCO 11/15), http://www.eesc.europa.eu/resources/docs/european-council-conclusions-19-20-march-2015-en.pdf.

[13] *See* Statement by the Members of the European Council (Feb. 12, 2015), http://www.consilium.europa.eu/en/press/press-releases/2015/02/150212-european-council-statement-fight-against-terrorism/ (reacting to terrorist attacks in Paris and outlining a list of policy measures to be adopted of the EU Passenger Name Record Directive).

[14] *See* European Council Conclusions (Oct. 21, 2016) (EUCO 31/16), http://www.consilium.europa.eu/en/meetings/european-council/2016/10/21-euco-conclusions_pdf (reaffirming the importance of concluding the Comprehensive Economic Trade Agreement between the EU and Canada following the vote by the Belgian devolved legislature of Wallonia in September 2016 to veto the agreement, and calling to a solution to the outstanding issues); European Council Conclusions, annex I (Dec. 15, 2016) (EUCO 34/16), https://eeas.europa.eu/sites/eeas/files/euco-conclusions-final_0.pdf (reporting a decision of the heads of state and government of the 28 member states on the Association agreement between the EU and Ukraine to allay the concerns emerged in the Netherlands where a consecutive referendum had rejected the terms of the agreement in March 2016, and to pave the way toward a provisional entry into force of the agreement).

[15] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 207, 2012 O.J. (C 326) 140 [hereinafter TFEU].

[16] *See* Charles de Marcilly, *La politique commerciale de l'UE au risqué des defies internes*, Fondation Robert Schuman (Policy Paper 407), Oct. 17, 2016.

[17] TEU, *supra* note 2, art. 16.

[18] TEU, *supra* note 2, art. 15.

[19] *See* Federico Fabbrini, *The Relation between the European Council and the Council*, 22 EUR. PUB. L. 489 (2016).

underlined, decision-making within the European Council has delivered too little, too late, since heads of state and government faced challenges in reaching agreement on the measures to be taken, and then met selective non-compliance by some member states in the implementation of the agreed measures.[20] Moreover as Deirdre Curtin has pointed out, the strengthening of the European Council has created problems of transparency and accountability, since this body operates behind closed doors and with limited oversight by other institutions.[21] Hauke Brunkhorst, has defined the exercise of power by the European Council as "collective Bonapartism" and accused this body of trumping European democracy.[22] In fact, the European Council is a democratic institution, since each of its members is elected (either directly by the people, or indirectly by Parliament) in every EU member state.[23] Yet, from an EU constitutional law perspective, the European Council has proved highly problematic as the institution governing the EU, for two main reasons.

First, the European Council has deepened the pre-existing cleavages between member states, fueling the resurgence of a clash between conflicting national interests. In fact, this was, and is, an inevitable consequence of the structural composition of the European Council and the electoral incentives underpinning it. Although a number of scholars had sought to mythicize the European Council as a bucolic institution in which member states can reconcile their interests and find consensus through deliberation,[24] the reality is that the European Council is made up of national leaders—whose job is to represent and promote the national interest.[25] But because EU member states often have conflicting national interests — from economic policy to trade, from security policy to foreign affairs — it is not surprising that disagreement has emerged in the functioning of the European Council. With heads of state and governments going to the European Council with the aim to win the best deal for their home country, clash between national leaders representing conflicting national interests have become a regular feature of the European Council life, with a negative feedback in the European public debate.[26]

Second, in an institution which structurally favors the clash between conflicting national interests, it has become inevitable for the leaders representing the larger and more powerful member states to gain the upper hand. Although formally speaking all heads of state and government sitting at the European Council table are equal, in reality state power matters—and some member states are more powerful than

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[20] *See* Sergio Fabbrini, *Intergovernmentalism and Its Limits: Assessing the European Union's Answer to the Euro Crisis*, 46 COMP. POL. STUD. 1003, 1022 (2013).

[21] *See* Deirdre Curtin, *Challenging Executive Dominance in European Democracy*, 77 MOD. L. REV. 1, 18 (2014).

[22] *See* Hauke Brunkhorst, *Collective Bonapartism—Democracy in the European Crisis*, 15 GER. L.J. 1177, 1179 (2014).

[23] TEU, *supra* note 2, art. 15.

[24] *See* LUUK VAN MIDDELAAR, THE PASSAGE TO EUROPE: HOW A CONTINENT BECAME A UNION (Liz Waters trans., 2013).

[25] *See* Petya Alexandrova & Arco Timmermans, *National Interest Versus the Common Good: The Presidency in European Council Agenda Setting*, 52 EUR. J. OF POL. RES. 316 (2012).

[26] *See* INGOLF PERNICE ET AL., A DEMOCRATIC SOLUTION TO THE CRISIS: REFORM STEPS TOWARDS A DEMOCRATICALLY BASED ECONOMIC AND FINANCIAL CONSTITUTION FOR EUROPE 83 (2012).

others.[27] As Jonas Tallberg has explained, bargaining within intergovernmental institutions is the result of several sources of power and "differences between large and small Member States" shape inter-state relations within the European Council.[28] Aggregate states' sources of power play the most fundamental role in explaining negotiation in the European Council, with the result that larger member states can dominate the decision-making process.[29] In this context, it is not surprising that Germany has emerged as the hegemonic player in defining the agenda of the EU[30]—from economic policy[31] to migration.[32] As I have claimed elsewhere, the Euro-crisis has produced a dynamic of domination.[33] Yet, this has raised a major challenge to the anti-hegemonic nature of the EU project. It is in fact evident that a system of governance that structurally disfavors the interests of smaller/weaker member units vis-à-vis larger/mightier sister states deeply undermines the fabric of the EU and its promise of continental pacification.[34]

In conclusion, the consolidation of intergovernmentalism as the leading mode of European governance has increased conflict and decreased legitimacy in the EU. The structural incentive for each member of the European Council is to focus on the interests of the state where he/she is elected—not the interest of the EU as a whole. Due to its composition, the European Council has fueled interstate conflicts, rather than taming them. And while conflict is part of politics,[35] domination by larger/mightier states has become the formula to solve interstate disagreement. Yet this institutional state of affairs has undermined the legitimacy of the measures decided by the European Council. Citizens of smaller or weaker countries do not have a way to influence the position of elected leaders of other member states, because they cannot vote in national elections of other EU countries: why should they accept decisions taken by the European Council which they perceive as simply

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[27] *See* Mark Dawson & Floris de Witte, *Constitutional Balance in the EU after the Euro-Crisis*, 76 MOD. L. REV. 817 (2013).

[28] Jonas Tallberg, *Bargaining Power in the European Council*, 46 J. COMMON MKT. STUD. 685, 687 (2008).

[29] In another, specular intergovernmental context, that of the Eurogroup which brings together the finance ministers of the Eurozone member states, under the chairmanship of a semi-permanent presidency—the former President of the Eurogroup, Jean-Claude Juncker, famously decided to step down from the job complaining that it was impossible for him to make decision because of the way Germany and France were running the show. *See* Brian Parkin, *Juncker Says Ceding Euro Job Due to Franco-German Interference*, BLOOMBERG NEWS, 30 April 2012 (reporting Mr. Juncker as stating that Germany and France acted in the Eurogroup "as if they are the only members of the group").

[30] *See* William Paterson, *The Reluctant Hegemon? Germany Moves Center Stage in the European Union*, 49 J. COM. MKT. STUD. 57 (2011).

[31] *See* Georgios Maris & Pantelis Sklias, *Intergovernmentalism and the New Framework of EMU Governance*, *in* WHAT FORM OF GOVERNMENT FOR THE EUROPEAN UNION AND THE EUROZONE? 57 (Federico Fabbrini et al. eds., 2015).

[32] *See* Filippo Scuto, *Le difficoltà dell'Europa di fronte alla sfida dell'immigrazione: superare il "sistema Dublino"*, Centro Studi sul Federalism Research Paper 2017.

[33] *See* Federico Fabbrini, *States' Equality v States' Power: The Euro-crisis, Inter-state Relations and the Paradox of Domination*, 17 CAMBRIDGE Y.B. EUR. LEGAL STUD. 1, 1 (2015).

[34] *See* Simone Bunse & Kalypso Nicolaïdis, *Large Versus Small States: Anti-Hegemony and the Politics of Shared Leadership*, *in* THE OXFORD HANDBOOK OF THE EUROPEAN UNION 249, 251-57 (Erik Jones et al. eds., 2012).

[35] *See* Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, 18 EUR. L.J. 667, 686-92 (2012).

reflecting the diktat of the larger/stronger nations? In this context, opposition to the EU—a process which has increased in every election taking place in Europe since 2009[36]—becomes a proxy for opposition to a system which is unresponsive to the interests of all citizens affected by decision-making. Otherwise when voice is limited, exit becomes an option.[37] The current form of government of the EU threatens the survival of the EU itself.

II. GREXIT?

If there was any remaining doubt on the unsustainability of the existing architecture of European governance, this was dispelled by the events occurring in the Eurozone, and specifically in Greece since 2015.[38] After a new, anti-austerity government was elected in Greece in January 2015, tough talks took place for over five months within the framework of the EU intergovernmental institutions between Greece and its European and international creditors on the re-negotiation of the conditions attached to the Greek program of financial assistance.[39] Based on a clear electoral mandate from the people, the new Greek government sought to renegotiate the policy measures agreed upon by the previous governments in the two Memoranda of Understanding,[40] which it blamed for a dramatic humanitarian crisis, with 25% unemployment and 25% decrease in GDP since the start of the crisis. Moreover, the new government demanded measures to relieve Greece from its skyrocketing domestic public debt.[41] However, its requests were dismissed by most other EU member states and supranational institutions as a breach of previously agreed commitments.[42] In the inability to find a compromise, and with its financial conditions quickly deteriorating due to the expiration of the second bailout, on June 30, 2015 Greece failed to repay on-time a tranche of the loans received by the International Monetary Fund (IMF), technically making a selective default on its debt.[43]

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[36] *See also* THE ROUTLEDGE HANDBOOK OF EUROPEAN ELECTIONS (Donatella Viola ed., 2016).

[37] *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970).

[38] *See also* FEDERICO FABBRINI, ECONOMIC GOVERNANCE IN EUROPE (2016).

[39] *See* Derek Scally & Suzanne Lynch, *Greek and German Ministers Can't Even 'Agree to Disagree'*, THE IRISH TIMES, Feb. 5, 2015 (reporting tense meeting between German Finance Minister Wolfgang Schäuble and Greek Finance Minister Yanis Varoufakis).

[40] *See* Economic Adjustment Programme for Greece, 2 May 2010; Memorandum of Understanding on Specific Economic Policy Conditionality, 6 August 2010 https://www.imf.org/external/np/loi/2010/grc/080610.pdf; Second Economic Adjustment Program for Greece, 1 March 2012; Memorandum of Understanding between the European Commission and the Hellenic Republic, 1 March 2012 http://ec.europa.eu/economy_finance/eu_borrower/mou/2012-03-01-greece-mou_en.pdf.

[41] *See* Lina Papadopoulou, *Can Constitutional Rules, Even if 'Golden', Tame Greek Public Debt?*, *in* THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS 223 (Federico Fabbrini et al. eds., 2014).

[42] A most explicit statement of this position was offered by Vice-President of the European Commission, Jyrki Katainen, statement, Brussels, 28 January 2015, proclaiming that "we don't change our policy according to elections." *See* Alderman, Liz, *Tsipras's Debt Plan Sends Athens Stock Mark Sliding*, N.Y. TIMES, Jan. 28, 2015.

[43] *See* IMF, Statement, 30 June 2015, press release No. 15/310 (reporting failure by Greece to repay loan).

Moreover, in the maverick attempt to change course to the intergovernmental negotiations, the Greek government called for a national referendum—asking the electorate to reject or approve the conditions for a new, third program of European financial assistance. Yet, such program had been proposed by the European Commission to replace the expired second program[44]—and was still only in draft form. In addition, the government actively campaigned for the 'no' vote. On July 5, 2015 the Greek people by a wide margin rejected the proposed bailout,[45] opening de facto the prospect for a Greek exit from the Eurozone. Contrary to the expectations of the Greek government, the referendum did not strengthen the position of the Greek government vis-à-vis its Eurozone partners. With Greek banks forcefully closed for weeks, and capital controls introduced to prevent the melt-down of the financial systems,[46] the Greek government therefore had no other option: after a cabinet shake-up, it advanced on July 8, 2015 a request for new financial assistance to the European Stability Mechanism (ESM), indicating its willingness to accept the previous creditors' requests for tough measures of economic adjustment.[47]

Yet, with trust between the member states at an all-time low, the Greek government's policy-turn was met with half-hearted feelings. Despite meeting in almost permanent session between July 7 and 11, 2015, the Eurogroup of finance ministers did not manage to master a compromise between its members—some of which openly called to force Greece out of the Eurozone.[48] With time running out quickly and the financial markets showing increasing unease for the situation, heads of state and government of the Eurozone countries met on July 7, 2015 and again on July 11, 2015 for emergency meetings in the Euro Summit. Eventually, after 17 hours of negotiation, on July 12, 2015 the President of the Euro Summit announced an agreement[49] which secured Greece's permanence within the Eurozone on the condition that the Greek government proposed, and the national parliament approved in record time, sweeping legislation on a wide set of policies (including pension reform, tax reform, labor market reform, the drafting of a new code of civil procedure, and the launching of a new program of privatization).[50] However, by explicitly rejecting the Greek request to consider debt relief, the Euro Summit left unanswered the question whether Greece would be able to follow-up effectively on

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[44] *See supra* note 40.

[45] Ευρωεκλογές [Euroelections], http://ekloges.ypes.gr/current/e/public/index.html#{%22cls%22:%22main%22,%22params%22:{}}; *see* Nomos (2015:092.22/4277) ΣΧΕΔΙΟ ΣΥΜΦΩΝΙΑΣ ΕΠΙ ΤΗΣ ΟΠΟΙΑΣ ΔΙΕΝΕΡΓΕΙΤΑΙ ΤΟ ΔΗΜΟΨΗΦΙΣΜΑ [Draft Agreement on What Carried Out the Referendum], http://www.ypes.gr/UserFiles/f0ff9297-f516-40ff-a70e-eca84e2ec9b9/oe092-22-4277.pdf (reporting text of the referendum, in Greek).

[46] Nomos (2015:4350) Τραπεζική αργία βραχείας διάρκειας [Bank Holiday Short], Official Gazette [ΦΕΚ] 2015, A:65 (Greece) (Act of legislative content introducing capital controls and a mandatory bank holidays).

[47] *See* Letter from the Greek Minister of Finance to the Managing Director of the ESM, (July 8, 2015).

[48] *See* Leaked Document from the German Ministry of Finance to Other Eurozone Countries and Institutions, Comments on the latest Greek proposal (July 10, 2015) (proposing that Greece should be offered a 5-year time-out from the Eurozone).

[49] Remarks by President Donald Tusk after the Euro Summit of 12 July 2015 on Greece (July 13, 2015) (PRESS 579/15).

[50] Euro Summit Statement SN 4070/15 of 12 July 2015.

these austerity measures and restore its economic condition—leaving dark clouds on Greece's permanence in the EMU.

In fact, the International Monetary Fund (IMF) refused to join the new program of financial assistance to Greece on the view that, without a debt haircut, Greece would not be able to return to finance itself on the financial markets.[51] Alas, the practical implementation of the new third bailout agreement mostly failed to achieve the expected results.[52] On the one hand, international creditors dug their heels and required that Greece continue to carry forward austerity measures, including by running ambitious budget surpluses as a condition to receive several tranches of financial assistance.[53] On the other hand, Greece mostly dragged its feet in the execution of the agreed-upon plan, among others by deciding unilaterally in December 2016 to redistribute the yearly budget surplus as 13th monthly salary to overtaxed public employees and pensioners.[54] In this situation, at the beginning of 2017 the possibility of Greece to repay its loans was once more under question: with electoral pressures in a number of Northern EU member states pushing against any relief for Greece, the Eurogroup failed in February 2017 to reach agreement on the payment of a next installment of financial aid,[55] and the IMF warned that Greece may be effectively again on the brink of exiting the Eurozone.[56]

Although the events of the Greek tragedy lend themselves to different readings, and none of the actors on stage appear blameless, there is a feature of the story which looks increasingly undeniable: the unsustainability of the current institutional architecture of the EMU. As the 10 meetings of Eurogroup's ministers in the month between June 18 and July 18, 2015 make clear, a Union which is dependent on the continuing negotiation between its member states is a house divided bound to implode. In fact, notwithstanding the attempt by the Greek government to inject national democratic input into a highly diplomatic and technocratic process through the call of a popular referendum (a step which had already been considered, but aborted in October 2011), the exercise of electoral democracy in one Eurozone member state clashed with the reality that democratic processes are in place also in each and every one of the other Eurozone countries. But as the Greek drama made clear, these national democratic processes can be irreconcilable by pushing in opposite directions. The current system of EU governance has created a constant collision of the respective electoral mandates of the member states, ensuring the

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[51] *See* Heather Stuart, *IMF Will Refuse to Join Greece Bailout Until Debt Relief Demands are Met*, THE GUARDIAN, July 30, 2015.

[52] *See* Memorandum of Understanding between the European Commission and the Hellenic Republic and the Bank of Greece (Aug. 19, 2015) https://ec.europa.eu/info/files/memorandum-understanding-greece-august-2015_en.

[53] *See also* Joschka Fischer, *The Return of the Ugly German*, PROJECT SYNDACATE, July 23, 2015, (criticizing creditors' obsession for the imposition of austerity in Greece).

[54] See *Greece Pensioners Receive Controversial Bonus Payment*, EURONEWS Dec. 22, 2016.

[55] *See* Statement by Eurogroup President Jeroen Dijsselbloem after the Eurogroup meeting (Feb. 20, 2017).

[56] *See* Int'l Monetary Fund, Greece 2016 Article IV Consultation, at 14, 48, IMF Country Report No. 17/40 (Feb. 7, 2017), https://www.imf.org/en/Publications/CR/Issues/2017/02/07/Greece-2017-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-44630 (last visited Mar. 26, 2017).

continuing instability—if not the outright failure—of the European integration project, in EMU and beyond.[57]

III. THE PROMISE OF PRESIDENTIALISM

As the previous sections have pointed out, intergovernmentalism has produced more problems than it has solved in the EU system of governance—and the Greek crisis testifies to that. With decision-making in Europe centered in an institution such as the European Council which is largely unresponsive to the interests of all EU citizens, the pull toward disintegration in the EU started to grow stronger. In my view, this is a threatening development, as the achievements of 60 years of European integration ought to be safeguarded. Moreover, it is a development which can be reverted: the dissatisfaction of European citizens and states should not be interpreted as an opposition to European integration as such. Rather, discontent vis-à-vis the EU should be seen as the product of an unsatisfactory settlement in the EU constitutional architecture.[58] Intergovernmentalism is a source of the growing popular discontent against the EU. Hence, reforming the European architecture of governance in a way that addresses its structural flaws is not a passing fancy: it is a necessity to ensure the survival of the EU.[59] In other words, the EU needs institutional reforms to enhance its form of government if it wants to weather the challenges it is currently facing and emerge alive from them.

Based on the analysis of the weaknesses of the EU system of governance, I submit that the EU needs an executive institution which is able to speak in the name of the Union, channeling citizens' preferences from across the EU member states and offering a venue where all of them can feel they have a stake in. At a time of increasing disunity in the EU, this article makes the case for an institution which can promote unity—an integrative force taming disintegrative pressures. Specifically, my suggestion is to establish a new authority: the President of the EU. The President of the EU should be vested with the executive power of the EU, should be elected by the citizens of the EU member states through a process that combines majoritarian with federalism concerns, and should be checked and balanced by the EU legislature—along a logic of separation of powers.[60] An EU President would fare comparatively better than the European Council as the locus of executive authority in the EU.[61] On the one hand, a monocratic office would enjoy greater vigor than a collective body—and it would be able to act more effectively. On the other hand, a single officeholder chosen by the citizens of the EU member states through a collective electoral exercise would enjoy greater legitimacy—and could plausibly

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[57] *See also* Miguel Poiares Maduro, *A New Governance for the European Union and the Euro: Democracy & Justice,* report commissioned by the European Parliament Constitutional Affairs Committee, September 2012, PE 462.484.

[58] *See also* Jürgen Habermas, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How is it Possible*, 21 EUR. L.J. 546 (2015).

[59] *See* Joseph H.H. Weiler, *Europa: 'Nous Coalisons des Etats, Nous n'Unissons pas des Hommes'"*, *in* LA SOSTENIBILITÀ DELLA DEMOCRAZIA NEL XXI SECOLO 51, 62 (Marta Cartabia & Andrea Simoncini eds., 2009).

[60] *See also* SERGIO FABBRINI, WHICH EUROPEAN UNION? EUROPE AFTER THE EURO CRISIS (2015).

[61] *See* THE EXECUTIVE AND PUBLIC LAW: POWER AND ACCOUNTABILITY IN COMPARATIVE PERSPECTIVE 315-345 (Paul Craig & Adam Tomkins eds., 2006).

claim to represent the interests of all EU member states and citizens, rather than just a fraction thereof.

The proposal to reform the EU institutional system through the creation of a new elected office of President of the EU joins an expanding debate about the need for greater executive capacity in the EU.[62] In the context of the Euro-crisis, in particular, a number of top EU policy-makers have made calls in this direction. In its June 2012 inaugural report "Towards a Genuine EMU" the President of the European Council, jointly with the Presidents of the European Commission, Eurogroup, and European Central Bank (ECB), acknowledged the need to "strengthen democratic legitimacy and accountability" in the EMU,[63] and in its December 2012 final report, it claimed that "the crisis has shown the need to strengthen not only the EMU's surveillance framework but also its ability to take rapid executive decisions to improve crisis management in bad times and economic policymaking in good times. . . . Reinforcing the capacity of the European level to take executive economic policy decisions for the EMU is essential."[64] Equally, in the June 2015 report "Completing Europe's EMU" the President of the European Commission, jointly with the Presidents of the European Council, the Eurogroup, the ECB, and the European Parliament (EP), indicated the need for an institutional strengthening of EMU, including through better steering of EMU affairs.[65] Moreover, countries such as France,[66] Italy,[67] and Spain[68] have spoken in favor of strengthening the government of the EU or the Eurozone.[69]

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[62] This debate had already taken place in the context of the constitutional convention that drafted the then aborted Treaty establishing a constitution for Europe. *See also* DEIRDRE CURTAIN, EXECUTIVE POWER OF THE EUROPEAN UNION 69 (2009).

[63] Report of President of the European Council SN 25/12 (June 25, 2012), 6 www.consilium.europa.eu/en/workarea/downloadasset.aspx?id=17220.

[64] Report of the President of the European Council, in close coordination with the Presidents of the European Commission, of the Eurogroup and the ECB *Towards a Genuine Economic and Monetary Union* 17 (Dec. 5, 2012) http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf.

[65] Report of the President of the European Commission, in close coordination with the Presidents of the Euro Summit, of the Eurogroup, of the ECB and the European Parliament *Completing Europe's Economic and Monetary Union* 18 (June 22, 2015).

[66] *See* Francois Hollande, French President of the Republic, Intervention liminaire de lors de la conférence de presse, (May 16, 2013) ("un gouvernement économique qui se réunirait, tous les mois, autour d'un véritable Président nommé pour une durée longue et qui serait affecté à cette seule tâche.").

[67] *See* Matteo Renzi, Italian Prime Minister, Speech at the European Parliament (July 2, 2014). *See also Europa: Un nuovo inizio. Programma della Presidenza Italiana del Consiglio dell'Unione Europea*, at 30 (July 11, 2014) http://www.governo.it/governoinforma/documenti/programma_semestre_euroep_ita.pdf. *See also* Sandro Gozi, Italian Secretary for EU Affairs, Op-Ed, *Europa, quegli scossini che facilitano il rilancio di una nuova governance*, IL SOLE 24 ORE, May 28, 2015 (stating that Europe needs "un Presidente della zona euro a tempo pieno").

[68] *See* Government of Spain, *"Better Economic Governance in the Euro area: Spanish Contribution"*, May 7, 2015 (expressing support in favor of "an authority responsible for economic policy in the Eurozone").

[69] *See also* Emmanuel Macron, French Minister of the Economy, and Sigmar Gabriel, German Minister of the Economy, Op-Ed, *Europe Cannot Wait Any Longer*, THE GUARDIAN, June 3, 2015 (stating that "to make its institutions work . . . Europe will need to address its democratic deficit as well as its executive one.").

Certainly, the proposals to strengthen the EU executive power are often associated with efforts to enhance the role of the European Commission as the government of the EU—along a parliamentary logic.[70] Nevertheless, even the recent attempts to connect the selection of the European Commission to the elections of the EP have failed to deliver the expected results.[71] Because the EP is elected on proportional representation, no party has a clear majority in the house, and thus the appointment of the College of European Commissioners and its internal composition is much more the result of inter-state negotiations than of party politics.[72] As Joseph Weiler has acknowledged, the selection of the Commission President in light of the result of the election of the EP "compromises the ability in a political sense for this or that candidate to say with authority 'I was elected by the peoples of Europe'."[73] Moreover, as I have argued elsewhere,[74] even if the EU could be transformed into a full-fledged parliamentary regime, it is questionable whether this would cure the institutional weaknesses described in section 2. Because seats in the EP are allotted between the member states based on population, albeit along a criteria of "degressive proportionality",[75] larger member states have a much greater sway than smaller ones in influencing government appointments.[76] While the rise of the European Council produced a dynamic of inter-state domination, because in an intergovernmental setting larger states have been able to exploit their relative power to the detriment of smaller states, also a transition to a parliamentary system would entrench the domination of larger over smaller states—although for very different reasons.

From this point of view, on the contrary, the creation of a President of the EU separated from the other EU institutions, and controlled by them, would better fit the compound nature of the EU.[77] A Union of states and citizens characterized by significant asymmetries like the EU can only prosper in an institutional regime in which separated institutions, each reflecting different logics of representation, share the power.[78] I have discussed in depth elsewhere what the powers of the new

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[70] *See* JULIAN PRIESTLEY & NEREO PEÑALVER GARCIA, THE MAKING OF A EUROPEAN PRESIDENT (2015).

[71] *See* Editorial Comments, *After the European Elections: Parliamentary Games and Gambles*, 51 COMMON MKT. L. REV. 1047, 1048 (2014) (discussing the political origin of the process of the leading candidates and arguing that "[s]omewhat tellingly, and indicating a certain unwillingness to embrace the concept in other Member States, the candidates have become known under their German name *Spitzenkandidaten* throughout the EU.").

[72] *See* Andrea Gratteri, *Parlamento e Commissione: Il difficile equilibrio fra rappresentanza e governabilità nell'Unione Europea*, 2 COMUNITÀ INTERNAZIONALE 237, 241 (2014).

[73] *See* Joseph H.H. Weiler, Editorial, *Fateful Elections? Investing in the Future of Europe*, 25 EUR. J. INT'L L. 361, 365 (2014).

[74] *See* Fabbrini, *supra* note 33.

[75] TEU, *supra* note 2, art. 14.

[76] *See* Federico Fabbrini, *Representation in the European Parliament: of False Problems and Real Challenges*, 75 ZEITSCHRIFT FÜR AUSSLANDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 823 (2015).

[77] *See* SERGIO FABBRINI, COMPOUND DEMOCRACIES (2012) (defending the logic of separation of powers in the EU).

[78] *See* ceteris paribus RICHARD NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENT 42 (1964).

President should be—and how he or she should be elected.[79] In my view, the President of the EU should execute EU laws, head the EU administration—including the highly competent services of the European Commission—and he or she should be empowered to veto EU legislation.[80] At the same time, I have suggested that the President should be elected through a system that tempers majoritarianism with federalism concerns: hence EU citizens would vote directly for the EU President but via state constituencies—each of which gets a number of "electoral votes" which equals the number of seats that state has in the EP plus the number of votes that state had in the Council.[81] If no candidate reached the majority of electoral votes in a first round, the two most voted candidates would face each other in a runoff 14 days after the first election.[82] Needless to say, these technical proposals can be criticized, and better crafted solutions can be brought forward.

Yet, the bottom-line remains the following: the EU needs an executive institution which is able to ensure centripetal force, against centrifugal pressures. A monocratic executive office, elected through a pan-European process and endowed with defined powers would do the job. At the same time, democracy is solid enough in the EU to withstand an elected institution functioning along a winner-takes-all logic—particularly if this is embedded in a system of separation of powers designed to check and balance the presidency. In fact, it is submitted here that an EU President would perform better than the European Council in smoothing inter-state conflicts and cleavages. Since EU citizens would have a direct voice in choosing who governs the EU, it would be more acceptable for them to abide by the decisions taken, even if they do not agree with them. Put otherwise, while the national leaders in the European Council only represent their member states, the EU President would represent the EU as a whole, and its actions would enjoy the greater legitimacy that follows from its popular election across the EU. In conclusion, at a time when EU citizens appear increasingly disillusioned vis-à-vis the EU, the institution of a President of the EU would offer the way through which citizens in the member states could channel their preferences and feel they have a stake on what the EU is and does.

IV. BREXIT

The implementation of the institutional reforms outlined in the previous section would require constitutional change in the EU.[83] As the rules governing the functioning of the EU are codified in the EU treaties, amending them would be necessary to establish a President of the EU. This is of course not an easy option. Nevertheless, it is submitted here that Brexit—the decision of the UK to leave the EU—creates a window of opportunity to this end.[84] On the one hand, from an

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[79] *See* Federico Fabbrini, *Austerity, the European Council and the Institutional Future of the European Union: A Proposal to Strengthen the Presidency of the European Council*, 22 IND. J. OF GLOBAL LEG. STUD. 269, 274 (2015).

[80] *Id.* at 310-13.

[81] TEU, *supra* note 2, art. 3, Protocol No. 36 on Transitional Provisions.

[82] Fabbrini, *supra* note 79, at 317-20.

[83] *See* TEU, *supra* note 2, art. 48.

[84] *See* THE LAW & POLITICS OF BREXIT (Federico Fabbrini ed., forthcoming 2017).

ideological perspective, Brexit challenges the optimistic reading of the process of European integration as an inevitable progress forward, exposing the rifts in the current EU and increasing the urge for reforms aimed at preventing the break-up of the Union. On the other hand, from a pragmatic perspective, Brexit creates the need for the remaining member states and EU institutions to adapt the EU to the new reality of a Union at 27 member states: institutional engineering and treaty changes will be necessary, among others, to re-allocate seats between member states in the EP, and to define the new rules on the financing of the EU. Within this framework, proposals to overhaul the EU architecture of executive power may therefore emerge as elements of a package deal which can win the endorsement of all member states committed to the European cause.

The decision of the UK to leave the EU found its roots in the idiosyncratic approach of the UK vis-à-vis the project of European integration[85]—but was catalyzed by the hasty moves of two Prime Ministers.[86] Since joining the EU in 1973, the UK remained a wary member of the EU—resisting most steps forward in European integration, and securing for itself a number of opt-outs from measures endorsed by most other member states: hence, when the EU created a common currency in 1992, the UK (with Denmark) was exempted from joining the euro;[87] when the EU incorporated the Schengen system in 1997, the UK (with Ireland) opted out of the abolition of internal border controls;[88] and when the EU enacted social rights documents—first through a Social Rights Protocol in 1992 and then through a Charter of Fundamental Rights in 2000—the UK (in the latter case, with Poland) secured an exception which would exclude it from the new supranational rules.[89] Moreover—despite proclaiming its support for the stabilization of the Euro—the UK did not join the efforts to strengthen the Eurozone undertaken in the aftermath of the Euro-crisis, being the only country (other than the Czech Republic) that did not sign the Fiscal Compact treaty in 2012,[90] and resisting forms of financial assistance to Eurozone countries in fiscal stress.[91]

In fact, opposition toward the EU entrenched within UK politics, and particularly within the Conservative Party—reaching its apex during the governments led by David Cameron. In order to tame the Eurosceptic fringe, in 2011 the UK government adopted the EU Act,[92] which committed the government to call

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[85] *See* SARAH HOBOLT, *EUROPE IN QUESTION* (2009).

[86] *See* Paul Craig, *Brexit: A Drama in Six Acts*, 41 EUR. L. REV. 447 (2016).

[87] *See* Protocol No. 15 on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland.

[88] *See* Protocol No. 20 on the Application of Certain Aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland.

[89] *See* Protocol No 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

[90] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012, http://www.eurozone.europa.eu/media/304649/st00tscg26_en12.pdf.

[91] *See* Council Regulation (EU) No. 2015/1360 of Aug. 4, 2015, amending Council Regulation (EU) No 407/2010 establishing a European financial stabilization mechanism, 2015 O.J. (L 210) 1 (shielding the UK and other non-Eurozone EU member states from having to contribute to financially support EU member states in fiscal crises).

[92] European Union Act 2011, c. 12 (UK); *see also* Paul Craig, *The European Union Act 2011: Locks, Limits and Legality*, 48 COMMON. MKT. L. REV. 1915 (2011).

a referendum to authorize any further expansion of EU powers. Moreover, in 2012 the UK government launched a balance of competence review, designed to assess areas where competences ought to be repatriated from the EU to the national sphere.[93] While the assessment ultimately concluded in 2014 that the division of powers between the UK and the EU was about right, Prime Minister Cameron expressed his intention to renegotiate British membership in the EU. Running for parliamentary elections in 2015, the Conservative Party committed to call a referendum on membership in the EU. Winning an unexpected majority in Westminster, Prime Minister Cameron thereafter spelled-out his demands for a new deal between the UK and the EU—in the field of migration, sovereignty and competitiveness—while Parliament approved the 2015 EU Referendum Act,[94] empowering the government to call a referendum on EU membership. Negotiations between the UK and its European partners concluded in February 2016, when the European Council reached a legally binding agreement which, among others, exempted the UK from participating to the process of "ever closer union."[95] Based on this deal, Prime Minister Cameron called a referendum in June 2016 and campaigned to remain in the EU.

As is well known, on June 23, 2016 the British people voted—52% in favor of leaving the EU, 48% in favor or remaining in the EU[96]—precipitating one of the most dramatic constitutional crisis the UK had ever faced. Following resignation of David Cameron, and the formation of a government led by Theresa May, the new Prime Minister committed to carry out the will of the British people. Yet, if her predecessor had miscalculated electoral politics, she misjudged constitutional constraints. While the government planned to autonomously trigger Article 50 TEU—the provision which regulates withdrawal of a member state from the EU—litigation started on the need to obtain parliamentary approval to notify the withdrawal decision. In November 2016, the High Court of England and Wales ruled that the government could not invoke its royal prerogatives to notify Article 50 TEU,[97] because the start of the withdrawal process would be to ultimately deprive UK citizens of EU rights originally attributed to them by Parliament per the approval of the European Communities Act 1972 (ECA 1972) which gave effect to UK membership to the EU. In a separate case in Northern Ireland, instead, the High Court rejected the argument that the devolved legislatures had to give their consent to UK

[93] Foreign & Commonwealth Office, Review of the Balance of Competencies (Dec. 12, 2012), https://www.gov.uk/guidance/review-of-the-balance-of-competences.

[94] European Union Referendum Act 2015, c. 36 (U.K.).

[95] *See* European Council Conclusions, annex I "A New Settlement for the United Kingdom within the EU" (Feb. 19, 2016) (EUCO 1/16).

[96] THE ELECTORAL COMMISSION, *EU referendum results*, (Feb. 17, 2017) http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information.

[97] Miller v. The Secretary of State for Exiting the European Union [2016] EWHC (Admin) 2768.

withdrawal from the EU, and denied that because of the Good Friday Agreement[98] the people of Northern Ireland had to approve by majority withdrawal.[99]

Cases were consolidated on appeal and heard by the newly established Supreme Court of the UK. In January 2017, the UK Supreme Court ruled 8 to 3 that the government could not trigger Article 50 TEU without parliamentary legislation, but it unanimously held that consent by the devolved legislatures was not needed.[100] The UK Supreme Court summarized the constitutional background to the dispute,[101] and emphasized how "Parliamentary sovereignty is a fundamental principle of the UK constitution."[102] The Court clarified that "[t]he Royal prerogative encompasses the residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation."[103] According to the Court however, while the UK government enjoyed prerogative powers in foreign affairs,[104] because of the principle of dualism[105] only Parliament could give domestic effect to treaties within the UK.[106] As the Court explained, the ECA 1972 represented an act of "constitutional character"[107] since it served as the "conduit pipe"[108] to incorporate within UK law all EU law—a body of norms with direct effect and supremacy over other sources of UK law.[109] The Supreme Court thus affirmed the High Court judgment that an act of the executive could not displace rights and privileges accorded to UK citizens by an act of Parliament, when the latter enacted the ECA 1972.[110] On the contrary, the UK Supreme Court refused to grant to the devolved legislatures a right to consent to withdrawal from the UK,[111] and ruled that UK constitutional conventions cannot be enforced in court.[112]

The judgment of the UK Supreme Court in *Miller* slightly complicated the UK government plan to start the official withdrawal from the EU. While the House of Commons had agreed already in December 2016 to a resolution calling on the executive to activate Article 50 TEU before March 31, 2017,[113] the Supreme Court was crystal clear that if "ministers cannot give Notice [of withdrawal] by the exercise of prerogative powers, only legislation which is embodied in a statute will do. A resolution of the House of Commons is not legislation."[114] Nevertheless, Brexit was

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[98] The Good Friday Agreement, brokered in 1998, ended years of sectarian violence in Northern Ireland paving the way for a special devolutionary agreement based on power-sharing between the Protestant and Catholic communities of the region. *See* A FAREWELL TO ARMS? BEYOND THE GOOD FRIDAY AGREEMENT (Michael Cox et al eds 2006).

[99] Agnew v. The Secretary of State of Exiting the European Union [2016] NIQB 85.

[100] R v. Secretary of State for Exiting the European Union ex parte *Miller* [2017] UKSC 5.

[101] *Id*. at 40.

[102] *Id.* at 43.

[103] *Id.* at 47.

[104] *Id.* at 54.

[105] *Id.* at 55.

[106] *Id.* at 57.

[107] *Id.* at 67.

[108] *Id.* at 65.

[109] *Id.* at 60.

[110] *Id.* at 69.

[111] *Id.* at 129.

[112] *Id.* at 151.

[113] 7 Dec 2016, Parl Deb HC (2016) col. 336 (UK).

[114] Miller at 123.

never put into question by the UK Supreme Court. In fact, just days ahead of the UK Supreme Court ruling, Prime Minister May had outlined her strategy for withdrawal in a major speech, where she had expressed her intention to also pull out the UK also from the EU single market.[115] Two days after *Miller*, the UK government introduced a lightly-worded bill in Parliament.[116] The bill was quickly approved by the House of Commons and the House of Lords, and received royal assent on March 16, 2017[117]—and on March 29, 2017 the UK Prime Minister formally notified to the President of the European Council the UK decision to leave the EU.[118] The notification started the two-year time-frame in which the UK and the EU will need to negotiate the terms of the divorce, as well as their possible new relation.[119] And in order to bolster its parliamentary majority, Prime Minister Theresa May decided on 18 April 2017 to call for snap parliamentary elections on 8 June 2017.[120]

With the UK on a course out of the EU, it will be inevitable for the remaining member states of the EU to amend the EU treaties in order to adapt the EU to the reality of a Union at 27. As I have argued elsewhere, in fact, there are a number of EU constitutional, and quasi-constitutional, provisions of EU law which need to be changed following Brexit.[121] First, changes will need to be made to Article 52 TEU, which currently lists all the member states of the EU, including the UK. Although this is a fairly formal amendment, an *ordinary* treaty revision is needed to remove the name of the UK from the list of Article 52 TEU: neither the withdrawal agreement between the UK and the EU,[122] nor a *simplified* treaty revision[123] can modify Article 52 TEU. According to Article 48(3) TEU, the ordinary treaty revision requires the European Council to "convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission" and charged to "adopt by consensus a recommendation [to amend the treaties] to a conference of representatives of the governments of the Member States." The European Council may decide by a simple majority "not to convene a Convention should this not be justified by the extent of the proposed amendments"[124]—but it must obtain the consent of the European Parliament to do so: hence the European Parliament can insist on calling a Convention to examine proposals for revisions to the EU treaties.[125] Finally, amendments to the treaties have to be agreed by common accord by a conference of representatives of the member states and "shall enter into force

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[115] *See* Theresa May, UK Prime Minister, The Government's Negotiating Objectives for Exiting the EU: PM Speech (Jan. 17, 2017).

[116] *See* European Union (Notification of Withdrawal) Bill 2017, HL Bill [108] cl. 1.

[117] *See* European Union (Notification of Withdrawal) Act 2017, c. 9.

[118] *See* Theresa May, UK Prime Minister, Letter to the President of the European Council (March 20, 2017).

[119] *See* European Council Conclusions (Apr. 29, 2017) (outlining the guidelines for the negotiations).

[120] *See* Theresa May, Prime Minister of U.K. (Apr. 18, 2017).

[121] *See* Federico Fabbrini, *How Brexit Creates a Window of Opportunity for Treaty Change in the EU*, Spotlight Europe #2016/01 (Bertelsmann Stiftung, Sept. 2016).

[122] TEU, *supra* note 2, art. 50.

[123] TEU, *supra* note 2, art. 48(6).

[124] TEU, *supra* note 2, art. 48(3).

[125] *See* JEAN-CLAUDE PIRIS, THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS 104 (2010).

after being ratified by all the Member States in accordance with their respective constitutional requirements."[126]

Moreover, following Brexit the other EU member states will also have to modify EU quasi-constitutional provisions on the allocation of seats in the EP, and the financing of the EU. On the one hand, pursuant to Article 14(2) TEU the EP shall be composed of 751 members of the EP (MEPs), and the specific allocation of EP's seats in the various member states is determined in a European Council decision, "adopted by unanimity, on the initiative of the European Parliament and with its consent." Currently, the composition of the EP is set in a European Council decision adopted in June 2013,[127] which assigns to the UK 73 seats in the EP—the third largest delegation (after Germany and France, and on a par with Italy).[128] On the other hand, according to Article 311 TFEU, the Council, acting unanimously and after consulting the EP shall adopt a decision laying down the system of own resources of the Union: this decision—which "shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements"—defines the *revenue*-side of the EU financing. National contributions to the EU budget are today set in a Council decision adopted in May 2014.[129] Although the UK enjoys a famous rebate (obtained in 1984, and preserved ever since) which allows it to pay less than it should, it still remains one of the major contributors to the EU budget — the 4th total net payer into the EU coffers (after Germany, France and Italy), according to the figures of the European Commission (for 2014).[130]

Historically negotiations on the European Council decision allocating seats to the EP, and the Council decision on the own resources of the EU have been extremely contentious: states have an interest in maximizing their seats in the EP, and minimizing their contributions to the EU budget, which is today mostly made up of states' transfers.[131] After Brexit, both these measures will need to be renegotiated, through a process which (given the requirement of unanimity and national ratification) is basically akin to treaty change. But this time a lot more is up for grabs: since the UK is one of the most populous and richest member states of the EU, its withdrawal from the EU will significantly change the stakes of the renegotiation of the decision on the EP composition and the rules on EU financing. It seems clear therefore that without the UK, the other member states and the EU institutions will need to engage in a much more significant grand bargain, both to re-apportion seats and to re-think the revenues and expenditures of the EU for a post-Brexit era.[132] In this context, a broader overhaul of the EU constitutional architecture tackling deep structural flaws in its system of government could become part of the package deal

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[126] TEU, *supra* note 2, art. 48(4).

[127] *See* Council Decision 2013/312/EU of 28 June 2013 establishing the composition of the European Parliament, 2013 O.J. (L181) 57.

[128] *See id*. art. 3.

[129] *See* Council Decision 2014/335/EU of 26 May 2014 on the system of own resources of the European Union, 2014 O.J. (L 168) 105 (Euratom).

[130] *See* European Commission, *EU Expenditure and Revenue 2014-2020*, http://ec.europa.eu/budget/figures/interactive/index_en.cfm.

[131] *See* Jonathan Rodden, *Strengths in Numbers? Representation and Redistribution in the European Union*, 3 EUR. UNION POL. 151 (2002).

[132] *See also* Rep. of High-Level Group on Own Resources, *Future Financing of the EU* (Dec. 2016).

of reforms and compromises that the EU member states may be willing and able to accept to move the EU forward.[133]

In conclusion, while Brexit catalyzes the urge for reform, it also provides the opportunity to do so by forcing the member states to engage in some significant revisions of the EU treaties and related constitutional acts. Although Brexit occurred due to the electoral miscalculations of Prime Minister Cameron, and moved forward in ways which had not been anticipated by Prime Minister May, the UK is on its way to exit the EU. Following the UK Supreme Court judgment in *Miller*, the UK Parliament approved legislation authorizing the triggering of Article 50 TEU, and the UK government notified its decision to withdraw. When the UK will leave the EU—at the latest, by default, by March 2019[134]—the EU will need to look internally, and put its house in order. As explained above, the EU treaties — and notably Article 52 TEU—as well as the European Council decision on the allocation of seats in the EP, and the Council decision on the own resources of the EU will need to be amended, through a highly complex and politically demanding process. In this context, reforms in the EU institutional system—including more sweeping proposals to strengthen the EU executive through the establishment of a new President of the EU, as suggested in this article—may be taken up as part of a grand bargain between the remaining member states to enhance the form of government of the EU for good.

CONCLUSION

The EU is at a crossroad. Over the last decade the EU has been facing multiple crises, which in a *crescendo* have challenged the project of European integration. From the Euro-crisis, threatening the survival of EMU, to the migration-crisis, threatening the survival of Schengen free movement zone—the EU has been increasingly facing questions about its very existence. As this article has claimed, these crises have exposed the weaknesses of the EU institutional system, and the lack of an executive branch able to take effective and legitimate decisions. In the current system of EU governance the European Council, the body representing the heads of state and governments of the EU, has come to play a central role in the decision-making process, but this intergovernmental body has been the source of more problems than solutions. First, the European Council structurally fuels discord between the member states; and second, it unleashes domination by the larger member countries as a way to resolve inter-state disagreement. As the Greek crisis has patently revealed, such a decision making-regime will lead to measures which are perceived as illegitimate and which will ultimately fail to be effective. With the risk of Grexit still looming large almost a decade after the beginning of the Euro-crisis, this article has suggested that a union based on the permanent negotiation between competing and parallel national democracies is inevitably bound to implode, undermining the achievements of more than sixty years of European integration.

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[133] *See* MICHAEL KLARMAN, THE FRAMERS' COUP. THE MAKING OF THE UNITED STATES CONSTITUTION (2016) (explaining grand bargain at the Philadelphia Constitutional Convention).

[134] *See* TEU, *supra* note 2, art. 50 (saying that after two years from notification of withdrawal, a country is out of the EU unless the European Council unanimously agrees to extend the negotiating period).

As an alternative, this article has proposed a reform of the EU constitutional system designed to institute an executive branch which is able to act effectively, and legitimately, in the interest of the EU as a whole. Specifically, the paper has made the case in favor of creating a President of the EU, separated from the EU legislature, and controlled by it. The President should be vested with the executive powers of the EU, and elected through a democratic process which tempers majoritarianism with federalism concerns. As it was claimed, such an institutional figure could play a crucial role in channeling citizens' preferences, creating a forum for political contestation on the direction of the EU. Moreover, at a time of increasing disunity, such a monocratic executive office would act as an agent of unity — an integrative force taming disintegrative pressures. Reforming the EU institutional setup so as to establish a President of the EU would clearly require a treaty amendment. Yet Brexit offers a major window of opportunity. With the UK on its way out of the EU by Spring 2019, the remaining 27 EU member states and the EU institutions will need to engage in sweeping constitutional changes. The EU treaties will have to be revised, and other legal acts (such as the rules on the EP composition and EU financing) have to be renegotiated. In this context, the case for a grand bargain becomes stronger, and the possibility to re-think in depth the EU institutional architecture becomes possible. While path-dependency is a feature of all institutions, the inevitability of EU constitutional reforms create the opportunity to strengthen the executive capacity and the democratic character of the EU system of governance.

On March 25, 2017, the EU celebrated the 60th anniversary of the Treaties of Rome, which in 1957 inaugurated the process of economic and political integration among the nations of Europe. The declaration signed on that occasion by the heads of the EU institutions and 27 leaders of the member states, however, was mostly focused on celebrating past achievements, as opposed to mapping the way ahead.[135] This uncertainty is mirrored also in the stand taken by the European Commission, which in a White Paper published on March 1, 2017, was content to outline five alternative scenarios for the future of Europe, without taking a clear position on them.[136] Nevertheless, hesitation is clearly not an option for the EU. With the threat of Grexit still looming large, and the reality of Brexit on its way, it is thus more necessary than ever that the remaining EU member states address the deep structural flaws of the EU institutional system. In fact, in February 2017 the EP has reaffirmed its view that the project of European integration needs to be moved forward — not only by exploiting in full the potentials of the current EU treaties,[137] but also by appropriate constitutional reforms, enhancing the functioning of the EU institutions[138] and its resources.[139] It is therefore time for the EU member states

[135] *See* Rome Declaration, European Council Press Release 149/17 (Mar. 25, 2017).

[136] *See* European Commission White Paper on the Future of Europe, COM (2017) 2025 (Mar. 1, 2017).

[137] *See* European Parliament Resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty, P8_TA (2017)0049.

[138] *See* European Parliament Resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union, P8_TA (2017)0048.

[139] *See* European Parliament Resolution of 16 February 2017 on budgetary capacity for the Eurozone, P8_TA (2017)0050.

which are willing and able to do so to launch an ambitious reform initiative aimed at putting the EU on track for another successful 60 years of integration.[140]

[140] *See also* Declaration by Germany, France, Italy and Spain after their informal summit in Versailles, 6 March 2017 (suggesting that Europe should move forward at different speeds, if not all member states are willing to participate).


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INTRODUCTION

Navid Wheeler: Hello everyone. Hello. Thank you for joining us today. My name is Navid Wheeler, I'm the Editor-in-Chief of the Connecticut Journal of International Law. Welcome to our 2017 symposium, A Continent Divided: Nationalism and the European Union.

We live in interesting times. The world is in a state of change. Not only is the political order in the United States in flux, caught between radical change and political gridlock, but the post-WWII political order in Europe is facing an existential crisis. The European Union and its member countries are undergoing a radical transformation with the exit of the United Kingdom, massive immigration from the Middle East and Africa, and the rise of populist right wing movements in many previously stable liberal democracies. Our symposium is intended to provide an opportunity for an in-depth examination of some of the dynamics and events taking place in Europe in order to gain a deeper understanding of the elements and forces driving recent changes.

Of course, before we get too far into today's symposium there are a few people who must be recognized. Without these people this symposium would not be taking place. So accordingly, I would like to recognize and extend special thanks to Carmen Gonzalez, Connor Scott, and Professor Willajeanne McLean, whose contributions, sleepless nights, and unwavering dedication have done so much to make this symposium a reality. We really appreciate it. I'd also like to thank Dean Timothy Fisher for his unwavering support for our journal and this symposium. It really meant a lot to us to know that the administration was supporting our efforts. Thanks as well to Professor Ángel Oquendo whose invaluable guidance and council really makes our journal success possible. And thank you to the UCONN Foundation for its contributions to our efforts this time and all of our past symposiums as well. And finally, I'd like to thank Deb King, Gene LeBlanc, IT, and all of the other supporting staff for their efforts promoting and coordinating this event.

Thank you. So at this time I would like to turn it over to Dean Fisher. Thank you again all for coming and I hope you enjoy our symposium.

Dean Fisher: Thank you, Navid. As Editor-in-Chief of the Connecticut International Law Journal, you have done a terrific job with all of the work and publications and programs of your journal, and of course this symposium is such a high point of the year. It also would not be possible without Carmen Gonzalez and Connor Scott who as Symposium Editors are responsible for making this happen today.

So, this is a moment of great change in the democratic world. Large parts of our population have become frustrated with elites and with policies, that while they provide progress, have seen very uneven enjoyment of the benefits. History shows that when institutions of civil society lose the respect or the confidence of the population, reactions can be unpredictable and as destructive as they might be, reformative. So, also, we are seeing that social stress can trigger scapegoating, some of our most vulnerable populations threatening the very values that underlie democracies.

This symposium is obviously going to explore forces afoot in Europe today and—but also of course at a time when we in the United States have so much to learn from Europe's experiences. We are seeing some of these same dynamics at work.

Well, we have a really impressive array of presenters today, and in particular we are honored to welcome Ambassador Pierre Vimont, who was previously ambassador to the United States from France and was the first Executive Secretary General of the European External Action Service. This is a wonderful opportunity for us and we are tremendously grateful for you making the trip, as well as all our other incredibly accomplished and illustrious presenters today.

Finally, a tremendous thanks and honor goes to our Professor Willajeanne McLean who as advisor to this symposium has really enabled us to assemble the talent that we have today, and for that we are tremendously grateful. So thank you all for coming. It's going to be a great program. Thank you.

Carmen Gonzalez: Thank you Dean Fisher. Good morning everyone. Thank you for being here. My name is Carmen Gonzalez and I'm one of the Symposium Editors for the Connecticut Journal of International Law, along with Connor Scott. At this time I would like to begin our first panel discussing Brexit and with that I will turn it over to Professor Willajeanne McLean. Thank you.

PANEL 1: THE UNITED KINGDOM: FROM EUROSCEPTIC TO BREXIT

Willajeanne McLean: Thank you all. Good morning and welcome. On the 23rd of June, 2016, a referendum was held in the United Kingdom which would decide whether the U.K. would remain a member of the European Union. The results stunned the world. Leave won by 51.9% to 48.1%. However, the referendum was just the beginning of a complicated process. Under the terms of the Treaty of Lisbon, Article 50, any country wishing to leave the Union must notify the European Council and negotiate its withdrawal with the E.U. Of note, there are two years to reach an agreement unless all agree to extend it. The exiting state cannot take part in the EU internal discussions about its departure. The formal notice was just given by Prime Minister Theresa May on the 29th of March, setting the day of Brexit for Friday, 29 March 2019. Just yesterday the European Parliament, a body whose approval of the U.K.-E.U. "divorce" proceedings is required, adopted a resolution on the key principles and conditions that must be met for Brexit. These conditions are known as the "red lines". The red lines call for citizens' interests to be at the forefront, in order to protect the rights of E.U. citizens living in the U.K., and those of U.K. citizens living in the E.U. It reminds the U.K. that it remains an EU member until its official departure. This includes meeting all of its obligations, including financial ones, which may run beyond the withdrawal date. As I said at the outset, this is complicated. Fortunately, we have panelists who eminently capable of deconstructing and explaining the phenomenon we call Brexit. You have their bios in your program, but I will take moderator's privilege to say one or two more words about them.

In order of their presentations, we have Professor Gráinne de Búrca, who among her other accomplishments is the co-author of the preeminent European textbook on European Union law, now in its 6th edition. She will speak about the unique U.K.-E.U. relationship and the reasons for the vote.

Dr. Peter Rutland's presentation is about the law of unintended consequences or how the political elite ended up with an outcome none of them wanted. He just returned to Wesleyan this year, having spent 2016 as a visiting professor at the University of Manchester. He was the recipient of a grant from the Leverhulme Trust and was working on a project entitled "Visualizing the Nation", which aims to explore how political nationalism has expressed itself through visual media, film, television, and the Internet.

Next is the Olimpiad S. Ioffe Professor of International and Comparative law, and Director of the International Programs at the University of Connecticut, our own Peter Lindseth. This semester he is the Senior Emile Noël Fellow at the Jean Monnet Center at NYU School of Law. His presentation will focus on Brexit, as a backlash against the Court of Justice of the European Union.

Last, but certainly not least, is Professor Frank Emmert. Professor Emmert, who braved wind, rain, airplane diversions, and ended his odyssey to Hartford in a car late last night, is a co-author of the leading U.S. case book on European law, which may be familiar to some of you sitting out there, entitled, "Cases and Materials on EU Law" which is now in its 4th edition. He will gaze into the crystal ball and give us a sense of what happens next.

Without further ado, please welcome Professor de Búrca.

Gráinne de Búrca: Good morning. Let me start by saying what a pleasure it is to be here and by thanking the student organizers and the Connecticut Journal for the invitation, and for Professor Lindseth for driving me here this morning.

So this is a topic which continues to unfold and to fascinate us. The vote, as Professor McLean said, took place last June and yet we are only beginning to grapple with the many implications of the Brexit vote. On this particular panel, which is devoted to that particular topic, what I want to ask is a question that has been buzzing around in my mind for some time, which may seem a very succinct and perhaps banal sounding one, but that I think needs a little further exploration: and that is the question of just how British was the Brexit vote? And what do I mean by that? Well, the main focus of the debate so far, at this point in 2017, has moved on from the initial quest to identify the causes of discontent and the errors and so on that gave rise to the referendum and the vote to leave, and to focus now on the big questions confronting us: the mechanics, the terms of exit, and the likely future terms of UK engagement with the EU. Those are obviously the critical questions for the future. But I still feel that understanding better the causes of Brexit continues to be an issue of essential importance, both for intrinsic reasons, but also for pressing practical purposes, in order to consider what kind of response or reform on the part of the EU and on the part of the UK might be appropriate.

I believe that an appreciation of the distinctive and local features of the vote as a reflection of the UK's distinctive relationship with the EU is very important, in addition to looking at the common features which it seems to share with developments across other democracies worldwide. So I think it is important to step back from the immediacy of the current issues and reflect again on the extent to which we can or should understand the Brexit vote as a British decision reflecting something very deep and distinctive about the relationship with the UK with the EU. And the reason why I'm coming to that question is because I have noticed that a very dominant focus in the aftermath of the referendum has been a sense, as your dean said in introducing this symposium, that it resonates so much with other events happening worldwide, that it resonates with the backlash we are seeing against the perceived consequences of economic globalization and migration, a rise in nationalist sentiment populist movement and that there has been a significant focus on understanding Brexit as part of this worldwide trend. A lot of the commentary has emphasized the similarities between the impetus for Brexit and the forces that propelled Donald Trump to victory here in the US. They are grouped together as populist political events that express and reflect the reaction against immigration, concern about economic insecurity, a rejection of transnational cooperation, and a return to inward looking nationalism all fueled by a rise of far right, and very right-wing, and far-right-wing sentiment and illiberalism.

This approach to understanding and explaining Brexit I is emphasizing different aspects of the vote than those which arise from the question I'm asking, namely how British it is. The more comparative approach emphasizes the similarities between the issues that were salient and the Brexit debate and those which are fueling political developments across other democracies, not only in the US but also in other parts of

Europe at present.

So, I want to suggest that we can learn something, though, from pausing for a moment and looking at what are some of the root causes of the Brexit vote: and by that I mean that its root causes are not in some kind of contagious common international backlash against globalization, but really in Britain's distinctive, in its cultural distinctiveness, historical distinctiveness and in the specific experiences and perceptions of EU membership on the part of the 17.5 million people who voted to leave.

I want to present a little about what I consider to be the local story, Brexit as a British event before moving on to think about Brexit as a part of the global wave that we are seeing at present.

The local reading of the UK vote sees it as something of a vindication of the position expressed by French President de Gaulle when in 1963 and 1967 he vetoed the UK's application for EU membership. At the time, he vetoed the application on the basis that, amongst other reasons, the UK saw the EEC primarily as a trade block and was insufficiently committed to the broader project of European integration. And indeed the trajectory of European integration since that time, from 1973 when the UK joined until today has questionably been one of ever closer union, moving beyond what was essentially a common market project to a much more integrated political union going far beyond economic and trade cooperation. By the time of the UK referendum in 2016, seen from that perspective, the Brexit vote could be understood as the unsurprising, maybe even predictable outcome of putting up for popular vote the continuation of a complex and always challenging political relationship the roots of whose problems were very evident from the outset. When the UK sought to join the EEC as it then was, it sought different things from its membership than did six founding states which had been more explicitly committed since the time of the European Coal and Steel Community and the embryonic European Political Community and European Defense Community of the early 1950s. The founding states had been more explicitly committed to an ever-closer union. The UK had chosen not to join the original six then and preferred a looser and much less supranationalized arrangement in the form of the Council of Europe, which was a wider, looser, intergovernmental cooperation forum. And it also chose not to join the original six EEC member states because its preferred commitment was to the multilateral free trade system and to its Atlantic relationships. The UK at the time prioritized these goals and relationships over its relations with what was then Western Europe.

It has been argued that the UK's change of heart, what led it to apply for EEC membership in the 1960s and 70s was its desire to avoid continued economic decline, not because of any conversion to the project of European political integration. So joining the EEC for the UK was a pragmatic economic choice and not an indication of political commitment to continental Europe as the rest of the six member states were treated.

And even after it joined the EEC, UK remained, (to coin a term used by Stephen George, a political scientist who described the UK's ongoing relationship with the EU some decades later) as an "awkward partner." Certainly other EU member states have at times expressed sharp reservations about aspects of EU policy, they secured

opt-outs for particular interests such as the Irish Abortion Protocol, The Danish Second Homes Protocol, and there has been a gradual rise in Euroskeptical movements across Europe and the EU member states at least from the time of the Maastricht Treaty onwards, if not before. But none the less, the UK has always remained somewhat exceptional, if not exceptionalist, in its attitude toward the EU. Britain sought and received special treatment in relation to the so called EU Budget Rebate. It adopted a pragmatic case-by-case approach to the introduction of new areas of EU policy. Each one was taken as a fresh decision to make and not as a natural extension of its commitment to European integration. The UK secured opt-outs on a range of issues on which it was unwilling to countenance closer integration, notably from economic and monetary union and justice and home affairs at the time of the Maastricht Treaty, with other shorter lived attempts seen in the social protocol attached to the Maastricht Treaty and more recently the protocol in the Charter of Fundamental Rights attached to the Lisbon Treaty.

In 2000, leading European and UK political scientist Helen Wallace wrote that British governments have been repeatedly concerned that other European governments would run ahead with other cooperative and integration adventures leaving UK on the margins. And that their fears have been repeatedly well founded. She noted that despite the enthusiasm of the UK for many particular EU policies, especially the single market, but also interestingly for EU foreign policy, there remained a deep resistance to the idea of European federalism, European supranationalism, and what that was assumed to imply. Helen Wallace also noted, I think tellingly, in view of the circumstances now in which we see how the decision to call a referendum was taken in the UK, she noted that typically UK governments and office have sought to develop a more engaged European policy while the lead party of opposition has found Europe as a persuasive and useful subject with which to differentiate itself from the governing party. So there has been a damaging cycle of acrimony, which hardly surprisingly has reflected itself in an ambivalent public opinion on European issues and an image of Britain as an unpredictable partner.

Her comment that British political culture doesn't easily yield to the pressures of Europeanization can be supplemented I think by the observation of one of the leading market research polling organizations in the UK conducting opinion polls over 40 years on British public opinion in relation to EU membership, which found that levels of support from membership have constantly fluctuated and regularly been overtaken by a majority of the British public opposed to membership. So it's not a surprise. It's not something new. You know, given these numbers, it's plausible to assume that if a popular referendum on UK withdrawal from the EU had been held on many occasions, any number of occasions, over the 40 years of EU membership, the outcome of the vote might well have been the same as in June 2016, long before the apparent populist revolution sweeping the west.

Britain was one of the few European countries to emerge with a sense of victory from the second world war and a sense of strength with its network of commonwealth relations and its firm Atlanticist outlook, as well as its distinctive history and strong sense of independence. The UK's decision to join the EU was a pragmatic one taken for economic reasons with clear reservations about the deeper project of integration. And while the experience of EU membership seems to have been broadly positive,

and to have generated a commitment to transnational integration and amongst the younger generations for whom Britain's post-war history and prior network of alliances are less salient, and whose education has integrated the reality and the benefits of the EU membership, it none the less failed to persuade or to win over part of the predominantly older public who had grown up in post-war Britain and somehow sought a return to that earlier state of affairs for whom the "take back control" slogan really resonated very strongly. The sense of exclusion or being left behind, which seems to have driven part of the Brexit vote, was thus not only, or not even mainly a sense of being economically left behind, but being left behind in a changing Britain and a changing Europe, which didn't reflect the sense of belonging or the preferences of this very important category of voters.

So the referendum vote in the end reflected a deep split right down the middle of the British public, with 52% voting to leave and 48% roughly to stay. And the most striking cleavages appeared along age and educational lines, not along economic lines, but those are salient too in other ways, but the really striking cleavages are age and education with other divisions being evident in the urban/rural split and in the devolved regions. Thus even though the decision came as a shock, given its immense repercussions for the EU and the UK and we are still dealing with the aftermath of that shock, I think the fact is that the approach of many Britain's towards EU membership, both at the political level and the popular level, very particularly in the popular media had never entirely overcome the initial reluctance about joining the EU and never settled into a stable pattern of support for EU membership. It meant that the warning signs about the risks of holding a popular referendum on the issue of membership were really quite evident for many years. So despite all the factors, the great variety of factors that seemed to have influenced the decision of the majority to leave, you could still say that the referendum results can reasonably be seen as the predictable outcome of a 43 year difficult relationship between the EU and the UK that never fully managed to transcend its contested origins and never fully won the hearts and minds of the British public. And once the political gamble was taken by are prime minister at the time to put the question to the people as a way of stopping the rise and to challenge the momentum of the Independence party, the risk of Brexit was real. You know, he may have succeeded in stopping the rise of the UK Independence party, but the cost was a narrow victory for long standing Eurosceptical forces and sections of the population that had never really been persuaded of the merits of integration.

What might be the implications of this interpretation of the Brexit vote for the future? Well, I think one reading of the significance of the age and education divide is that as the younger generation emerges a majority support might well develop for a much closer relationship with the EU than that that's currently contemplated by those leading the Brexit movement, possibly even for renewed EU membership after a period outside the EU. I think the salience of education points to the importance of both adequate public investment in education and directing those efforts to ensure post-secondary education for all, as well as the integration of a European civic component into the national's school curriculum.

I'm conscious that I only have five minutes left, so that brings me to the second dimension or part of the story, or the alternative story. When I say alternative, I don't

mean that this is an alternative to the local British story, but rather another dimension of the Brexit vote being the contagion story, i.e. Brexit as a boat on the global tide of populist anti-internationalism. What I want to suggest here is not at all that these issues are not important and did not resonate with and are not an important part of the issues that fueled the debate that lead to the Brexit vote. But I want to add that I think there is a risk, and this is my real reason for wanting to highlight the local dimension of the story: I think there is a risk given the broad sense of political challenges and changes taking place across many democracies at present, of lumping together too many different issues and lumping together within the broad category of populism and the populist wave. This includes a large range of distinct issues even though some of them, or even many of them, are related, yet they would benefit from separate analysis.

The first issue is attitudes toward immigration. A second is economic insecurity. A third is a move against internationalism, that is very resonant here in the US with the current administration, toward economic nationalism and other forms of nationalism. And a fourth is a rise of the right, the far right, the rise of illiberalism, including the move against constitutional checks and balances on popular democracy. I think there is a cluster of issues often grouped together and we would benefit from separating them out and looking a little more closely at each. To come to the last part of my comments, I think if we look at the Brexit vote, we see that concerns about immigration are unquestionably key, and were very, very, salient, and that comes out from all of the different analysis that have been done of the vote. The relevant of economic factors and economic status is clearly evident, but in a less straight forward way. There is no doubt from both the evidence of the vote, but also from the debate that the twin issues of EU-driven austerity policy on the one hand and EU-promoted economic liberalization on the other hand generated very significant discontent and opposition, not just to EU policies, but to the EU itself, among significant parts and different parts of the population. And yet, while there seems to be a clear correlation between employment status in the UK and the vote to leave, between being in the most economically disadvantaged group and the vote to leave, there is an even stronger correlation between the vote to leave and member of the group that is classified in the analysis of the polls as "wealthy Eurosceptic". 23% of the UK population is identified in surveys of the vote as being in the "wealthy Eurosceptic" category and people falling into this category voted overwhelmingly by something close to 80% to leave. Whereas a full 90% of the poorest group, which apparently makes up 12% of the population, voted to leave. Hence the salience of economic status is clear, but the message is not straightforward: both wealthy and poor alike voted for Brexit. Hence, immigration clearly resonated as a concern. But the issues that led those in the most disadvantaged socio-economic category to vote seem to have been very strongly identitarian, and not just economic. It was not necessarily a belief that leaving the EU would improve their economic status, but the identitarian issues of control and sovereignty (leading to a vote against "rule from elsewhere") seem to have resonated strongly.

Because I'm now out of time, I will just say two sentences about the remaining issues already mentioned: to what extent does the Brexit vote reflect a move against internationalism, against globalism? I think much less so than in the election here in

the US. I think the Brexit vote was against European integration very distinctively, but one of the stated goals of the Brexit campaign was that Britain would be free to be internationalist on its own terms again, to be akin to Singapore, and to engage in the free trade regime as a sovereign state. I don't see quite the same economic nationalism or anti-internationalism in the Brexit vote as in other areas, though it was clearly an anti-EU vote. Similarly, and I won't go into this because it's a complicated argument, but it is also less clear to what extent the Brexit vote was part of this populist, illiberal democratic movement, resisting the imposition of constitutional constraints on popular democracy, with the EU viewed as a kind of a macro-constitutional constraint on the UK people. I think this dimension was much less evident in various ways because I think the Brexit vote was seen as a way of restoring British democracy, British checks and balances, the British political system to be fully sovereign again, rather than somehow a vote for strong-man (or strong woman!) rule and erosion of those domestic checks and balances.

So I'll draw to a close here and just repeat that I'm not trying to argue that the broader international context is not deeply relevant to what happened in the UK. Clearly it is relevant, and clearly there are resonances in many of the issues that are arising elsewhere with what is happening and what happened in the UK. But at the same time I think there is a risk of overlooking the really distinctive UK and local dimensions of Brexit, and I think that is relevant for other populism movements across Europe. Unless we look closely at what's happening elsewhere: e.g. in France, what are the issues that are salient in France? What are the issues that are salient in Greece? What are the issues that are salient in the Netherlands, and in Germany? And unless we try to understand those distinctive relationships and issues, we will lack a full understanding of what is happening, what the appropriate responses may be, and how best to shape them.

Thank you very much for your attention.

Peter Rutland: So, welcome everybody. I do have a PowerPoint, which hopefully will miraculously appear shortly. I should start with a couple of caveats. First of all, I'm not a lawyer. I'm a political scientist, so I feel somewhat trepidatious addressing a room full of lawyers. I feel like I should have brought a lawyer with me. And secondly, I'm not a specialist on British politics or European politics. I'm actually a Russia specialist, so my day job is studying the actions of Mr. Putin, which keeps me pretty busy.

As you have guessed by now, I'm originally from England. I was born in Stoke-on-Trent, near Manchester, which had the highest 'leave' vote of any city in Britain, 69%. And last year by coincidence I was on leave, as Willajeanne explained, in Manchester University studying a project to do with Russian nationalism and other nationalisms around the world, and I was able to witness the Brexit campaign and watch the debates on TV and talk to people who were active in the campaign. So I'm coming at this from that particular angle, a kind of insider but also an outsider because I have lived in the US for almost 30 years, half my life in Britain and then half here.

And these are my general conclusions in case I run out of time and don't get to finish the PowerPoint presentation. Picking up the story from the previous speaker,

I will deep dive into the specificity of the British case and say, it does reveal deep structural flaws in the British political system, flaws which were there before, but people weren't really paying attention to them, although in the last 20 years they became increasingly obvious. The case also does reflect global issues refracted through the British specifics. It does emphasize the importance of individual leadership, something that social scientists these days tend to overlook, especially political scientists. But individual leaders really matter and the role of Boris Johnson and David Cameron is absolutely crucial to this story.

And the only law I will talk about is the law of unintended consequences, one of my favorite laws. And I'll start out with a joke. I do see some parallels between the UK and the USSR. In each case a leader introduced elections sure that he would win the elections, Mikhail Gorbachev in 1989, David Cameron in 2016. But they lost those elections due to a surge of nationalism, that broke apart the Soviet Union, and that saw the Brexit referendum vote 'leave'. And in each case the leader was overthrown by somebody called Boris. Boris Yeltsin, I think he is the one on the left, and Boris Johnson, the mayor of London, now foreign secretary, on the right.

So, what was David Cameron thinking? Basically, he was thinking I am a winner. He famously told Angela Merkel, I've won three votes in a row, you know, the elections, the Scottish referendum, it's in the bag. I know how to do this stuff. I'm a great politician. So pride came before the fall. He promised a referendum mainly for internal political party reasons. He had this core of Euroskeptics within his party, at least a third of the MPs thought Britain shouldn't be in the European Union, and they constantly challenged the Europeanist leadership of the Tory party. This was a problem going back to Margaret Thatcher if not earlier.

He also faced the rise of the UK Independence party, Nigel Farage's creation, which in the 2014 EU election won 28% of the vote. Now in the regular UK Parliamentary election they only won 12% of the vote in 2015, but the turnout was half as big in the European election and so that's why they put in such a good performance. But still the Tories were afraid that UKIP was going to start winning Westminster seats, and once that happens in a first past the post electoral system, there can be a tipping point and suddenly you can have a large block of UKIP deputies taking seats away from the Tories.

The other contingent factor was that from 2010 on the Tories have ruled in coalition with the Liberal Democrats. They didn't have an absolute majority. And the Liberal Democrats controlled their more wacky impulses. After 2015, the Tories, surprising themselves and everybody else, won a majority of seats in the House of Commons, so they could do what they liked. And the Lib-Dems would have never allowed the referendum to happen if they had still been in the coalition.

So as Martin Schulz, the president of the European parliament, said, the continent is being held hostage by an internal fight in the Tory party, and I think that is absolutely true.

We already heard about the history of the EU and Gráinne explained it in more detail than I can command, the precise nature of that strange relationship, so I will skip this slide in the interest of time. I would add that one of the things that was going through David Cameron's mind was that he didn't want to leave the European Union. He was one of the committed Europeanists in the party. But he was convinced he

could persuade Brussels to give him something to take back to the British people that would win the referendum. He came back with virtually nothing. A three-year transition period for the social benefits for migrants from EU countries such as Romania and Bulgaria. And that just wasn't enough to satisfy the attacks from UKIP and his own party's right wing.

The whole question of a referendum is a new addition to the Westminster model. If you go back to Margaret Thatcher, she was quoting Clement Attlee saying, it's a device alien to our traditions, which has so often been the instrument of Nazism and fascism. That is what the Labor Prime Minister Clement Attlee said in 1945 and that is what Margaret Thatcher said at the time of the first EU referendum in 1975. And boy, were they right. A referendum is an extremely blunt instrument: just two features that were fumbled in the British case, the Brexit case. Why wasn't there a minimum turnout requirement and a minimum majority vote requirement, which is common in many referenda around the world? If there had been a 60% positive vote requirement we wouldn't be sitting here talking about this. We would be talking about something more positive and more fun. And secondly, the Australians, who have a well-developed use of referendum, have very strict rules about how you run the referendum. Each side of the ballot has to include something like a five-page point-by-point summary of exactly what "yes" means and exactly what "no" means. And that was not done in the British case. So nobody knew what they were voting for. Are we voting to stay in the single market or not, customs union or not, free movement or not? That is still not clear, you know, nine months later.

The campaign itself was a strange campaign. It was very passive. There were very few billboards. There were very few bumper stickers. It was a pretty invisible campaign. I think UKIP were the only people really putting up billboards. The main action was on TV, TV debates, which were informative, but also raised as many questions as they answered. Labour was strangely silent, even though 90% of Labour MPs backed Remain. Jeremy Corbin is lackluster about everything, even things he cares about he is lackluster, so he was double lackluster about the European Union, which he himself said was a 7 out of 10 question , that the benefit of EU membership was 7 out of 10. Labour were afraid of losing seats in the May local elections, so the instruction went out from London, do not campaign for Remain until after the May 25th local elections. So the local Labour activities who wanted to go out there and hit the streets for Remain were ordered not to, because Corbin thought that Remain would damage Labor's chances with its working class electorate.

Briefly, the issues were sovereignty, immigration, and budgetary questions. I think sovereignty, this is my hunch, but also based on some polling data that sovereignty, the sense of take back control, parliament, choosing your leaders through the ballot box, this was the dominant rhetoric of the leave campaign. Immigration was an issue, but the campaign tried to pretend it wasn't the main issue, and they did stress, as Gráinne said, they were globalists. One of the points they kept making was that the immigration laws were unfair by letting any Europeans in, and by denying family unification and skilled workers from the Commonwealth and other countries. The budgetary questions were hotly disputed. They came up with this number of 350 million pounds a week that is being sent to Brussels, and that was hotly disputed by the Remain campaign. So above all it was identity politics. The

British identity has always been defined in opposition to Europe. The dates that school children learn are those dates of invasion, successful or unsuccessful, from the continent. If you are interested in drilling down into this question of the relationship between economic and identity politics, the best thing I ever read was a long blog post by Eric Kaufmann from London School of Economics where he did an econometric type of analysis of the polling data and he found the strongest correlation was between authoritarian values and Brexit vote. He did similar work with the Trump supporter data, and found a similar correlation. Authoritarian values are tested by questions asking about how you raise your child, do you think it's good for children to be independent or is it more important for children to obey their parents, those kinds of questions. So it taps into this authoritarian mentality. So it's not just about feeling British or European, it's also about the order versus freedom spectrum.

These are some of the images [shows slides of campaign billboards]. In the interest of time I'll just skip through. Generally, there weren't many images in the campaign. It was a strangely kind of cerebral debate about all these abstract questions about future patterns of trade, the impact on the City of London, and so on. So it didn't actually engage with people. So even though identity politics was driving a lot of the debates, neither campaign really operationalized identity visually very effectively. And generally speaking, the Leave campaign did a better job, that said, than the Remain campaign.

This was a controversial billboard of UKIP [Shows poster stating "Turkey (pop. 76 million) is joining the EU.] Of course, Turkey is not joining the EU any time soon, even though they have been in negotiations since 2005. However, they did have a point that as part of the refugee deal in 2015 Turkey agreed to kind of warehouse the Syrian refugees, 2 to 3 million of them, in Turkey and shut down the smugglers and human traffickers taking them to Greece. In return for that, Erdogan demanded that the EU pay for all of that, $3 to $4 billion per year, which they have been paying. And he got a pledge for visa free travel for Turks to the EU, to Schengen, and that hasn't been implemented yet. So the migration refugee deal may break down. But UKIP did have a point that staying in the EU might have meant visa free travel for Turks, which may or may not have gotten them into the UK.

This was a controversial poster. It was actually only up for one day and was taken down. This is from the UKIP campaign bus, titled "breaking point", showing the tide of refugees. This is a photo from the Slovenian-Croatian border, and it was controversial because it looked a lot like a Nazi propaganda poster from the 1930s, which was quickly pointed out by the press.

So, Boris Johnson was the key factor. He was actually stuck on this zip line for like 20 minutes. It broke. So David Cameron is one actor whose actions drove this outcome and then Boris Johnson is the other, because you needed charismatic leaders to carry the campaign. Nigel Farage is charismatic, but he's also extremely controversial, but Boris Johnson was popular. He's a very nice guy. He's very funny. He's popular. He was the successful mayor of London. And when he threw his weight behind Leave, and according to some it was only in February 2016 that he really decided to back Leave, so he wasn't a committed Europhobe, that really gave the Leave campaign the edge, without which I don't think it would have succeeded.

The Remain campaign was focused on a whole smorgasbord of issues, mainly the economy. Project Fear the opponents called it. None of them really got traction with the electorate. These are some of the Remain campaign images. This one, I think they actually didn't use this one in the end. This was from the ad agency that prepared some images for them, which I was able to get a look at. And a lot of the images they decided were too negative or too confusing. This one also. This is Michael Gove who was a Leave campaigner, Boris Johnson, and Nigel Farage.

So one key point really jumped out at me. I have been to two or three Brexit panels at political science conventions and nobody has mentioned the press. But the press is absolutely critical because the simple fact is newspapers have an incredibly influential role in British politics. People still read newspapers in Britain, less than in the past, but they still read them in the millions every day. And Rupert Murdoch has basically kind of swung every election since 1990. When he backed Major, Major won. When he backed Blair in '97, Blair won. When he backed Cameron, Cameron won. When he backed Leave, Leave won. So it's a 100% record. And 80% of the press by circulation backed leave. So it's not surprising that people picking up the press every day getting these silly anti-Europe straight banana stories-- there's a 70 page allegedly regulation about the shape of bananas-- this also influenced the electorate. The TV was neutral, but in this kind of neutral debate between the two sides, actually it kind of helped Leave because it gave them equal status to Remain. This is *The Sun* just three months before the referendum announcing that it was backing leave, criticizing the actress Emma Thompson who said something about Britain being a cake filled, misery laden, gray old island. And this was a bit of some false news, allegedly leaking the news that the Queen was in favor of Brexit, which turned out not really to be true.

Telling quote from an *Evening Standard* journalist, "I once asked Rupert Murdoch why he was so opposed to the European Union. 'That's easy,' he replied. 'When I go into Downing Street they do what I say; when I go to Brussels they take no notice." [Anthony Hilton, *Evening Standard*, Feb. 2, 2016] Direct quote, on the record.

This is some data, on the left, the number of immigrants. So you can see it up ticked in the last ten years. Britain was 4% immigrant when I was growing up. It was 6% immigrant by 1991. And now it's 12% foreign born. So the immigrant population has doubled in the last 25 years. The graph on the right is the ups and downs of polling on Leave versus Remain, and as you can see, Remain did have this positive surge between 2014 and 2015, but at the time Cameron called the referendum it was neck-and-neck. So it was very hard to predict who would win. This is the regional distribution which is very striking. Some parts of London were 80% pro-remain. Cities, industrial cities in the north were as I said, 69%, 60% Leave. So it was very much a north/south thing with London, which is 45% foreign born benefiting from globalization and Europeanization, and the rest of the country not so much. This is the age breakdown, which is very striking. Young people are more pro-European than the old people. If the old people didn't have the right to vote Brexit would have lost. It is an open question however, when young people get older will they still remain pro-European or is conservatism something that creeps up with age? We'll have to wait and find out. But I won't be around to see that definitively answered.

These are the structural flaws to the political system that I don't have time to talk about. As a political scientist, this is what interests me, but now I'm afraid the whole topic is in the hands of the lawyers because it's going to be two years of very, very, complicated and nasty legal maneuvering. And I'll conclude at that point. Thank you.

Peter Lindseth: Our first two presentations introduced some of the key issues quite nicely. Gráinne de Búrca gave us an excellent overview of the Britishness of Brexit, and Peter Rutland did a deeper dive into some of the truly British dimensions of it. To open my own remarks, let me go back to a point that Peter made on his first slide about the apparent contradiction between the logic of globalization and democracy. There is an economist at Harvard, Dani Rodrik, who has a famous analytical framework—a "trilemma"—that tries to spell out this tension between democracy and globalization. His main point is that globalization demands a shift in regulatory power away from the national level to the supranational level. But if you are going to move regulatory power to the supranational level, then you have to move democratic legitimation to that level as well. This is not easy, as the European case demonstrates.

One of the central challenges of European integration has been the "democratic deficit" or, more deeply, the "no demos problem." There are significant obstacles in the EU to creating the kind of robust democratic and constitutional legitimacy on the supranational level that exists historically on the national level. The historical experience of democracy remains, for better or worse, associated with representative institutions and judicial bodies on the national level. These national institutions are experienced as the robust expressions of democracy. The EU of course has tried to replicate those mechanisms in the European Parliament and the European Court of Justice. The issue is whether they have created a merely formal, "as if" democracy and constitutionalism on the EU level, something that mimics the forms of democracy and constitutionalism but does not reproduce its substance in a sociopolitical, sociocultural, or sociohistorical sense.

The question ultimately boils down to how people "experience" the EU. There is considerable evidence that they experience it as very bureaucratic, technocratic, indeed "juristocratic" (to use a neologism, meaning "the rule of judges"). But the bottom line is that they do not yet experience it as democratic and constitutional in its own right in a historically recognizable sense. I think that that's quite significant. They don't experience the EU as democratic precisely because there is not yet a coherent, robust, democratic sense of legitimacy on a European scale, in which the majority of a European "demos" can rule over the minority without that rule being experienced as rule by an "other." That sense of legitimate democratic rule is not something one can easily engineer. Rather it is something that derives from deeper and more complex sociopolitical, sociohistorical, and sociocultural developments. That's something that emerges over time. And that's really one of the main drivers I think of this contradiction between the logic of globalization and democracy. As Rodrik's trilemma tells us, when markets extend beyond borders, they functionally demand regulation that is also transnational. But our capacity to legitimize those transnational forms of governance in democratic terms is challenged by this "no

demos problem" beyond the confines of the state.

My focus today is on one particular dimension of this problem: the idea of Brexit as a backlash against the "juristocratic" European Court of Justice. In some ways, one might perceive me as the representative of Euroskepticism on this panel, but let me be clear: I'm actually strongly in favor of the integration project as a whole and I thoroughly agree that Brexit is a huge mistake for the UK. I agree with the demographic points made by both Peter and Gráinne, particularly as to youth. While there might be some marginal erosion of the enthusiasm toward integration among the young, I think the general enthusiasm of this age group toward European integration is going to persist. I think that, as those people get older, they may recall longingly their membership and perhaps even seek the UK's readmission. Indeed, this may well point to the eventual emergence of a European "demos," even in Britain. And I also think it's absolutely true, on a more instrumental, practical level, what Martin Wolf said in the *Financial Times* on March 28. As my first slide quotes him, after Brexit the UK "will be poorer, more divided and less influential. Brexiters will deny all this. They are wrong." I think this point is pretty indisputable.

But even if this is a colossal error on the part of the UK – the consequence of some of the internal Tory politics that Peter was talking about – the UK nonetheless has some legitimate objections about how European governance currently operates. In particular, I would say that the role of the European Court of Justice can and should be rethought. Even with Brexit, the remaining 27 member states will have to find a new balance between the political dimension of integration and the judicial dimension of integration.

So, if we look at my second slide, this is quotation from a speech this past January by Theresa May, the UK Prime Minister, at Lancaster House: "We will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain." "Take back control"—we have heard this emphasized several times this morning. This was a major element of the Leave campaign, and it was often linked to a desire to end the jurisdiction of the European Court of Justice in Britain. If you are trying to understand this sentiment about taking back control, about the restoration of sovereignty, you must also appreciate how the European Court of Justice has often been a target of anger in the UK.

Part of the reason is that the European Court of Justice has played a crucially important role in the construction of the EU. If you want to have a functioning internal market, you have to have some adjudicator that is going to create some measure of legal uniformity — to have the last word, or at least to have some primacy if not even supremacy in ruling on disputes over the scope and content of EU law. This functional argument in favor of the ECJ is really hard to dispute, as far as it goes. But the real problem is not so much that functional claim, but the related constitutional claim. The European Court of Justice has converted the functionalist logic of integration — the necessity to have a kind of supreme adjudicator in the EU — into a constitutional principle. And in fact, this notion of European constitutionalism is the animating idea behind much of the Court's jurisprudence, going back to what would be the *Marbury v. Madison* of EU law, the *Van Gend en Loos* decision of 1963.

Why might this be a problem? Why is this something that even the 27 member

states that remain need to address? The issue is the imbalance between the power of European judges versus European politicians. The problem is judicial entrenchment. Certain key policy choices are set out in the EU treaties; for example, as to the free movement of workers. The Court regards the treaties as a constitution, creating a rights-based constitutional system under the rule of law, in which the Court is the ultimate arbiter. Yet the treaties are also extraordinarily detailed in terms of policy choices. It's a rather long document and much of we find in the treaties would normally be contained in enabling legislation or regulatory statutes on the national level. These policy choices, if they were contained in a statute, would be subject to majority voting in the national legislature. But because the EU treaties are international treaties among the member states, they require the unanimous consent of all the member states to revise them. This makes them entrenched to a degree not seen in enabling legislation on the national level. There have been efforts to try to modulate the way in which amendments to the treaties can be done, through simplified amendment versus more full-blown amendment. But the bottom line is revising the treaties still requires unanimity.

How does this entrench judicial power? The European Court of Justice claims ultimate supremacy in interpreting the scope and content of the policy choices contained the EU treaties, again, for example, as to the free movement of workers. Free movement of workers is one of the "four freedoms" that serve the cornerstones of European public law. One of the distinguishing features of European law, at least as compared to public international law, is that the treaties create rights for individuals that they can vindicate both in their domestic courts and then, by way of preliminary reference, at the EU level. But the problem is that, because the treaties require unanimity to amend them, this gives extraordinary power to the ECJ. When the court is called on to interpret the treaties, it is difficult if not impossible to override a decision of the European Court of Justice. By comparison, consider the United States Supreme Court. When it interprets the United States Constitution, override is similarly difficult. But if the US Supreme Court is interpreting mere enabling legislation (say, the National Environmental Policy Act or some other regulatory statute like the Fair Labor Standards Act), Congress retains the power to override the Court's interpretation simply by amending the legislation.

This is not generally the case in the EU, at least insofar as the policy choices contained in the treaties are concerned. Because the legal entrenchment of the treaties has, in effect, "constitutionalized" so many policy choices, this gives extraordinary interpretive power to the European Court of Justice — creating, in effect, a kind of "juristocracy" on crucial questions of policy. The combination of entrenchment and judicial power makes it extremely difficult if not impossible for political actors either on the national level or the supranational level to override the interpretations of the ECJ unless they can muster unanimity among the member states to do so. There are large political costs associated with undertaking these kinds of overrides and there has been very few instances in the history of European integration in which the member states have in fact mobilized in this way. So as my next slide points out – using the words of Dieter Grimm, a former judge on the German Constitutional Court – the result is "over-constitutionalization" of EU law. Because of the Court's ultimate power, a whole range of policy choices, at least beyond the adoption of the treaties

themselves, are in effect removed from politics. The Court is given the ultimate power to define the scope and content of, say, the free movement of workers.

This puts David Cameron's negotiations with the remaining member states in the lead up to the Brexit referendum in a different light. In negotiating reforms applicable to Britain that would come into effect if Remain had won the referendum, one of the things Cameron was trying to do was revisit the question of free movement of workers and how that relates to immigration. A little background here is necessary. After the accession of the central and eastern European countries in 2004 and 2007, the UK chose not to take advantage of the transitional restrictions on the free movement of workers that the accession treaties allowed for all the original member states. In effect, Cameron was seeking to reinstitute the transition period anew, allowing the UK to apply immigration restrictions for a number of years going forward. There were real questions about whether such a deal would pass muster with the European Court of Justice. We will never know now because Leave won the referendum and Cameron's deal was never implemented. But this is precisely the sort of political adjustment to policy choices in the treaties, short of outright amendment by unanimity, that the "over-constitutionalization" of EU law effectively forecloses.

Consequently, while there are all sorts of things that are peculiarly British about Brexit, just as Gráinne and Peter have stressed, there are also features of European integration that I think should be revisited in the interest of viable, sustainable, integration process over the long-term. The problem of "over-constitutionalization" is among the most important. It gives rise to what my final slide calls the "principal-agent inversion" in EU public law. The Court mobilizes the discourse of EU constitutionalism to justify transforming itself into the ultimate principal in the integration process. From this perspective, you can begin to understand why not just in the UK, but throughout the EU, a lot of critics have expressed concerns about the role of the Court.

The difference between the UK and the rest of Europe, however, is that these anti-ECJ feelings became an argument for Leave entirely, for Brexit entirely. By contrast, in a place like Germany, to criticize the Court is not impugn the integration project as a whole. But in the peculiar sort of political culture of the UK, well described by Peter and Gráinne, the opposite was true. In this sense, we can understand Brexit in important part as a backlash against the European Court of Justice.

Okay, I'll leave it there.

Frank Emmert: I am very grateful for the organizers first to invite me here, but also to accommodate my somewhat compressed schedule right now. Thank you so much.

For a change of pace, we are going to watch a movie together. The University of Connecticut proudly presents "The Hangover: Part IV". Special United Kingdom edition. Written and produced by yours truly. Thank you for having me here.

The first question is what does Brexit and binge drinking have in common? It was fun while we were doing it. Wasn't it? But when does this headache finally stop?

Clearly, the UK politicians did not think very much about the technicalities of

the referendum, as if you could just have a simple "in/out" vote on an issue as complex as membership in the EU. Essentially, they conducted a kind of "Pepsi Text" with the British voters: Here is the Pepsi you all know and over here is the future Pepsi that we don't have yet but it will be awesome! So, which one do you choose?

I want to give three examples of how to do or not to do a referendum. At the end, the basic take-away you want to retain is that, well don't do it! Peter Rutland indicated a couple of cautionary measures that could be put into place and I think we urgently need to learn how to do a proper referendum, if we continue to insist on having them in the first place. This is true everywhere but of particular importance in the European Union where little, if any thought has been given to the proper way of framing a referendum. Bottom line, we are opening up more and more opportunities for referenda, but we haven't learned how to manage, how to control them, if you will.

My first example is the referendum in Denmark on the Maastricht Treaty of 1991. What did the Danish government do? They thought they were doing the right thing. They took the Maastricht Treaty - and this is the original treaty which basically sounded like "Article 73, Paragraph 3, will be supplemented and amended like this and a paragraph will be inserted between Paragraph 4 and 5…" Two hundred and something pages of technical language amending the original EEC Treaty, and they sent this text to every household. And then they asked the Danish people, do want this? And surprise, the people said no. I was arguing - after the fact, of course, because hindsight is always 20/20 - at least they should have put the existing treaty and the revised treaty on facing pages, distribute them together and say, this is what we already have, like garble, garble, garble, and this is what it's going to be afterwards, garble, garble, garble. Do you mind? And then maybe people would have said, what's the big difference? It is already largely incomprehensible legalese and it does not seem to change all that much. But they didn't do that. The government didn't show that most of the treaty language was already in place, more or less in a similar fashion? And the people were intimidated by a complicated document they could not understand. Unsurprisingly, they fell prey to populist politicians arguing that the treaty meant too much of a transfer of sovereignty and various other bad things, and nobody could easily demonstrate that this was not really the case, that the new treaty did not change all that much. In the end, everybody made a long face after some 50.7% of Danish voters said no to the Maastricht Treaty.

My second example is the referendum on Estonia's accession to the EU. Unlike some of the other Central and Eastern European Countries, Estonia didn't need to do a referendum, but since it was sort of popular in the region, they also announced that they would do one before joining the EU. For a long time, however, the opinion polls were tracking very interestingly. The other countries in the region, like Poland or the Czech Republic, at the beginning, in the early years after they had regained their complete independence, experienced support for EU accession almost in the magnitude of 80% or so. Some years later, once the rather tedious and technical negotiations were completed and the basic rules for accession were on the table, most of the countries in the whole region still wanted to get into the EU by a good two thirds majority. Only in Estonia, the support had always waivered just around one

third. Basically, from the start, only about thirty percent of Estonians wanted for their country to get into the EU, thirty percent were against and some thirty percent were undecided. After gaining independence from the Soviet Union, the country was experiencing a bit of an economic miracle and an often-heard slogan in those days was, "we just got out of one union, we don't want to join another union in a hurry". Most surprisingly, in spite of great efforts by the EU and the Estonian government, this didn't change at all over the years as the accession drew closer. The opinion polls were steady like this and the government was really getting frustrated and investing more and more into the information campaign and the many arguments how EU accession would safeguard the freedom and the prosperity of the country. All it took was some populist claiming that if we join the EU, food prices will double, and support fell back to just around 30%. Trump took a lesson from those kinds of slogans, without factual backup, but very effective. I was there at the time as Dean of an American-founded law school, and very actively involved in training programs for all kinds of professionals, judges, prosecutors, attorneys, in-house counsel, even journalists and linguists. However, the more we did, it often seemed, the actual support for EU accession almost seemed to decline. Some people even started to say that if their own leaders, the local elites wanted EU accession so badly, it was only because they were going to get well paid jobs in Brussels, while everyone else will get screwed. And at some point, we said the only argument that might get the Estonians to say yes would be that if they said no, the Latvians would get into the EU ahead of them. But then, low and behold and completely innocent of the political establishment, two Estonian performers won the Eurovision song contest in 2001, roughly the European equivalent to American Idol, bringing the entire competition to Tallinn in 2002. And not only did the Estonians pull off a smooth and much celebrated event in January 2002, their contestant, a young woman who was actually Swedish, scored again near the top. And the opinion polls for EU support jumped virtually overnight and three months later, on 14 September 2003, Estonia voted by 66% for European accession "because the Europeans actually like us". So, we took a generational decision on the basis of a pop contest.

Finally, my third example is from Switzerland. In my opinion, having lived and worked there for five years, I think the Swiss may be the only ones who are "getting" direct democracy. Thus, if you want direct democracy, you can definitely learn a few lessons from Switzerland, some things to do and some things to avoid. To be fair, many of my Swiss colleagues don't agree with me on that because they say hey, look at us, we are not even in the EU, we are not able to do much of anything! Indeed, Switzerland did not even join the UN until 2002. And this is largely because of direct democracy and because of the complex system of Swiss federalism. Before an important international agreement can be ratified, the Swiss have the right to vote and unless the agreement is supported by a majority of all Swiss voters AND by a majority in the majority of all cantons, the agreement cannot be ratified. But what the Swiss do is they vote approximately four or five times a year on a variety of issues. In each case, the government provides explanations on the vote and recommends what would be in the best interest of the country. So, what happens is that the people actually look at the issues, rather than the political sentiment at the time when the vote is taken. They may not necessarily look at the issues the way me

or maybe us would want them to. To be sure, a significant percentage of Swiss voters does support anti-foreign, anti-immigration initiatives, but by and large the Swiss vote on the issues. They don't have five or ten years of pent up aggravation with their government that they are finally going to release, no matter what the actual issue is. Because that's what we tend to do with direct democracy much of the time: Giving people a chance to vent in a vote that seems to many less significant than a parliamentary or presidential election. Remember when the European Constitution was rejected in France and the Netherlands? All opinion polls and research confirm that the rejection of the Constitution wasn't about the Constitution. In France, it was about President Chirac, who was deeply unpopular by then, and his politics in general, and in the Netherlands, the vote was about immigration and foreigners who were mostly not the EU foreigners that the Dutch were voting on. So, my plea would be, let's not have referenda unless we get it somehow right, unless we get good and fair information in front of the people and somehow assure that they are aware of the real impact of their vote and what is being decided.

However, my topic is actually what is going to happen next with Brexit. Let's take a closer look. Along the way, we are going to do a little bit of crystal ball reading. The best case scenario, the worst case scenario, and then, what's probably going to happen, maybe.

First, let us remember what Britain was trying to get. And I think Prime Minister Theresa May is still living in Lala Land. The British seem to think they are going to get smooth running negotiations over a time period that is somewhat limited to about two years. They seem to think that they can keep full and unburdened access to the internal market for British goods, maybe even British people, but certainly British financial services. And they seem to think that they can get all this without having to follow EU law, in particular decisions of the European Court of Justice, unless they do a bit of raisin picking here and there, you know, we follow this rule, but not that one. All of this, they want to get in exchange for still allowing access to the British market for EU goods, but not people, certainly not the third country nationals that EU people might be married to and all that kind of stuff. And the only thing the British are sort of grudgingly accepting is that they will not be at the table anymore where the decisions are taken but they actually have little or no idea what that means. Maybe Theresa May should have traveled to Switzerland first and asked them, because in Switzerland the government has been very deeply frustrated for a very long time that the decisions that matter for Swiss products and services, decisions about standards, licensing, packaging, labelling, marketing, use and disposal, are made elsewhere, namely in Brussels and without input from the Swiss. Yet, a country like Switzerland, which earns 2 out of 3 Swiss Francs of its GDP in trade with the EU, has no choice but to follow the rules that apply in the internal market of the EU, whether they like them or not, since it makes no sense to impose different rules in Switzerland, which would only force Swiss producers to follow one set of rules for their sales in the EU and another for their sales in Switzerland. Along the same lines, Markus Lusser, then President of the Swiss National Bank once told me that whatever the European Central Bank decides is emulated ten minutes later by the Swiss National Bank. That is all there is left of the famous sovereignty of the Swiss National Bank because a relatively small neighbor of the EU can simply not afford

to have a genuinely independent monetary policy. And the Swiss government is pretty much in the same boat. If 66% of your GDP depends on trade with the EU you are not going to run an independent legal system. Switzerland implements European directives more dutifully than most of the Member States do. The only difference is they don't sit at the table when they are negotiated. England, and I'm not saying the United Kingdom for reasons I will elaborate, England has just voted for the same position. Fascinating. Well, we'll see.

Why is it unrealistic for the British Government to think they can get this scenario, smooth negotiations and overall positive outcome for the United Kingdom? I think there are several reasons. First, the negotiations will drag on. And they could drag on well beyond the two years. Not much has ever been done in the EU on a tight schedule and this one will be a particularly complicated negotiation. This will create legal uncertainty. We already see it. Investors are holding back. Business are creating subsidiaries on the continent just in case. Solicitors are getting licensed in Ireland, and so on and so on. Everybody is making their contingency plans. What are we going to do if Britain is no longer fully integrated in the internal market? At the end, this is going to produce a bad deal for the United Kingdom. Why? We'll come back to that in a second.

As the negotiations drag on and eventually draw to an end, the economy in Britain will already have suffered for a while. Some jobs will have migrated. Some younger people will say, well, I don't know what my future here is going to be, so they will take jobs at banks in the Netherlands instead of staying in the city of London. Talent is migrating already. Scotland and Northern Ireland have already said that they might want another referendum. They never wanted out of the EU in the first place. And then little England might feel rather cold and lonely out there at some point. Why is this not so unlikely? This brings me to my second reason. In fact, the EU has no interest in giving the United Kingdom a good deal. If the UK could get what it wants, the EU would have Poland and certain other countries lining up immediately and asking for the same gig, or even better gigs, right? There is really not much of a desire in Brussels to please Britain. After all, Britain has always been a difficult partner in the European Union. We have accused Britain many times of a poor European spirit, for example, when Maggie Thatcher was negotiating very hard deals with the European Union, including the famous discount on budget payments. Still, to be fair, we have to admit and remind ourselves that once Britain actually accepts some part of European law, they have been rather good at implementing it, respecting it. I have sometimes contrasted Italy in the good old days with the United Kingdom. Italy always signed everything, but the United Kingdom was always difficult in negotiating, but then of course in Britain it gets applied and in Italy it doesn't. It's not quite as extreme of course, but Britain wasn't such a bad Member State, but it was always a difficult Member State. So, there is no desire, but it's also not possible for the EU to give them a good deal. And this is my third reason why Britain will pay a high price for Brexit. Whenever you are negotiating essentially as an outsider with the EU, you have to please 27 Member States. The outcome of the Brexit negotiations will be an international agreement that needs to be ratified by Britain and all 27 remaining Member States. It's going to have to be a unanimous gig. And this does not even take account of the European Commission and the

European Parliament. So, any one Member State is going to hold Britain over a barrel on this exit deal. And everybody is going to line up with their particular interests for their goods, services, and people and their objections to whatever might be conceded to the United Kingdom.

In the EU, if you are inside, you have veto power when important decisions are made and unanimity is required. That gives you a lot of power to get special deals and that is how Britain got its discount on budgetary contributions, got its exemption from monetary union and introducing the Euro, and it is how Britain did not have to join the Schengen Agreement on border free travel, and so on.

However, when a country is outside, it's exactly the opposite. Now you have to please everyone on the other side and that's going to go very difficult with 27 remaining Member States and their very diverse and complex interests and priorities.

Negotiations in the EU anyway never go smoothly when something is controversial and difficult. Some legislation has taken 10 and even 15 years to get adopted. Enlargement to 28 Member States has not made that any easier. The recipe for the EU in the cases where unanimity or at least consensus was hard to achieve has always been basically muddling through somehow. However, muddling through in the Brexit negotiations is going to do one thing for sure, it will create prolonged uncertainty. More than anything, the Brexit negotiations will be an example of a case where the devil is in the details. So, it's very clear to me that the two-year time line will be extended. We will certainly not have a comprehensive deal after two years. We may have a superficial deal that needs to be filled with all kinds of interpretations. If that should be the outcome, the question will be who is going to provide the details, the important nuances that determine who profits and who pays for a particular arrangement. Is it going to be the European Court of Justice or someone else? Britain, apparently more than anything, no longer wants to be subject to the dictatorship of the European Court of Justice. I doubt that those who coined these slogans know much or anything about the Court and its case law but it would certainly be hard for Britain to swallow a situation where the Court would have the power of the final arbiter over the interpretation of the exit treaty. But that is precisely how things work in the EU. Take my word for it, Ladies and Gentlemen, the one thing we will NOT have within two years is a nice, comprehensive, understandable deal that Britain and the remaining Member States, some of which may have to have a referendum over this, can easily sell to their electorate.

So, what are my personal and subjective and of course controversial predictions? I think the two-year time frame will be extended. The period of uncertainty will be bad for the UK economy, but it might be bad for pro-European politicians on the other side as well. If the entire negotiations look too much like haggling that is really unfriendly and bickering back and forth, this is not going to boost the standing of people like Angela Merkel and others who are trying to preserve the integrity of the European Union.

The UK is not going to get anywhere near what they were hoping to get out of Brexit. Of course, they are not going to admit that, the Brexit campaigners, right? The deal is probably going to actually turn out quite bad. But like Trump, they may try to sell it as a great victory. If the British government is half smart and there is a big "if" in that, they will host another referendum. This time, they should ask Peter

Rutland to design it. Secondly, what they should then do is ask the people, "well now we have a deal, do you still want it?" That would be a reasonable thing to do. Giving the people the choice, because what we did the last time was the famous Pepsi test. Remember, they said, here is Pepsi, this is what you know. And there is new Pepsi. We don't have it yet, but it's going to be awesome. Which one do you want? That was the last referendum. The second time around, people should actually be able to taste the new Pepsi, vote on facts, not aspirations, however unrealistic. And then the people should say well, thank you, but no thank you. This is what you could call the cautiously optimistic scenario.

I have always prided myself in being cautiously optimistic and then Brexit went the way it went, Trump was elected, so I am no longer so sure about it. On the other hand, Le Pen was not elected, so maybe there is hope in the end.

Unfortunately, there is also a nuclear option. The Brexit negotiations will attract a lot of media attention. This is going to incentivize the populists across Europe. They will want to grab some of that lime light with their nationalist, xenophobic, and anti-European slogans. In light of such rhetoric, the EU might become perceived by more and more people as disconnected, self-serving, run by bureaucrats for bureaucrats who are trying to preserve their fiefdom and perks in Brussels. This could cause a wider backlash. We already have pretty strong nationalist parties in many European Member States. Several of those might actually come to power and the whole thing might indeed blow up in our face. In this scenario, Brexit would just be the first domino to fall.

The nuclear scenario might actually be the one motivation for the other Member States to at least negotiate in good faith with the United Kingdom so that they will not be perceived as arrogant and disconnected from the needs and interests of the public and the people.

Yet, what would we or should we do if that nuclear option would sort of materialize on the horizon? If more and more nationalist and anti-European powers would be gaining strength, we would probably need a completely new set up for the EU with an inner circle of the countries that are committed to continue what they have accomplished so far, and maybe even further integration, and an outer circle that is sort of hovering around them with more selective participation. But that would require a complete recast of the constitutional and the institutional setup. It might be desirable, maybe even essential for the long-term future of Europe, but I doubt that we can accomplish such a fundamental reform in the atmosphere we will see and under the time pressures that we are going to have. Cooler heads and better economic times may be needed for this one.

One last word of caution: all this crystal ball reading is completely ignoring external shocks that might happen. We have someone in the White House who is rather unpredictable. We have a volatile situation in the Middle East. We might get more waves of immigration, in particular if Erdogan decides he doesn't get enough from the EU and starts bussing refugees to the border. Those kids of external shocks could overlay everything we are talking about and make these predictions very academic and very theoretical. Nevertheless, European history has shown that external shocks can work both ways. They it might drive the EU closer together in the spirit of "let's focus our energies and pool them and solve the problems at hand".

We are actually seeing something along these lines right now with the rather uniform stand the EU is taking toward the UK. On the other hand, external shocks might drive the EU apart or even blow it up, for example if nationalists become so strong that they will close the borders, prevent any foreigners from coming in and throw out many that have long been established, and so on.

What can we learn from this if anything? Well, don't put complicated and important questions in a simplistic yes/no referendum, please! Pretty please??!!

Thank you very much.

Willajeanne McLean: We have about-- weren't they fabulous? I think we need to give them another round.

There were so many things that were brought up that we could sit here for the next several hours and discuss the nuances of every panelist presentation, but I fear that the editor in chief of the CJIL and the symposium editors would have my head. So, we have about nine minutes for discussion and/or questions. I will throw it first to the panelists. Were there things you heard in each other's presentations that you want to briefly comment upon?

Okay. They have concurred. We are opening it up to questions. I think there are people coming around with microphones.

Audience Member: Thank you very much. I enjoyed the presentation from each and every one of you. My question really has to do with-- there was a lot of comments about, almost to the effect, what are they, crazy? And I was just wondering, why, after Cameron had the referendum and the British people voted and Theresa May came into power, and she was originally against it, why she did not find a way of stopping the progress towards Brexit? I know she made a commitment to Brexit is Brexit, but she would not be the first politician who did not keep, fulfill her promises. And then parliament had an opportunity too to say no, but they kept on going, almost like driving a car at 60mph into a brick wall and kept on accelerating. I'm just looking for some type of rationale as to why they kept going the way they did.

Gráinne de Búrca: So, this is speculation and I think that maybe we need to be in Britain to understand it. But my understanding is simply it's become—due to the power of the media and the press and the fact that the conservative party has this majority support now such that it's become impossible to question. The political risks to the party-- to the conservative party in being seen in any way to question that vote or open it to any kind of discussion, rather than leaving it as purely executive issue - is perceived to be too great. So, it's in the Conservative party's self-interest to accept the word of the people and not to open it again. But yeah, apart from that it seems difficult to understand-- I have asked exactly your question of colleagues in the UK because I can't understand why they haven't been able to find a way around the impasse; to open some of these channels of discussion, questioning, and so on. It seems to be that there is a great fear of the media, you know, the judges after the Miller Decision were called enemies of the people. The parliament is cowed. There is very little appetite to expose the loss of political support that they might experience, that is the risk of the conservative party's choosing to hold on to hold on

to power in this way.

Peter Rutland: I would add to that the kind of complete dysfunctionality of the Labor party right now. So, in a two-party system it could work if the second party, the Labor party or opposition party campaigned strongly and aggressively for remain and insisted on a general election on the issue of in or out. So, they wouldn't necessarily have to have a second referendum, they could have a general election and the prime minister can call at any time. And it's convention that a new prime minister should put herself up for a popular mandate. But the trouble is that Labor is trailing in the polls right now by 15%+ to the conservatives. So even if they wanted to run a hard remain campaign, they would just fail, so they are scared of the election and they would win the election if that happened now. So, it's this kind of confluence of circumstances, strong personality of Theresa May and the incredibly weak personality of the Labor leader who is deeply unpopular with the Labor MPs.

Frank Emmert: I think there is also a tradition of law abiding conduct in Britain, as the people have spoken, and once we recognize a rule, even if we don't like it, we follow it. And it's a bit weird because it's a consultative referendum, it's not constitutionally binding, and yet, even the House of Lords and some found it difficult to say we don't do it that way.

Peter Lindseth: And I would just simply add that there is really a fundamental change in understandings of the role of representative institutions. I think that today there is a tremendous legitimacy, for good or ill, associated with the direct democracy by way of referendum. So, the whole notion of democracy via representative institutions is taking a back seat. I think that if they actually had an open vote in Parliament, without the whip, and allowed the Remainers among the Conservatives to vote as the wished, then in combination with Labor, the Lib-Dems and SNP, there would have been an overwhelming majority in Parliament to remain, regardless of what the outcome of the referendum was. This would have been perfectly legal because the UK Supreme Court held, in the *Miller* decision, that the referendum was advisory and that the government could not use the prerogative power to give notification without a specific authorization from Parliament. That was an opportunity both for the Commons and the Lords to remobilize the discourse of representative democracy and assert Parliament's traditionally superior democratic legitimacy, which was, until recently, a cornerstone of the British system. So, Brexit marks potentially a decisive transition away from the notion of parliamentary sovereignty toward the superiority of direct democracy via referendums.

Audience Member: Thank you.

Audience Member: For Professor Lindseth, how many judges sit on the European Court of Justice and how are they selected? That may have been in your schematic there, but if it was...

Peter Lindseth: It was not. There is one judge from every member state. And

then there are 11 advocate generals. The Court sits in various formations including a grand chamber of 15 judges, which hears the major cases. The judges and advocates general are nominated by the member states, but when they sit, they sit as European judges. So, in this sense the Court is reflective of, dare I say it, the schizophrenic nature of European integration. The appointment process is national but, once appointed, the judges and advocates general are supposed to pursue the Union interest as opposed to being the British judge or the German judge or what have you.

Willajeanne McLean: Last question.

Audience Member: Just a very quick question about the justice system. What defines a jurisdiction? For example, if I were to appeal to the court, what would be my basis for appealing?

Peter Lindseth: There is no appeal to the Court of Justice of the EU except in matters relating to the legality of EU action. In that regard, the court acts as a kind of supreme administrative court in many respects looking at the legality of specific regulations or personnel decisions or what have you. Most of these sorts of cases go to the so-called General Court, which sits below the European Court of Justice. But with regard to the conformity of national law with supernational law, there are two ways that a case can come before the Court primarily. One is through an infringement action brought either by a fellow member state or the European Commission. The other is through a preliminary reference from a national court, asking the Court to rule on or interpret EU law. And that has become the primary means by which the European Court of Justice polices the actions of member states and their conformity with European law. Actions are brought in national court by private litigants and then if an EU law issue arises, the national court makes a preliminary reference to the European Court of Justice.

Frank Emmert: So basically, the national court sends the case up to the European court, asks for an interpretation of EU law, gets that back, and then adopts the national decision, which makes it, of course, enforceable in the national structures, but with the interpretation of EU law from Luxemburg. So, this is a very ingenious system and it's very different from any other, the international code of justice in The Hague or the European Court of Human Rights, don't have that power. They are hovering out there like a UFO in orbit and they can issue beautiful decisions, but whether or not they will be domestically implemented is a political question. In the EU, it's a legal question.

Willajeanne McLean: We have time for one more question.

Audience Member: So, this is for Professor Emmert. I was wondering, was it your estimation—did I understand correctly that you felt the most compelling interests for the EU to give the UK a good deal is this political objective of not losing—not looking like a bad guy? Basically, not losing legitimacy vis-a-vis. If you had to articulate the EUs interest on the economic side, what would you say that is?

And a second question on that, in terms of the future, so like the question of post-Brexit for Europe, what do you think about the big elephant in the room which is the Franco-German Axis?

Frank Emmert: I think the British—in Britain it's always fascinating that half of the people in power in Britain, they have no clue how the EU actually works. And the people from Britain who understand the EU tend to work in Brussels and with Brussels very closely.

Peter Lindseth: It makes them illegitimate...

Frank Emmert: It makes them illegitimate, exactly. So, Britain is thinking that the economic argument is going to be important for the EU, and it's not. First of all, the market will continue, one way or another, even if there will be import duties into the-- duties now days on average between 3%-5%, they are insignificant, so, the economic part of what will be the market access and so on, I think is not going to sway this at all. But I think the political situation is really important. Europe has always worked essentially around what you mentioned, the Franco-German Axis. If France and Germany agree on stuff then there will be others around them that will be persuaded relatively easily, the first and then some others, and then things move forward. And of course, it was also the original intention to secure peace in Europe, right, between in particular France and Germany. I don't think that if we would have a French government deciding that they want to get out or at least have a different EU, that France and Germany would go to war again, like they had a habit for a while or the Germans had a habit of attacking the French. But it's really going to change fundamentally. If this is no longer there, then the EU, and it's just going to be like other regional trade associations. In particular, if they do what Peter is maybe hinting at, maybe cut back on the powers of the European Court of Justice and the way to do that would be to cut off that preliminary references procedure and that has been proposed to limit that only to the highest courts in the country, so that only the supreme courts could make those references, which would first of all reduce the numbers dramatically, but more importantly on the supreme courts we tend to have the elderly, white, males, carefully selected conservatives judges who are not going to ask crazy questions. Whereas on every other court you have all kinds of judges who would be very happy opening the sliding roof and letting some European light shine onto some questions of national law that they might disagree with, like gender discrimination, and discrimination of foreigners, and stuff like that. So, if we do that, if we cut off that Franco-German collaboration and plus the other core countries around, I think the Netherlands and several others are really very important forces of European integration, and we cut back the European Court of Justice opportunities of getting in there, if not, reforming them intelligently maybe, if we can, we might as well go somewhere else. Maybe I will move to Asia and try to set something up.

Willajeanne McLean: On that very optimistic note, thank you.

PANEL 2: THE EUROZONE AND THE EUROPEAN ECONOMIC CRISIS

Connor Scott: Good morning, and welcome back from the break. Thank you very much. My name is Connor Scott and I am one of the symposium editors for the *Connecticut Journal of International Law*, along with Carmen Gonzalez. At this time, we are going to start our discussion on the Eurozone of the European Economic Crisis. A with that I would like to turn the stage over to the panel moderator, Professor Stephen Utz. Thank you very much.

Stephen Utz: Thank you. After the encouraging and placid views of the last panel, I do want to apologize for the fact that we may have a few disturbing things to say. This panel will delve into the shadows of the European Union and talk about technocratic and governmental enforcement to some extent. But, always with a social dimension to the fore. As a matter of fact, one thing about the current Eurozone crisis, Brexit, and related problems for the EU is that they have made the technocrats among us, and some of us are sympathetic with the viewpoints of the technocrats, recognize that there is a social dimension to what seemed previously to be rather neutral and colorless issues. We won't try to make them more colorless, but we will try on this panel to make some connections between that world and the very obvious present world of, well, anti-EU populism, anti-government populism—as Professor Emmert called it, the pent-up aggravation that now populates the world of our governmental decisions.

I would like to say a word about dimensions of the problem our panel will address that the previous panel did not discuss. The current world is one concerned primarily with gaps between groups of people, perhaps between the have's, have-not's, between cities and non-urban parts of the population. But it's also to some extent concerned with gaps between, as I mentioned before, technocrats and elites of different sorts both in and out of government.

So, one part of the problem today in the EU and also in the United States that relates to this upsurge of populism is the importance of decisions and negotiations between governmental and non-governmental economic elites. These didn't figure, I think as significantly in the last panel's discussion as did the explicitly governmental or judicial elites. We will be talking about the people who negotiate or have attempted to negotiate greater conformity within the European Union concerning economic matters, matters of public finance, matters on the tax side of the agenda, as well as on the spending side.

So, the European Union has a history of careful, slow but careful negotiation, thoughtful negotiation about many of these issues. There has been an attempt over a long period of time for people in and out of the explicitly governmental part of the EU to come to some agreement about the uniformity of tax bases. There is uniformity with respect to the consumption tax base embodied in the VAT, the European VAT and there has been a serious effort, several waves of serious effort to do the same thing for income taxation and especially for the taxation of corporations. This will come up in the course of our discussion. Professor Bender is going to make mention of some aspects of this unknown or less conspicuous part of the EUs evolution.

But the EU has already succeeded to a significant extent in calming tensions at

the level of basic consumption. This would I think relate mostly to the family level of life in the EU. It also relates very closely to the stability of small markets and small business ownership. That part of the success of the EU, I think, has been challenged and maybe come under even greater challenge in the coming years. Certainly, from the previous panel's discussion it sounds as if, I don't want to use any strong language, but all Hell as broken loose, and so, we'll see what happens in the near future.

I think I have said enough about what I think might be among the topics that our panelists will speak on, and so let me introduce them. Professor Tanja Bender of Leiden University, one of the directors of the International Tax Center of Leiden University, will talk to us about some of the tax and non-tax aspects of this latest crisis. Professor Jeffery Atik will talk specifically about the Euro and the Eurozone, but brings the social meaning of the Eurozone to the floor in his discussion. Professor Federico Fabbrini of the City University of Dublin, but previously of almost everywhere else, I mean, he's kind of been -- name a country and university he has not been connected with -- will talk about primarily institutional aspects of the constitutional crisis. I think perhaps that ties in with my theme of technocratic and administrative problems. And then finally, Professor Philomila Tsoukala, who has a special interest in comparative family law, will give us some insight into the southern European perspective on the crisis that has now burst out all over.

So, without further ado, I turn the stage over to Professor Tanja Bender.

Tanja Bender: Hello everybody. Thank you very much. Thank you very much Professor McLean and The Connecticut Journal for International Law for inviting me. It is always such a big pleasure to be back here where I have so many good memories.

I will approach today's topic, the rise of nationalism within the EU, and for this panel more specifically the European economic crisis, from a direct tax angle. No worries, I will not bore you with technical tax details. I will go into some of the tax harmonization elements related to the economic crisis. I see two trends here that I would like to discuss with you, but first some brief background on the state of harmonization within the EU. Considering the focus of the first 40 years of existence of the European Union on economic operation and specifically on creating an internal market based on the free movement of goods, services, people, and capital, it would have made sense if taxation would have been harmonized by now because without harmonization there is a risk of double taxation whenever a cross border transaction takes place, and as we have seen more recently, there is also a risk of double non-taxation. However, there is hardly any harmonization so far. For harmonization of corporate taxes unanimity among Member States is needed, and since tax revenue is obviously very important for Member States they are afraid to give up sovereignty. The quote you see here from the Court of Justice for the European Union, "As community law stands at present, direct taxation does not as such fall within the purview of the community" is a standard phrase we read in ECJ tax cases. Direct taxation belongs to the sovereignty of the Member States. And EU institutions do not have the power to levy direct taxes for themselves. But not even do they have real power to harmonize taxes.

So up until a few years ago, only indirect taxes were substantially harmonized: value added taxes, custom duties. In addition, we had a few directives in the area of direct taxation, basically taking away double taxation on certain cross border activities. We did have quite some what we call negative integration, that is the ECJ declaring elements of domestic tax systems of Member States incompatible with EU law. But apart from that it has proven to be very difficult to achieve further harmonization. A very important step forward would have been to achieve one common tax base for corporations but an important proposal for that did not make it in 2011. However, aspects of the CCCTB are now once again on the agenda as part of the European Commission's drive against aggressive tax planning. I will return to this shortly.

I want to pay attention to two trends that can be seen since the economic crisis. The first one is one that I'm sure you are familiar with because it also happens here in the United States: tax competition. Member States competing with each other hoping to attract businesses. The idea is that tax incentives will increase national welfare by attracting business activities that will contribute to economic growth, job creation, and national competitiveness.

In a way, it is a nationalistic thing, to attract mobile capital at the expense of other countries. It is not new. It has happened ever since the European Union existed and already before that. But since the economic crisis for both Member States who needed more revenue and for companies who were even more than before focused on cutting costs, it made it more relevant. This competition has taken the form of lower tax rates, incentives for research and development activities, and rulings. I would like to take away a common misunderstanding about rulings because I will get back to that briefly when I discuss state aid. Advanced tax rulings or advanced pricing agreements are not sweetheart deals. In principle, a ruling is an agreement between a revenue authority and a taxpayer about how the law will be applied to this tax payer. So, it is a certainty in advance that should not be anything different from how the law will be applied after the fact and without a ruling. Tax rulings are merely a confirmation of the national tax rules.

So those are the three main tax instruments used by countries to compete for new activities. They have caused what is called the race to the bottom: increased tax competition within the European Union. Several empirical studies found an increased tax competition within the EU compared to other regions. The average effective corporate tax rates, that's a blend of the rate and the tax base, has decreased within the EU from 29.1% in 1998 to 21.1% in 2014, so that's eight percentage points in 15 years. And because of elements within the EU legal system such as the Parent-Subsidiary and Interest & Royalty Directives prohibiting the levy of withholding taxed irrespective of the level of tax in the receiving Member State, that effect has in the past been amplified. It is very difficult for individual Member States to do something when they see certain Member States lower their taxes.

All this has happened openly. There was, for example, a brochure published by the UK government in 2013 in which it states that the UK government's goal is to make the UK the best place in the world to locate an international business. And that it is committed to creating the most competitive tax regime in the G20. The brochure is still on their website now. So, increased tax competition among Member States is

the first trend.

Now turning to the second trend, we see increased support for harmonization or coordination and that has to do with tax avoidance and tax evasion.

First, avoidance. Avoidance is a legal way of minimizing taxes. Especially multinationals have been in the news a lot lately for using rules or mismatches in rules between tax systems to minimize their taxes, by setting up companies in other jurisdictions for using attractive tax treaties, and also for using the tax incentives provided by countries such as we just saw. Another term that is often used for this is aggressive tax planning.

And of course, the economic crisis made it even more relevant for multinationals to save on their tax cost. At the same time, EU citizens were facing austerity measures as a result of the crisis. Individual income taxes were raised to finance the crisis and the tax burden on the more immobile factors, especially for domestic companies and individuals increased. So, citizens felt that multinationals were taking advantage of the tax competition while they, the citizens, are paying for it. And NGOs fueled this sentiment. There was a lot of publicity going on and even demonstrations against the tax planning by certain multinationals. The Lux Leaks documents were published with very careful timing. The result is that the EU citizens have turned against aggressive tax avoidance by multinationals.

And then of course the question: what is the solution for that? Well, because of the nature of aggressive tax planning, unilateral decisions tend not to work. If some, but not all countries close loopholes, activities will be moved to countries that still allow tax planning. Only if all countries participate, location decisions would be based on economic factors and not on taxation anymore. So seen from the point of view of individual Member States it would be more advantageous to leave the situation in their own country unchanged if all other Member States would close the loopholes, because that would move the activities to their country. At the same time if all Member States leave the situation as it is, the problem is not solved and we continue to have this race to the bottom. A classical prisoner's dilemma. The only way out is a coordinated effort. So, within the EU, all of a sudden there is a desire to coordinate in order to combat tax avoidance.

And now evasion. Evasion is a little different, although in the end, in the eyes of many not that different. Tax evasion is about dishonest tax reporting by taxpayers, about misrepresenting facts to tax authorities and that is illegal of course, and this distinction does make a big difference especially for lawyers. However, in the perception of the public opinion there seems to be less difference between evasion and avoidance. Anyway, for evasion a solution would be to introduce additional transparency requirements, to share more information among Member States about taxpayers, and also here, this works only really well if all countries participate. In recent years, Member States have taken major steps towards improved information sharing. I will turn to this issue shortly.

So, there is both evasion and avoidance by multinationals leading to a decrease in their taxes in a time where the rest of Europe is facing higher taxes and Member States are in need of revenue. So, all of a sudden there is support for a combined effort in the area of corporate taxes within the EU to combat tax evasion and avoidance and to curtail tax competition. And we see things happen. A lot of progress

has been made in administrative cooperation among Member States. We now have mandatory automatic exchange of information, also for tax rulings. We will have country by country reporting obliging multinationals to publish on a country by country basis what their profits are, what their numbers of employees are, information about assets and capital, and taxes they have paid and accrued. We have an anti-avoidance package with a directive-- with a lot of rules containing measures against avoidance. And finally, we have a proposal, a relaunch of the CCCTB, this common, consolidated, corporate, tax base, that would be a solution for many of the problems within the direct tax area of the EU.

And lastly, I will briefly mention another element in the battle in the EU against tax avoidance by multinationals, which targeted also US companies and that is state aid. What is state aid? Well, Member States are prohibited from giving economic advantages to taxpayers on a selective basis favoring certain undertakings over others. And the European Commission has since 2014 accused Member States of granting state aid to multinationals - Starbucks, Apple, Amazon, McDonalds, Fiat, Engie - and we're talking big numbers. Apple would need to repay EUR 13 billion plus interest to the Irish government. So far all cases have been appealed, both by the taxpayer and by the Member State, so we don't know yet whether the European Commission will succeed. But that those cases received a lot of public support and cheers from EU citizens.

So, now there seems to be support for actions in the corporate tax area from the EU, which in a way is contradictory to the other trend we have seen of more nationalism and a fear of handing over sovereignty to the EU.

Summarizing, there is this one trend of tax competition among Member States, fitting into the general picture that anti-EU sentiments are growing and that there is not an a priori support for transfer of sovereignty to the EU. On the other hand in tax matters there is a clear call from EU citizens to combat tax evasion and avoidance and the only way that can effectively be done is by harmonizing or at least coordinating corporate taxes. We have seen the second trend be used by the EU to finally implement some important measures in the area of direct taxation for corporations. And of course, the multi-million-dollar question is: will this current pace continue or will we go back to the situation we had or even worse? Thank you very much.

Jeffery Atik: [Jeffery Atik's portion of the transcription has been omitted in lieu of our publication of his article.]

Federico Fabbrini: [Federico Fabbrini's portion of the transcript has been omitted in lieu of our publication of his article.]

Philomila Tsoukala: Thank you Federico. I come from a faculty that hasn't quite settled the question of how much executive power the dean should have entirely, which is why we have building committees decide upon what new buildings should or shouldn't be constructed. So, deanship takes many forms. And it partly depends on the institutional culture, which may be something that is relevant to what you are talking about.

So since the other colleagues from what could vaguely be termed the European periphery have taken different tacks (Gráinne has made herself the native informant on Brexit; Federico has gone constitutional) I will be the native informant for the south. And I will briefly talk about causes of the so-called Greek crisis, we in Greece prefer to talk about the Euro crisis for very understandable reasons. So I will talk about causes and I will talk about solutions that have already been put in place and what is proposed for the future. The main thing I want to put forward at the end is the question of legitimacy from the perspective of mostly the south, but I'm going to try and imagine a northern point of view as well. By legitimacy here I mean acceptance. I don't mean anything more complicated than that. I mean the degree to which the Union enjoys a certain level of acceptance by the citizens.

In terms of the causes of the crisis, I think by now there are more or less three different accounts of what happened. When people talk about the Greek crisis, the correlative causation that usually is attributed to that is the question of sovereign debt. And I think it's pretty much settled in the literature now that that is very much not what happened. It may be what happened in Greece, but even in Greece it was only partly so. And here is why. If the idea is what happened in Greece was: Greece accumulated sovereign debt, at some point investors stopped being willing to finance Greece's deficits at rates that were reasonable for Greece and that is what started this whole cycle [then] that was only partly true even for Greece. Greece was the basket case of Europe in terms of public finances, but even in Greece between 2001 and 2005, really between 1999 and 2005 there was an effort to try and drive the budget deficit down. The situation went out of control after 2004. What drove the debt to GDP ratio derailing in reality was the accumulation of private debt. There was an increase in debt in the public sector as well, but what tipped the scales was in fact the sudden increase in private sector debt. To a large degree Greece did the same that everybody else did except public finances were much worse than anybody else, which drove the debt to GDP ratio being considered unsustainable.

So that is the sovereign debt hypothesis. It's really unfortunate that Greece became the poster child for the crisis because then you could take the narrative of, okay this is a problem of states just over spending on welfare and that is what's wrong with Europe, but that is not at all what was going on. Spain was a problem as well. It managed to narrowly avoid a bailout, but if you look at their public finances they were much better in terms of what they were doing in budget deficit than Berlin was before the crisis. They were actually sticking to the Stability and Growth Pact. Spain's problem, as well as Ireland's problem, was racking up of private debt. In Spain, it financed the private sector construction boom, in Ireland it was the banking sector that drove the situation.

The second account is that this was a problem of current account imbalances and there are at least three subcategories within that explanation. One is that current account imbalances meaning you import a lot more than what you export started developing in the south. One account is that southern states lost control of their labor costs. Their unit labor costs went up. They were no longer matched to their productivity and that meant they lost export shares in the market. So that is the competitiveness version of the current account problem, which to a large extent the European Commission has adopted in its recommendations for countries going

forward. That is actually also not true. Unit labor costs did go up in the south, but if you break down the tradable sectors, and the non-tradable sectors, as it turns out labor costs were not a problem for the export domains in any of the southern countries, not even Greece. Greece did not lose export shares before the crisis. That was not what drove the problem. It's because its unit labor costs went up basically in the non-tradable sector, which was the public sector. And the same is true of other southern countries. So competitiveness [in the sense of losing export shares] is not really an explanation.

There are two other subversions of current account imbalance. The second one attributes the current account imbalance to the Euro itself and sees an imbalance because while Germany was racking up a trade surplus, exporting more than importing and saving money, the south was the mirror image. It was doing the exact opposite. Between 2001 and 2004 that is actually pretty easily explainable because a big chunk of what Germany exports, it exports to the south. So it's a definitional question. If Germany is going to run a trade surplus vis-a-vis its trading partners in the south, they by definition need to run a trade deficit vis-a-vis Germany. After 2005 that is no longer so much true because Germany manages to gain a bigger share in exports in Asia and that no longer drives the [current account imbalance] issue.

The explanation that says this dynamic is driven by the Euro also has to do with differences in the real interest rates between the countries of the south and the north. Germany manages to do well in exports, it saves money from that, so there is money coming into Germany. German banks now have an interest to place that money in the south because they can get a better return. The real interest rate is higher in the south than it is in the north because the economies are very different. The south is growing faster than the north because it is catching up, so it makes sense to invest. So basically, and this is not just Germany-I'm being the typical Greek here, I'm falling victim to the post-crisis consciousness which has used Germany as the driving force here. France is equally as much in this picture in what is driving the credit flow that is going from the north to the south. So this is an explanation that has to do with the Euro.

Others are saying the Euro didn't cause this trend and this flow of money from the north to the south would have happened anyway, regardless of the Euro, basically because the rest of the world was on the same [credit] binge anyway. So just as American banks were, lending to credit unworthy buyers, the same would have happened with a bunch of credit that was flush in the banks at the time in Europe.

So the third subcategory of the current account imbalance is really the third explanation for the crisis which is that it was basically a private credit bubble. So that is what happened and that caused the sudden stop in 2008, and the rest is history.

Now, in terms of solutions, the economists call Europe a halfway house because we put in place the Euro without putting banking union, fiscal union [in place]. Currently institutionally the EU at least aspires to put all of that stuff in the discussion. The Presidents' report really is looking towards full political union in the future. The American economists -who were warning from the beginning this is not an optimum currency union- are saying dismantle the whole thing. Do everyone a favor. And the third category of solutions is now beginning to emerge which is the idea of the multi-speed Europe that has just now made its way into the EU

vocabulary, at least as an imaginable if not acceptable yet, proposition.

Now I'm going to the question of legitimacy. This was a systemic crisis, yet the narrative frame that was used to explain it largely has to do with a moralistic tale of ants and grasshoppers, and it has very little to do with what actually happened. Essentially this is the narrative that has predominated, which is making future political discussions extremely difficult. So Federico, good luck selling your institutional reforms to German citizens who have been told that what they did was bailout Greek grasshoppers for using the money to go on vacation as opposed to what actually happened which was the Greek state was given money so that it could repay money to the banking system so that it would not go bust in 2010.

So that narrative has become really entrenched and that is what has made me very pessimistic for the last seven years. I am becoming more optimistic paradoxically, not because I think anything has improved, but because just as in a marriage whether you decide to stay or exit partly depends on your fallback position. So what are your options outside this halfway house that we have built? What has happened lately is that those options have gotten significantly worse. So from the southern-- let me just talk about Greece specifically, the last seven years have been a disaster. We have economically a disaster, politically a disaster, financially a disaster, socially a disaster, and we are now surrounded by a geopolitical situation that is extremely volatile. So I think Germany will leave the Euro first before Greece ever does anything like that. And from the perspective of the north, I guess this relates back to the Brexit discussion, the fallback position-- that is a bigger question. This is what will determine what happens next: how France and Germany decide or calculate what their fallback situation is if they decide that they don't want to keep going with this Union.

Politically I think-- the narrative of we either have to dismantle it or we need to move to full political union or an EU president is partly what is driving elections like the Brexit or the rise of populists. Because if what you are saying is that we need to give yet more power to this structure that has-- that we perceive now at least as having caused havoc, it's really complicated. I don't know politically how that will play out and I am worried about it, which is why the option of the multi-speed Europe as a bad marriage with a prenup that goes into couples' therapy maybe might not be such a bad idea after all.

Thank you.

Stephen Utz: Before asking for comments or questions from the audience, would anyone on the panel care to...yes, Federico.

Federico Fabbrini: [Per his request, Professor Federico Fabbrini's portion of the transcript has been omitted.]

Stephen Utz: Comments?

Philomila Tsoukala: Specifically, on the question of Eurozone governance, yeah, the commission can, you know, talk itself blue about budget deficits and urging Germany to spend its surplus and trying to chide France to reign in its budget deficit,

did you see anything happening on that front?

Federico Fabbrini: [Per his request, Professor Federico Fabbrini's portion of the transcript has been omitted.]

Stephen Utz: Any questions? Any intimidatingly technical comments from the audience? Really? I think there is a microphone.

Audience Member: So, I just one question for Federico on the point that there has been too much concentration of power and having the commission able to vet budgets, etc. But so then, and I agree with you on that, but then so the only real solution I suppose if we were going to back away from that would be getting rid of the fiscal compact, but in any-- number 1, but then number 2, to make the budget constraints on states credible if they are not going to be legally enforced by the commission, the only way we are going to get credibility is to have a state default, right? So, are you saying we basically need to have a Greek default? Right? Is what you are calling for then? Right? And maybe some others.

Federico Fabbrini: [Per his request, Professor Federico Fabbrini's portion of the transcript has been omitted.]

Audience Member: And if I could just tack on one question to that. I wondered if I could get Tanja and Federico talking—Federico is talking about the grand bargain, right? And I guess maybe you were implying maybe something with taxes or something with further Eurozone-- sorry, say strengthening some of the fiscal capacities, things on that end against issues with refugees, let's say. But how about on the tax end. I'm wondering is there something on taxes that can be given to the Germans and to others in the core that would make them go along with some of the other things that are needed on Eurobonds. Is that an area of grand bargaining?

Tanja Bender: Not, definitely not in the current system because there is apart from the contributions member states make to the EU there is no independent taxing power for the EU and as far as I'm aware there is no talk about it going on right now. But maybe that will change after Brexit. Federico, maybe you have different information?

Federico Fabbrini: [Per his request, Professor Federico Fabbrini's portion of the transcript has been omitted.]

Audience Member: We haven't had that experience with our banks. But the real challenge then on creating a fiscal or taxation capacity at the EU level is really not about taxing some of these transnational phenomenon that might have externalities, but it's really what Philomila was talking about, is how do you recycle the German surplus back to the periphery and create mechanisms that through a political process creates an optimal currency area. So that is just a comment, but really a question to Philomila though-- the Greek experience for the last seven years

is really actually quite extraordinary because it may just reflect cleavages within Greek society about who benefits verses not from what has been an utter catastrophe for the Greek economy and Greek society, but really what it points out is despite that pain the will to remain members of the EU persists by a margin. What is it, 60%, give or take, or even higher, 70. Yeah.

Philomila Tsoukala: If you just talk about EU, it's higher. If you talk about Euros, it's lower, but really high.

Audience Member: So, it's suggestive of something about the changing nature of demos consciousness, if you will, or a national consciousness within the EU, despite the strong attachment to Greek identity the power of the European idea remains strong. And is that your perception?

Philomila Tsoukala: Well, that has been Greek perception since 1821. It is really existential for Greeks and Greece has a very deep and intimate relationship with Germany from the very beginning of the existence of its state. The creator of the fundamentals of our legal system is Georg Ludwig von Maurer, a Bavarian, who set the fundamentals from 1830-1834. And the existential question was the alternative for Greece has always been either we are going to be part of Europe or we are part of a neighborhood that is highly unstable where we are less-- so it was a question of political identity and geopolitical interests and it's always been perceived as such. And this is why it was very easy to essentially blackmail the Greeks at every point, you know, like say no, no, we are backing off as much as Greeks were trying to blackmail the other side. I don't mean to suggest this was just one way. But that is why at every moment Greece's bluff could be called because the alternative for Greece is really not that attractive. So it's always been a question of political identity. Sometimes I think of Greece's relationship to Germany, like Germans and Greeks have this kind of like the Id and the Superego. You know who is who.

Stephen Utz: On that Freudian point I think we will close for this panel. Thank you.

KEYNOTE ADDRESS

Peter Lindseth: So before I introduce Ambassador Vimont, I also want to add my congratulations to the entire team of students and also the faculty advisors of the Connecticut Journal of International Law. I've gotten several extraordinarily positive comments from panelists. Several of us have been on other Brexit panels over the last many months and actually we're finding this conference really great because it's not just about Brexit but also about the Eurozone crisis, the rule of law crisis, and, lurking in the background, the refugee crisis. I think that the students in particular have done an extraordinary job of pulling together the several strands of these many-sided crises. As Gráinne de Búrca once put it to me, it is really a "polycrisis" facing the EU.

I also want to give a particular shout out to Carmen Gonzalez. Not only has she done a great job organizing, but she actually took one of my classes, so that gives her extra points in my book. I admire her for not taking "maybe" for an answer when she asked me to participate. She really persevered over a long period of time and I want to give her special acknowledgment as well as to the entire CJIL team.

So now on to our speaker. It is a great honor to have Ambassador Pierre Vimont with us today. He's had an extraordinarily distinguished career both at the national level and at the supranational level and thus has real perspective to bring to bear on the situation in Europe today. He is a graduate of Pantheon-Sorbonne with a law degree. He is also a graduate of Sciences-Po, Institut d'Etudes Politiques, and also Ecole national d'administration, the national school of administration. As part of his 40-year diplomatic career, he served as Ambassador of France to the United States from 2007 to 2010, and also as permanent representative of France to the European Union from 1999 to 2002. These are perhaps two of the most important positions that one could hold in the French diplomatic service. He's also been chief of staff to three former French Foreign Ministers. At the EU level, finally, he has served as the secretary general of the European External Action Service from December 2010 to March 2015. Since retiring in March 2015, Ambassador Vimont has been a senior fellow at Carnegie Europe with a research focusing on the European neighborhood policy, trans-Atlantic relations and French foreign policy. Thus, as evidenced by this extraordinary biography, it is really a tremendous honor for us here at the University of Connecticut School of Law to welcome Ambassador Pierre Vimont.

Ambassador Pierre Vimont: Thank you very much, and I apologize for interrupting your lunch with what is considered to be a keynote address, but I would like it to be as pragmatic and low key as possible. Before starting I would like to thank the school of law of the Connecticut University for inviting me, for Carmen and the whole team for having asked me to come. You know at this moment in Europe we are going through a very confusing situation, particularly in France with the presidential elections looming in a few weeks' time. It's always very useful to go outside of your country and to try to understand with a little bit of distance what is really going on as the debate in France about the European Union is getting more and more confused. Candidates for the presidential election hesitate between avoiding at all costs to talk about the European issue or on the contrary discussing

this topic as, for the average voter in France, this is a very important issue and a challenge for the future. I would like to talk today with my experience as a practitioner. I've been quite impressed listening to the two panels this morning because being inside the engine and trying to make this whole European union work efficiently can make oneself lose sight of the overall picture. Having had the experience of being both a national diplomat working in Brussels and an official assigned to the European External Action Service, I have precisely tried to do what Federico says is impossible to do which is to try to forget your national interests and promote instead European interests. Federico is right, it is difficult but necessary at the same time. You become a bit schizophrenic by the end of the day, but that's part of life, isn't it? I would like to discuss four points and I'll try to be as brief as possible.

The first point I would like to address is the nature of the populist and nationalist wave which has grown around Europe. I would like particularly to underline -and that will be my second point- that we should be sensitive to the fact that Europe is already paying its toll to this growing trend. In other words, the impact of this populist nationalism is already there to be seen in the way institutions in Brussels are reacting and the way some of the concepts we've been using for more than 60 years are being transformed and profoundly modified. Third point, I would like to look at what this means for the future and what is the debate really about today in Europe. One hears about all these ideas on the future of Europe like, for instance, the commission's White Paper which was just released. Yet one may wonder whether we have been able to put the finger on what is at the heart of the ongoing institutional debate in Europe today.

First point, what are we witnessing at the moment? I very much agree with what was said previously, namely that when we're talking about Brexit, the liberal democracy in Poland or Hungary, French presidential elections or even the Dutch referendum on the Ukrainian association agreement, all these events have something in common but are also quite different from one another. Each one should be seen along its own merits, yet it is also a testimony to the diversity of what's going on in Europe. Two points I think are important to underline. One is the increasing criticism about transfer of sovereignty and the idea of interdependence, the fact that we work more together and that this is going in the right direction. There is in each one of the European countries a strong feeling today that people agreed at the time with this idea of transfer of sovereignty but that the European Union hasn't delivered as much as people were genuinely expecting. The reason behind this disenchantment is naturally linked to the different crisis Europe has been going through in recent years, be it the economic and financial crisis, the migration pressure or more recently the Brexit issue. If one focuses on the financial crisis, the assessment nowadays in the EU is that the economic and social model of Europe is slowly coming to a halt. It's facing huge, major structural problems that the European Union hasn't been able to solve, hence the low growth, the increasing number of jobless people and for many of them the decrease in purchasing power. So this is where strong criticism lies. Not to say that people are against more transfers of power or refusing what has been done in the past but there is the sense that something has gone dysfunctional in Europe and that Europeans would like this to be rectified. The other trend we are witnessing is a challenge to some of the basic principles that we all agreed on, like democracy,

loyal cooperation, solidarity. Take for instance the migration challenge that we have been facing. It has been, at the end of the day, a debate about solidarity, about burden sharing and we've never had such divisive debate among us about a solution or an agreement that a few years ago we would have been able to solve more easily. Remember Mrs. Thatcher's "I want my money back"? Remember General de Gaulle's "Empty Chair" policy in 1965? These were not easy issues or easy challenges to be solved but solutions were found. Today on these controversial issues, deep divergences remain with an inability to move forward. One could also mention the current situation in Hungary or Poland: without interfering with complicated domestic politics, the simple fact that a prime minister in one member state can launch a national consultation which is so biased against the European institutions is something totally new we never experienced before and which goes right at the heart of the concept of loyal cooperation which is enshrined in the Treaty itself. So we have here a slow process at work which seems to be undermining some of our basic principles.

My second point concerns an evolution that we don't underline enough at the moment, namely that this populist wave is already impacting the way we're working today in Brussels. Let me just give a few examples. First of all, the idea of unity; this idea that we all work together and move together as a common, single union is being contested now with ideas promoting flexibility or some two-speed process which are already finding their way through some of the current decisions and policies. The latest revision of the neighborhood policy represents a telling instance of such development. A few years ago, the neighborhood strategy was one single policy dealing with a group of foreign countries. Now we're going for something different. We're talking about dealing with each one of these neighboring countries in a different way. Think also of the debate about the future of Europe where the idea of a flexible Europe, meaning a core group of countries moving ahead without the others, is being presented as a possible course for potential progress. The simple fact that this idea has been floating around seems a clear indication of changes to come. Second instance, the whole concept of freedom as in freedom of movement or free circulation of goods and services is being increasingly overcome by the notion of protection. Protection has become the main concern in Brussels and nowhere is it more apparent than in the trade field. The idea of a "Buy European Act" modelled on the "Buy American Act" is something that would have been unthinkable even a few years ago. Today, it's part of the agenda of many of the French candidates in the presidential election. Of course, France has never been renowned for being particularly in favor of liberal trade but this is a move one can detect in many other countries inside Europe.

Then the notion of interests as opposed to values and principles is another trend gradually emerging in today's Europe. For many years since the birth of the European Communities, any reference to national or European interests was considered as highly inappropriate and too closely linked to a geopolitical vision of the world. The whole inspiration behind the Rome treaty and the following Treaties is indeed about values and principles as the antidote to the negative impulses triggered by national interests and displayed at nauseam during many centuries among embattled European nations. Recently Federica Mogherini, as the high

representative for foreign policy and security, has been eager in the European Union Global Strategy to reconcile values and interests through the concept of "resilience" perceived as a way for EU foreign policy to promote human rights when these are under threat in countries where Europe needs to increase at the same time its political influence. Last example is the emerging trend whereby transformation is being overrun by transaction. In the past, Europe has naturally experienced the merits of transaction and has been rather good at making pragmatic deals. Yet such deals were taking place inside a larger framework of increased integration with a broad consensus that integration remained the genuine purpose of any European action. Today transaction appears more like being done for the sake of transaction without mentioning any more the integration goal nor the transformative process which represented the permanent trend underpinning Europe's efforts during the twenty or so last years. A different Europe is therefore emerging under the influence of these new trends inspired by some of the ideas diffused by the populist movements. Even in some of the recent cases brought to the European Court of Justice, European judges have given a new twist to their traditional interpretation of EU legislation which seems to indicate a new intention to take into consideration the ongoing debate around some of the controversial issues raised by the populist leaders. For instance, the issue over the wear of Muslim veils in enterprises or the possible limitations to the freedom of movement for European workers with regard to their rights for social benefits represents an illustration of this current trend of thought. Not to pretend that populist ideology is about to win the game and take the upper hand in the current political debates but something close to a rethinking process is progressively sinking in which requires vigilance and serious consideration.

Hence, and this will be my third point, the need for European institutions and national leaders to reflect seriously on the undercurrent trends as they have become apparent through all European nations and to better understand the reasons behind the discontent if not the disenchantment against the European project. If one tries to look more deeply into this current dissatisfaction, one of the conclusions has to recognize that Europe is being criticized for not having delivered enough. That doesn't mean that people are critical about the whole integration process but rather that they would like this process to be improved and the current dysfunctions to be repaired. If there is no response to European citizens' call for reform, could we see more support for solutions of the Brexit type? The exit option, in my opinion, remains essentially a British specificity which relates back to the political choices Britain made at the time of the Maastricht Treaty in 1992 when the UK opted out of the single currency, the Schengen arrangements and the provisions related to social Europe. Therefore, the idea that Brexit could become contagious to the rest of the member states seems to me a farfetched option. But alternatives to the exit solution do exist. One of them is what I would call the paradigm shift. Federico Fabbrini was talking this morning about the need for constitutional changes and such possibility is definitely part of this paradigm shift. But one could add many other options. Fundamentally European citizens are unhappy about what's going on because the way Europe has been advancing for the last 60 years was in line with a middle of the road approach which adopted elements of both the inter- governmental and federalist method. Right from the beginning of the European construction when we were 6 and

even more so when membership was progressively enlarged to 28, there never was a genuine determination to come out of this undefined course, drop the compromise culture and tackle the core issues at stake. For instance, what were the final borders the Union members could envisage and how far were they ready to push forward the enlargement of the European Union. The same applied for the endgame of the European integration and the final concept of this ongoing Union: should it be a federal union? Or should it remain the undefined system Europeans have pragmatically built without trying to conceptualize this work in progress? Lastly, what ambitions European nations are aspiring to. If only from the foreign policy point of view, what kind of political power – hard, soft or smart - does Europe want to be? Here again, member states never really reached a common understanding on such fundamental issues. For lack of clarity on what should be the answers to these fundamental questions, the easy option of no decision has prevailed with the corollary of sticking to the middle of the road approach. Nonetheless this absence of any straightforward goal has accentuated the impression of a vacuum and the need for some bold change. In its own way, the European Commission through its recent White Paper has opened an interesting conversation on this precise topic. Should the EU stick to the single market? Should it try to go for a more ambitious goal and increase its competencies in new fields of action or should it on the contrary restrict its competences to a few items where it should improve its efficiency? Additionally, should the Union try to be more flexible and allow for a core group to work on its own? This debate could open the way to a paradigm shift, one where Europe tries to clarify its ambitions. Now it remains to be seen whether there is popular support to do precisely that. Looking at the way the European Union is being perceived in most of European countries, one may wonder whether this is the course public opinion, at this moment in time, is ready to follow. Put in a different way, the question could boil down to whether Europeans are looking for more or less Europe. It is far from certain political leaders inside the Union at the moment would be ready to engage in this kind of narrative in front of their public opinion. If one accepts such assessment, then a third option could be seen as the more realistic, the one I would call the functionalist approach. Such option admits that for the time being we have to stick to the existing treaties and improve our act inside the framework of our existing institutions. What does such an approach mean? It means picking up the challenges as they are at the moment, the Euro crisis, the migration crisis, defense and security, enlargement, trying to clarify what is at the heart of the problems we face today and coming up with some clear guidelines on how to proceed. Take for instance the euro issue: the natural trend among member states will be to go for institutional improvements, which will imply a parliament of the Euro zone or maybe a European minister of finances. But the structural problems which are at the heart of the existing shortcomings - tax harmonization, integrated economic policies, increased EU budget to mitigate the economic imbalances that have derailed the course of the monetary Union – need also to be tackled. Yet these issues are highly divisive and may lead to some harsh discussions. The same is true when looking at the enlargement issue. Enlargement today is about deciding what we intend to do with Turkey whose accession process is already engaged or with Ukraine, Moldova or Georgia which are the next ones on the line and knocking at the door. Every time we

try to discuss this issue between EU members, we have never been able to come up with a clear answer on whether we are ready to envisage these new memberships or not. By not taking any decision EU leaders give the impression they are not listening to the concern and fears of the average European citizens who would like to have a clear understanding of where the EU is heading for.

Two remarks could be added in relation with this functionalist approach. One is about institutions. How can the existing institutions of the Union be improved and reach the degree of agility traditionally required in times of crisis? The prospect of inventing a totally new executive power seems unrealistic, considering the current state of minds among the Union members. But if we are not there yet, what could be done nonetheless is taking each one of the institutions, the Commission, the European Council and the Council of Ministers, and making these institutions more agile and better prepared to take swift decisions in the midst of any crisis as any executive power does. This is particularly relevant when addressing the European council which has gradually become the main decider in times of crisis while developing a tendency for micromanagement. The natural response to this dysfunctional trend should be through the definition of new working methods which can improve both preparation of and follow up to the decisions of the European Council. The second remark has to do with the democratic deficit which is the weak point of the EU institutional framework. It involves both the European Parliament and the Parliaments of the member states and the need to improve the interaction between these two actors. At the same time, the administrations in Brussels could also play a useful role in filling the gap over this democratic deficit by listening more to the world outside of Brussels when preparing their legislative proposals.

Finally, there may be a case for revisiting the overall narrative related to the European Union and updating the significance of the whole European project. To go back time and again to 1945 and to emphasize that the European Union has prevented any new war since 1945 is all very well but risks missing the point for the new generation of the millennials who need to relate to their present environment. There are many new challenges to discuss, how the European Union can play a major role in the trans-Atlantic relationship, how it can help defining a new world order in the foreign policy or economic field. This is definitely a task Europe needs to take a grip on without delay.

I've been quite too long, I apologize, and I'll stop there.

Peter L. Lindseth: So, we are going to take some questions and I believe that we're going to take the same approach that we took with the panels, requesting that questioners use a microphone. To kick things off, I'm going to exercise the chair's privilege of posing the first question. I take from your final summation, which moved from the functionalist approach to the need for a new narrative, that no matter how pragmatic and focused the EU seeks to be on particular questions, fundamental issues behind European integration can't be avoided. In some sense, the big questions are embedded in every single issue. So if you're talking about the EU's role in the world, its capacity to autonomously mobilize resources, whether in service of a soft power model or in service of a hard power model, that then ties back to the questions of EU "constitutionalization" and "demos" – to questions of solidarity and institutional

design and narrative. Aren't we ultimately talking about the extent to which a political community exists that feels a sense of ownership of European institutions?

Ambassador Pierre Vimont: You're right Peter, but at the same time let's look at the reality at the moment in the European Union. I don't think there is, apart from a minority, any appetite among the populations to make a big step forward to something that could look like a federal Europe. What I think a majority of the population around Europe is calling for at this stage is to fulfil the goals set in the Lisbon Treaty and be more efficient in reaching these objectives than we have been up to now. This is about the migration issue, defense and security, enlargement. If only we could already manage to do that, then maybe we could start thinking about more ambitious goals afterwards. I understand what you're saying and I agree with you that we're not taking the easiest road to go there. It would be much easier to do this if we had a clear understanding of where we're heading for. But the problem here is that, even when we were only 6 members states involved, we were not able to agree on this. By the way, I don't think if you take today the 6 original member states, they would agree among themselves about what they want to do. With the Netherlands and France on one side who rejected in 2005 the constitutional treaty and Germany, Belgium, Luxembourg or Italy on the other side, one can observe strong differences and we have to accept that reality. My point then would be to work on what we have today on our agenda and discuss it in full clarity and with a clear political vision of where we want to go. The debate about the future of the Euro zone for instance, this is a debate where we need to get the citizens on board and promote an open and public discussion about where we want to go. Enlargement is another illustration of the same case. President Juncker, when he arrived at the head of the commission, stated there would be no new enlargement during his tenure. This sounded as a realistic statement but there was no public discussion about this, no discussion with the member states either and in the end Juncker's position didn't solve the issue. Time and again when meetings are taking place with our partners from the Eastern neighborhood, a lot of time is being spent on the enlargement issue which polarizes relations between member states without any clear conclusion. With this kind of outcome, the reality is that leaders are not able to convince their citizens they know where we're heading for.

Peter L. Lindseth: Ok so what I'd like to do is perhaps collect two or three questions. I think we're going to go a little bit over and I specifically want to encourage students and maybe people in the back of the room in general to perhaps pose a question. Be bold, if you have a question. We'd love to hear it.

Audience member: Hi my name is Andres. I'm an LLM student here at UConn and I have a question within your functionalist approach, in your opinion what would be the main adjustment that the EU need to do to prevent more Brexit's going forward?

Peter L. Lindseth: Ok and so let's see if we can gather maybe two more, if we can do that and then we'll wrap up with your response.

Audience member: Hi my name is Chris. I'm a first-year student here. I was wondering what you would think would be the appetite of the European Union to the idea of an enlargement with countries that are divided from other countries like Catalonia of Spain and Scotland with the UK?

Peter L. Lindseth: Anyone maybe toward the front of the room now?

Audience member: Sorry I'm not a student. I might still like to be but since no one else had their hand up I just wondered you know I share a lot of your concerns Ambassador, about you know what you can do and grappling with concrete ways forward, realistic ways forward but I know you're speaking in a sense when you speak of "we" I know you're speaking of those in Europe trying to you know find a way forward but one of the problems I think is that the disconnect between the "we" as in those who are trying in Brussels and so on, Strasberg, to come up with a plan and the distance between that and the people. I mean you used the term and I understand entirely what you meant but you used the term to sell this or invent a narrative and that always sounds like the original sin of the EU which is that you know it's an elite project. It's a project that came out of the idea of statesmen, it was men and you know that that project is very ambitious, became more and more ambitious but never fully took hold and I just wonder whether given how many crises the EU has been through, you know is it not time for or is there not an appetite at the top level for really opening the EU to public opinion. Not just telling and selling but really saying ok what do you think? You know so one of the suggestions that was made after the failure of the constitution and changing it and so on was the idea of well what about if we really want a rebirth for Europe, why not have a public debate and a plan and maybe this will absolutely horrify Frank and others, but a Europe wide referendum. You know the idea of really taking that gamble and just seeing what is it that could be advisory, it could be anything but the idea of coming from the bottom up rather than the top down? And it's a risk. It might derail things, it might but you know we've faced other risks until now. So sorry, that was a long way of putting the question.

Ambassador Pierre Vimont: All these three questions are very interesting. On the Brexit and the risk of other Brexit's around Europe, what is the best way to prevent that from happening? The most efficient firewall, this may sound like a joke, is the Brexit itself. Today the UK decision to leave the EU is stirring in many of European countries a negative effect. In the country I know best, France, the simple fact that it took 9 months for the British government to send its official letter requesting the opening of negotiations according to article 50, even if that is quite understandable for many technical or political reasons, added to the vision of the difficult political debate taking place inside the United Kingdom itself hasn't played in favor of the contagious effect some observers were expecting. The result is that in France, Germany and many other countries, opinion polls recorded recently a growing trend opposing the idea of copying Britain with similar referendums on EU membership. Today in France, we are observing a fascinating discrepancy between

a high proportion of French voters ready to vote for Mrs.Le Pen who promotes in her electoral platform a "Frexit" and, at the same time, 2/3 of the French population refusing according to the most recent opinion polls this same "Frexit".

On the question related to the elitism of the whole European project, there is a lot of truth in this assessment but how to push back that risk? There are those advocating for a bottom up approach and one can see already some concrete results of this: some candidates for instance in the French election are calling for a large national consultation on Europe; in his own style, Prime Minister Orban is doing the same with his ongoing national consultation and, as you know, Jean-Claude Juncker with his white paper has called for a public consultation. So this bottom up approach is becoming rather popular but I think this is not enough. Some twenty years ago, European leaders seemed genuinely committed to the European Union ideal and not afraid to come out in the open and publicly take a strong stance in favor of European integration. The impression one gets today listening to Prime Ministers and Heads of State coming out of the European Council sessions is that leaders take a very cautious attitude as regards the future of Europe and make very cautious statements about the benefits of the whole integration process. No surprise then that it becomes rather difficult for their population to feel committed to the European idea. We need at the top genuine believers in Europe if we want to rekindle some firm engagement in favor of Europe.

The third question on Catalonia or maybe tomorrow on Scotland is not easy to answer. I agree that these regional claims for a stronger voice or even for independence have to be taken into account. But I wonder if the regional level is the relevant one for making the European Union more efficient. Looking for instance at what is going on in the West Balkans with the different countries which have applied for membership in the European Union, Montenegro, Macedonia, Albania, Serbia, tomorrow Kosovo, brings the question of how the small dimension of many of these future members can fit with their future economic development and the benefits that can be expected from their EU membership. Of course, one can mention to the contrary Luxembourg, Malta or Cyprus but the reality of today economic progress is more in favor of bringing nations together to gather forces and be more competitive rather than having more micro-states.

Peter L. Lindseth: I'd like to now invite Dean Fisher to the podium.

Dean Timothy Fisher: As a last-minute change, we're going to briefly interrupt the program for a brief ceremony of personal thanks, which for you to understand requires that I first tell you a little bit about Mr. Morton Katz who you've seen just come up to the front. Morton Katz got his college degree in 1939 at UConn, enlisted in the Army when the United States entered World War II. He was in the 509th parachute battalion, first in England and then seeing action across North Africa, Sicily, Italy including the Anzio Beachhead through Southern France and you'll hear from him about his connections with the free French forces on to the Ardennes Offensive, the amphibious crossing of the Elbe River, the liberation of the Wobbelin Concentration camp in the occupation of Berlin. After the war he served in the new defense department, retired as a full colonel and then not having seen enough

challenges enrolled with us in 1949, 48, and got his JD from the University of Connecticut in 1951. Not at this campus, not at our previous campus but at our campus before our previous campus and has had a wonderful career since then, including being a familiar face to a number of us who have been at these programs but also an active criminal defense practice on a pro bono basis to this day. Mr. Katz has a few words to say to Ambassador Vimont, and a token of his appreciation.

Morton Katz: Thank you Dean Fisher. When my battalion was in Southern France during Operation Dragoon, the liberation and the invasion of Southern France we forged a close relationship with the FFI, the French Force of the Interior whose performance of duty with us made our invasion a success and the liberation much easier. The medallion which I am about to present was struck off by the United States Government during the bicentennial years, 1975-1976 and specifically to commemorate the signing of the Declaration of Independence in Philadelphia in July 4, 1776. And that was followed by the War of Independence which again the Presidents of the French Forces under the command of the Marquis de Lafayette and General Rochambeau were a great factor in the liberation of the independence of our country. The other medallion was closer to home as it were. It commemorates the-- Benjamin Franklin. Mr. Franklin was a-- not only the founding father of our country-- one of the founding fathers, but he was our first ambassador to France and he initiated the diplomatic relationship between the newly-- new country of the United States and the French government. It is my privilege now to make this presentation to the Ambassador and I hope that you will accept this not only for what they stand for but as a personal thanks to the French Forces for what they have done for us in two separate wars and as a memorial of the memory of the-- a memento of the friendship of the American People. Mr. Ambassador.

PANEL 3: THE RULE OF LAW CRISIS IN POLAND AND HUNGARY

Carmen Gonzalez: Hello everyone. We're going to get started on our third panel for the day discussing the rule of law crisis in Poland and Hungary and with that I'm going to turn it over to Professor Mark Janis.

Mark Janis: Well thank you to you all for sticking around for the best part of today's conference. I speak to you as an American and a little bit of an Englishman and of course I speak with distance from all of this because as you know England and America have never really been part of the European project. I graduated law school in England in 1972 and the right answer to the exam question, could or should Great Britain become part of the European Union or the Common Market, was then "no". One of the leaders of the European Union just a few months ago said and was widely reported in England speaking about Brexit saying, "It's going to be an awfully messy divorce, but frankly it was never a happy marriage". Britain never as you know, most Brits, never really accepted the European project. They accepted certain parts of the promise of the European Union but it's always been a different story and the same is of course true even more so for the United States. Many of our ancestors came here not to be European and isolationism here has always been strong. It really took the Japanese attack on Pearl Harbor to turn us away from isolationism in the 1930s when somebody coined a phrase now recently reemerged called "America First". Still, an English poet John Donne once wrote "Ask not for whom the bell tolls. It tolls for thee". And so what happens in Europe affects Americans and it also effects the British. In fact, the British are even closer. As the old British saying often goes: clouds over the channel, Europe is isolated.

When I look at this part of today's program, I think of the last hundred years. Not just back to 1945 but back to 1914 and the First World War and the great transformation in European society. Back in 1914. say you had the British Empire, Austria-Hungarian Empire, German Empire, French Empire, Russian Empire, and it was really a very different sort of place socially, economically, culturally. The First World War was of course the great dissolver of all of that. E.H. Carr, the man who among others invented a discipline now called international politics or international relations that's taught in many universities, wrote in the 1930s about what he called the 20-year crisis, you know from 1919 to 1939. And at this point in time with E.H. Carr we can really talk about an 80-year crisis. As Europe has struggled to find a new model if you will, the old model that it developed over time cracked in the early part of the 20th century and Europe has been struggling with a new model for 100 years.

Throughout much of the 20th century, the debate was among three groups. There were the fascists, there were the communists, and there were the liberals. If we were holding this conference here or anywhere in Europe in the 1930s we might have been taught that it was going to be the liberals who would lose, that the future was either with the fascists or with the communists. It didn't turn out that way. The weak sister ended up prevailing and at the end of the Second World War it was more or less the liberal democracies that in terms of economies and power, economic and military held sway. In the liberal democracies, the format was largely based on three sets of

rights. The first one was property rights. That is people who had property, should be able to protect their property against government. The second right was the right of majorities. Short translation of which is called democracy. That the majority should be able to rule.

And those two rights, or you could call them legs of a table of the rights of the liberal democracies have stood up pretty well. There's a lot of protection for private property. There's a lot of respect for majoritarianism. It's the third leg in the table that's given many countries huge problems and I don't subtract England and America from having those huge problems. That third leg of the stool is the protection of minorities against both property rights, the wealthy people, and majority rights, democracy. And there's a new term which I think was coined not so many years ago, 10-15 years ago called the illiberal democracy which is based only on two legs of the stool: property rights and democracy. Illiberal democracies explicitly repudiate the third stool which is respect for minorities. Whether they be political minorities or economic majorities or alien minorities or ethnic minorities or religious minorities. The idea is that democracy should rule. Now as many of the panelists before us have mentioned two of the shining examples of illiberal democracies are Hungary and Poland and we have three wonderful panelists who are going to tell us first about Poland and Hungary and then about a success story in Romania. So, we have two Daniels and a Vlad. Let me introduce the first Daniel, Daniel Kelemen, thank you.

Daniel Kelemen: All right, thanks very much. Thanks to Carmen and the organizers for having me, and to all of you for coming. And I think, as was said before, the organizers have done a great job organizing a conference that addresses different aspects of the "polycrisis" - the multiple intersecting crises that the EU is facing. We've talked about two of them already, the Brexit crisis and the Eurozone crisis. We could have also addressed perhaps the refugee crisis, and now we're going to talk about the rule of law or democracy crisis. Maybe it is not useful to rank them - and I don't want to belittle the significance of the others - but I would say that the crisis we're going to talk about here is the most profound and existential one for the EU. I'd put it this way—with the Eurozone crisis, the EU can lose money. The Brexit crisis is kind of like losing an arm – an important part of its body politic. In the refugee crisis, quite horrifically, vulnerable people can lose their lives. But this crisis of the rule of law and democracy is one in which, to echo the Ambassador, Europe can lose its eternal soul. Let me explain what I mean by that.

So, what I'm going to talk about really is the backsliding from democracy toward authoritarianism in a couple of member states in the EU. Specifically, I'm going to talk about why the EU hasn't done more about it to stop it and the threat it opposes to the fundamental values of the union. And let me just start by sort of laying out a couple of my premises before I get to my analysis so you know where I'm coming from. You might ask what kind of regime exists in Hungary? What kind of regime is being put into place in Poland there? It has only been in motion for a year so it is less far along, but I want to say I won't give into this idea of calling them illiberal democracies-- that's the term from Fareed Zakaria from a decade ago. I mean I think that term is an oxymoron and a sort of euphemism for reasons I can

explain later, but I view these as electoral authoritarian regimes. So, they have elections, yes, but not totally free and fair ones necessarily. They are often biased in favor of the dominant party. And while they have elections, they are authoritarian in many other respects, as I'll describe. Crucially attacks on the rule of law and on the independence of the judiciary are an integral part of the consolidation of this kind of electoral authoritarianism.

These governments go after other institutions too, such as the press and NGOs, but going after the judiciary is always step one or two in the formation of these types of regimes. So, our conference or our panel is about a rule of law crisis, but for me it's simultaneously about a democracy crisis.

So, I want to talk about the democratic deficit in the EU. My use of the term might sound odd because you have heard this term used differently by Peter Lindseth and other people who study the EU; when they talk about the democratic deficit, they mean a deficit of democracy at the EU level? Normally the term refers to the idea that EU institutions are too detached from the people, that they're not electorally accountable enough, et cetera. And this extensive literature criticizes the lack of democratic legitimacy of EU institutions. Well what I would push us to think about, for the purposes of my talk, is to sort of flip that notion on its head and say that the really important democracy deficit threatening Europe now is not at the EU level but at the national level in national capitals like Budapest and Warsaw.

Any democratic deficiencies the EU may have pale in comparison to what is happening in these member states. After I describe what has been happening in these countries, I come to my central question: why has the EU failed to do more about it? After all, democracy and the rule of law were conditions of membership for countries in the EU, these countries that joined. The EU treaties contain a list of the fundamental values of the EU in Article 2 which include democracy and the rule of law and there is even a procedure that was put in in the treaty Article 7 for basically imposing sanctions on states who violate those fundamental values of the union, yet nothing much has been done, especially in the case of Hungary.

What I'm going to ask us to think about, to understand this is to think of the EU as a kind of quasi federal system that is democratic, broadly speaking, at the federal level, but that has pockets of authoritarianism at the state or member state level. When you think about it that way, sadly it shouldn't be that surprising that you have some autocratic member states in this federal union, because in fact there's a big literature in comparative politics that tells us this is very common in big federations. See a couple quotes from prominent scholars in this field on my slides. I'll just read one of them from Ed Gibson from Northwestern, "Subnational authoritarianism is a fact of life in most democracies in the developing or post-communist world." What they mean by that is there are again states within otherwise broadly democratic federations where authoritarianism can persist for a long time. This should be no surprise to us here in America because of course we had it ourselves for decades. You've all heard of the solid south, right? And you know we had a form of authoritarianism in some southern states when the federation as a whole is democratic. Such subnational authoritiarianism is common in some Latin American countries also. In Argentina, after the military rule was ousted they still had authoritarian leaders in some states like in San Luis for decades. In Mexico too, as

the national government democratized, some states remained authoritarian. This literature offers lessons about how local authoritarians survive in unions that are supposedly committed to democracy. The answer is, in short, party politics, and we are going to translate that story over to the EU, and then we can see the much the same is happening in Europe. In short, this literature shows that if the local authoritarian delivers votes or seats to a national party or coalition of parties at the national level, that that coalition needs to wield power nationally, they will protect and tolerate their local authoritarian - just like the Democratic party did for its southern democrats, in the US. And that's basically what's happening in the EU as we'll get to later in this talk.

This literature can also tell us something about when these authoritarian enclaves fall in these federal systems. Again, it is usually due to party politics. If the national party of which the authoritarian state is a member eventually finds them too embarrassing and worries that being associated with the authoritarian leader or party in that state would damage the national party's reputation, then they may dump them or pressure them to change their ways. Likewise, if the opposition parties nationally can intervene forcefully to support the local beleaguered opposition and help them mobilize more effectively, that could dislodge the local authoritarian.

One final theoretical point - and then I'll talk about Hungary and Poland: I think the problem we have in the EU today, essentially, is that the EU is in in what I view as an "authoritarian equilibrium." To address complaints about the democratic deficit at the EU level, the EU has given more importance to the European Parliament in policy-making. Also, they've given parliament a role in selecting the president of the European Commission, which is the EU's executive. All of this has upped the stakes of having a majority in the European parliament, and that in turn has upped the stakes of having European party groups stick together so they can run the EU. But that means that they'll stick together, even if that means protecting a local authoritarian who is one of their team. And that is I think the problem we face now and that is what has given Victor Orban so much cover as his fellow members of the European People's Party have protected his semi-authoritarian regime from EU pressure.

Alright, so, what is happening in Hungary? I mean how did we get to the point where in just the last two weeks – and by the way these are is just the latest abominations. We could go back over the past six years to see more – but just in recent weeks we have Hungarian parliament enact a law that asylum seekers are going to be subject to mandatory detention in containers at the border; we've seen them pass a law yesterday that would force the closure of the highest ranked and only remaining really independent university in the country, the central European University funded by the American-- Hungarian American financier George Soros; and also we have seen Orbán has just launched a "Let's stop Brussels" referendum which is actually like a "push-poll" where he's going to send all of these, mailings to every household saying "What's the area where Brussels is taking too much power away from us?" et cetera. The chutzpah is incredible. He put these placards of "Let's stop Brussels" for instance all over the subway in Budapest which was funded by EU money.

But how did we get there and how did we get to a leader who started out as a liberal freedom fighter against communism now being the best friend in the EU of the former KGB agent, Putin? Well, I can't tell the whole story, and I've only got a few minutes so I'm going to be very fast but essentially what happened in the Hungarian case is a kind of constitutional revolution. In the wake of a scandal in the governing party of the left, Fidesz, which is Orban's party, won a big majority in 2010. Fair and square they won a majority of votes, which translated into 2/3 of the seats in the parliament. The Hungarian constitution allowed that if you had 2/3 of the seats, you could rewrite the constitution. You had total power essentially, no checks and balances once you had 2/3 of the seats in parliament, and they did. So they rewrote the constitution doing moves to consolidate power and eliminate checks and balances, replace holders of any independent offices within government and then right away one of their key moves was attacking the judiciary. They packed the constitutional court enlarging its size so they could add Fidesz appointees and therefore get a majority in the constitutional court. They did other things like force early retirement of judges across the whole system to get rid of senior judges so then they could put in more Fidesz judges. They created a new office that would manage the judiciary, headed by the way by the wife of the guy who rewrote the constitution on his iPad, both of whom went to university with Orbán. They were all law students together. Then Orbán's government attacked the independent media, closed down opposition newspapers, et cetera, attacked civil society organizations and NGOs. And by the way, they've just presented a new law - I think today - modeled on Putin's foreign agents law to require registration of any NGO's with foreign funding. That is again going after Soros and others. But back to the past – in the run up to the 2014 election, they changed the electoral law to favor their Fidesz party and to try to assure that they would win. Once they won the reelection in 2014 using this new electoral system, then Orbán was out in the open about his ambitions. He said I'm going to build an illiberal democracy modeled on Turkey, China, Russia. Ok now I'm going to fast forward because I'm running out of time but some people look at this, and they say the problem is that the EU had lacked adequate tools to stop erosion of democracy and the Commission didn't enforce things strictly enough. Maybe they just need new tools of enforcement but I would say that partly traditional tools of enforcing EU law case by case, issue by issue don't work when really there's a macro thing going on which is a systemic attack on the rule of law and democracy. Case by case, you can't capture that. Likewise, relying on private enforcement by individuals to defend their EU rights doesn't work when some of the issues in question aren't justiciable. Like you can't bring a case for the fact the judiciary is not independent, right? And also, once he's captured the whole judiciary that whole mechanism of private enforcement won't work and then this nuclear option of Article 7 in the treaty where all the other states by unanimity could agree to punish the country, that doesn't work because of that high bar of unanimity, and there were those willing to protect Orban. But that brings me back to my partisan story.

Why has Orban gotten away with this? Orban's party is a member of the European people's party which is the party of the center right, which CDU in Germany is a member of, and also the Republicans in France. So, it is the center right party even though he's drifted far to the far right and become authoritarian, they

protect him non-stop and they have up with his actions. Only last week did the party's unity start to break it appears because of the attack on Central European University, but for 6 years they've defended him non-stop against criticism because he delivers the votes they need to have a majority at the EU level and because he's their co-partisan.

In my last minute I'll say Poland has been a bit different and I can't tell the whole story but just in the past year Kaczyński came into power promising that he was going to "bring Budapest to Warsaw" - to do the same thing in Poland that Orbán did in Hungary. They won a majority, immediately tried to pack the constitutional court and eliminate the independence to the judiciary, they're still in the midst of a constitutional crisis where the government won't publish the constitutional courts decisions, et cetera. Poland has gotten into a bit more hot water though where the Commission has been more aggressive and triggered the beginnings of what could lead to Article 7, because Kaczyński's party is not part of the European People's Party. It is in a much weaker party group at the EU level, composed of more far right parties. Their only powerful party ally is the Tories, but they're on their way out the door, so they've lost leverage. So Kaczyński's been alone, and I think that's why there's been more action against him shortly, but we'll have to see how it unfolds. So just to conclude if I could. I have 30 seconds left. What could the EU do better about this? They could bring more infringement proceedings and be more aggressive. I don't think that will solve things. They could invoke Article 7, and suspend voting rights. I think they should. The problem now is there are two authoritarians, the Polish and the Hungarian governments, who swear to block action against the other. So you can only do it if you act against both simultaneously. Eventually I think the only way to get at these regimes is to find ways to threaten, to cut off their EU funding which they rely on, or for the center right to find its principles and to denounce Orbán and what he's doing and there's a fight going on within the party about that. The center right in Europe has to eventually decide whether they want to be the party of center-right democracy or go down in history as the party that defended the rise of autocracy within the EU. Thank you.

Daniel Hegedüs: Ladies and gentlemen, thank you for having me. I am greatly honored by the opportunity today to be able to contribute to this symposium. In my presentation, I would like to touch upon the issue of the interaction between the European Union and the Hungarian government, and especially the role of the EU in the Hungarian democratic backsliding process. But before doing so, please allow me to briefly address the issue of a very actual concern of Hungarian democracy today.

During the last two weeks, the Hungarian government rendered the functioning of the Central European University illegal by a very discriminative legislation, and rejected any consultations with the stakeholders of the academic community in Hungary. Due to the fact that the CEU, as a mission driven university, promotes democracy and liberal values in Central Europe, the attacks of the Hungarian government against the university shouldn't only be considered a great violation of academic freedom, but also as a further symbolic step showing the Hungarian government's disrespect toward the common liberal democratic value base of Western democracies. Bearing the fact in mind that CEU operates as an American

university in Budapest, the Hungarian academic community would highly appreciate if it could count on your solidarity in this very actual issue.

Coming back to my presentation, the Hungarian developments are frequently compared to Russia and Turkey, and therefore Hungary is also often labeled as a kind of illiberal democracy. Of course, these comparisons can be seen useful to underline the direction of authoritarian trends in the country, however they do not necessarily contribute to the understanding of the key characteristics of a very unique hybrid regime existing within the democratic community of the European Union.

In my presentation, I would like to provide an analysis of the Hungarian developments from the perspective of hybrid regimes theories. Based on the inductive theorization of the Hungarian regime's unique characteristics, I would like to offer the theoretical model of the "externally constrained hybrid regime", what we developed together with Prof. András Bozóki from the Central European University, as an explanation regarding the question how the contemporary political system of Hungary could be best described and categorized.

What are these unique characteristics mentioned before? Up to now, Hungary is the first and until now the only former Western type, consolidated liberal democracy which left the democratic development past behind, and evolved to a kind of hybrid regime. I said the only one, because I am convinced that in the case of Poland one still cannot observe any systemic repercussion of the quality of democracy. Poland is only temporarily a defective democracy. Not as Hungary, where a constitutional capture situation evolved, and in the case if Mr. Orbán would lose the next elections, it would be still a really hard task to bring the country back to the democratic development path. At this point I would like to point-out that hybridization is not a one-way process, as it was seen until now in the mainstream political science literature. Hybrid regimes cannot only develop as consequences of stuck or incomplete democratization processes, but as one can see in the case of Hungary, even consolidated liberal democracies can develop back to a kind of hybrid regime or start following an authoritarian development past.

Concerning the second unique characteristic, Hungary is the first ever hybrid regime in the European Union, and the country's EU membership has crucial systemic effects on the regime's functioning. That means that as an EU Member State with questionable democratic quality, Hungary calls for the partial revision of the linkage/leverage theory of Levitsky and Way arguing that the stronger are the links between a country and the Western democratic community, and the more influence the Western democratic community can exercise over a country, the higher are the chances of democratic consolidation. In a global comparison. Hungary unquestionably used to belong to the internal circle of liberal democracies. However, the Hungarian case underlines the fact that the systemic deconstruction of liberal democracy was still possible within the European Union. Therefore, also that political discourse should be partially revised, which defines the European Union as a family of democratic member states.

Changing the focus to the role of the European Union, I would like to argue that from a system theory perspective the European Union should not merely be considered as a kind of international environment for its Member States. The EU should rather be seen as a multi-level polity, a common supra-national, federal

superstructure of the political systems of its Member States. Being in this form a part of the national political systems, the European Union fulfills several system functions for its Member States. Regarding democratic quality, the EU not only opposes the democratic backsliding process of a Member State, what I call the EU's 'constraining function', but it can also contribute to the survival of defective democracies and hybrid regimes under EU jurisdiction. Furthermore, it can also support the legitimacy of such regimes. These three 'system constraining', 'system supporting', and 'system legitimizing' functions could be identified as the EU's key functions toward its Member States with systemic democratic deficit. Although as already mentioned, these functions are not identical for all countries within the EU, they can be considered fairly identical for Member States, which are net beneficiaries of the EU cohesion transfers, and show clear symptoms of democratic backsliding.

Focusing first on the 'constraining function', it must be emphasized that the European Union is built on the principles of democracy and liberal constitutionalism, as it is formulated in Article 2 of the Treaty on the European Union. As the fundamental principles of the European Union are also binding for the Member States, it could be perceived on the basis of Article 2 TEU that if Member States seriously violate these values, they also have to face certain consequences, including the possibility of sanctions. However, as the competencies of the European Union vary extensively among the different fields of democracy, fundamental rights, or checks and balances, the level of adopted standards and the existence of nuanced benchmarks can also diverge.

Although Hungary is often labelled as 'illiberal democracy', bearing the regimes key characteristics in mind, it hardly complies with the illiberal democracy definition of Fareed Zakaria. On the one hand, instead of the low level of human rights, the quality of fundamental freedoms can be considered rather fair in the country. If only the quality of human rights and fundamental freedoms should be put under the microscope, Hungary would most probably qualify as liberal democracy. On the other hand, representative democracy is seriously compromised and the existence of an 'uneven political playing field' is clearly identifiable in Hungary. Although the term of 'rule of law crisis' is actually widely used within the EU, 'democracy crisis' would be a better suiting terminology for the Hungarian case, as it offers a more precise, and more comprehensive explanation of the democratic backsliding phenomenon. Not only the institutional checks and balances are lacking, but the process of democratic competition is also seriously unfair, thus the country qualify as a hybrid regime between democracy and authoritarianism, for example as 'competitive authoritarianism' described by Levitsky and Way.

The reason behind this complex situation is the diverging quality of the EU's constraining function. On the one hand, lacking both the ideal legal toolkit as well as the firm political will to act, the European Union could not hinder the evisceration of "checks and balances" and the rule of law in Hungary. Nevertheless, it influenced and slowed down the process in some respects. The sheer fact that the Hungarian government has had to consider possible European reactions led to the famous 'peacock dance' policy of Mr. Orbán. On the other hand, based on the individual legal remedy option provided by the European Court of Human Rights (ECtHR) and on the fact that the European Convention on Human Rights and the ECtHR case-low

constitute an inseparable part of EU law, the EU has been able to secure a rather fair level of fundamental rights and individual liberties in Hungary. Present days, not the Hungarian constitutional institutions, like the Constitutional Court or the ombudsperson are the final guardians of the Hungarian citizens' fundamental freedoms, but the EU and the ECtHR.

To provide reference to the growing role of the ECtHR in the safeguarding of the fundamental rights of Hungarian citizens, the following data could be mentioned. The number of Hungarian applications to the ECtHR in Strasbourg rose between 2010 and 2016 by 1,177 percent. Currently Hungary has the highest number of applications on per capita basis in the whole Council of Europe region. While Hungary only counts for 1.25 percent of the population in the Council of Europe, it is responsible for 10.41 percent of all pending cases in Strasbourg. These figures also demonstrate the existence of the 'external constrain', which safeguards Hungarian citizens' fundamental rights and freedoms, and withholds the country from a further advance in a more authoritarian direction.

Switching our focus to the 'system sustaining function', Hungary receives approximately 3.2 percent of its annual GDP through transfers of the European cohesion policy. Although intended to provide public investments and facilitate economic growth, these European cohesion transfers also contribute to the abundance of misusable funds in the country. Hence, they create a financial incentive for the hybrid regime's elite to tolerate the above mentioned constraining function. Furthermore, they also stabilize the regime in general economic terms.

According to Freedom House, Hungary can be characterized by a phenomenon of 'reverse state capture', meaning that not public interests capture the state, but the state organizes and maintains its own corruption networks. Pursuant to the data published by Transparency International, 70 percent of all Hungarian public procurement tenders is affected by corruption, while the overpricing in these tenders totals up to 25 percent. Bearing in mind the above described nature and extent of corruption in Hungary, it is rather easily understandable how EU financial transfers contribute to the survival of the hybrid regime.

Coming to the last function, the system legitimizing function, the lack of proper EU sanctions on Hungary due to the non-compliance with EU fundamental values, like democracy or rule of law, leaves the impression behind as Hungary still would be a kind of functioning liberal democracy. Unsurprisingly this argumentation is heavily exploited by the Hungarian government both in domestic and international context, and it helps to maintain the regime's democratic legitimacy. Last but not least, it contributes to a self-sustaining vicious circle of non-sanctioning democratic backsliding in the European Union.

Finally, I would like to sum up some conclusions. On the one hand, the EU's constraining function has been effective in that cases, when EU actions have had solid legal basis, like on the field of fundamental rights, concerning the case of the planned reintroduction of capital punishment. On the other hand the constraining function has been rather ineffective, when objective benchmarks were missing, like on the field of 'rule of law' and 'checks and balances'. These differences in the standard setting result in the strengths and weaknesses of the EU's constraining function, which influenced the main characteristics of the Hungarian hybrid regime.

Concerning the qualities of the regime, on the one hand I agree with Dan Kelemen that Hungary doesn't qualify as an illiberal democracy as defined by Fareed Zakaria. However, according to my opinion it doesn't qualify, because the level of fundamental rights is more or less tolerably high. On the other hand, I am convinced that the 'competitive authoritarianism' theory of Levitsky and Way offers the best explanation of the Hungarian regime characteristics, as the country clearly shows the key defining benchmark of 'competitive authoritarianism', the 'uneven political playing field' or systemically unfair political competition. At this point I only would like to refer to the fact, that the OSCE, the Organization of Security and Cooperation in Europe, classified the 2014 Hungarian parliamentary elections as 'free but not fair', meaning that one of the fundamental benchmarks of democratic elections was not fulfilled in an EU member state. Hence in my eyes, and again I agree with Dan Kelemen, Hungary doesn't undergo a rule of law crisis. Hungary, an EU Member State, shows clear signs of a very serious crisis of democracy.

How can this situation be changed in the future? As East-Central-Europeans are predominantly pessimistic, I would like to call the attention on two possible negative scenarios. The first scenario can take place, if the European Union cancels its generous cohesion policy during the renegotiations of the Multiannual Financial Framework (MFF), or denies the access to it for countries, which are not complying with the EU's fundamental values. In this case, without the appropriate financial incentive, Hungary could probably lose its interest in the membership, and can strive to an EU exit to also abandon the Union's constraining function.

Or, in the second case, if the French or the German elections take a wrong direction during 2017, the EU can cease to function as a liberal political and value community in the future, and can abandon its own external constraining function as well. Bearing the fact in mind that both cases result in a situation that there won't be any external pressure on Member States for democratic compliance, under these conditions Hungary and Poland could continue their journeys in the direction of more authoritarian waters. Thank you very much for your attention.

Vlad Perju: I would like to start by echoing Daniel's point about standing in solidarity with the Central European University. The actions of the Orban government have been particularly reprehensible. The Central European University has been over the past two decades or so, really one of the most extraordinary success stories of academic innovation in Eastern Europe. It has drawn brilliant students from all over the region. It has put them into contact with cutting edge research in their respective fields. The university has built extraordinarily successful departments. So, I hope that you will consider adding your name to one of these petitions that are circulating around about standing in solidarity with CEU.

As the last panelist of the day I have the opportunity to draw some connections with the discussions that have been going on before. Dan Kelemen presented the various crises of the EU and talked about ranking them. For myself, I think it's really interesting to what extent the story we are telling in this panel is quite different from the stories that have been told in the previous panels. I invite you to check, according to your own political intuitions, if these accounts align or they don't align. The Brexit situation and the Brexit panel have been essentially about how Brexit is a tragedy for

which the EU itself is partly responsible. For instance, the Union's political institutions are insufficiently responsive. It has, we were told, a European Court of Justice that has over- constitutionalized European politics. Its democratic deficit continues to be unmitigated. It is thus no wonder that things turned out the way they did with the Brexit vote. The Eurozone crisis panel has given us a similarly complex story. The gist of it was that, while some of the choices that have been made at the national level might be questionable, there is a lot to blame on the EU's methods for reaching major political decisions. Think, in this context, of the so-called voluntary bail-out (voluntary, as it has been correctly pointed out, only in the Inquisition sense of the term). Here, in the "rule of law" last panel of the day, we are offering a different account. That account, and I think that Dan put it very nicely, is about deep democratic (and constitutional) deficits at the national level. So, we're here looking at what kind of pressure the European institutions can put on national processes. In other words, we're asking a question that is really quite significant from the perspective of European constitutionalism, namely how the European Union can intervene in the relation between a national government and their own citizens. In this context, like the previous speakers, I too want to challenge labelling the situation in Hungary and Poland as moving in a direction that is sometimes referred to as illiberal democracy. Not because these regimes are not illiberal - of course they are - but they are also anti-democratic. While, formally speaking, they appear to have remained committed to the continuation of the regular electoral cycle, many of the reforms - from media control to reforms of electoral laws - reflect no commitment to a genuinely open completion for power among pluralist forces. Moreover, we have come to understand democracy as more than just showing up to vote on a given day. It is important in a democracy what happens in the period leading up to the vote, the kind of public deliberation that goes on. Those processes have been short circuited on purpose in Hungary and in Poland, and we should not turn a blind eye to these developments.

A second, and related, point concerns the element of surprise about the turn of political events in Hungary and Poland. The common reaction to that situation has been along the lines of: "the European Union let them in and all of a sudden look what they're doing. Who would have thought?" In reality, if one had actually paid attention, one might have seen this coming. I recommend, in this context, a conversation from 2007 between Vaclav Havel, the intellectual then-president of the Czech Republic, and Adam Michnik, the Polish dissident. Havel asks Michnik if he saw the situation at the time in Poland exceptional from the larger political developments in Central and Eastern Europe. Michnik answers: Poland is in no way an exception. I could give multiple examples from other countries. A Slovak coalition, the Euro Skeptic rhetoric of Vaclav Klaus, the anti-communist radicalism of Viktor Orban who reinvented himself in his career. The post-communist radicalism of Viktor Yanukovych. [Yanukovych, in case you don't remember, is the former president of the Ukraine who's now a tenant in Hotel Putin. The real model is the consistent and effective authoritarianism of Vladimir Putin. We should look at the practices of Putin to understand the nature of the threats to democracy in countries in post-communist Europe." Looking back at this prediction a decade later, we should keep in mind - as Gráinne de Búrca told us this morning - that there are

specificities to each of these jurisdictions. At the same time, as Michnik's prediction shows, one should also understand what brings together the different experiences, what makes them be part of the same wave. In this second dimension, what stands out is cross-learning among jurisdictions that turn authoritarian. Methods of undermining democracy and constitutionalism have been traveling across borders. They are tested in one place, then whatever works travels and is used in another place. So, there have been a lot of migration of constitutional techniques that we have seen over the past decade or so.

I want to take this as a starting point for my intervention about a jurisdiction where things could have turned out as badly as they have in Hungary and Poland - but didn't. That jurisdiction is Romania. We need to understand why constitutional democracy in Romania did not implode, and specifically the EU's role.

If you had placed yourself 5 years ago, in the summer of 2012, the EU's most urgent political problems included the the explosion of Roma by the French, the fast pace at which Viktor Orban undermined the constitutional state in Hungary, and, finally, the crisis of the rule of law in Romania.

Very briefly, about what happened in Romania - and, I should add, this is representative of the pace at which the rule of law crisis unfolds in various jurisdictions. Romania is a mixed, semi-presidential system, where the president is directly elected and the president and the prime minister both have executive authority A common challenge to all mixed regimes that are EU members is to decide who will be representing the country in the European Council. As Federico pointed out earlier today, the European Council brings together heads of state or of the government. What happens when there is both a head of state and the head of government? The question is particularly urgent in a situation of so-called cohabitation, when the president and prime-minister belong to opposing political forces. In many mixed jurisdictions, such a Finland, Poland and now Romania, the question about who gets to represent the country in the European Council typically goes up to the constitutional court. The court decides, and the political actors abide by that decision. But, in Romania's case, there is a twist. No long before the Court's decision came down, holding that the president has the competence to participate in the European Council meetings and that the prime minister can represent the country only when expressly delegated by the president, control over the Official Journal changed from Parliament to the Executive. This matters because the decisions of the Constitutional Court must be published before they can come into effect. And the Executive delayed the publication of the decision of the constitutional court on participation in the European Council by long enough for the prime minister to get on that flight to Brussels to attend the meeting of the European Council.

Then the next thing that happened, within a matter of days, concerned the Ombudsman. I should mention that this is happening in July, when the members of Romanian parliament are on vacation. Now, Romanian MPs take their vacation very seriously, as you could imagine. Probably even if Mr. Putin was to declare war on Romania, the members of Parliament would be hard-pressed to reconvene. So, all of a sudden, an extraordinary session of the Romanian parliament is called in the middle of July. What for? The official reason was to assess the activity of the Ombudsman. Now, I should tell you that the ombudsman is not particularly distinguished

institution in the country's overall institutional architecture. The position has been occupied by individuals of no particular distinction, or who, in any event, did not want to rock the boat. But the reason why the ombudsman's position mattered in July 2012 was that the only the ombudsman has standing to challenge ex ante, that is, before coming into effect, the constitutionality of an emergency degree adopted by the executive. So, in other words, if the ombudsman is politically obedient, the government can oftentimes make immediate changes in the legal order by using emergency decrees. So, in the end, the 2012 parliamentary majority managed to replace the ombudsman and then proceeded to enacting a number of executive orders, including one that curtailed the jurisdiction of the constitutional court. Still, the Romanian politicians were not as effective and radical as Poland's Law and Justice Party, although there is a family resemblance between the two cases. As you might know, in Poland, the parliamentary majority enacted controls on the docket of the country's constitutional tribunal, decided on a blocking majority in the constitutional tribunal, enacted requirements about new quorum requirements in that judicial body. Furthermore, the Polish executive not only delayed but it went as far as declining to publish decisions of the constitutional court. You see my point about how mechanisms for eroding constitutional democracy migrated across jurisdictions.

In Romania, things came to a head when, following the measures I mentioned above, the parliamentary majority voted to suspend the president. The Constitution requires a referendum following such a vote in Parliament. In anticipation of the fact that the president's suspension from office would only be temporary unless confirmed by a popular referendum, the executive sought to lower the quorum threshold for deeming referenda valid. The constitutional court stepped in to hold the lowering of the threshold unconstitutional. Since the court decision derailed the attempts to remove the president from office - no one believed that the court-endorsed 50% participation rate of all citizens above voting age in the coming referendum, which was organized in less than a month, not to mention in the middle of the summer - the critical question became if the executive and its supporting parliamentary majority would comply with the decision of the court. One could envision something similar to the Polish scenario, as it unfolded later. For instance, would the decision of the court be published in a timely manner and produce its effect? The initial signals from the executive showed reluctance to comply. Yet, eventually, the decision was published and the majority stated that it would comply. It is true that attempts were made - unsuccessfully - to rig the referendum, and indeed Mr. Dragnea, the future president of the Social-Democratic Party, which was one of the two main parties before the effort to unseat the president, would eventually be criminally convicted for his acts during the referendum. So, why did the political majority comply with the decision of the Court?

For one, there was tremendous pressure from the European institutions and especially from within the European socialists with whom Romania's social-democrats are affiliated. Secondly, also at the supranational level, there was already an existing mechanism in place, a mechanism for cooperation and verification, that had been set up at the time when Romania joined the European Union in 2007. The existence of this mechanism provided the necessary expertise for the European experts to know the country and be able to interpret, more or less in real time,

institutional developments. It also provided them a vocabulary that was politically neutral in which they could frame their demands. But the third, and I think most important reason why they attempt to undo the constitutional state in Romania failed, was that the politicians in charge were too inexperienced, too young to follow through with what would have been an obvious and radical breakdown of the rule of law pillar of the constitutional state. They blinked in precisely the way that Kaczynski in Poland or Orban in Hungary never did. Politicians like Victor Ponta, the then-prime minister, essentially did their own cost benefit calculus on what each course of action would entail. They decided that giving in to the demands that were coming from the European Union was more advantageous. It was certainly good for the country that they reached that decision but it is important to keep in mind that they also could have decided otherwise. While the implications or risks of the illegality of disobeying the constitutional court might have been part of the calculus, it is hard to believe that it played a very big part - precisely because unseating the president promised to give them control over the judicial system, the kind of control that would have then immunized them from prosecution. Thus, the decision whether or not to comply with the court was reached in a space that was more or less de-juridified. This is relatively clear at the municipal level, but is also arguably true from the European, supranational perspective. The means available to the European institutions to influence developments at the national level are essentially political. In Romania as elsewhere, EU influences through political pressure. As far as the European court of justice is concerned, its role is basically non-existent. Contrast this to Peter Lindseth's diagnosis earlier, about the overconstitutionalization of the European space. The following example should make this contrast event more evident.

A recent development is enormously concerning. It involves the strategic way in which the concept of identity, of constitutional identity, has been deployed not by the European Court of Justice but by national constitutional courts. These courts have essentially drawn lines in the sand to defend the otherwise highly questionable actions taken by national governments. National/constitutional identity is a concept born in the decisions of the 1970s of the German constitutional court. The concept then becomes part of the European treaty through a process that I don't have time to describe here. What we have seen recently is that, as opposition to Viktor Orban for example in Hungary is becoming a bit stronger, as Orban no longer has the votes to enact constitutional amendments in exactly the terms he wants, he can rely on the constitutional court that by now he controls to defend and entrench his policies. The umbrella of national constitutional identity has essentially immunized policies of the Hungarian government that have deeply undermined both constitutionalism and democracy. This is an extremely important development because, while one might think that political pressure from the EU might have some effect on the actions of a national government, we now see those actions being protected by constitutional courts that have been politically captured. So much for celebrating the concept of constitutional identity. Rather, this has become the new battlefield on which the fate of the "rule of law" might turn. Thank you.

Mark Janis: We have a few minutes for questions. Is that ok? Very good. So please. Sir?

Audience member: Thank you for your insight. Both the Poles and the Hungarians live in what has been historically a very dangerous part of the world. Russia seems to consider that their own buffer zone and with the decline in the strength of NATO, US is at a distance, I think there's some-- I've read some articles that suggested that there's some concern within both Hungary as well as Poland about Russia flexing its muscles and I was just wondering how much of that fear may have got into the current crisis that we're having in those two countries, the constitutional crisis?

Daniel Kelemen: I'll say something about that. Yeah, it's a great question. I mean I think that interestingly Hungary and Poland although their regimes have much in common in sort of the vision they have for the kind of regime they want to build; their stance visa vie Russia is very different, right? Where Orban some people view him as, throw out the term Putin's trojan horse in the EU, right? He's done this nuclear deal with Russia where he's basically done a contract with the Russians to build big nuclear power stations in Hungary and even though the EU has the sanctions regime on Russia in reaction to the invasion of Ukraine, despite that Orban has had Putin to visit and welcomed him, talk about warming up relations with Russia, et cetera. You know Poland of course, the Kaczynski regime is very anti-Russian and they justify some of what they're doing on the kind of nationalist anti-Russian terms but then strangely their simultaneously kind of anti- German, right? Which usually you're one or the other but the Pols manage to do both.

Audience Member: Thanks. So, I think it's a question to Dan, but it's probably a broader question to the panel. So, you talked about how nothing has been done yet against the breaking down of democracy or whatever, which one you want to call it. One reason you mentioned was the EPB and how it basically wants Orban for counting beans in the European parliament but I want to suggest that there is-- that the problem is deeper and that really it's not just strategic but the EPB has parties that share many of the-- of Orban's takes on several issues including refugees for example and here I think that the EU has a problem in the sense that the EU itself is facing a problem of declining legitimacy based on what it has or has not been doing on the issue. I'm teaching EU law this semester and we just covered the refugee crisis, and I just got an email, a very long email from a really unsettled student who was saying, he was asking me how is it-- I don't understand. How is it that the Turkey deal doesn't violate the right to non-reformal from the 51 Geneva convention? They just couldn't wrap their heads around the idea that the deal is numerical, quantitative one for one. So, the way that the EU is dealing with the refugee crisis, what we've already done even before it was like a crisis of-- and notice the crisis as we call it crisis because we think it's a crisis that all these people are coming in as opposed to there's a crisis because they are refugees and they don't have a home, right? Even before this crisis we were paying money to Libya for maintaining prisons essentially and making sure that people don't get on the boats. So, I think the EU is in a very

tricky position where it's wasted quite a bit of its symbolic capital in that regard. I wonder what your thoughts are on the topic.

Daniel Kelemen: I'll just say something quickly so others can chime in. I mean first I agree completely the EU Turkey deal is an abomination and actually I think people give it credit for stopping the refugee flow which I think is a bit of a mistake. I think it was more to do with the closure of the Balkan route, but anyway that's another discussion but I think your first point was yeah that many in the EPB besides just wanting his votes or his power, they actually agree with his values and I think that's true. There are many people in the EPB that, specifically with regard to the Hungarian response to the refugee situation kind of embrace that and certainly Orban becoming the kind of face of a get-tough stance has helped strengthen him Europe wide, but just on my specific topic here what I'd point out is this. You know the refugee deal and Orban's stance on refugees is more of let's say late 2014, 15, and 16, whereas the EPB had been defending him as he eroded democracy already for years before that was the big issue. So, this-- you know this issue intersected with that issue but it exists you know separately from it.

Daniel Hegedüs: Yeah probably just one further point. If the EPB would change its position and would not follow this party family based etiquette within the European parliament it's not only the case of the EPB concerning the previous cases of Slovakia and Hungary, also the European socialists were not able to sanction their own party family members. But we clearly see the example of Poland their piece, their justice parties not belonging to any of the big European party families. The European Commission could start a rule of law in the spring of 2016. Perhaps it will finish the procedure without any clear conclusion and without the capability to sanction Poland as a member state in any form because to a sanctioning you need an article 7 procedure and any effective concluding of an article 7 procedure in the European council currently is unrealistic. I only see one point where there is some development at European level. During the earlier years there was always the argumentation that the council or the commission anyhow at European level, the actors do not start an article 7 because if they do not come to the conclusion of any sanction then it could be interpreted as a kind of failure and now the interpretation changed and many argued even if we couldn't close an article 7 procedure with sanctions at least should initiate it and signalize the great concerns concerning the quality of democracy in these member states.

Mark Janis: Yes, please?

Audience Member: Thanks Mark and thanks to the panel. A great presentation. I have a question which in a way follows up on this and it's really, Dan, going to your point about politics but try to understand also the institutional dimension of it. I think your comparison between what's happening in Europe today and the example of the United States with the Southern Democrats during the desegregation it's great in a way how it signals how the democratic party was tolerating behaviors by members of their party which in fact ideologically speaking were very different from

what the north conception was but I'm wondering there then to what extent also the institutional differences between the European Union and the United States matter? I mean the United States at some point after Brown v. Board of Education, the US president could send the 101 airborne to police black kids in Little Rock, Arkansas. In Europe, there's nothing like that. So, you have the party dimension but you don't have the institutional structure for the center to police compliance at the national level. Of course, that leads back to my point that I think the lack of an executive power at the central level in Europe allows the expansion of this crisis. So, my question to you is how could you ever sort of reform that system and deal with institutional dimensions with the political dimension as well and just a final comment-- it's very interesting if you go back to the draft treaty creating European political community in 1954, one of the power which was given to the super national authority was precisely to enforce human rights at the state level. So back in the 50s the concern was that you could have a new fascist regime as you know breaking off again in one of the member nations and of course that has been-- that was not taken in the Rome treaty but we are basically back at square one in a way so how do we solve that problem?

Mark Janis: Let me just toss in one thing. I'm sorry I'm looking at my phone here because I've left my US Constitution, my pocket edition behind, so it's hard to do this stuff. As I almost remembered, section 4 of article 4 of the American Constitution reads "The United States shall guarantee to every state in this union a republican form of government" and my memory of constitutional law is that this has never been an operative constitutional prevision in our history. That is, I don't remember this happening and one sees the parallel here. It's very hard politically even with such a provision to have the central union protect these kinds of rights. So, if Europe is having trouble with this, all I can say is we tried and we weren't able to do it. We're no model.

Daniel Kelemen: Yeah, I mean I would agree with that and I would just say two things on that point on Federico's question. You know one point is, and I mentioned this in my talk that some of the fundamental values that are supposed to be protected and guaranteed in all states in article 2 of the treaty including let's say democracy, they're not actually things that are sort of individually judiciable. So maybe in an ideal world you'd want the EU to pass, and I don't think this will happen for lots of reasons but you want them to pass sort of legislation, secondary legislation that gave a concrete right. So, let's think like a European voting rights act or something but there is none. Right? So that's-- I mean the closest we've come-- I'm not a US con. law expert to kind of getting at the issues I think you're talking about is yeah individuals can bring voting rights act challenges right but there is nothing like that. So, there's no way that you as a citizen can take advantage of all the powers the EU legal system has for individuals which are many, right, it makes the system impressive, but you can't use that against the fact that your country is no longer a democracy. And then the last thing I'd say, look the EU is developing, it's getting a lot of power in many sensitive areas but the EU I think will never be a traditional kind of state. So, the last thing the EU will ever do is like deploy troops to integrate

a school somewhere. That kind of thing is just not going to happen and so therefore if you're not going to have real state coercive power from the center I think at the end of the day the only thing you can have is go back to like the Greek punishment, banishment, right? So, if you can't force states to do something you have to have a threat of exclusion, right? You have to say ok, you're not going to take refugees Hungary? You're out of Schengen. Right? No more free movement for you until you take—or eventually expulsion from the union. Because it's just a pipedream to think you'd have force.

Mark Janis: These were knowledgeable choices taken by sensible politicians after the fall of communism. There was a choice that Europe had which either bringing in the ex-communist states or not and there was much debate about it whether or not this made sense. Whether or not it threatened the viability of the European Union not only in economic terms but even more political terms and I can remember reports by distinguished groups of lawyers, you probably know some lawyers, saying that you know x or y state should not be brought into Europe because they didn't have a traditional rule of law, they weren't ready to have democratic governments and the political leaders said: "yes we understand you but we want to take the risk." We want to see if whether or not we can imbue these states with these values back and forth and justice. There have been f efforts that the EU has made financially in terms of experts and to try to educate the central Europeans in these forms and sometimes it's worked and other times it really hasn't. So, these were risks. So, if you will it is just early days yet. We'll come back and do this in 50 years and you'll tell us what you think. So, we shouldn't be too unjust. I think this is a good time to wrap up. I promised you the best panel. I delivered.

It had nothing to do with me. It just had to do with the panelists but I want to say in fairness to the other panels and to Ambassador Vimont that they were great too and I think the Journal was great and I think the law school was great and I think the weather was great and I wish you all a very good weekend.

CLOSING REMARKS — SAVING THE EUROPEAN UNION: CONSTITUTIONAL DEMOCRACY AND SOLIDARITY AGAINST NATIONALISM

Ángel R. Oquendo[*]: Well, thank you to everybody. We appreciate your attention, as well as patience. Since we do not want to push our luck, we will be going through this last segment of the event rather rapidly.

At the outset, I would like to express our appreciation to the student organizers of this gathering: Connor Scott and Carmen González. Both of you guys have done, as everyone knows, an amazing job. Afterward, Connor will speak in detail, though not too much, about the other generous souls who have contributed the most to this activity and will be saying "thanks" to them again.

In a nutshell, the European Union should embark upon two existential journeys in the face of its current malaise and the underlying ethno-nationalist menace. It should (1) launch a bottom-up popular dialogue in order radically to alter how it understands itself, with a focus on the rights it constitutionally recognizes and (2) beef up its solidarity-inspired engagement, as well as that of its population. These twin endeavors would inevitably have to take place most protractedly and improbably. Nonetheless, they may very well constitute the sole hope of keeping the flame alive.

The discussion today has concentrated on the threats posed by the exit of the United Kingdom on Europe's northwestern frontier, by the debt debacle in the Euro-Zone, particularly along the southern periphery, and by the weakness of the rule-of-law in the east. Moreover, it has evoked broader issues, which mostly relate to the nationalistic tendencies evident, as well as divergent, throughout and upon which we may briefly reflect at this instant, as well as, more informally, after the official closure of the Symposium. By the way, we need not rush on our informal reflections. We can take our time and still beat traffic.

The troubles and challenges facing the European Union conjure the famous proclamation of Antonio Gramsci: "The crisis consists precisely in the fact that the old is dying and that the new cannot be born. In this interregnum, a wide array of morbid phenomena appears."[1] In my opinion and counterintuitively enough, ethnic nationalism, not the Union, represents the aging life-form that is painfully progressing toward death. Simultaneously, a new collective self-understanding is struggling, apparently hopelessly, to come to birth.

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[1] ANTONIO GRAMSCI, QUADERNI DAL CARCERE 311 (Q 3, §34) (Giulio Einaudi, ed., 1977).

Loosely defined, an ethno-nationalist movement identifies or associates the polity with a particular, mostly dreamt up,[2] ethnic group or perspective. It excludes outsiders and other standpoints as alien. Needless to say, insiders act illegitimately, as well as arbitrarily, not merely in concocting an identity along these lines but especially in their exclusion of others.

Ethno-nationalism is a worn-out, tired concept. It has been perishing for over two centuries. At least since the French Revolution, people in Europe and beyond have been attempting to imagine the integration of political collectivities on the basis of principles, rather than ethnicities.[3] Of course, they have not succeeded in displacing the ethnic nationalist paradigm, despite its conceptual and moral bankruptcy, because of its apparent capacity to bring the masses together simply and quickly. This simplicity and quickness of appeal explains, in addition to its staying power, why it will not inevitably disappear soon, or ever.

Nationalism, according to Jürgen Habermas, "emerges within educated middle-class and spreads out through the channels of modern mass-communication."[4] "It takes on artificial features," he elucidates, "due to both its literary development and its wide public dissemination."[5] "Its constructed character renders it intrinsically susceptible to manipulative misuse at the hands of political elites."[6] In light of this manipulability, politicians frequently feel tempted to proceed nationalistically in order to reach and remain in office.

The principled alternative, which harks back to the Enlightenment or earlier,[7] presents itself nowadays under the formulation of "constitutional patriotism," popularized by Habermas himself,[8] coined previously in Germany,[9] and espoused in

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[2] *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES 5-6 (2006) ("In an anthropological spirit, then, I propose the following definition of the nation: it is an imagined political community—and imagined as both inherently limited and sovereign.").

[3] *See, e.g.*, Declaration of the Rights of Man and Citizen of 1789, *appended to* CONST. (Fr.) (1958) ("The representatives of the French people . . . have decided to set forth in a solemn declaration the natural, unalienable, and sacred rights of man, . . . so that the citizens' grievances, hereafter based upon these simple and incontestable principles, will tend to uphold the constitution and to enhance the happiness of all. . . ."); CONST. (Bol.) (2009), pmbl. (We shall construct "[a] state not only based on the notions of respect and equality for all, along with principles of sovereignty, dignity, complementarity, solidarity, harmony, and of equity in the distribution and redistribution of the social product, but also in which the quest for good living prevails and respectful of the economic, social, legal, political, and cultural plurality among the inhabitants of theses lands. . . .")

[4] JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS 635 (1992) [hereinafter, HABERMAS, FG].

[5] *Id*.

[6] *Id*.

[7] *See, e.g.*, IMMANUEL KANT, DIE METAPHYSIK DER SITTEN, Part II, Chapter I, § 43 (1797) (on file with the author) (Public law "is a system of laws for a people, that is, a multitude of persons or peoples who relate to each other reciprocally, as well as legally, under a will that unites them all. They therefore need a *constitution* (*constitutio*) so that they may participate in determining what is right.").

[8] *See* HABERMAS, FG, *supra* note 4, at 651 ("constitutional patriotism"); JÜRGEN HABERMAS, DIE EINBEZIEHUNG DES ANDEREN: STUDIEN ZUR POLITISCHEN THEORIE 143, 263-264 (1996).

[9] Dieter Henrich attributes the term "constitutional patriotism" to Dolf Sternberger. Dieter Henrich, NACH DEM ENDE DER TEILUNG: ÜBER IDENTITÄTEN UND INTELLEKTUALITÄT IN DEUTSCHLAND 74 (1993).

some form throughout and outside Europe.[10] It finds an echo in philosophical conceptions developed in the United States, such as the "political liberalism," "overlapping consensus," or "public reason" of John Rawls.[11] Those who take this outlook propose integrating communities socially and politically through a set of constitutionalized norms, which usually imply specific basic entitlements, rather than through a shared ethnic or linguistic background.[12]

At times, the European establishment seems to have embarked upon this path. It has proposed constitutions or their equivalents and has, with limited success, urged its constituents to follow its lead.[13] Not surprisingly, ethno-nationalism has resurfaced and resisted at every turn.[14]

In part, this constitutional campaign has foundered because its proponents have not embraced it openly or clearly. Mostly, however, it has made scant progress because it has unfolded on a top-down basis. The whole effort has failed to mobilize, let alone fire up, the citizenry.[15]

Europe would need to venture two steps in order to improve its prospects in this quest. First, it would have to set in motion a protracted, profound, deliberative, and democratic process. Thereby, its denizens would ponder, discuss, draft, and

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[10] *See, e.g.*, Francesc de Carreras, *Patriotismo sin tribu*, EL PAÍS, Nov. 11, 2001 (on file with the author) ("Against a pre-political and pre-legal concept of fatherland resting on a shared historical past and on a will to constitute a community of destiny, constitutional patriotism advocates a collective identity based on the values of liberty, equality, the rule of law, and democracy."); Guillermo Hoyos Vásquez, *Multiculturalismo y democracia en América Latina*, CONGRESO LATINOAMERICANO SOBRE FILOSOFÍA Y DEMOCRACIA 289, 302-289, 303 (Humberto Giannini, Patricia Bonzi, eds., 1997).

[11] *See* JOHN RAWLS, POLITICAL LIBERALISM 135 (1993) (". . . political liberalism supposes that there are many reasonable comprehensive doctrines with their conception of the good, each compatible with the full rationality of human persons…"); John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 234 (1993) ("[T]he idea of an overlapping consensus is introduced to explain how, given the plurality of conflicting comprehensive religious, philosophical, and moral doctrines always found in a democratic society—the kind of society that justice as fairness itself enjoins—free institutions may gain the allegiance needed to endure over time."); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 773 (1997) ("A citizen engages in public reason, then, when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse.").

[12] *See supra* notes 8-11 and accompanying text.

[13] *See, e.g.*, Sarah Lyall, *Irish to Vote on Complex European Union Treaty, Raising Fears of Its Rejection*, N.Y. TIMES, June 12, 2008, at A12 ("In 2005, a proposed European constitution—written under the aegis of Valery Giscard d'Estaing, the former French president—died after it was rejected by voters in France and the Netherlands.").

[14] Craig S. Smith, *Sensing Opportunity, Rightist Seeks the French Presidency Again*, N.Y. TIMES, May 2, 2006, at A8 ("But recent opinion surveys indicate that [France's aging right-wing firebrand, Jean-Marie] Le Pen's approval rating has surged to more than 20 percent after government missteps over a draft European constitution a year ago, rioting last fall in immigrant neighborhoods, largely by second-generation residents, and a labor law that drew nationwide protests last month."); Richard Bernstein, *Charter for the European Union Meets Resistance*, N.Y. TIMES, May 22, 2005, at 8 (§ 1) ("Anticonstitution campaigners, like Geert Wilders, a maverick populist member of Parliament and a leading anti-immigration campaigner, have toured the country to warn that the Dutch will lose control of their own borders.").

[15] *See, e.g.*, Marlise Simons, *Dutch Voters Solidly Reject New European Constitution*, N.Y. TIMES, June 2, 2005, at A10 ("But most noted by analysts after the results became known was the enormous gap between politicians and common citizens.").

ultimately approve a constitution. In the end, they would attain a new constitutional identity on their own and deliberately, not by following the mandate or recommendation of their representatives and upon a leap of faith. Secondly, the European Union would have to focus more on social-welfare guaranties. It would then have a better shot at convincing its constituencies of the concrete advantages of the advocated transformation.

Transitioning to this vantage point on both counts would not only increase the legitimacy of Europe's institutional organs. It would also augment their functionality. The Union would operate more legitimately by intensifying its commitment to democracy and distributive justice. Normatively, it currently runs, at best, on the boon of a large unified market and of a lasting peaceful coexistence or, at worst, on a "chauvinism of affluence,"[16] which comes across as oppressive against the impoverished periphery and exterior. The European Union would additionally turn into a more functional enterprise, with members permanently committed to the good of all. It presently tends to function as an arrangement of convenience. Individual countries pursue, almost exclusively, their own self-interest. Great Britain appears to provide an extreme case in point, all the way up to its dramatic decision to bolt.[17] This generalized stance renders it practically impossible to build anything in the long term.

Evidently, not even the statesmen and -women most devoted to the communal project have fully grasped its civic implications. When Germany's Chancellor Angela Merkel traveled to France in a moment of tragedy in 2015, for example, she justified her presence on the basis of friendship, while deploying the formal, comfortably distancing, German pronoun "*Ihnen*." [18] In the aftermath of a tremendously difficult election in the Netherlands in 2017, she spoke of partnership too.[19] This manner of addressing neighbors engaged in a joint undertaking of trans-national consolidation for over six decades sounds somewhat tepid, to say the least. Non-European nations with much looser ties to the Continent, such as the United States, can already refer to their European counterparts as "friends" or "partners."[20] Merkel could have instead used the expression "fellow citizens."

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[16] HABERMAS, FG, *supra* note 4, at 659.

[17] *See, e.g.*, Stephen Castle, *Britain Receives Proposals for "Better Deal" to Stay in the E.U.*, N.Y. TIMES, Feb. 3, 2016, at A4 ("Mr. Cameron has said that he wants to negotiate a 'better deal' from the bloc. . . . Mr. Cameron called the new plan a 'very strong and powerful package,' adding that, while there was no final agreement and more work was needed, 'strong, determined and patient negotiation has achieved a good outcome for Britain.'") (quoting former Prime Minister David Cameron).

[18] Addressing the French people after the Parisian terrorist attack on November 14, 2015, Merkel proclaimed: "'We, your German friends, we feel so close to you.'" Thorsten Denkler, *Merkel: "Wir weinen mit Ihnen,"* SÜDDEUTSCHE ZEITUNG, Nov. 14, 2015 (on file with the author) (quoting Angela Merkel). *See also* Adam Nossiter, Aurelien Breeden, and Katrin Bennhold, *Paris Attack Was the Work of 3 Team*s, N.Y. TIMES, Nov. 15, 2015, at A1 ("'We, your German friends, we are so close with you.'") (quoting Angela Merkel).

[19] *See* Angela Merkel, *Speech at the Demography Summit in Berlin*, CHANCELLORSHIP DOCUMENTS (Mar. 16, 2017) (on file with the author) ("The Netherlands is our partner, our friend, our neighbor.")

[20] Mark Landler & Thom Shanker, *Gates and Clinton Unite to Defend Libya Intervention, and Say It May Last Awhile*, N.Y. TIMES, Mar. 28, 2011, at A9 ("our European friends") (quoting Hillary Clinton); Liz Moyer, *U.S. and Europe Set Rules for Derivatives Regulation*, N.Y. TIMES, Feb. 11, 2016, at B3 ("our European partners") (quoting former U.S. Treasury Secretary Jacob J. Lew).

In fact, a common citizenship binds the peoples of Europe's Union,[21] generally entailing "the right to move and reside freely within the territory," "to vote and to stand as [as a candidate] in [European and municipal] elections," and "to petition . . . European . . . institutions."[22] Granted, it is evolving sluggishly and still has a considerable way to go: above all, in the sense of incorporating a robust notion of anti-discrimination, along with a vigorously enforced set of entitlements and duties, such as those guaranteed by the Charter of Fundamental Rights of the European Union. [23] On solidarity, specifically, not to mention other progressive or emancipatory aspirations, this otherwise ambitious unification-venture has little to show for itself. Surprisingly, sometimes the Central European Bank actually seems to be moving faster and farther on this front than other European bodies or the national governments and populaces.[24]

In sum, Europe should dare the recommended two-fold strategy to assure its own survival. In other words, it should (1) set up a participatory procedure to constitutionalize and to transform how it views itself and (2) enhance social-welfare entitlements for the benefit of the immense majority of its inhabitants. Obviously, these initiatives would have to come to fruition over an extended period of time and against all odds. All the same, they appear to offer the only chance of overcoming the Continent's long-standing critical predicament and defeating ethnic nationalism, along with the morbidity that it propagates.

These thoughts, as well as a few others, popped up in my mind upon listening to the very interesting and diverse conversations of our speakers from this morning on. Hopefully, we will all continue thinking and talking about these topics based

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[21] *See* Charter of Fundamental Rights of the European Union, 13 December 2007, 2012 O.J. (C 326) 391.

[22] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007 O.J. (C306) 1, art. 20(1).

[23] Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253, art. 8(1) ("Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union."); Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, 37 I.L.M. 253, art. 8(1) ("Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship."); Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007 O.J. (C306) 1, art. 20(1).

[24] *Compare* Jack Ewing & Liz Alderman, *Inaction by Greeks Tests Patience of Rescuers from the Central Bank*, N.Y. TIMES, May 7, 2015, at B1 ("The European Central Bank has already lent about 110 billion euros, or about $120 billion, to banks in Greece—more than to any other country's financial institutions, relative to the size of the economy. The banks need the cash to continue providing credit to the Greek economy.") *with* Stephen Castle, *When Britain Goes to Vote, European Union May Feel the Results*, N.Y. TIMES, May 7, 2015 ("Mr. Cameron has spoken of restricting welfare payments for Europeans who can come to Britain because the bloc guarantees the citizens of member states free movement across European borders."). *See also* Jürgen Habermas, *Warum Merkels Griechenland-Politik ein Fehler ist*, SÜDDEUTSCHE ZEITUNG, June 22, 2015 (on file with the author) ("By announcing the purchase, if necessary, of an unlimited number of governmental bonds, [Mario Draghi, the head of the European Central Bank,] pulled the chestnuts out of the fire for the Eurogroup. He had to press ahead on his own because the heads of government were unable to act in the common European interest. They remained trapped in their respective national interests and stuck in a state of paralysis.").

upon the information and inspiration imparted by our thoughtful participants, who deserve all of our gratitude. Have a great weekend!

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