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U.S. Statutory Rights and Public Policy Under the Federal Arbitration Act and the New York Convention in International Disputes

Daniel M. Schwarz*

Alleged public policy can readily defeat the international arbitral process, and, in the international community's trust and effectiveness, erode legal security and thus increase the cost of trade and investment by adding to the legal risk premium. Yet public policy must have its place in order to control abuse and to avoid conflict with the essential values of the legal orders with which international arbitration must achieve symbiosis.[1]

I. Introduction

This quotation indicates the difficulties that national courts and arbitrators face when dealing with the tension between international arbitrants' need for predictability and various legal systems' objective to oversee the international arbitral process and ensure compliance with certain fundamental values. Arbitrants' ability to minimize uncertainty and assure that contractual terms will be applied as written under the stipulated law[2] is almost always diminished by the possibility that courts and arbitrators may apply the rules of law of the place of the arbitration, the place of performance of the contract, the home jurisdiction(s) of the parties, or of other jurisdictions with a nexus to the dispute. These extra-contractual rules may apply because they are "mandatory," "super-mandatory," or because it is recognized that "the arbitration agreement is simply broader than the stipulation of the governing law of the contract."[3]

This article addresses a particular subset of this "public policy" conundrum within the context of several pertinent "mandatory law" issues. U.S. citizens, residents, or foreigners who may seek to benefit from U.S. law in specific circumstances ("United States persons") are often parties to international arbitration agreements. Frequently, these agreements stipulate that some foreign law will be applicable to any disputes that arise under or in connection with the contract. However, when a dispute arises, the United States person may realize that by arbitrating under the stipulated foreign law, the right to sue under a federal statute will be lost (assum-

1. *See* JAN PAULSSON, THE IDEA OF ARBITRATION (forthcoming 2013) (partial manuscript on file with author).

2. *See* David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F.L. REV. 49, 85 (2003) (noting that certain terms in arbitration agreements and contracts may not be enforced as written).

3. *See* PAULSSON, *supra* note 1; *see also* James M. Gaitis, *Clearing the Air on "Manifest Disregard" and Choice of Law in Commercial Arbitration: A Reconciliation of Wilko, Hall Street, and Stolt-Nielsen*, 22 AM. REV. INT'L ARB. 21, 43 (2011) (questioning whether the parties' intent will continue to be enforced in light of Supreme Court jurisprudence).

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ing the right exists in the absence of the arbitration and choice-of-law clauses).[4] In such a case, the United States person might wish to assert, either by running into court or in the arbitral proceedings themselves, that the loss of the potential remedy under the federal statute violates U.S. public policy. Following are examples of two cases yielding diametrically opposite results and conflicting public policies.

In *Thomas v. Carnival Corporation*,[5] a seaman sought to avoid an agreement to arbitrate under Panamanian law in the Philippines, and so argued that compelling arbitration would cause him to lose his right to sue in the United States under the Seaman's Wage Act (which right he undisputedly would have had absent the agreement to arbitrate). The Eleventh Circuit Court of Appeals agreed, and invalidated the agreement because the choice clauses operated in tandem as a prospective waiver of the seaman's right to seek a remedy under the federal statute in violation of public policy.[6] By contrast, in *Roby v. Corporation of Lloyd's*,[7] a syndicate agreement provided that disputes would be resolved through arbitration in England under English law, and the investors claimed that enforcing the agreement would operate as a prospective waiver of the investors' potential remedies under U.S. securities laws. The Second Circuit disagreed, held that English law provided the investors with sufficient protection, and "refused to allow a party's solemn promise to be defeated by artful pleading."[8]

This article seeks to demonstrate whether a modified-*Thomas* approach or a modified-*Roby* approach will be more beneficial to the stakeholders in the international arbitral system. To do so, it will analyze various actions that pre-arbitration courts, arbitrators, and post-award enforcement courts may take when faced with an assertion that the forfeiture of a U.S. statutory remedy has violated public policy. It will also provide an overview of "mandatory" rules in international arbitration and varied conceptualizations of "public policy." Finally, this article

4. *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 534 (1995) (asserting that the analysis is the same because foreign arbitration clauses are connected to foreign forum-selection clauses); *see also* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) (holding the forum selection clause should be given effect and that the arbitration should take place in the United Kingdom instead of the United States).

5. 573 F.3d 1113 (11th Cir. 2009) (holding that the agreement was invalid because forfeiting the right of remedy was against public policy).

6. Lindo v. NCL (Bahamas), Ltd., 652 F.3d 1257, 1277–78 (11th Cir. 2011) (differentiating *Thomas* and explaining why *Lindo* could not rely on that case); *see also* Daniel M. Schwarz, Note, *A Regression from the New York Convention: Questions Raised by* Thomas v. Carnival Corporation, 64 U. MIAMI L. REV. 1441, 1471 (2010) (remarking that the *Thomas* holding revived fears of judicial hostility toward arbitration).

7. 996 F.2d 1353, 1363 (2d Cir. 1993) (recognizing that forum selection and choice-of-law clauses may be found unreasonable if the fundamental unfairness of the selected forum's law deprives the plaintiff of a remedy).

8. *Id.* at 1360 (reasoning that a plaintiff should not be able to circumvent forum selection and arbitration clauses simply by alleging violations of law not recognized by the forum established in the agreement).

will propose a set of factors that courts and arbitrators should examine in the future as bearing on an adjudicative result.

II. Basic Conceptions of the Law Applicable in International Arbitration

As a general matter, the law applicable in an international arbitral dispute will be the law chosen by the parties (the *lex contractus*).[9] If the parties have not stipulated an applicable law, the arbitrators will "apply the law determined by the conflicts of laws rules which they consider applicable."[10] This is uncomplicated and uncontroversial. Also relatively uncontroversial is that arbitrators may apply a rule of the place where the tribunal sits ("law of the situs"), especially where that rule is procedural in nature[11] (the law of the situs is usually, but not always, synonymous with the procedural law governing the arbitral proceedings, the *lex arbitri*).[12] Arbitrators' authority to apply a clearly substantive rule of the situs affecting the merits of the case is less clear.

If a particular rule has achieved the status of international public policy (and such rule may or may not coincide with a principle acknowledged to be *jus cogens*[13]), a challenge to its applicability in the arbitral proceedings is unlikely to be successful.[14] For example, arbitrators will generally consider themselves bound to apply a rule prohibiting torture, should an arbi-

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9. *See* UNCITRAL Model Law on International Commercial Arbitration, 24 I.L.M. 1302, 1307, art. 19 (1985) (stating that an arbitral tribunal shall follow the rules of law chosen by the parties); *see also* U.N. Conference on Trade and Development, Dispute Settlement, International Commercial Arbitration: 5.5 Law Governing the Merits of the Dispute, at 8, UNCTAD/EDM/Misc.232/Add.40 (2005) (prepared by Jean-Michel Jacquet), http://www.unctad.org/en/docs/edmmisc232add40_en.pdf (explaining that parties' choice of law in international arbitration reinforces the influence given to parties in arbitration generally).

10. *See* UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 33, U.N. Doc. A/RES/31/98 (Dec. 15, 1976) (establishing the applicable law in international arbitration).

11. *See* George A. Bermann, *Mandatory Rules of Law in International Arbitration*, *in* CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 325, 330 (Franco Ferrari & Stefan Kröll eds., 2011) (comparing the rules of the arbitral situs for private international law with those for international arbitral tribunals); *see also* Edna Sussman, *The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business*, 18 AM. REV. INT'L ARB. 455, 463 (2007) (explaining the importance of choosing the seat of arbitration because the law of the seat often governs substantive matters and usually governs procedural matters).

12. *See* TREVOR COOK & ALEJANDRO I. GARCIA, INTERNATIONAL INTELLECTUAL PROPERTY ARBITRATION 239 (2010) (illustrating in the context of confidentiality that the *lex arbitri* and the law of the situs are usually the same); *see also* James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT'L ARB. 9, 54 (2004) (explaining that the *lex arbitri* is almost always the law of the situs because it is rare for contracting nations to agree on a *lex arbitri* of a nation other than the nation serving as the site of the arbitration).

13. *See* LORI F. DAMROSCH ET AL., INTERNATIONAL LAW 99, 194–99 (5th ed. 2009) (explaining that *jus cogens* norms are non-derogable by contract).

14. *See* Kenneth M. Curtin, *An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 15 OHIO ST. J. DISP. RESOL. 337, 346 (2000) (noting that an enforcing court in an international arbitration dispute must be aware of its own public policy and that of other interested nations); *see also* Jay R. Sever, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration out of Control?*, 65 TUL. L. REV. 1661, 1680 (1991) (stating that in Argentina, all arbitral proceedings and awards must comport with public policy).

trant assert that torture has occurred.[15] But of course not all rules of international law have achieved such mandatory status (particularly rules that are likely to determine the outcome of commercial disputes), and even if a particular rule has achieved the eminence of international public policy, its application should not always be taken as a given.

Lex mercatoria, a nebulous body of law based on customary practice, equity, and good faith and fair dealing applicable to commercial relationships in general, may also have application in international arbitration where the parties' agreement so provides, or the parties otherwise consent to its application.[16]

This article focuses on a more complicated and controversial scenario—when a party argues that a national law is applicable that is *not* part of the *lex contractus*, the *lex arbitri*, the law of the situs, or any conflicts of laws determination.[17] In some way, application of the extra-contractual law will be premised upon the public policy of the state to which the rule belongs. Complicating matters is the fact that the basis for the rule's applicability might be that it is grounded in the *international* public policy of the particular state. One example of this is a state's *national* predilection for *international* comity.[18] But the crucial theoretical questions are (1) what level of significance need the asserted applicable rule have to the particular legal system? and (2) how powerful does the connection between the "outside" legal system and the particular dispute need to be? Commentators have long grappled with these questions, and, outside the context of a particular dispute, meaningful answers are difficult to achieve. The best that can be hoped for is a series of factors for pre-arbitration courts, arbitrators, and post-arbitration enforcement courts to consider. Legal certainty for all stakeholders would be strengthened if such factors were adopted by or recommended into positive law by the appropriate body.[19]

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15. *See* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 84 (1987) (noting that an arbitrator held a contract void after finding that the object of the contract was bribery and thus, contrary to public policy); *see also* Christopher S. Gibson, *Building the Civilization of Arbitration: Arbitration, Civilization and Public Policy: Seeking Counterpoise Between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 PENN ST. L. REV. 1227, 1240 (2009) (explaining that the concept of public policy is not static and may morph to include new ideas, such as human rights law).

16. *See* Antonis Patrikios, *Resolution of Cross-Border E-Business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of the Lex Informatica*, 38 U. TOL. L. REV. 271, 274 (2006) (noting that *lex mercatoria* is a functional method of decision-making for international arbitration); *see also* Karyn S. Weinberg, *Equity in International Arbitration: How Fair Is "Fair"? A Study of Lex Mercatoria and Amiable Composition*, 12 B.U. INT'L L.J. 227, 233 (1994) (explaining that the application of *lex mercatoria* in arbitration proceedings may stem from the arbitration clause or the terms consented to prior to arbitration).

17. *See* George A. Bermann, *Introduction: Mandatory Rules of Law in International Arbitration*, 18 AM. REV. INT'L ARB. 1, 4 (2007) (questioning whether a tribunal should follow the *ordre public* of the jurisdiction whose law governs or the jurisdiction where the tribunal sits).

18. *See* Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc., 473 U.S. 614 (1985) (holding that concerns of international comity require enforcement of the arbitration clause at issue, despite acknowledging that the result would be different in a domestic context); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 507 (1974) (holding that due to the international character of the activity in question, the arbitration clause must be enforced).

19. *See* Edna Sussman, *The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business*, 18 AM. REV. INT'L ARB. 455, 456–59 (2009) (naming Congress, the Supreme Court and ICC as the main bodies governing international arbitration in the United States).

III. Dealing with the Prospective Waiver Problem

A. Pre-Arbitration Courts

U.S. courts deciding whether to grant a motion to compel arbitration pursuant to the New York Convention need not explicitly consider the prospective waiver problem.[20] Courts are required to compel arbitration if four factors are present: (1)"there is an agreement in writing to arbitrate the dispute, (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen."[21] Some courts consider this test to be outcome determinative and thus refuse to consider the validity of a "prospective waiver" argument, which is arguably analogous to an affirmative defense where the four requirements are met.[22] Therefore, the power of pre-arbitration courts to consider public policy as a basis for invalidating or modifying an agreement to arbitrate must originate elsewhere.[23] It possibly arises from Article II of the New York Convention, which provides that an agreement to arbitrate is unenforceable if it is "null and void, inoperative or incapable of being performed."[24] It is not fully clear if Article V's "public policy" basis for refusing to enforce an arbitral award is being implicitly applied in lieu of Article II's "null and void" language, or if the "prospective waiver" question is separate and distinct from any explicit Convention or FAA language.[25] This lack of clarity suggests that it is perhaps only a judicially created creature of U.S. law.[26]

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20. *See* Penn Plaza LLC v. Pyett, 556 U.S. 247, 265–66 (2009) (explaining that the issues of whether to submit a matter for arbitration and whether such matter would be waived in arbitration are separate and distinct); *see also Mitsubishi Motors Corp.*, 473 U.S. at 637 n.19 (noting that prospective waiver is not an issue to be analyzed at the stage where a district court is deciding whether to enforce an arbitration agreement).

21. *See* Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1144–45 (5th Cir. 1985) (stating that courts, per the New York Convention, should make a limited inquiry into the four factors when determining whether arbitration should be compelled); *see also* Amizola v. Dolphin Shipowner, S.A., 354 F. Supp. 2d 689, 696 (D.La. 2004) (holding that courts should compel arbitration where the four factors are established).

22. *See* Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 203–04 (1956) (applying an outcome determinative test to conclude arbitration is substantive, not procedural). *But see* Thomas v. Carnival Corp., 573 F.3d 1113, 1120, 1124 (11th Cir. 2009) (concluding that the prospective waiver argument is a valid affirmative defense in a suit to compel arbitration).

23. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (opining that courts cannot refuse to enforce an arbitration clause based on public policy grounds); *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967) (explaining that an agreement to arbitrate can be invalidated only if the reason for invalidation goes to the making of the agreement).

24. *See* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 737 (2009) (granting a motion to compel arbitration based on Article II of the New York Convention); *see also* Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 (suggesting that where a court is presented with a matter governed by an arbitration agreement it should refer such matter to arbitration unless the agreement is "null and void").

25. *See* Joseph R. Brubaker, *The Prospective Waiver of a Statutory Claim Invalidates an Arbitration Clause: The Eleventh Circuit Decision in* Thomas v. Carnival Corp., 19 AM. REV. INT'L ARB. 309, 313 (2009) (suggesting that arbitration agreements that violate public policy under Article V of the New York Convention are also invalid under Article II); *see also* Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT'L L. REV. 17, 47 (2002) (discussing the prospective waiver analysis addressed in Mitsubishi).

26. *See Lindo*, 652 F.3d at 1272 (finding that the arbitration clause of a crewmember's employment contract to be enforceable at the initial arbitration-enforcement stage).

This section begins by discussing several approaches for addressing "prospective waiver" arguments that pre-arbitration courts may use. It must be remembered that the methods of review of the permissibility of "contracting around" statutory rights in a domestic context are different from the methods of review of the validity of a prospective waiver by virtue of a foreign forum selection or arbitration clause. Nevertheless, the former may provide some guidance as to the latter, since the goal here is to compile an optimal and pertinent set of considerations.

Johnson v. Moreton,[27] an English case between English parties, represents a possible approach to public policy that may inform how to address the "prospective waiver" problems. In *Johnson*, parties to an agricultural tenancy sought to exclude the operation of a provision of the Agricultural Holdings Act from their agreement.[28] The British House of Lords suggested that the validity of this action is heavily dependent upon whether and to what extent the statute's purpose would be frustrated, and stated,

> Where it appears that the mischief that Parliament is seeking to remedy is that a situation exists in which the relations of parties cannot properly be left to private contractual regulation, and Parliament therefore provides for statutory regulation, a party cannot contract out of such statutory regulation (albeit exclusively in his own favour) because so to permit would be to reinstate the mischief which the statute was designed to remedy and render the statutory provisions a dead letter.[29]

While it might be recognized that *Johnson* involved neither arbitration nor any international component at all, it is illustrative of a basic idea underlying the notion of public policy: Parties may not "opt out" of certain rules of law, even when they believe that doing so will affect only themselves;[30] rather, many laws are enacted with an eye toward protecting the public at large.[31] And the public interest requires uniform conduct in those types of transactions or activities addressed by these particular laws.[32] If a government has an interest in the transaction and that

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27. *See* Johnson v. Moreton, [1980] A.C. 37 (H.L.) (appeal taken from Eng.) (holding a covenant in a lease invalid as being contrary to public policy).

28. *See id.*; *see also* Christopher P. Rodgers, *Diversifying the Farm Enterprise: Alternative Land Use and Land Tenure Law in the UK*, 45 DRAKE L. REV. 471, 472 (1997) (explaining that the Agricultural Holdings Act of 1948 introduced lifetime security of tenure).

29. *See Johnson* [1980] A.C. 37 (H.L.) at 69 (quoting Salford Union Guardians v. Dewhurst [1926] A.C. 619 (H.L) 625).

30. *See* Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 TUL. L. REV. 1, 37–38 (2011) (discussing whether the opt-out feature of U.S. class actions is compatible with the public policy of foreign countries); *see also* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 73 (1991) (addressing the public policy implications of companies opting out of a strict domestic regulatory scheme where there is a choice of a foreign forum, foreign law, or an arbitration clause).

31. *See Mitsubishi Motors Corp.*, 473 U.S. at 635 (emphasizing the importance of the antitrust laws to the national interest in a competitive economy); *see also* General Telephone Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 326 (1980) (illustrating the EEOC's role in protecting the public interest against employment discrimination).

32. *See* Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968) (stressing the necessity of obeying the antitrust laws based upon the devastating effects that could result from noncompliance); *see also* Alfred P. Rubin, *Actio Popularis, Jus Cogens and Offenses Erga Omnes?*, 35 NEW ENG. L. REV. 265, 271–72 (2001) (recognizing the adoption of certain defined norms in the international community that are so significant from which no derogation is permitted).

transaction gives rise to arbitral proceedings, it may be incumbent upon a pre-arbitration court or the arbitrators to recognize the need for uniform conduct and to ensure the applicability of the law designed to protect the public interest.[33]

To demonstrate this approach's application in an international context, assume that the agreement between a German landowner and an English tenant farmer provided that any disputes would be resolved through binding arbitration in France under French law. Assume next that the tenant farmer sues the landowner in English court for breach of contract. The landowner will move to compel arbitration under the agreement. But the tenant farmer will respond that arbitration under French law operates as an impermissible waiver of his rights under the Agricultural Holdings Act. Assuming the statute is designed to protect vulnerable tenant farmers because the legislature determined that tenant farmers are likely to be susceptible to mistreatment as a result of bargaining power inequalities, an English court should hold that allowing arbitration in France, where it is clear that the French arbitrators will not apply the Agricultural Holdings Act, should invalidate the arbitration clause at least as far as the particular Agricultural Holdings Act rights are lost (i.e., courts have severed the choice-of-law clause rather than forbidding arbitration, thus still giving effect to the rest of the agreement).[34]

While the *Thomas* court did not discuss notions of unconscionability or rest its decision on the vulnerability of seamen, it is difficult to believe that arbitration would have been compelled if the court was not concerned with the potential for frustration of the Wage Act. In any event, other approaches are possible, and indeed, necessary; in the absence of specific legislative guidance this approach might undesirably require judges evaluating precedent to effectively decide that rights provided under one federal statute are more important than the rights provided under another, leading eventually to a "ranking" of the normative value of various federal statutes. On the other hand, inasmuch as the *Johnson* approach of looking at the potential for frustration of the statutory purpose is a useful way to distill the essence of what public policy actually is, its guidance will inevitably remain part of prospective waiver analysis.

S.K.I. Beer Corp. v. Baltika Brewery[35] approaches the issue from the other end of the spectrum. *S.K.I. Beer* suggests that an intensive review of a statute's text is required to determine its vulnerability to prospective waiver, an approach that fails to adequately respond to the public

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33. *See Thomas*, 573 F.3d at 1122 (calling on courts to protect a party's right to pursue statutory remedies as a matter of public policy); *see also* Krstic v. Princess Cruise Lines, Ltd., 706 F. Supp. 2d 1271, 1279 (S.D. Fla. 2010) (holding that severance of an unenforceable choice-of-law clause in an employment agreement was warranted as a matter of public policy).

34. *See* Perez v. Globe Airport Sec. Serv., 253 F.3d 1280, 1286 (11th Cir. 2001) (noting court decisions that have either severed the illegal provision or held the entire agreement unenforceable); *see also* Dockeray v. Carnival Corp., 724 F. Supp. 2d 1216, 1226 (S.D. Fla. 2010) (holding that the choice-of-law clause in an employee's seafarer's agreement was unenforceable but upholding the agreement's arbitration clause in light of the agreement's severability provision).

35. 612 F.3d 705, 711 (2d Cir. 2010) (holding that a clause in a beer wholesale agreement selecting a Russian forum for disputes between a Russian brewer and a New York wholesaler did not contravene New York public policy).

policy at stake.[36] It implies that the legislature's intent to make the statute's application mandatory is outcome-determinative, which is quite different from figuring out whether a statute was designed to remedy vulnerabilities experienced by a particular group of individuals. In *S.K.I. Beer*, the parties agreed to a Russian forum selection clause,[37] but *S.K.I. Beer* argued that section 55 of New York's Alcoholic Beverage Control Law[38] rendered the clause an unenforceable violation of public policy.[39] The court rejected this argument and placed heavy emphasis on the word "may" in the statute and found it significant that "the section does not state that a beer wholesaler is prevented from agreeing to maintain a civil action in a different forum."[40] *S.K.I. Beer* also relied on *Roby*, citing with approval the lower court's holding that the burden to prove a lack of a comparable remedy under the foreign law falls to the party asserting the public policy violation, and that mere speculation as to what rights that party would have in the arbitral proceedings is not sufficient to defeat the presumption of enforceability.[41]

The permissive versus mandatory language approach is too straightforward for comfort, as it may fail to acknowledge the reasons underlying the enactment of the statute in the first instance,[42] i.e., some "void" in the legal landscape. Legislative deference is generally considered admirable, if not axiomatic, but it is nevertheless clear that the court discounted New York's goal of providing specific protections for beer wholesalers.[43] This is not to say that the "may apply" versus "shall apply" distinction has no place in the analysis, because legislators must be assumed to convey their intentions clearly through a statute's text.

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36. *Id.* at 709–10 (analyzing the statute's text to determine if the New York legislature intended to grant a beer wholesaler an absolute right to sue in a New York forum); *see also* YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 4 (2008) (indicating that a canon of statutory construction should be disregarded if application would frustrate the legislature's desired purpose in enacting the statute).

37. *See S.K.I. Beer Corp.*, 612 F.3d at 711 (stating that the parties' agreement required a Russian forum); *see also* Michael Murray, Recent Decision, *S.K.I. Beer Corp. v. Baltika Brewery*, 612 F.3d 705 (2d Cir. 2010), 24 N.Y. INT'L L. REV. 205, 208 (2011) (discussing the implications of the parties' Russian forum selection clause).

38. Section 55 provides that "[i]f a brewer fails to comply with the provisions of this section, a beer wholesaler may maintain a civil action in a court of competent jurisdiction within this state for damages." *See* N.Y. Alco. Bev. Cont. Law § 55-c(6) (McKinney 2001) (providing that a wholesaler may maintain a civil action for damages in New York if a brewer fails to comply with the provisions of the Alcoholic Beverage Control Law).

39. *See S.K.I. Beer Corp.*, 612 F.3d at 707 (arguing that the forum selection clause violated section 55 of New York's Alcohol Beverage Control Law).

40. *See id.* at 710 (explaining that the legislature's distinctive use of the permissive term "may" in section 55 of New York's Alcohol Beverage Control Law demonstrated its intentions to allow civil actions to be brought in another forum).

41. *See id.* at 711–12 (examining S.K.I.'s argument in view of the narrowly interpreted exception to enforceability of forum selection clauses); *see also Roby*, 996 F.2d at 1363 (stating the necessary requirements that must be met for a resisting party to rebut the presumption of enforceability).

42. *See id.* at 712 (suggesting that section 55-c of New York's Alcohol Beverage Control Law was enacted to promote the public's interest by regulating the relationship between brewer and distributor); *see also* Garal Wholesalers, Ltd. v. Miller Brewing Co., 193 Misc. 2d 630, 751 N.Y.S.2d 679 (N.Y. Sup. Ct. 2002) (holding that the amendments advance the beneficial purpose of regulating the sale and marketing of beer within the state).

43. *See* N.Y. Adv. Leg. Serv. 679, 1996 Reg. Sess., Sen. B. 5410-B (N.Y. 1996) (requiring the sale and delivery of beer by brewers to beer wholesalers be pursuant to a written agreement to protect the general economy and the public interest); *see also* F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1449 (2010) (explaining that the reasons for legislative deference stem from respect for legislative judgment, promotion of democracy, and benefits of the legislature's superior design).

These two cases provide background for an introduction of the proposed factors for pre-arbitration courts to consider. The core of the inquiry must be (1) whether the statutory protection claimed as lost is even applicable to the facts of the case; if not, further analysis may cease and arbitration may be compelled;[44] (2) if so, a determination as to the likelihood that the U.S. statute will apply, notwithstanding a foreign *lex contractus*, because the parties have stipulated to its application, either because it is demanded by conflicts of law rules or, more controversially, because the court believes that the arbitrators will recognize the mandatory nature of the rule combined with a heavy U.S. nexus to the dispute; (3) comparing the protections available under the *lex contractus* to the statutory right at issue, and refusing to compel arbitration only where the protections available under the *lex contractus* are so deficient as to thwart the congressional purpose in passing the U.S. statute. Taken together, use of these factors falls somewhere between the "pure" public policy inquiry of *Johnson* and the rigidity of *S.K.I. Beer*.

The first factor is necessary to promote efficiency. It is superfluous and unnecessary to delve into the far more complicated second and third factors if the party asserting the existence of an invalid "prospective waiver" has no factual basis for asserting a right to relief under the statute. For example, if a party states that arbitrating under foreign law will cause him to lose his right to sue in the U.S. under the securities laws, the court should first establish that, *inter alia*, the assets at issue qualify as "securities."

Second, the court must analyze the likelihood that the U.S. statute will apply. If the parties stipulate to its application or it is otherwise obvious that the arbitrators will consider the claim (because of the broad scope of the arbitration clause), arbitration may be compelled because U.S. public policy will be vindicated.[45] The court should also be empowered to consider the likelihood that the arbitrators will find the U.S. statute to be mandatory, notwithstanding the difficulty of making such a finding.

The U.S. Court of Appeals for the Ninth Circuit, in particular, has taken the most rational approach to the "prospective waiver" problem, though it does not precisely follow the framework laid out above. That court has consistently held that, similar to *Roby* and other well-known Lloyd's of London cases, the standard to be applied is "whether the law of the transferee court [or the law to be applied in an arbitral tribunal] is so deficient that [a party] would be

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44. The use of this factor demonstrates some of the difficulty in this area because it conflates whether the statute *should* apply with its actual application to the merits. For this reason, its use by arbitrators would be more problematic than its use by a pre-arbitration court, which already has a mandate to effectuate the public policy of the state where it sits. *See* Kristian v. Comcast Corp., 446 F.3d 25, 37 (1st Cir. 2006) (restating the importance that arbitration provide both fair and adequate means for enforcing statutory rights); *see also* SCOTT MARTIN, 2-14 ANTITRUST COUNSELING AND LITIGATION TECHNIQUES § 14.03 (Matthew Bender & Co., 2011) (explaining that one of the threshold issues in international antitrust cases is whether the claim should be dismissed or stayed and arbitration compelled).

45. *See Mitsubishi Motors Corp.*, 473 U.S. at 637 n.19 (articulating that a choice-of-law clause that results in a party's prospective waiver by barring that party's right to recourse is against public policy); *see also* H. Patrick Glenn, *Centennial World Congress on Comparative Law: Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977, 998 (2001) (noting that an estimated 90% of international contracts contain arbitration clauses).

deprived of any reasonable recourse."[46] This test highlights the significance of the third factor. For instance, in *Simula, Inc. v. Autoliv, Inc.*,[47] a plaintiff argued that if Swiss law were to apply to the exclusion of U.S. antitrust law, a "profound and irrevocable detriment [to] United States automotive safety and the national interest in open and competitive markets" would result.[48] The court first noted that the Swiss Tribunal might apply U.S. law in situations affecting U.S. markets, and second, that even if only Swiss law is applied, the plaintiff had not shown that it would not provide him with sufficient protection.[49] To return to the example above, this would require the English court in the tenant farmer case to determine the likelihood that the French arbitrators would apply the Agricultural Holdings Act, and if not, to compare the tenant farmer protections under French law to the Agricultural Holdings Act. This analogy demonstrates why this type of comparability analysis is consistent with a "pure" public policy analysis while simultaneously giving teeth to the preferences for arbitration and party autonomy.

The courts of appeals that have made the conscious choice to compare substantive protections provided under foreign law with the content of the statutory right that will supposedly be lost should be commended for this mode of analysis because it adequately reconciles U.S. national policy in favor of international arbitration with the U.S. policy of ensuring access to statutory protections for those who would be entitled to them absent a choice-of-law clause, particularly where latent bargaining power inequalities exist. This method is thus largely preferable to the method of those courts, like *Thomas*, that simply "invoke 'public policy' to deny arbitration on the sole basis that a consumer or an employee or the victim of civil rights violations have been deprived of 'statutory rights' by having agreed to an applicable law that does not provide for the statutory relief in question."[50] The *Simula/Roby* method seems to recognize the principle that the arbitration agreement is broader than the stipulated law whereas the *Thomas* line refuses to make this acknowledgment.

This might involve more than just analyzing the two sets of statutory protections side-by-side; it might require examining customary practice to assess whether and how particular provisions might be applied. For example, in *Central National-Gottesman, Inc. v. M/V "Gertrude Oldendorff,"*[51] a U.S. court found a "prospective waiver" where an English court would "give force to an exculpatory clause in the bill of lading, [thus] insulating parties other than the shipowner

46. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981) (holding that when the alternative foreign forum would provide so inadequate or unsatisfactory a remedy, the court may find that dismissal is not in the interests of justice); *see also Roby*, 996 F.2d at 1363 (articulating choice of law clauses as unreasonable when the chosen law is so fundamentally unfair that it may deprive the plaintiff of recourse).

47. 175 F.3d 716 (9th Cir. 1999) (determining that the arbitration clause applies broadly to disputes arising between the parties).

48. *Id.* at 722 (alleging that the choice-of-law provisions and arbitration clauses in the parties' agreement violate public policy because of the risk that the foreign court will not apply American law).

49. *Id.* at 723 (finding that the plaintiff had failed to show that the Swiss Arbitral Tribunal would provide inadequate antitrust remedy).

50. *See* JAN PAULSSON, THE IDEA OF ARBITRATION (forthcoming 2013) (partial manuscript on file with author).

51. 204 F. Supp. 2d 675 (S.D.N.Y. 2002).

from liability, in violation of COGSA."[52] The court heard testimony from a foreign law expert in support of its conclusion that English courts would adopt a different, narrower view of the term "carrier" and would give effect to the exculpatory clause.[53]

The purpose underlying a U.S. statute could be noticeably vindicated in the arbitral proceedings in other ways. As such, a pre-arbitration court should look at the potential for the application of, and the substantive rights provided by, the law of the situs, international law, and *lex mercatoria* before refusing to compel arbitration. Most likely, these types of possibilities will be raised by the parties in connection with the court's consideration of the second factor.

B. Arbitral Tribunals

Let us assume the following: The Second Circuit rejects an investor's argument that agreeing to arbitrate in England deprives him of protections otherwise available to him under U.S. securities laws in violation of public policy. The investor, now arbitrating in England, asserts that the arbitrators are not bound by the decision and are required to apply U.S. securities law because the claim is "in connection with" the parties' agreement. While the Second Circuit may have assumed that the proceedings would go forward under English law, the arbitrators have broad discretion to consider whether to apply U.S. law. What sort of nexus to the U.S. is required for the arbitrators to decide U.S. securities law is applicable? This question is not straightforward and a set of factors should be established to answer it.

Put more generally, "[a]rbitrators may be asked to apply a law which purportedly overrides the provision of the contract, its governing law, and indeed the law of the place of arbitration."[54] Arbitrators have an extraordinarily difficult task when faced with an assertion that a law other than the *lex contractus*, *lex arbitri* or law of the situs should apply.[55] First, it must be recognized that this is, in fact, a "task"; arbitrators have a positive obligation to consider whether such a law applies.[56] As such, arbitrators should not be persuaded by an arbitrant's argument that the arbitrator is not qualified to consider whether the law applies, and should resist any inclination to apply that law simply because the arbitrator's jurisdiction arises from party agreement. If public policy is to have any role, where an agreement provides that disputes arising "under or in connection with" the contract shall be arbitrated, arbitrators should con-

52. *Id.* at 679–80 (recognizing that the London courts would not offer the same remedies provided under the Carriage of Goods by Sea Act).

53. *See id.*

54. PAULSSON, *supra* note 50.

55. *See* Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT'L 274, 276 (1986) (noting the difficulty arbitrators experience when faced with applying mandatory rules of law in the conflict that arises between the will of the states and the will of the contracting parties); *see also* Alan Scott Rau, *The Arbitrator and "Mandatory Rules of Law,"* 18 AM. REV. INT'L ARB. 51, 62–63 (2007) (discussing the difficulty arbitrators face in deciding whether to apply mandatory laws).

56. *See* Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1768 (2010) (stating it is the arbitrator's role to decide what rule of law governs when the parties' agreement is "silent"); *see also* United Nations Commission on International Trade Law, G.A. Res. 31/98, 31st Sess. Supp. No. 17, U.N. Doc. A/31/17, at art. 33(1) (Dec. 15, 1976) (requiring arbitrators to make choice-of-law determinations when resolving contract disputes).

sider a country's law other than the *lex contractus* and the law of the situs.[57] As stated by Professor Alan Rau, "[A]ttention to the will of the parties, and attention to the *lex contractus*, are after all two quite different things."[58] Further complicating the analysis is the recognition that even if the arbitrator decides that such an "other" law is mandatory, it may not have mandatory application to the particular facts at hand or it may be effectively obsolete.[59] The Supreme Court recognized in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*[60] that the arbitrator's identification of and decision whether to apply a particular rule of law must not be the arbitrators "own conception of sound policy."[61] However, this is fundamentally different from whether an arbitrator has a duty or obligation to *enforce* a mandatory rule of law.[62]

One oft-criticized unique approach to the mandatory rules quandary was taken in ICC Case No. 6320 (1992).[63] There, disputes between a U.S. contractor and a Brazilian utility were to be adjudicated in arbitration in France under Brazilian law.[64] The utility wished to assert a RICO claim against the contractor, and indeed, the tribunal acknowledged that it had "jurisdiction" of the claim.[65] Despite this, the tribunal found the claim "inadmissible" because "to apply RICO as a 'mandatory rule' would be 'contrary to the choice of law the parties agreed to.'"[66] For such application, "the priority of the will of the parties" to hear a claim not based on

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57. *See* Northrop Corp. v. Triad Int'l Mkt., 811 F.2d 1265, 1270 (9th Cir. 1987) (stating that general conflicts-of-law principles were not strong enough to override the public policy concerns acknowledged in previous cases by the Ninth Circuit); *see also* George A. Bermann, *Mandatory Rules of Law in International Arbitration*, 18 AM. REV. INT'L ARB. 1, 2 (2007) (recognizing that some mandatory rules of law cannot be contracted around because of the importance of protecting the public interest).

58. *See* Rau, *supra* note 55, at 63; *see also* M/S Bremen v. Zapata Off-shore Co., 407 U.S. 1, 20 (1972) (permitting enforcement of a forum-selection clause even though one party to the contract no longer wanted to be bound by it).

59. *See* CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES 278 (2009) (discussing ICC Case No. 6320, where a tribunal found the United States RICO statute to be mandatory law but inapplicable because the U.S. market was not involved); *see also* Charles N. Brower & Abby C. Smutney, *Annual Review of Significant Developments: 1995*, 30 INT'L LAW. 271, 285 (1996) (observing that arbitral tribunals have decided not to enforce mandatory law when the contracting parties elected to apply a different rule of law).

60. 130 S. Ct. at 1776.

61. *See id.* at 1769 (stating that arbitrators should not decide what rule to apply on their "own conception of policy"); *see also* Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1146 (2011) (interpreting the Court's decision in *Stolt-Nielsen* as forbidding arbitrators from acting as common law courts by creating law to fill gaps).

62. *See* Rau, *supra* note 55, at 51–52 (questioning the existence of an arbitrator's duty or obligation to enforce mandatory law); *see also* Nathalie Voser, *Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration,* 7 AM. REV. INT'L ARB. 319, 332–337 (1996) (offering analysis to determine if arbitrators have a duty to apply mandatory laws).

63. 20 Y.B. Comm. Arb. 62 (ICC Int'l Ct. Arb.) (detailing the arbitration between a Brazilian utility company and a U.S. contractor).

64. *Id.* at 62.

65. *Id.* at 64.

66. SIMON GREENBERG, CHRISTOPHER KEE & J. ROMESH WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE 122 (2011) (using examples to assert the rare application of mandatory laws in international arbitrations); *see also* Alan Scott Rau, *The Arbitrator and "Mandatory Rules of Law,"* 18 AM. REV. INT'L ARB. 51, 56 (2007) (excerpting an arbitration refusing to apply mandatory law).

the chosen law must be subordinated to the existence of a state's "strong and legitimate interest in the application of its law."[67] Rau notes the tension created by the tribunal's inference that the choice-of-law clause limited the scope of the arbitration clause and its simultaneous recognition that it had "jurisdiction" of the claim.[68] What is meant by "strong and legitimate interest"? Perhaps it is not so different from an analysis of the following factors that arbitrators should consider.

When faced with the assertion that some "other" law (U.S. law, in the context of this article) is applicable to the arbitral proceedings, arbitrators are, and should be, guided by several factors. These include, but are not limited to, (1) the place of performance of the underlying contract; (2) the citizenship and/or domicile of the parties; and (3) where the award will ultimately be enforced.

1. Rules of the Place of Performance of the Contract

Suppose a Japanese manufacturer and a U.S. wholesaler enter into an agreement under which the manufacturer is to deliver 100 widgets to the wholesaler, and for whatever reason, delivery is to take place in Canada. Disputes are to be arbitrated in London under Swiss law. No one doubts that Canada has *some* interest in applying its rules to the transaction. If the act of selling widgets in Canada is illegal (and therefore contrary to Canada's public policy), but the same act is legal under any other law, the London arbitrators might hold (1) the rule prohibiting the act of selling widgets is an active and fundamental part of Canada's legal system, and (2) the fact that the transaction consisted of a single delivery to take place in Canada is enough for the arbitrators to invalidate the contract, since there is an obvious and significant nexus between Canada and the conduct.

This example demonstrates why arbitrators should consider rules of the place of performance of the contract. Thus, in the context of the "prospective waiver" issue, arbitrators should apply a U.S. statute where the statutory scheme is considered essential to the U.S. legal system as a whole (such as the Sherman Act or various securities laws), and where a contract is to be substantially performed in the United States such that statutory protection for the parties is necessary to effectuate Congress's purpose.

2. Rules of the Place of Citizenship or Domicile of the Parties

The following is rather intuitive: An arbitrant that claims the right to a statutory protection that is not part of the *lex contractus* should not have the ability to claim the right to *any*

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67. GREENBERG, *supra* note 66, at 122 (explaining that the United States lacked a strong and legitimate interest because of factual and geographic remoteness); *see also* Rau, *supra* note 66, at 56 (stating that the United States lacked such a "strong and legitimate interest").

68. Rau, *supra* note 66, at 53 (noting that every question arising from arbitration law involves tension between the contractual and jurisdictional models of arbitration).

existing statutory protection;[69] that party must have some connection to the rule. In general, this connection will exist because that party is a citizen or resident of the jurisdiction from which the rule is derived. For example, the parties in *Roby* were from the United States and sought remedies under U.S. securities laws. Were the dispute between Mexican investors and Lloyd's, it is unlikely that the Mexican investors would have asserted protections under U.S. securities laws. If they did, however, the United States would have no connection to the dispute and the arbitrators should accordingly refuse to consider the applicability of U.S. investor protections to Mexican investors not connected to the United States. This factor is part of a more general discussion; in the context of the more specific "prospective waiver" problem, it can usually be assumed that the party asserting the loss of the right to the U.S. statutory protection will be a U.S. citizen or resident or otherwise entitled to the benefit of the statute.

3. Rules of Likely Enforcement Jurisdictions

Professor Rau has intimated that the rules of the jurisdictions where the award will ultimately (or likely) be enforced have a particular importance.[70] Where such a jurisdiction is relatively clear to the arbitrators, it is difficult to dispute the reasons for taking particular account of such jurisdiction's rules. Simply put, various arbitral rules provide that arbitrators have a duty to render enforceable awards. This duty necessarily entails review of the standards by which an award's validity will later be assessed.

C. Post-Arbitration Courts

Under current U.S. law, "If there is an agreement to arbitrate, and the issues presented to the arbitrator fell within that agreement, courts may overturn the arbitrator's award only on very narrow grounds. . . . (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrator(s); (3) the arbitrators were guilty of certain kinds of procedural misconduct; and (4) 'the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award' was not made."[71] A post-arbitration challenge claiming that an arbitrator misapplied, should have applied, or should not have applied a law other than the *lex contractus* or the law of the situs may be classified as an assertion that the arbitrators "exceeded their powers."[72] Alternatively, and more directly for

69. *See* Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT'L 274, 283 (1986) (observing a reluctance by arbitrators in making an exception to this principle by applying mandatory rules of a foreign law); *see also* Voser, *supra* note 62, at 345 (illustrating that it is "uncontested" that arbitrators should apply rules such as statutes only where the case at hand has a connection to the enacting state).

70. Rau, *supra* note 66, at 74 (theorizing that the threat of an unenforced award intimidates arbitrators from considering any issues abstractly); *see also* Voser *supra* note 62, at 333 (commenting that arbitral tribunals are obligated to ensure that their awards will be enforceable).

71. *See* Flexible Mfg. Sys. Pty., Ltd. v. Super Prod. Corp., 86 F.3d 96, 99 (7th Cir. 1996) (listing the circumstances in which a court may overturn an arbitrator's award). On a philosophical level, it is worth noting that regimes for recognition of foreign judgments vary widely. For example, "[c]ourts of some states (e.g., France) recognize a foreign judgment only if they would have applied the same law to the controversy as that chosen by the rendering court, or if the choice of law did not affect the result." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW IV, 8 Introductory Note (1987).

72. *See* Bd. of Educ. of City of Hartford v. Local 818, Council 4, AFSCME, AFL-CIO, 502 A.2d 426, 429 (Conn. App. Ct. 1985) (describing plaintiff's claim that the arbitrators misapplied a doctrine agreed to by both parties, asserting that the arbitrators exceeded their power).

present purposes, 9 U.S.C. § 207 provides that a court "shall confirm the arbitration award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention."[73] Recognition and enforcement of an arbitral award may be refused if the recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought.[74] However, it has been vehemently argued that enforcement courts should consider the public policies of the place of performance of the contract.[75] In addition, an award may generally be vacated if it is arbitrary and capricious, displays manifest disregard of the law, or fails to draw its essence from the underlying contract.[76] However, despite the apparent existence of multiple grounds by which an award may be vacated, a party seeking to vacate the award, even on the basis of a "prospective waiver"-type claim, has, and should have, a high mountain to climb.[77]

To demonstrate a more general problem, suppose a post-arbitration award enforcement court in the United States is faced with the assertion of the loser (in arbitration) that "the arbitrators rejected the applicability of statute X," where statute X is not the *lex contractus*, the *lex arbitri*, or the law of the situs; statute X, however, governs in the place where the contract was to be performed. The post-arbitration enforcement court must examine whether the claim of statute X's applicability was raised before the tribunal and, if so, was the basis for the arbitrator's rejection (however, the fact that the arbitrators did not adequately explain their reasoning or provide more detail as to the legal basis for their decision will probably not be, and should not be, sufficient). If a post-award enforcement court reviews the record and finds that the party did not assert the applicability of statute X in the arbitral proceedings, it is disingenuous

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73. 9 U.S.C. § 207 (1970) (stating that once an arbitral award is made, any party to the arbitration may apply for an order confirming the award); *see also* HSN Capital LLC v. Productora v. Comercializador de Television, S.A. de CV, No. 8:05-cv-1769-T-30TBM, 2006 WL 1876941, at *2 (M.D. Fla. July 5, 2006) (remarking that courts must validate arbitration awards unless they uncover reasons to refuse to enforce the award).

74. *See* Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1442 (11th Cir. 1998) (reporting that Article V (2)(b) allows a court to refuse to enforce an arbitral award if it would be against public policy).

75. *See* Northrop Corp. v. Triad Int'l Mktg. S.A., 811 F.2d 1265,1267 (9th Cir. 1987) (recognizing that courts refused to consider the law of the place of performance notwithstanding that contract was clearly illegal under that law); *see also* Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 714 (2d Cir. 1987) (emphasizing that courts would not enforce a London award to continue to properly distribute benefits); *see also* Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise Between Aribtral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law,* 113 PENN. ST. L. REV. 1227 (2009) (stating that public policy is relevant and pressing for many reasons); *see also* Rau, *supra* note 66, at 56 (maintaining that an arbitrator's prudence should never be carried to the point that such a consideration appears in his award).

76. *See* Lummus Global Amazonas, S.A. v. Aguaytia Energy del Peru, S.R. Ltda., 256 F. Supp. 2d 594, 605 (S.D. Tex. 2002) (recognizing that awards meet the arbitrary and capricious standard only if the reasoning for the arbitrator's award cannot be deduced from the surrounding facts); *see also* Jennifer Samsel, *Evolving Judicial Review of Arbitration Awards: Is Massachusetts Lagging Behind in "Manifest Disregard" of Arbitrators' Substantive Errors of Law?*, 40 SUFFOLK U. L. REV. 931, 932 (2007) (acknowledging that recently a common-law category of award vacatur has developed to deal with situations in which an arbitrator disregards the law).

77. *See* O.R. Sec., Inc. v. Prof'l Planning Assocs., 857 F.2d 742, 747 (11th Cir. 1988) (holding that to vacate an arbitration award there must be proof that the arbitrators specifically ignored the law); *see also* Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1110 (2009) (stressing that the lower federal and state courts recognize grounds used to vacate an arbitration award).

for that party to be permitted to raise the issue. Such a finding should weigh against the party, but since the concern is in fact "public policy," it should not completely bar the claim for non-recognition of the award. But under present law, U.S. courts called upon to enforce an award are limited to whether the award violated U.S. public policy. This may be a rule ripe for reassessment.

Returning to a "prospective waiver" question, suppose then that statute X is a U.S. statute. The loser in arbitration claims a violation of U.S. public policy because protections otherwise available under the statute were lost. In general, the inquiry of the enforcement court, assuming there has been no involvement of a pre-arbitration court (see below), should consist of factors (1) and (3) for pre-arbitration courts, above. Factor (2) is not necessary because it can be assumed that the arbitrators refused to consider the applicability of the U.S. statute (again, it must be remembered that rights generally will be protected where applicability is gauged and not only where the U.S. statute is held to apply and applied). Thus, if the statutory protection does not encompass the particular conduct at issue, the award should be enforced, and if it does, the enforcement court should examine the substantive comparability of protections available under the *lex contractus* (or perhaps any other law the arbitrators found mandatory), and if comparable, should enforce the award. Accordingly, in the final inquiry, the comparability analysis serves to illuminate the answer to whether, if the award is enforced, the non-application of statute X to the U.S. party truly affected his or her rights to such an extent that the entire congressional purpose for enactment of the statute would be thwarted. Admittedly, this standard is somewhat imprecise, and its application by equally competent judicial authorities could lead to inconsistent results. But hearkening back to *Johnson v. Moreton*,[78] it is a reasonable interpretation of what it means for courts to base decisions upon "public policy." Hence, as stated above, meaningful overarching answers are difficult to achieve outside the context of a concrete dispute.

In addition, the post-arbitration enforcement court must ask whether the validity of a prospective waiver of law X was litigated prior to arbitration. To the extent that the litigant has the ability to assert that the pre-arbitration court was wrong to refuse to invalidate the clause due to a "prospective waiver" of a statutory right, such a prior determination by a fellow U.S. court, if not simply *res judicata*, should carry significant weight in the interest of finality; an "abuse of discretion" standard of review of the prior court's determination on each individual point is appropriate. Moreover, the post-enforcement court has the opportunity to review whether the applicability of the U.S. statute was raised before the arbitrator, and if so, how the arbitrator dealt with the claim. This may put the U.S. court in an awkward position; its view of whether the U.S. statute was mandatory in the context of the arbitration may differ from the arbitrator's view, not least because of the U.S. court's home bias. Thus, refusal to enforce arbitral awards on the basis that the arbitrator did not allow a U.S. statutory claim, yet should have, should be rare; only where the arbitrator's refusal to apply the U.S. statute or any comparable legal protection was patently unreasonable and resulted in tangible prejudice to the party should a court refuse to enforce the award.

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78. *Johnson*, [1980] A.C. 37 (H.L.).

IV. Conclusion

The "prospective waiver" problem highlights significant complications associated with application of mandatory law in international arbitration. At best, logical sets of factors can be developed for pre-arbitration courts, international arbitral panels, and post-arbitration enforcement courts to consider, though "prospective waiver" arguments based in public policy must continue to be adjudicated on a case-by-case basis.

Pre-arbitration courts should consider (1) whether the statutory protection claimed as lost is applicable to the facts of the case; (2) if so, the likelihood that the U.S. statute will apply notwithstanding a foreign *lex contractus*; (3) if not, the protections available under the *lex contractus* compared to the statutory right at issue, and refuse to compel arbitration only where the protections available under the *lex contractus* are so deficient as to entirely and utterly thwart the congressional purpose in passing the U.S. statute.

Arbitrators should consider the significance of the statute to the U.S. legal system as a whole and the level of the U.S. nexus to the dispute, and more specifically (1) whether the United States is the place of performance of the contract; (2) citizenship or domicile of the parties, if appropriate; and (3) whether the party is likely to seek enforcement in a U.S. jurisdiction. Arbitrators generally should not hold the U.S. statute inapplicable on the basis that its protections do not coincide with the facts of the case because this dangerously resembles actual application of the statute.

Post-arbitration enforcement courts should generally accord deference to determinations made by pre-arbitration courts and arbitrators in accordance with existing law. With this in mind, they nevertheless should examine the same factors as considered by the pre-arbitration courts: (1) whether the statute is applicable to the facts, i.e., whether the aggrieved party has any warrant for complaining in the first place; and (2) most importantly, what extent were the rights provided to the aggrieved party by the arbitrators under the *lex contractus*, the *lex arbitri*, the law of the situs, the *lex mercatoria*, and/or other laws based on conflicts determinations or international law consistent with the rights that would have been provided were the U.S. statute applied.

To return to one of the initial questions raised, the use of these factors favors a modified-*Roby* approach over a modified-*Thomas* approach. Courts and arbitrators can vindicate U.S. public policy in several evolving ways. Requiring the application of a specific statute as written by one legislature, and invalidating or severing an arbitration clause where the statute's application will not directly occur poses too great a threat to the benefits of legal certainty accruing from the international arbitral regime.

International Workers' Rights Enforced Through Free Trade Agreements: DR-CAFTA and the DOL's Case Against Guatemala

Deirdre Salsich*

I. Introduction

In recent years, the United States has expanded trade with Latin America, most notably with the ratification of the North American Free Trade Agreement (NAFTA) on January 1, 1994 and the signing of the Central American Free Trade Agreement (DR-CAFTA) with five Central American nations and the Dominican Republic on August 5, 2004.[1] Liberalized trade policies and increased globalization have contributed to the expansion of multinational corporations (MNCs) into developing countries, many of which are still grappling with the vestiges of undemocratic regimes, including weak rule of law, lax enforcement and corruption.[2] Corporations retain headquarters, research and development and much of their intellectual capital in the country of incorporation, but have moved their manufacturing centers to developing nations to reduce operating costs.[3] This shift has resulted in decreased protections for workers in developing nations where governments compete in the "race to the bottom"[4] to make their exports more competitive in the global marketplace.[5] Domestic labor laws vary, and even in

1. *See* North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U. S., reprinted in part in 32 I.L.M. 289 (1993) and parts in 32 I.L.M. 605 (1993) (NAFTA). The United States ratified NAFTA along with Mexico and Canada, making it the first regional Free Trade Agreement in the Western Hemisphere. DR-CAFTA is an agreement between the United States, Guatemala, El Salvador, Costa Rica, Honduras, Nicaragua and the Dominican Republic.

2. *See* Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 2 (1995) (recognizing that transnational corporate activities have an adverse impact on developing countries ranging from corruption to environmental issues); *see also* Lester Munson, *Inside: Point/Counterpoint: CEDAW: It's Old, It Doesn't Work, and We Don't Need It*, 10 HUM. RTS. BR. 23, 25 (2003) (noting real threats to human rights in the world including unrelenting poverty and undemocratic, corrupt regimes).

3. Apparel companies incorporated in the United States and Europe have transferred a substantial amount of their operations to Latin America in recent years. *See* Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 FORDHAM INT'L L.J. 386, 386–87 (2006) (citing increases in the export of the apparel industry as a result of DR-CAFTA and the potential for renewed commitment to democracy in Guatemala).

4. *See* JEFFREY DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED APPROACH 219–20 (2d ed. 2006) (noting that poor conditions in foreign factories prompted the development of a workplace code of conduct for corporations to adopt).

5. *See id.* at 218–19 (using Nike as an example, explaining how voluntary corporate enactment of codes of business conduct has proliferated due to shareholder, consumer and NGO interest in corporate behavior).

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countries that have ratified international labor conventions, compliance with these regulations is often inadequate.[6]

In 1998, the International Labor Organization (ILO) issued the Declaration on Fundamental Principles and Rights at Work identifying four fundamental rights: (1) freedom of association and the right to collective bargaining; (2) the elimination of forced labor; (3) the abolition of child labor; and (4) the elimination of employment discrimination and right to equal treatment in the workplace.[7] Developing nations eager to enter free trade agreements with industrialized nations have ratified some of these conventions, but retain the right to decline ratification of others without jeopardizing their membership in the United Nations or access to free trade.[8] The ILO has extremely limited ability to enforce these norms compared to

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6. *See* Justine Nolan & Michael Posner, *International Standards to Promote Labor Rights: The Role of the United States Government*, 2000 COLUM. BUS. L. REV. 529, 532–33 (2000) (stating that the ILO lacks effective mechanisms for ensuring member states' compliance with international labor conventions); *see also* Sean Cooney, *Testing Times for the ILO: Institutional Reform for the New International Political Economy*, 20 COMP. LAB. L. & POL'Y J. 365, 376–79 (1999) (discussing five distinct flaws in the ILO's monitoring system that make it difficult to assess compliance).

7. *See* ILO, Declaration on Fundamental Principles and Rights at Work, June 1998, 37 I.L.M. 1233 (1998), http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm (declaring the ILO's commitment to fundamental labor rights principles with the goal of social and economic justice). These rights are also reflected in the eight "core" ILO conventions. *See* ILO, Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Nov. 19, 2000, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182 (resolving to prohibit and eliminate the worst forms of child labor as defined in the convention); *see also* ILO, Convention 138 Concerning Minimum Age for Admission to Employment, June 19, 1976, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138 (establishing minimum working age standards and guidelines); *see also* ILO, Convention 111 Concerning Discrimination in Respect of Employment and Occupation, June 15, 1960, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111 (setting forth that each convention member undertakes a national policy to eliminate employment discrimination as defined in the convention); *see also* ILO, Convention 105 Concerning the Abolition of Forced Labour, Jan. 17, 1959, http:// www.ilo.org/ilolex/cgi-lex/convde.pl?C105 (reaffirming previous international conventions against forced labor in establishing member states' commitment to abolishing forced and compulsory labor); *see also* ILO, Convention 100 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, May 23, 1953, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C100 (adopting proposals supporting equal remuneration for men and women workers of equal value); *see also* ILO, Convention 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 18, 1951, http://www.oit.org /ilolex/cgi-lex/convde.pl?C098 (implementing the protection of worker organization members' rights to organize and bargain collectively); *see also* ILO, Convention 87 Concerning Freedom of Association and Protection of the Right to Organise, July 4, 1950, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087 (recognizing the importance of freedom of association and the right to organize as relevant to improving international labor conditions); *see also* ILO, Convention 29 Concerning Forced or Compulsory Labour, May 1, 1932, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029 (resolving to completely suppress forced or compulsory labor and detailing country-specific guidelines for compliance with the convention).

8. Even inaugural ratifiers (including the United States) of the principal ILO Conventions have been reluctant to ratify others. *See* Edward E. Potter, *The Growing Significance of International Labor Standards on the Global Economy*, 28 SUFFOLK TRANSNAT'L L. REV. 243, 245–46 (2005) (averring that the United States did not take seriously its obligation to ratify ILO conventions in the decades following the Great Depression); *see also* Michael A. Cabin, *Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?*, 109 COLUM. L. REV. 1047, 1064–66 (2009) (indicating that free trade agreements that account for local conditions are preferred to the specificity of ILO conventions, leading to increasing non-ratification).

the bargaining power that multinational corporations enjoy in protecting commercial rights.[9] This is especially true when MNCs employ sub-contractors (a highly common practice in developing countries) to manage day-to-day operations, reducing corporate oversight of labor conditions.[10] Traditionally marginalized groups, including indigenous peoples and women, are disproportionately affected by the lack of government and corporate oversight of labor rights; inequality increased overall for women, children and communities as a whole.[11]

Non-governmental organizations (NGOs), particularly international non-governmental organizations (INGOs), play an "increasingly important" role in advocating for the protection of human rights as MNCs increase their footprints in the developing world.[12] The International Labor Rights Fund (ILRF), Human Rights Watch and others work to monitor workplace conditions for laborers in the developing world, yet coordination between these highly visible INGOs and a likely ally, local and regional labor unions, is rare in some parts of the world.[13] The labor movement in the United States, however, has been instrumental in working to help organize workers on the ground in developing countries and to voice their concerns to the U.S. government.[14]

The United States' decision to use Transnational Domestic Labor Regulation (TDLR) under DR-CAFTA to address labor violations in Guatemala has timely implications in both

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9. *See* Michael A. Cabin, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 184–85 (2002) (opining that MNCs have disproportionate power to enforce commercial interests because of their freedom to "opt out" of foreign legal systems' rule of law using choice of law mechanisms); *see also* Lena Ayoub, *Nike Just Does It—And Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 416–17 (1999) (stating that the ILO and other international organizations have failed in preventing MNCs from committing labor violations).

10. See Ayoub, *supra* note 9, at 403–04 (1999) (asserting that despite MNCs routinely inspecting subcontractors' plants to ensure compliance with labor codes, violations are still highly prevalent); see also Benjamin N. Davis, Note and Comment, The Effects of Worker Rights Protections in United States Trade Laws: A Case Study of El Salvador, 10 AM. U. J. INT'L L. & POL'Y 1167, 1194–95 (1995) (describing employer policies of hiring subcontractors to manage workers and ban union organizers at Export Processing Zones in El Salvador).

11. *See generally* NICHOLAS KRISTOF & SHERYL WUDUNN, HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE xxi (2009) (hypothesizing that economic empowerment through microfinance, improvements in basic health care and ending the international human trafficking trade will elevate women and marginalized populations from poverty).

12. *See* UN Secretary-General, *Rep. of the Secretary-General on the Work of the Organization, General Assembly Official Records Supplement No. 1*, ¶ 52 U.N. Doc. A/54/1 (August 31, 1999) (by Kofi Annan) (claiming that transnational corporations have the potential to encourage local governments to respect human rights).

13. *See* Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights, in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 22, 22 (Lance Compa & Stephen F. Diamond eds., 1996) (opining that unions "rarely enlist the support of human rights groups for the defense of workers' rights").

14. *See* Lance Compa, *Assessing Assessments: A Survey of Efforts to Measure Countries' Compliance With Freedom of Association Standards*, 24 COMP. LAB. L. & POL'Y J. 283, 301 (2003) (citing Social Accountability International's unique initiative to coordinate labor standards monitoring with trade unions in Asia); *see also* Ylan Q. Mui, *Wal-Mart Works With Unions Abroad, but Not at Home*, WASH. POST, June 7, 2011, http://www.washingtonpost.com/business/economy/wal-mart-works-with-unions-abroad-but-not-athome/2011/06/07/AG0nOPLH_story .html (explaining that labor leaders from groups in Central America, along with unions in the United States, Argentina, and Chile have bolstered South African organizations in their negotiations with Wal-Mart to unify Wal-Mart's workers worldwide).

countries and worldwide.[15] During the 2010 elections in the United States, public sector labor unions bore the brunt of criticism from candidates and incumbents eager to establish themselves as fiscally responsible reformers of their respective states.[16] Union membership in the private sector dwindled to 11.9% in 2011.[17] In Guatemala, studies have shown that in the years following the end of a three-decade civil war in which indigenous and labor rights activists were targeted as threats to the state, labor violations continue unabated.[18] The Guatemalan government and judiciary have been largely ineffective in addressing the rights of a diverse constituency[19] that still grapples with the effects of years of military and quasi-military rule in which goals of economic modernization were often pursued at direct cost to indigenous people and women.[20] Why should the labor movement or the U.S. government expend precious resources investigating transnational labor violations occurring in FTA partner nations in the midst of a jobless economic recovery? The following quotation can be aptly applied to describe the utility

15. *See* David J. Doorey, *In Defense of Transnational Domestic Labor Regulation,* 43 VAND. J. TRANSNAT'L L. 953, 955–56 (2010) (defining Transnational Domestic Labor Regulation as legislation enacted in one country that is intended to influence labor regulation in other countries).

16. New Jersey Governor Chris Christie, a likely Republican presidential candidate in 2016, has accused teachers of "using students like drug mules" to advance their own pro-union message. *See* Richard Pérez-Peña, *Democrats Pounce on Chris Christie's Harsh Words*, N.Y. TIMES, Apr. 16, 2011, at A17. In New York, a state with a historically high rate of unionization in both the public and private sector, this rhetoric is softer, but very much an ongoing topic of public debate. Governor Andrew Cuomo has plans to terminate public workers in an effort to close a budget gap and repair the state's overburdened pension fund. *But see* Michael Cooper, *Hevesi Pleads Guilty to a Felony and Resigns*, N.Y. TIMES, Dec. 23, 2006, at B1. Alan Hevesi, former New York State comptroller and sole trustee of the state's $145.7 billion public pension fund, pleaded guilty to defrauding New York State of millions in addition to accepting over $1 million in consulting fees and campaign contributions.

17. *See* Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Union Members Summary (Jan. 27, 2012) http://www.bls.gov/news.release/union2.nr0.htm (analyzing the change United States union membership).

18. *See id.*

19. Guatemala was a Spanish colony from 1524 to 1821; Spanish is the official national language, but 22 other languages and dialects are spoken. Guatemala's population is made up of people of primarily Spanish descent, indigenous ancestry, and mixed (ladino) Spanish and indigenous ancestry. There are also sizable German and Swedish populations. *See* Hector Alejandro Gramajo Morales, *Political Transition in Guatemala, 1980–1990, in* DEMOCRATIC TRANSITIONS IN CENTRAL AMERICA 111, 112 (Jorge I. Dominguez & Marc Lindenburg, eds., 1997) (summarizing the choices of the Guatemalan government to exclude certain demographic groups from the political process in the pre-democracy period); *see also* Jeffery D. Corsetti, Note, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 412 (2006) (describing how the Guatemalan government is unable to protect its citizens from gang related violence); *see also* Allison W. Reimann, Comment, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1231–32 (2009) (explaining why Guatemalan women need to seek asylum in the United States due to the Guatemalan government's unwillingness and inability to help protect them from acts of sexual violence).

20. *See* PETER H. SMITH, DEMOCRACY IN LATIN AMERICA 258–59 (2005) (identifying the overthrow of pro-union democratically elected President Jacobo Arbenz in 1954 as the end of reform and political participation for indigenous people).

of comparative labor law: "Sometimes one can best understand one's own condition by noticing what is taking place elsewhere."[21]

Though established in the United States and framed by some as a U.S.-centric organization,[22] the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) filed a complaint with the Office of Trade & Labor Affairs, a bureau of the U.S. Department of Labor (DOL-OTLA) on April 23, 2008, charging the Guatemalan government with failure to "effectively enforce its labor laws and comply with the commitments under the ILO Declaration on Fundamental Principles and Rights at Work" pursuant to DR-CAFTA.[23] The Complaint was asserted on behalf of five labor unions and one prospective union (the Coalition of Avandia Workers) in Guatemala, where workers were allegedly subjected to threats in retaliation for union activity, physical violence toward union leaders and unlawful killings.[24] On July 30, 2010, Secretary of Labor Hilda Solis requested consultations with the Guatemalan government under the labor regulations outlined in DR-CAFTA,[25] marking the first time that the United States has charged a fair trade agreement (FTA) partner with labor violations.[26]

In this article, I will discuss the procedural choice by the United States to charge the Guatemalan government with labor violations and the participation of non-governmental actors in this exercise of transnational domestic labor regulation. Next, I will discuss the potential for TDLR to improve or worsen the inequality that separates the indigenous population and labor activists from other Guatemalans. Additionally this article will conduct a comparative assessment of the North American Agreement on Labor Cooperation (NAALC) to enforce labor regulations in Mexico as a "side" agreement to NAFTA in the absence of ILO enforcement. Finally, I will analyze the role of MNCs in regulating their own compliance with international labor standards through the adoption of corporate codes of conduct, and the possibilities for the formation of customary, enforceable international labor norms and regulations.

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21. *See* Richard Delgado & Jean Stepancic, *Foreword: Latinos and the Law Symposium*, 83 IND. L.J. 1141, 1144 (2008).

22. *See* Elly Leary, *Crisis in U.S. Labor Movement: The Roads Not Taken*, 57 MONTHLY REV. 2, http://monthlyreview.org/2005/06/01/crisis-in-the-u-s-labor-movement-the-roads-not-taken (stating that the AFL-CIO's international relations are unable to evolve because of "U.S.-centric arrogance").

23. *See* Public Submission to the Office of Trade & Labor Affairs (OTLA) under Chapters 16 (Labor) and 20 (Dispute Settlement) of Dominican Republic-Central America Free Trade Agreement (DR-CAFTA): *Concerning the Failure of the Government of Guatemala to Effectively Enforce Its Labor Laws and Comply With Its Commitments Under the ILO Declaration of Fundamental Principles and Rights at Work* (April 23, 2008) (The Complaint).

24. See id. at 2.

25. The labor regulations outlined in Chapter 16 of DR-CAFTA largely reflect those outlined in the 1998 ILO Declaration on Fundamental Principles and Rights at Work. *See* Dominican Republic-Central America Free Trade Agreement, art. 16, Aug. 15, 2004, www.ustr.gov/trade-agreements (outlining the labor regulations that largely reflect those outlined in the 1998 ILO Declaration on Fundamental Principles and Rights at Work).

26. *See* Office of the United States Trade Representative, *United States Trade Representative Kirk Announces Labor Rights Trade Enforcement Case Against Guatemala*, EXECUTIVE OFFICE OF THE PRESIDENT (July 30, 2010), https://www.dol.gov/ilab/media/factsheets/20100730-FactSheet.pdf (announcing the first time the United States has charged a partner in the Free Trade Agreement with labor violations); *see also* Letter from Ron Kirk, U.S. Trade Representative, & Hilda Solis, Secretary of Labor, to Erick H.C. Echeverria, Minister of Economy, & Edgar A. Rodriguez, Minister of Labor and Social Protection (July 30, 2010), http://www.ustr.gov/webfm_send/2114 (regarding U.S. concerns about Guatemala's labor rights violations).

II. Questions of Jurisdiction in Transnational Labor Regulation

Identifying and addressing labor violations in developing nations presents the foundational problem of jurisdiction. The ILO was created in 1919 in the wake of World War I as one of the original three international organizations; in 1946 it became an integral member organization of the United Nations.[27] The preamble to the ILO Constitution stated that the "failure by any nation to adopt humane conditions of labor was an obstacle in the way of other nations that desired to improve conditions in their own countries,"[28] an assertion that solidified workers' rights as central to lasting world peace.[29] In comparison to other UN organizations, a relatively small number of the 183 member states have ratified the ILO's fundamental conventions.[30] Ironically, the United States has declined to ratify Convention No. 87, Freedom of Association and Protection of the Right to Organize, and Convention No. 154, the Collective Bargaining Convention of 1981,[31] even though it has granted its own citizens these rights under the National Labor Relations Act (NLRA).[32]

In the United States, Congress has the authority to regulate international trade,[33] and thus has the option of linking trade to enforceable labor standards in negotiating FTAs.[34] That the United States has failed to recognize core labor standards as a matter of customary international law while simultaneously expanding trade with nations that either fail to recognize or enforce these rights for their citizens presents serious questions as to whether free trade in its current iteration encourages reciprocal socially responsible conduct on the part of governments and corporations.

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27. *See* Hector Bartolomei de la Cruz et al., The International Labor Organization: The International Standards System and Basic Human Rights 4–5 (1996) (summarizing the history of the founding of the ILO under the League of Nations in 1919 and its later incorporation into the United Nations).

28. *See id.* at 5 (quoting the ILO Constitution and linking workers' rights to the promotion of social justice); *see also* INT'L LAB. ORG., *Text of the Constitution: Preamble*, http://www.ilo.org/ilolex/english/constq.htm (last visited Mar. 13, 2012) (stating that nations' failures to maintain proper labor conditions present obstacles to countries that seek to improve their own labor conditions).

29. *See* Bartolomei de la Cruz., *supra* note 27, at 5 (1996) (quoting the ILO Constitution and linking workers' rights to the promotion of social justice).

30. *See* Edward E. Potter, *The Growing Significance of International Labor Standards on the Global Economy*, 28 SUFFOLK TRANSNAT'L L. REV. 243, 246 (2005) (noting that China, India, and the United States have ratified few of the fundamental labor standards).

31. *See* INT'L LAB. ORG., *supra* note 28 (listing the 150 of the 183 member states that ratified Convention No. 87 and the 41 states that ratified Convention No. 154).

32. 29 U.S.C. §§ 151–169 (1935) (granting workers protection to exercise full freedom of association, self-organization, and designation of representatives of their own choosing).

33. *See* U.S. CONST. art. I, § 8, cl. 3 (vesting Congress with sole power to "regulate Commerce with foreign Nations"); *see also* Gibbons v. Ogden, 22 U.S. 1, 206–08 (1824) (holding that Congress has exclusive right to regulate trade and commerce between the United States and foreign nations).

34. See Paula Church Albertson, *The Evolution of Labor Provisions in U.S. Free Trade Agreements: Lessons Learned and Remaining Questions Examining the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)*, 21 STAN. L. & POL'Y REV. 493, 495 (2010) (describing the important role congressional authority plays in determining whether trade policy will be linked to labor policy).

Some theorists argue that transnational labor violations are best dealt with by local governments and industrial relations actors, including employers, employees, and unions because intervention by foreign actors undermines the sovereign right of national governments to regulate domestic labor policies.[35] Others advocate for a combination of public and private TDLR by rich nations with the cooperation of NGOs in order to improve and enforce labor regulations in developing countries.[36] The first framework for regulation is problematic, because it assumes that developing nations have crucial structures in place to address labor violations, including domestic laws recognizing the right to collective bargaining,[37] law enforcement agencies to investigate labor violations, and impartial judiciaries receptive to the legal rights of marginalized populations.[38] Second, when domestic governments ignore evidence of labor violations, the consequences for workers worldwide are severe. Outsourcing of manufacturing jobs causes higher levels of unemployment in wealthy nations, and workers in developing countries suffer when crucial labor standards are either absent or unenforced.[39] In the second framework, critics argue that TDLR would reinforce paternalist postcolonial or protectionist economic policies at the expense of the people living in developing nations.[40] If one of the goals of free trade is "to create new opportunities and higher living standards for families, farmers,

35. *Compare* Benjamin Davis, Note and Comment, *The Effects of Worker Rights Protections in United States Trade Laws: A Case Study of El Salvador*, 10 AM. U. J. INT'L L. & POL'Y 1167, 1214 (1995) (opining that in light of severe labor and human rights abuses, "sovereignty is a useless abstraction for workers who face economic coercion and state terror at the hands of a national elite"), *with* David Doorey, *In Defense of Transnational Domestic Labor Regulation*, 43 VAND. J. TRANSNAT'L L. 953, 966 (2010) (arguing that labor regulation is a question of sovereign autonomy).

36. *See* David M. Trubek et al., *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 LAW & SOC. INQUIRY 1187, 1196 (2000) (noting that international governments, organizations, NGOs, and social movements have influenced the establishment of international labor standards); *see also* Harvard Law Review, *Legal Tools for Altering Labor Conditions Abroad*, 118 HARV. L. REV. 2202, 2202–203 (2005) (characterizing efforts of foreign governments to regulate labor violations abroad as coordinated with non-state actors, including businesses, NGOs and transnational groups).

37. *See* BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 10 (2005) (stating that while many developing countries are concerned with improving labor standards, there are still those that deny workers' rights to collective bargaining and freedom of association); *see also* Edward Potter, *The Growing Importance of the International Labor Organization: The View from the United States*, *in* GLOBALIZATION AND THE FUTURE OF LABOUR LAW 356, 365 (John D.R. Craig & S. Michael Lynk, eds., 2006) (noting that prior to the passage of DR-CAFTA, the ILO performed an audit of all member nations' domestic labor laws to verify whether they were equivalent to the core ILO conventions).

38. *See* Kevin Kolben, *Transnational Labor Regulation and the Limits of Governance*, 12 THEORETICAL INQUIRIES L. 403, 419 (2011) (observing that judicial systems in developing countries are often dysfunctional); *see also* Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, 5 INT'L J. CONST. L. 211, 231 (2007) (asserting that "most social and political actors [in Guatemala] expect the justice system to be ineffective").

39. *See* Phillip R. Seckman, Note, *Invigorating Enforcement Mechanisms of the International Labor Organization in Pursuit of U.S. Labor Objectives*, 32 DENV. J. INT'L L. & POL'Y 675, 680 (arguing that all workers suffer when jobs are outsourced to the labor markets with the lowest standards).

40. *See* Doorey, *supra* note 35, at 966 (asserting that TDLR may undermine the positive aspects of low cost labor standards and interfere with national sovereignty in developing nations); *see also* Harvard Law Review, *supra* note 36, at 2202 (criticizing TDLR for potential paternalist or protectionist economic consequences in developing nations).

manufacturers, workers, consumers, and businesses,"[41] the United States and its FTA partners are currently failing individuals and communities in places like Guatemala, where 51% of the population lives on less than $2 a day and 15% on less than $1 a day.[42] The lack of consensus among UN member states as to minimum labor standards in an era of increased global trade has reduced the efficacy of the ILO conventions such that "conventions create no leveling effect on international labor standards unless all nations ratify them."[43] Therefore, the United States' refusal to ratify certain core ILO conventions poses obstacles to its long-term policy goals in enforcing TDLR policies in FTA partner countries.

A. The "Internationalized" Effort to Address Human Rights Violations in Guatemala

In the late 1940s and early 1950s, Guatemalan Presidents Juan José Arévalo and Jacobo Arbenz embarked on a policy of agrarian reform similar to the process that took place in Mexico whereby land was redistributed to peasant farmers and indigenous peoples were encouraged to form and join unions.[44] Even though both leaders were elected in democratic, free elections, the United States viewed the agrarian policies as harbingers of communism.[45] The United Fruit Company, a U.S.-based corporation, had lost substantial farmland to the Arbenz administration's expropriation of uncultivated land to peasants, and subsequently supported a U.S.-led overthrow of the Arbenz government in 1954.[46] While the United States maintained a hard line interventionist foreign policy toward Guatemala throughout the 20th century,[47] it would be misguided to place all blame on the United States and other international post-colonial powers in Latin America for the legacy of inequality in the region. The United States' troubled

41. *See Mission of the USTR*, OFF. OF THE U.S. TRADE REP., http://www.ustr.gov/about-us/mission (stating that the Office of the U.S. Trade Representative, a part of the Executive Office of the President, carries out American trade policy by developing and coordinating U.S. international trade, commodity, and direct investment policy and by overseeing negotiations with other countries).

42. *See* Bureau of W. Hemisphere Affairs, *Background Note: Guatemala*, U.S. DEP'T OF STATE, http://www.state.gov/r/pa/ei/bgn/2045.htm (Jan. 19, 2012) (reporting that Guatemala is the most populous country in Central America and has, according to the World Bank, one of the most unequal income distributions in the hemisphere).

43. *See* Edward E. Potter, *The Growing Significance of International Labor Standards on the Global Economy*, 28 SUFFOLK TRANSNAT'L L. REV. 243, 245–46 (2005) (noting that even the most widely ratified conventions regarding labor standards do not cover over half of the world's workers because China, India, and the United States have ratified few of the fundamental labor standards).

44. *See* PETER H. SMITH, DEMOCRACY IN LATIN AMERICA: POLITICAL CHANGE IN COMPARATIVE PERSPECTIVE 258–59 (2005) (describing President Arbenz's process of agrarian reform and encouragement of indigenous populations to participate in unions).

45. *See* BRYCE WOOD, THE DISMANTLING OF THE GOOD NEIGHBOR POLICY 156–57 (1985) (citing the end of the non-interventionist Good Neighbor Policy and the United States' subsequent aggressive anti-Communist stance in Guatemala and throughout Latin America).

46. *See id.* at 157(discussing the inequity alleged by the United Fruit Company after President Arbenz enacted a new Agrarian Reform Law).

47. *See* SMITH, *supra* note 44, at 258–59 (explaining the process of U.S.-supported installment of military government in 1954 and failure of Guatemalan political elite to include indigenous populations in national agenda).

history in the region compels respect for the thousands of Guatemalans employed at MNCs directing 38.5% of Guatemala's exports to the United States.[48]

Native ruling elites in Guatemala and throughout Latin America (typically light-skinned people of predominantly Spanish or other European descent)[49] have historically marginalized indigenous populations and labor activists as anti-government, in many instances suppressing the efforts of both groups with retributive violence and anti-union measures, thus prolonging the harm of colonialism and cultural hegemony into the postcolonial era.[50] The participation of both international and domestic elites in promoting "neo-liberal multiculturalism"[51] alongside economic reforms that fail to recognize the autonomy of indigenous groups keep these groups in subordinate positions in society and fail to address their objective of social and political inclusion.[52] The failure of the Guatemalan government to date to comprehensively address the collective rights of indigenous peoples[53] or even include them fully in the political process presents a unique opportunity for the judiciary or non-governmental actors to take the reins in continuing the "highly internationalized peace process" that brought an end to three decades of armed conflict.[54]

When labor violations become human rights abuses, international consensus is desperately needed. But there has been much opposition to elevating workers' rights to the level of human rights because "civil and political rights have traditionally been narrowly construed to exclude

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48. *See* Bureau of W. Hemisphere Affairs, *supra* note 42 (providing an overview of Guatemala and its relationship with the United States).

49. *Compare* Sieder, *supra* note 38, at 211 (examining exclusion of indigenous people from the political system in Guatemala emphasizing their lack of access to courts), *with* Donna Lee Van Cott, *Institutional Change and Ethnic Parties in South America*, 45 LATIN AM. POL. AND SOC'Y 1, 6–7 (2003) (analyzing increased representation of indigenous voters and candidates in national politics in many South American countries in the 1980s and 1990s). Evo Morales, an Aymara Indian, was elected president of Bolivia in 2005 and was reelected to a second term.

50. *See* SMITH, *supra* note 44, at 258 (2005) (citing history of suppressing unions following overthrow of Arbenz administration and installation of military government in 1954); *see also* Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U.J. INT'L L. & POL'Y 117, 149 (1993) (highlighting that merely six out of 300 factories owned by business-owning elites recognized unions).

51. *See* Charles R. Hale, *Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America*, 28 POL. & LEGAL ANTHROPOLOGY REV. 10, 21 (2005) (noting that international aid has promoted Euro-Guatemalan support of multicultural reform); *see also* Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, 5 INT'L J. CONST. L. 211, 214 (2007) (hypothesizing that "neo-liberal multicultural" policies recognizing the rights of indigenous peoples, along with neo-liberal economic policies initiated by the International Monetary Fund (IMF) and rich countries, actually undermine the rights of indigenous peoples in practice).

52. *See* MAYA BUVINIC & JACQUELINE MAZZA, SOCIAL INCLUSION AND ECONOMIC DEVELOPMENT IN LATIN AMERICA 22 (2004) (noting the gap between legislation aimed to foster social inclusion and its actual implementation); *see* Sieder, *supra* note 51, at 214 (suggesting that neo-liberal multiculturalism provides only minimal attention to the rights of indigenous people).

53. *See generally* RIGOBERTA MENCHÚ, I, RIGOBERTA MENCHÚ (1984) (recounting decades of government sponsored oppression of Guatemalan indigenous peoples); *see also* Sieder, s*upra* note 51, at 218–19 (linking the failure of proposed constitutional reforms addressing indigenous rights to racist campaigns aimed at "raising fears" of discrimination against the nonindigenous).

54. *See* Sieder, *supra* note 51, at 217–18 (detailing how small indigenous rights organizations issued demands to achieve agreements between the government and guerrillas).

trade union rights or expansively construed to undermine these rights."[55] The distinction between workers' rights and human rights in Latin America, particularly in Guatemala, is impractical. The struggles of indigenous Guatemalans, Guatemalan women and labor activists are intertwined. With little to no recognition of the cultural, political or social rights of indigenous peoples, MNCs have increased their presence in Central America and at the bargaining table in both international and domestic political arenas.[56] Arguably, all business is now international business, and the United States' aggressive pursuit of FTAs in Latin America demands an articulate labor policy that holds both MNCs and FTA partner governments accountable for labor violations.

B. The ILO's Inability to Enforce Labor Norms and Regulations

The ILO has a unique tripartite constituency in which governments, employers and workers are represented at agency meetings.[57] Article 19 of the ILO Constitution distinguishes between a convention (a binding multilateral treaty) versus a recommendation (a non-binding measure); in both cases, the member states vote on the adoption of the measure and a two-thirds majority is needed for acceptance.[58] Each member state is entitled to two government representatives, one employer representative and one representative for workers.[59] The ILO has promulgated more than 180 conventions and issued more than 190 recommendations; ratification of individual conventions ranges from as few as two countries to as many as 164 of the 183 member nations.[60] The ILO can bind states that have ratified its conventions, and the lack of

55. *See* HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION, ix (Colin Fenwick & Tonia Novitz, eds., 2010) (describing the traditional view of labor lawyers who believed the human rights law framework was not appropriate for labor law).

56. *See* Graciela Bensusan, *Labour Law in Latin America: The Gap Between Norms and Reality*, *in* LABOUR LAW AND WORKER PROTECTION IN DEVELOPING COUNTRIES 135, 138 (Tzehainesh Teklè ed., 2010) (emphasizing that the employer discretion inherent in corporate restructuring was the consequence of low levels of pre-existing protection under state enforcement in Guatemala).

57. *See Tripartite Constituents*, INT'L LAB. ORG., http://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm (last visited Feb. 27, 2012) (informing that the International Labor Organization is the only tripartite United Nations agency where governments, employers and workers are represented).

58. *See* Constitution of the International Labour Organization art. 19, June 28, 1919, 49 Stat. 2712, 15 U.N.T.S. 35 (ILO Constitution), http://www.ilo.org/ilolex/english/constq.htm (indicating that Article 19 of the International Labor Organization's Constitution categorizes requirements for conventions and recommendations, but both require a vote by the member states and a two-third majority for adoption).

59. *See id.* (detailing the four representatives that each member state may send to meetings of the General Conference of representatives).

60. Notably, the United States ratified only Convention No. 105, the Abolition of Forced Labor in 1991, 34 years after it was issued. *See* Harvard Law Review, *Legal Tools for Altering Labor Conditions Abroad*, 118 HARV. L. REV. 2202, 2205–06 (2005) (quoting the International Labour Organization's statistics on the range of ratifications of individual conventions).

consensus in ratification of its core conventions demonstrates the inability for the organization to effect meaningful change in labor regulations.[61]

The ILO does not have the express authority to issue sanctions against a member nation that has committed labor violations; the ILO Constitution provides only that the "Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith."[62] This patently vague language offers no technique for enforcement of the very standards the ILO seeks to promulgate. Moreover, the ILO does not expressly govern employers, and when FTAs lack mechanisms to redress labor violations, "workers suffer when their governments do not balance their labor rights against the competing rights of their employers."[63] Thus, the failure of governments to enforce domestic or international labor standards bolsters the power of MNCs in developing nations.

1. Workers' Rights Versus Human Rights

In post-conflict scenarios, governments are often woefully ineffective in protecting labor rights while simultaneously pursuing increased economic development. The Organization for Economic Cooperation and Development (OECD), an organization of (primarily) wealthy nations founded in 1961 to "help governments foster prosperity and fight poverty through economic growth and financial stability,"[64] has promulgated a set of guidelines for MNCs operating in developing nations.[65] Some scholars have proposed that globalization and increased competition have resulted in a "mutually supportive" relationship between trade liberalization

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61. See Claudia T. Salazar, *Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations Under the Alien Tort Claims Act*, 19 ST. JOHN'S J. LEGAL COMMENT. 111, 152 (2004) (summarizing the inability of the ILO to enforce labor regulations); see also Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 184 (recognizing extensive investigation into human rights abuses in Burma by the ILO but an ultimate lack of enforcement power).

62. *See* ILO Constitution, *supra* note 58, art. 33 (stating Governing Body's ability to recommend solutions to the Conference to compel compliance).

63. *See* John C. Knapp, *The Boundaries of the ILO: A Labor Rights Argument for Institutional Cooperation*, 29 BROOK. J. INT'L L. 369, 400 (2003) (showing the inadequacy of the ILO to protect workers due to its limited control over employers).

64. *See* ORG. FOR ECON. COOP. & DEV., http://www.oecd.org (presenting the OECD's objectives and methods for accomplishing such objectives).

65. See James Salzman, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769, 793 (2000) (criticizing OECD rights as an example of "boutique rights" that fail to confront human rights violations by MNCs).

and the core labor standards established by the ILO.[66] But others have noted that there is little correlation between adoption of labor standards in developing countries and their ability to attract foreign direct investment (FDI). In his analysis of the OECD's 1996 study, Bob Hepple found "[t]here is no correlation between aggregate real wage growth and the level of observance of core labor rights, such as freedom of association. . . . Host states that observe core standards are not significantly worse in attracting FDI than those that systematically abuse these standards."[67]

These findings reinforce the notion that governments and MNCs are still willing to engage (directly or indirectly) in the race to the bottom at the expense of workers. The data also provides a strong argument for increased involvement of "rich" countries like the United States in developing incentives for MNCs to comply with ILO standards[68] and form their own complementary internal codes of conduct. In Latin America in the 1980s and 1990s, the World Bank and the International Monetary Fund (IMF) promoted free trade and economic liberalization policies as mandatory courses of action if these countries were to become more democratic and thus gain international approval.[69] If FTAs and neoliberal economic policies are the norm in international business and trade, then the United States and other wealthy FTA nations will need to take the lead in protecting workers' and human rights through TDLR.

C. Free Trade and Labor: The Bipartisan Trade Promotion Authority, NAFTA and DR-CAFTA

The United States' decision not to ratify six of the eight core ILO standards is significant. The United States is one of seven major industrialized nations (along with Germany, France,

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66. *See* Kevin Banks, *The Impact of Globalization on Labor Standards*, *in* GLOBALIZATION AND THE FUTURE OF LABOUR LAW 77, 86 (John D.R. Craig & S. Michael Lynk, eds., 2006) (summarizing the OECD's 1996 study concluding that elevated labor standards increase growth and efficiency by improving skill levels and encourage innovation and higher productivity); *see also WTO Trade & Labor Standards*, FOREIGN POLICY IN FOCUS, http://www.fpif.org/reports/wto_trade_labor_standards (citing the United States' argument that linkages exist between trade and labor standards); *see also Trade and Labour Standards*, ORG. FOR ECON. COOP. & DEV., para 171, COM/DEELSA/TD(96)8 (Jan. 16, 1996) http://www.oecd.org/officialdocuments/public displaydocumentpdf/?cote=COM/DEELSA/TD(96)8&docLanguage=En (postulating that evidence favoring a mutually supportive relationship between trade reforms and labor rights is both clear and reliable).

67. *See* Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347, 349 (1999) (finding that observing core standards makes little difference in terms of attracting FDI); *see also* Robert M. Stern, *Labor Standards and International Trade*, http://141.211.144. 225/rsie/workingpapers/Papers426-450/r430.pdf (observing that empirical research indicates no connection between real-wage growth and observance of labor rights); *see also* Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61, 68–69 (2001) (noting that observing labor rights would not reduce advantages gained by providing cheap labor).

68. *See* Salzman, *supra* note 65, at 788–89 (2000) (pointing to data that provides an argument for increased involvement of affluent countries in ensuring compliance with ILO standards).

69. *See* PETER H. SMITH, DEMOCRACY IN LATIN AMERICA 119–20 (2005) (summarizing the economic crisis in the 1970s leading to adoption of neo-liberal economic policies in Latin America); *see also* Vlad Spanu, *Liberalization of the International Trade and Economic Growth: Applications for Both Developed and Developing Countries*, http://www.cid.harvard.edu/cidtrade/Papers/Spanu.pdf (illuminating the policies of the IMF in the 1980s and their role in economic liberalism).

Japan, Italy, the United Kingdom and Russia) that hold permanent seats in the Governing Body, the executive body of the ILO.[70] As a power-wielding member of the ILO, the United States should uphold the principles reflected in the eight core conventions, particularly with regard to international trade.[71] The United States has nonetheless retained the ability to determine labor standards and the level of enforcement on its own terms in negotiating FTAs with developing countries. In 2002, Congress passed the Trade Promotion Authority Act (TPA), establishing free trade as the instrument that "serve[s] the same purposes that security pacts played during the Cold War, binding nations together through a series of mutual rights and obligations."[72] The TPA is the definitive piece of legislation establishing objectives and norms for FTAs entered into by the United States.[73] The TPA highlights five "core" labor standards designed "to promote respect for worker rights and the rights of children consistent with the core labor standards of the ILO."[74] The United States' renewed commitment (at least its legislative commitment) to the ILO principles is significant because of its clear intent to aggressively seek FTAs with both developing and industrialized nations in the future.

NAFTA and DR-CAFTA are currently the only regional FTAs, but the United States is in negotiations with eight other nations to form the Trans-Pacific Partnership (TPP),[75] an agreement that would encompass an existing FTA with Peru[76] and expand trade with Pacific Rim nations. Scholars have criticized the labor provisions in CAFTA as inadequate duplicates

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70. *See* Patrick Macklem, *Labour Law Beyond Borders*, 5 J. INT'L ECON. L. 605, 617 (2002) (opining that conventions promulgated by the ILO are directly tied to the industrial histories of those states responsible for their formulation); *see also Governing Body*, INT'L LABOUR ORG., http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/governing-body/lang--en/index.htm (last visited March 4, 2012) (outlining the structure of the Governing Body, including its permanent member states).

71. *See* Marisa Anne Pagnattaro, *The Helping Hand in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 FLA. J. INT'L L. 845, 856 (2004) (advocating the United States' obligation to uphold core labor standards); *see also* Mary Jane Bolle, *Trade Promotion Authority Renewal: Core Labor Standards Issues: A Brief Overview*, CRS REPORT FOR CONGRESS (2007), http://www.national aglawcenter.org/assets/crs/RS22608.pdf (proposing the argument for upholding the core labor standards).

72. *See* 19 U.S.C. § 3801(b)(2) (2002) (stating that the expansion of international trade agreements is the "engine of economic growth"); *see also* Pagnattaro, *supra* note 71, at 854 (discussing how FTAs promote improved international labor conditions).

73. *See Panama Trade Promotion Agreement*, OFF. OF THE U. S. TRADE REP., http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa last visited March 4, 2011 (detailing the function of Trade Promotion Agreements in U.S. international trade as establishing free trade regulations); *see also* Pagnattaro, *supra* note 71, at 858 (defining the purpose of TPAs).

74. 19 U.S.C. §§ 3802(a)(6), 3813(6) (2002).

75. *See Trans-Pacific Partnership,* OFF. OF THE U.S. TRADE REP., http://www.ustr.gov/tpp (detailing the structure of the TPP and the countries involved). The TPP, if ratified, would include Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore and Vietnam.

76. The Obama Administration has pursued an ambitious agenda to expand free trade, most recently signing FTAs in October of 2011 with South Korea, Colombia and Panama, countries that ostensibly fit within the proposal for a TransPacific Partnership. *See* Binyamin Appelbaum & Jennifer Steinhauer, *Congress Ends 5-Year Standoff on Trade Deals in Rare Accord*, N.Y. TIMES, Oct. 13, 2011, at A1 (describing the effects of Congress passing three free trade agreements in October of 2011).

those set forth in previous FTAs with Jordan, Morocco, Singapore, Chile and Australia,[77] but the USTR's investigation into labor violations in Guatemala may be a positive outcome borne out of the failures of the NAALC, the "side" agreement to NAFTA intended to deal with labor violations. Incorporating labor provisions into FTAs instead of relegating them to ancillary legal documents may ultimately help to address violations as a condition of doing business with partner nations.

1. The NAALC as a "Side" Agreement: Failures and Missed Opportunities Lead to an Enhanced Role for Nonstate Actors in Creating and Enforcing Labor Policy

At the time of NAFTA's ratification, Mexico had ratified six of the eight core ILO conventions; the United States, however, had signed only one, the Abolition of Forced Labor.[78] When NAFTA was ratified, labor experts in Canada became concerned that "deeper economic integration with the United States would inevitably lead to a deterioration in working conditions in Canada, as Canadian enterprises faced more competition from less regulated southern states with lower wage rates and levels of unionization."[79] Moreover, the NAALC "does not establish enforceable international standards by which to measure or redress labor rights abuses."[80] Though an important step in creating external oversight for labor violations, the NAALC has been characterized as having greater "symbolic" value as "the first trade agreement to establish contractual rights and obligations with trade sanctions provisions, regarding violations of labor standards," than practical impact.[81] Maquiladoras operating in Mexico in the 1990s established a dominant presence in the country, creating jobs in a stagnant economy and creating a work environment with little regard for workers' rights.[82] NGOs investigated reports of blatant sex discrimination against women, including mandatory pregnancy screenings and refusals to hire

77. *See* SETH PIPKIN, WRITTEN IN INVISIBLE INK: A CASE STUDY ON THE POLITICS OF FREE TRADE REFORM AND LABOR REGULATION IN GUATEMALA 13–14 (2006) (explaining critics' view that agreements like those of Chile and Singapore would not work for countries in Central America because those countries are poorer and less adept at enforcing labor laws); *see also* Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 FORDHAM INT'L L.J. 386, 387–88 (2006) (criticizing DR-CAFTA labor provisions as inadequate); *see also* Harvard Law Review, *Legal Tools for Altering Labor Conditions Abroad*, 118 HARVARD L. REV. 2202, 2214–15 (2005) (noting that the agreements of CAFTA, Morocco, Singapore, Chile and Australia are modeled after Jordan's agreement and suffer from the same flaw, which is that there is no threat of discipline to ensure each country will comply).

78. *See Official titles of the Conventions adopted by the International Labour Conference*, INT'L LAB. ORG., http://www.ilo.org/ilolex/english/conventions.pdf (last visited Mar. 1, 2012) (noting that the Abolition of Forced Labour Convention was adopted by the ILO in 1957).

79. See Kevin Banks, *The Impact of Globalization on Labour Standards: A Second Look at the Evidence*, *in* GLOBALIZATION AND THE FUTURE OF LABOUR LAW 77 (John D.R. Craig & S. Michael Lynk, eds. 2006) (claiming that deeper integration with low wage countries would put economic pressure on Canada to lower its labor standards).

80. See Amy Belanger, Note and Comment, *Internationally Recognized Workers' Rights and the Efficacy of the Generalized System of Preferences: A Guatemalan Case Study*, 11 AM. U. J. INT'L L. & POL'Y 101, 107 (1996) (stating that although regional free trade agreements are increasing in usage, NAFTA, like the International Labour Organization, does not establish enforceable methods to protect workers).

81. *See* George Tsogas, Labor Regulation in a Global Economy 149 (2001).

82. *See generally* Susanna Peters, *Labor Law for the Maquiladoras: Choosing Between Workers' Rights and Foreign Investment*, 11 COMP. LAB. L.J. 226 (1990) (describing the practice of U.S. corporations moving their apparel operations to Mexico in the years leading up to the ratification of NAFTA).

women of childbearing age, even though these practices violated Mexican labor law.[83] NGOs have used the NAALC complaint process and served as plaintiffs' counsel in civil lawsuits against companies in Mexico to obtain relief for victims.[84] The NAALC is therefore useful on a case-by-case level, but it is not an instrument for broad enforcement.

2. DR-CAFTA's Structure for Investigation and Enforcement of Labor Violations

Similar to previous FTAs, CAFTA contains a provision that binds each of the ratifying nations to enforce its own labor laws.[85] In the past, labor advocates have criticized these "enforce your own laws standards" as wholly ineffective.[86] The USTR has requested consulta-

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83. *See A Job or Your Rights: Continued Sex Discrimination in Mexico's Maquiladora Section*, HUMAN RIGHTS WATCH (1998), http://www.hrw.org/legacy/reports98/women2/Maqui98d-03.htm#P265_55228 (arguing that Mexico's Maquiladora section has had continued sex discrimination that the Mexican authorities have failed to correct); *see also* Laurie J. Bremer, *Pregnancy Discrimination in Mexico's Maquiladora System: Mexico's Violation of Its Obligation Under NAFTA and the NAALC*, 5 NAFTA: L. & BUS. REV. AM. 567, 577 (1999) (stating that NGOs investigate reports of sex discrimination in Mexico because Mexican government agencies do not enforce anti-discrimination laws that are designed to protect women); *see also* Karsten Nowrot, *Symposium, Legal Consequences of Globalization: The Status of Non-governmental Organizations Under International Law*, 6 IND. J. GLOBAL LEGAL STUD. 579, 597 (1999) (discussing that NGOs are investigating and publicizing international law violations that force governments to notice recognized international standards).

84. *See* Lance Compa, *Assessing Assessments: A Survey of Efforts to Measure Countries' Compliance with Freedom of Association Standards,* 24 COMP. LAB. L. & POL'Y J. 283, 297 (2003) (citing the International Labor Rights Fund's efforts to campaign for workers rights using the NAALC and civil lawsuits); *see also* Nicole L. Grimm, Comment, *The North American Agreement on Labor Cooperation and Is Effects on Women Working in Mexican Maquilados*, 48 AM. U. L. REV. 179, 212–13 (1998) (explaining that several maquiladora-related petitions were filed alleging violations and that in one case the U.S. NAO found that "Mexican labor authorities had employed questionable practices.").

85. *See* Dominica Republic-Central America-United States Free Trade Agreement, U.S.-Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar., Aug. 5, 2004, http://ustr. gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (stating that "[a] [p]arty shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the [p]arties, after the date of entry into force of this [a]greement").

86. *See* Pagnattaro, *supra* note 77, at 432 (suggesting that the central deficiency in CAFTA's labor provisions is the lack of "meaningful enforcement provisions"); *see also Testimony Regarding the Central America Free Trade Agreement Before the H. Comm. on Ways and Means*, 108th Cong. 1 (2004), http://www.laborrights. org/creating-a-sweatfree-world/resources/10597 (statement of Bama Athreya, Deputy Director, International Labor Rights Fund) (stressing that because CAFTA does not direct countries to change their labor laws no substantial changes will result from the "enforce your own law" provisions); *see also Deliberate Indifference: El Salvador's Failure to Protect Workers' Rights*, HUMAN RIGHTS WATCH (Dec. 4, 2003), http://www.hrw.org/en/ reports/ 2003/12/03/ deliberate-indifference (reasoning that because none of the provisions are enforceable there are no meaningful consequences for violations).

tions with the Guatemalan government, a measure that constitutes "a formal dispute settlement procedure that may be invoked by the parties to DR-CAFTA . . . concerning any issue covered by the agreement."[87] Although this language is vague at first glance, it offered an open door for the U.S. government to certify the AFL-CIO's complaint and ultimately raise the issue with Guatemala. These consultations will take time, and they may ultimately serve a limited symbolic purpose in the transnational labor regulation movement. But the talks are an important preliminary step toward TDLR by the United States, a measure that would achieve its free trade goals while fulfilling an obligation to respect human rights in countries where it does business as a matter of customary international law.

III. Dialogue Between Labor Unions and Governments: The AFL-CIO as Nongovernmental Actor and Ally for Workers in Guatemala

The AFL-CIO has traditionally focused its efforts on protecting and maintaining the integrity of workers' rights within the United States,[88] but has historically supported organized labor worldwide, notably the mining strikes in apartheid-ruled South Africa in the 1980s[89] and, most recently, the efforts of Egyptian workers to protest against President Hosni Mubarak's passive indifference to high unemployment and inequality.[90] Unions are one of many different types of NGOs occupying an important role in establishing international fair labor policies.[91] NGOs "may not enjoy lawmaking power . . . but they clearly are able in some cases to constrain private behavior as effectively as sovereign commands."[92] In addition to their

87. *See* Chad Bond, *Selected Update on Trade Agreements in the Americas and Trade News Highlights From May 2010 Through July 2010*, 16 L. & BUS. REV. AM. 907, 908 (2010) (summarizing the process by which the United States utilized dispute resolution techniques in issuing its complaint against the Guatemalan government).

88. *See* Constitution, *Preamble*, AFL-CIO, http://www.aflcio.org/About/Exec-Council/AFL-CIO-Constitution/Preamble (establishing that the AFL-CIO was created to protect and represent the working people of America through a "free and democratic labor movement"); *see also* Our Mission and Vision, AFL-CIO, http://www.aflcio.org/About/Our-Mission-and-Vision (naming as one of the key tenants of the AFL-CIO's mission to "help lead a movement for social and economic justice in America and the world").

89. *See* International Labor Conference, 78th sess., 1991, Geneva, Record of Proceedings, 19/12 (1991) (voicing AFL-CIO's continued support for strikes in opposition to South African Apartheid policies); *see also* William Minter & Sylvia Hill, *Anti-Apartheid Solidarity in United States–South Africa Relations: From the Margins to the Mainstream*, *in* 2 INTERNATIONAL SOLIDARITY 798 (2008) (profiling various international and anti-apartheid efforts by the AFL-CIO to mobilize labor protests).

90. *See* James Parks, *Egypt's Workers Strike for Democracy and Rights*, AFL-CIO (Feb. 2. 2011), http://www.aflcio.org/Blog/Global-Action/Egypt-s-Workers-Strike-for-Democracy-and-Rights (reporting that the AFL-CIO supported labor strikes during Egypt's 2011 protests); *see also* Kareem Fahim & Mona El-Naggar, *Violent Clashes Mark Protests Against Mubarak's Rule*, N.Y. TIMES, Jan. 25, 2011, at A1 (reporting that high unemployment played a role in the 2011 Egyptian demonstrations); *see also* David Moberg, *AFL-CIO Backs Egyptian Worker Protests, Says Obama Policies Not Clearly "On Their Side,"* IN THESE TIMES, Feb. 10, 2011 (elaborating on the AFL-CIO's efforts to support organized labor in Egypt's 2011 popular uprising).

91. *See* Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies,* 9 AM. U.J. INT'L L. & POL'Y 117, 149 (1993) (linking growth in international free trade to expanded roles for workers' rights advocates in unions and other NGOs); *see also* Daniel H. Pink, *The Valdez Principles: Is What's Good for America Good for General Motors?*, 8 YALE L. & POL'Y REV. 180, 192–93 (1990) (arguing that corporate NGOs can promote socially responsible labor practices); *see also* Jason R. Wiener, *A New Globalization: Mediating the Role of Mediation in Enforcing International Fair Labor Standards*, 23 WIS. INT'L L.J. 205, 220–21 (2005) (listing examples of how different NGOs advanced socially responsible labor practices).

92. Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 969 n.18 (1996).

role in pressuring private corporations to comply with international and domestic labor regulations, NGOs monitor MNC compliance and report their findings publicly.[93]

In the United States, labor rights are enshrined in the National Labor Relations Act (NLRA)[94] and the Fair Labor Standards Act (FLSA),[95] laws that collectively established freedom of association, collective bargaining and a federal minimum wage as part of the New Deal legislation of the 1930s. Labor advocates have expressed the concern that free trade agreements result in loss of jobs in the United States and labor violations in FTA partner states.[96] These are legitimate concerns that are not necessarily in competition with each other.[97] In many ways, the AFL-CIO's complaint to DOL-OTLA intends to hold the United States accountable for its role in labor violations that occur in FTA partner nations as much as it seeks to urge the implementation of fair domestic labor policy in Guatemala.

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93. *See, e.g.,* Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 547–48 (2008) (encouraging third-party NGOs, like the Fair Labor Association, to use contract law to set core labor standards in written agreements with the multinational corporations); *see also* Larry Cat Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739, 1762–63 (2007) (discussing a report published by the National Labor Committee on labor violations of Jordanian labor law and international human rights norms by multinational corporations, including Wal-Mart); *see also* Compa, *supra* note 84, at 297 (lauding the International Labor Rights Fund's reports of child labor and discrimination against women).

94. *See* National Labor Relations Act, 29 U.S.C. §§ 151–69 (2012) (safeguarding the rights of employees to bargain, organize, and negotiate the terms of their employment and other protections).

95. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (2012) (establishing a federal minimum wage rate for all employers to pay their employees).

96. See Paula Church Albertson, *The Evolution of Labor Provisions in US Free Trade Agreements: Lessons Learned and Remaining Questions Examining the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)*, 21 STAN. L. & POL'Y REV. 493, 494 (2010) (highlighting the response of the Labor Advisory Commission for Trade Negotiations and Trade Policy that proposed CAFTA legislation would result in "deteriorating trade balances, lost jobs, and worker rights violations"); see also Eli J. Kirschner, Note, *Fast Track Authority and Its Implication for Labor Protection in Free Trade Agreements*, 44 CORNELL INT'L L.J. 385, 386–87 (2011) (taking into account the labor advocates' concerns over the American anticipated job losses and the delineation of labor standards); see also David Bacon, *New Free Trade Agreements Threaten to Kill Jobs and Labor Rights*, TRUTH-OUT.ORG, Oct. 11, 2011, http://www.truth-out.org/new-free-trade-agreements-threaten-kill-jobs-and-labor-rights/1318363783 (criticizing President Barack Obama's optimistic promises based on the outcomes from prior Free Trade Agreements).

97. *See* Marisa Anne Pagnattaro, *The Helping Hand in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 FLA. J. INT'L L. 845, 855 (2004) (demonstrating that labor advocates are, "for the most part, not opposed to globalization").

A. History of the Labor Movement and MNC Presence in Guatemala

The AFL-CIO's complaint is unique because it motivated the first instance where the United States has charged a trade agreement partner with labor violations,[98] but it is not the first time that international trade mechanisms have been utilized to address labor violations in Guatemala. The United States has a lengthy history of self-serving transnational labor policy and enforcement that often intermingled with its business interests in Guatemala. Despite its agreement to adhere to the inter-American non-interventionist Good Neighbor policy of the 1930s and 1940s,[99] the U.S. government maintained strong ties to the United Fruit Company (UFCO),[100] a corporation that regarded the sovereign territories of Latin America as their "own private fiefdoms"[101] where UFCO was a "law unto itself."[102]

During the Cold War, the United States pursued an aggressive interventionist agenda throughout Latin America aimed at stemming Soviet influence in the region and "bolster[ing] inter-American support and solidarity."[103] In Guatemala, the U.S. Central Intelligence Agency sponsored a coup of the democratically elected government, replacing it in 1954 with a military dictatorship that targeted unions through intimidation and violence.[104] In the late 1970s and early 1980s, the ruling government (varying between military and military-controlled civilian government) engaged in the systematic disappearance of anywhere from 100,000 to 200,000 people, the majority of whom were indigenous Guatemalans.[105] During this period and following the end of the civil war, the Guatemalan judiciary was largely unresponsive to claims filed

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98. *See* Press Release, Office of the U.S. Trade Representative, United States Trade Representative Kirk Announces Labor Rights Trade Enforcement Case Against Guatemala (July 30, 2010), http://www.ustr.gov/about-us/press-office/press-releases/2010/july/united-states-trade-representative-kirk-announces-lab (alleging that the Guatemalan government is failing to effectively enforce its labor law relating to the right of association, the right to organize and bargain collectively, and acceptable conditions of work).

99. *See* BRYCE WOOD, THE DISMANTLING OF THE GOOD NEIGHBOR POLICY Introduction, at ix–xiv (1985) (describing the Good Neighbor Policy as a "nonintervention and noninterference" policy whereby the United States "agreed not to send armed forces" to any of 20 Latin American nations unless military assistance was requested).

100. *See* NICK CULLATHER, SECRET HISTORY: THE CIA CLASSIFIED ACCOUNT OF ITS OPERATIONS IN GUATEMALA, 1952–1954 19 (2006) (asserting that the Truman administration regarded the United Fruit Company as an ally against a possible communist uprising in Guatemala during the 1950s); *see also* Richard H. Immerman, *The CIA*, *in* GUATEMALA, THE FOREIGN POLICY OF INTERVENTION 81 (1982) (detailing the United States' protest on behalf of the United Fruit Company of the Agrarian reform in Guatemala).

101. *See* PETER CHAPMAN, BANANAS: HOW THE UNITED FRUIT COMPANY CHANGED THE WORLD 1–2 (2007) (noting that the United States identified most small states in Central America as "banana republics").

102. *See id.* (stressing that the United Fruit Company was more powerful than many nation states).

103. *See* PETER H. SMITH, DEMOCRACY IN LATIN AMERICA 84 (2005).

104. *See* CHAPMAN, *supra* note 101, at 7 (identifying the role of the United Fruit Company in supporting the military coup of Jacobo Arbenz, furthering the United States' anticommunist policy in Latin America and the Caribbean); *see also* Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies,* 9 AM. U.J. INT'L L. & POL'Y 117, 136 (1993) (citing active U.S. role in implementing military rule contributing to the suppression of organized labor); *see also* A. John Radsan, *An Overt Turn on Covert Action*, 53 ST. LOUIS L.J. 485, 498 (2009) (concluding that Guatemalan President Jacobo Arbenz Guzman's aggressive agrarian reform was the main reason for the CIA-sponsored coup).

105. *See* Compa, *supra* note 104, at 137 (describing the numerous human rights violations a brutal military campaign amassed against indigenous peoples).

claims filed by indigenous peoples or Guatemalan labor rights advocates because the judiciary was not independent of military influence.[106]

In the late 1980s, labor rights advocates petitioned the United States Trade Representative (USTR) under the Generalized System of Preferences (GSP)[107] to review documented assassinations, torture and arrests of trade union leaders, finally garnering an affirmative response from Congress in 1992.[108] Despite initial resistance to the idea of U.S. intervention, the USTR ultimately found that Guatemala was "taking steps" to remedy labor violations, and would therefore be allowed to keep its preferential status under GSP on a provisional basis.[109] In 1993, following a period of civilian rule, President Jorge Serrano staged an *auto-golpe* (self-coup), and the military once again overtook the central government.[110] The United States supported the Guatemalan military in a "stabilizing" effort that resulted in the killings of thousands, the majority of whom were labor activists or indigenous people assumed to be participants of a numerically small guerrilla movement.[111] The historical intermingling of U.S. interests in Guatemalan politics undoubtedly had a role in the USTR's decision not to revoke Guatemala's GSP status.[112] President Clinton would later apologize in 1999 for the United States' support of right-wing military governments in Guatemala, asserting that the United States "was determined to remember the past but never repeat it."[113]

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106. *See* Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, 5 INT'L J. CONST. L. 211 (2007) (characterizing Guatemalan judiciary as "hostile" toward prospective indigenous plaintiffs).

107. The GSP is a program administered by the USTR whereby exports from select developing countries are exempt from duties with the objective of promoting economic development in those countries. *See* OFF. OF THE U.S. TRADE REP., http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp (last visited Apr. 2, 2012) (explaining the intention behind the GSP).

108. *See* Compa, *supra* note 104, at 139–41 (1993) (noting that the persistent efforts of U.S. labor advocates ultimately led to congressional action); *see also* Lance Compa & Jeffrey Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LABOR LAW & POL'Y 199, 211 (2001) (indicating that advocates detailed the numerous arrests and assassinations of trade union activists in the first four GSP petitions).

109. *See* Compa, *supra* note 104, at 142 (explaining that Guatemala petitioned for an extended review period in March 1993, but remained a GSP beneficiary because of an unrelated delay in USTR's decision); *see also* U.S. TRADE REP., *Kantor Announces Results of 1992 GSP Reviews: Emphasis on Worker Rights Is Underscored*, No. 93-42 (June 25, 1993) (stating that the USTR will review Guatemala's labor rights practices after a short time period).

110. See Compa, *supra* note 104, at 143–44 (explaining that Serrano dissolved the Guatemalan Congress and Supreme Court); *see also* Tracy Wilkinson, *Leader Ousted in Guatemala: Latin America: The Army Ends the Nation's Crisis by Forcing out Embattled President Who Seized Total Power,* L.A. TIMES, June 2, 1993, at A1, http://articles.latimes.com/1993-06-02/news/mn-42535_1_absolute-power (detailing the coup and its failure).

111. *See* Compa, *supra* note 104, at 137 (summarizing effort of the military to suppress organized labor movement in Guatemala and target indigenous peoples concentrated in the coastal highlands).

112. *See* MARTHA L. COTTAM, IMAGES AND INTERVENTION: U.S. POLICIES IN LATIN AMERICA 36–44 (1994) (providing an account of U.S. political interest and influence in Guatemala in the 1950s); *see also* Compa, *supra* note 104, at 145–46 (1993) (stating that U.S. economic interest in Guatemala may have been a factor in determining the GSP labor rights petition's result).

113. *See* John M. Broder, *Clinton Offers His Apologies to Guatemala*, N.Y. TIMES, Mar. 11, 1999, at A1, http://www.nytimes.com/1999/03/11/world/clinton-offers-his-apologies-to-guatemala.html (explaining that the United States' support of right-wing governments in the Guatemalan civil war that contributed to the death of approximately 200,000 Mayans was a mistake).

In 1996, following the end of the civil war, the transitional government in Guatemala ratified ILO Convention No. 169, addressing: "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live."[114] The language of this convention reflects the ILO's broader commitment to the linkage of indigenous workers' rights to economic human rights. In ratifying this convention, Guatemala seemingly came to terms with the truth that it had for years subverted an ethnic group below the ruling class in order to further the national goal of economic growth and development.[115] In practice though, the Guatemalan judiciary has failed to resolve or even respond to claims from indigenous Guatemalans that they or their loved ones suffered harm during and after the civil war.[116] Although the treaty has been widely ratified throughout Latin America, critics "rightly view it as a mechanism for reconstituting the hegemony and legitimacy of weak states and fragile democracies, rather than signifying a genuine governmental commitment to guarantee rights to indigenous peoples."[117] The case of Guatemala, therefore exemplifies the contention that international labor standards are limited in their efficacy without substantive enforcement mechanisms.

1. The Role of NGOs in Pressuring Investigation of Violations and Enforcement of Labor Standards Pursuant to CAFTA

After the ratification of NAFTA in 1994, it became clear to labor advocates in the United States that free trade was a policy that the United States would inevitably seek to engage in with other countries to satisfy multiple economic objectives. In response to the ratification of DR-CAFTA in 2004, the AFL-CIO unequivocally stated its opposition to the FTA: "the lack of international labor and environmental standards in free-trade agreements encourages multinational corporations to shift their production plants to locations where such [minimum labor] standards either do not exist or are not enforced."[118] The AFL-CIO cogently identified existing

114. International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Jun. 27, 1989), http://www.ilo.org/ilolex/english/index.htm (recognizing the disparate amount and nature of the rights which indigenous people possess compared to those of the other people of the country); *see also* Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, 5 INT'L J. CONST. L., 213–14 (2007) (summarizing Guatemala and other Latin American countries' recognition of indigenous rights through ratification of Convention No. 169 beginning in the 1990s).

115. *See* Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies,* 9 AM. U.J. INT'L L. & POL'Y 117, 137 (1993) (citing violent military campaign against numerically small guerrilla movement, resulting in killings and disappearances of more than 100,000 people, the majority of whom were indigenous); *see also* Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law*, 10 NW. U. J. INT'L HUM. RTS. 54, 60 (stating that Convention 169 has put the participation of the indigenous people at the forefront, making it necessary to get their permission before any relocation, any withdrawal or exploration of natural resources can occur).

116. *See* Sieder, *supra* note 114, at 223 (stating that many courts have struggled with the applicability of Convention 169 or they intentionally ignore it); *see also* Michael Holley, *Recognizing the Rights of Indigenous People to Their Traditional Lands: A Case Study of an Internally Displaced Community in Guatemala,* 15 BERKELEY J. INT'L L. 119, 141 (explaining that Convention 169 may be too flexible because it gives the government the option of enforcing the legislation as individual rights instead of collective rights).

117. *See* Sieder, *supra* note 114, at 214 (citing the criticisms of the ILO Convention No. 169).

118. *See* Marisa Anne Pagnattaro, *The Helping Hand in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 FLA. J. INT'L L. 845, 855 (2004) (quoting American Federation of Labor Congresses of International Organizations, 2004 IUC Report: Revitalizing American Manufacturing).

unfair labor practices in countries like Guatemala and DR-CAFTA's lack of enforceable labor standards as the two-pronged problem of FTAs. Long before negotiations for DR-CAFTA began, Guatemala's reputation for hostility toward organized labor was glaringly apparent to the United States and its other trading partners.[119] However, non-governmental actors have assumed primary responsibility in using available legal mechanisms to bring labor violations to the attention of domestic and foreign governments.[120]

What *should* the United States and other wealthy nations engaged in free trade with developing nations do to combat labor violations when labor is reduced to a commodity? If domestic governments are unwilling to regulate employers or investigate allegations of labor or human rights violations, why should the United States or other nations expend resources to monitor FTA partner nations' compliance with core labor standards? Amy E. Belanger argues that in pursuing FTAs with developing countries through preferential programs such as the GSP, the United States undertakes a normative role of conditioning preferential trade status on satisfactory labor practices:

> When a developing country is allowed to abuse its workforce, the benefits under GSP accrue to the business community at the direct expense of suppressed workers. Theories of comparative advantage in free trade falter when confronted with the egregious oppression of labor as an exploitable resource. Therefore, the rationale is that developing countries should not be allowed to exploit labor as a comparative advantage.[121]

In the late 1980s, the AFL-CIO joined the ILRF and several other labor and human rights groups in a lawsuit against the U.S. government for failure to monitor labor violations in Guatemala pursuant to the provisions in its GSP agreement.[122] The court found that the labor

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119. *See* Laura Glass-Hess, *Ready or Not, Here Comes DR-CAFTA: Comparing the Right of Association in Mexico, Guatemala, and El Salvador*, 35 GA. J. INT'L & COMP. L. 333, 365 (2007) (contrasting the treatment of labor movements in Mexico and Guatemala); *see also* Amy E. Belanger, Note and Comment, *Internationally Recognized Worker Rights and the Efficacy of the Generalized System of Preferences: A Guatemalan Case Study*, 11 AM. U.J. INT'L L. & POL'Y 101, 101–04 (1996) (listing series of state-sponsored human rights abuses, including government-justified raids and killings at Guatemalan factories in the early 1990s); *see also* Lupita Aguila, *Guatemala: A Dangerous Place to Be a Union Member*, LABOR NOTES (Dec. 29, 2009, 3:15 PM), http://labornotes.org/blogs/2009/12/guatemala-dangerous-place-be-union-member (discussing the United States' efforts to pressure Guatemala into adhering to labor laws).

120. *See* Compa, *supra* note 115, at 135–36 (describing efforts of labor and human rights advocates as a "systematic movement to expose worker rights violations" that "created new models for labor rights advocacy"); *see also* Kevin Kolben, *Integrative Linkage: Combing Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203, 225–26 (2007) (exploring the rise of the "private regulation" of labor rights in the transnational labor movement); *see also* Harvard Law Review, *Legal Tools for Altering Labor Conditions Abroad*, 118 HARV. L. REV. 2202, 2214–15 (2005) (commenting upon the increase in non-governmental activism to address labor law violations).

121. *See* Belanger, *supra* note 119, at 115 (noting Congress's rationale that developing countries should not benefit from the program by exploiting their own labor).

122. *See* Int'l Labor Rights Educ. & Research Fund v. Bush, 954 F.2d 745, 747 (D.C. Cir. 1990) (detailing the plaintiffs' claims and request for enforcement).

NGOs did not have standing. Judge Mivka filed a dissenting opinion conceding that while the human rights groups lacked standing, the labor rights groups had sufficient standing to assert the claim on behalf of the Guatemalan workers.[123] Conversely, the United States Trade Representative placed Guatemala's GSP status under review in 1995 after numerous complaints from NGOs, but Guatemala was never subjected to suspension or withholding of its GSP status "on the grounds that evidence of trade unionists victimized by arrests, beatings, and assassinations made a case for human rights violations, but not labor rights violations."[124] Because the court and the GSP split the issue, these complaints were never resolved for lack of justiciability.[125] In theory, labor rights are inextricably linked to human rights. The practical reality remains that labor violations are extremely difficult to resolve due to the bifurcation of the issue.

B. The Substance of the DR-CAFTA Complaint

The AFL-CIO in its Complaint charged the government of Guatemala with "serious and repeated failures . . . to effectively enforce its own labor laws" and urged the government to uphold its "commitment to 'respect, promote and realize' core workers' rights as outlined in the ILO Declaration on Fundamental Principles and Rights at Work."[126] The Complaint asserts that DOL-OTLA has jurisdiction to review these allegations pursuant to Article 16.6(1) of CAFTA because it "concerns 'any matter arising under this Chapter.'"[127] The Complaint avers these claims on behalf of five unions and a coalition of workers whose efforts to unionize were thwarted by the employer: the Union of Port Quetzal Company Workers (STEPQ); the Union of Izabal Banana Workers (SITRABI); the Union of International Frozen Products, Inc. Workers (SITRAINPROCSA); the Coalition of Avandia Workers; the Union of FRIBO Com-

123. *See id.* at 752 (Mikva, C.J., dissenting) (asserting that labor rights groups had standing to file claim on behalf of Guatemalan workers); *see also* Belanger, *supra* note 119, at 122 (1996) (discussing Chief Judge Mikva's argument that Congress specifically addressed the connection between trade benefits and injury in the GSP statute).

124. *See* Lance Compa, *Assessing Assessments: A Survey of Efforts to Measure Countries' Compliance with Freedom of Association Standards*, 24 COMP. LAB. L. & POL'Y J. 283, 290 (2003) (noting that economic and foreign policy concerns resulted in inconsistencies in labor rights decisions); *see also* Lance Compa and Jeffery S. Vogt, *Labor Regulation and Trade: Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LAB. L. & POL'Y J. 199, 215–16 (2001) (addressing the two reasons given by the UTSR for not finding Guatemala in violation).

125. *See* Compa, *supra* note 124, at 221 (stating that review of the complaints was closed and Guatemala was kept in the GSP program despite Guatemalan unionists because Guatemala was "taking steps" in compliance with GSP labor requirements).

126. *See* Public Submission to the Office of Trade & Labor Affairs (OTLA) under Chapters 16 (Labor) and 20 (Dispute Settlement) of Dominican Republic-Central America Free Trade Agreement (DR-CAFTA): *Concerning the Failure of the Government of Guatemala to Effectively Enforce Its Labor Laws and Comply With Its Commitments Under the ILO Declaration of Fundamental Principles and Rights at Work*, at 2 (Apr. 23, 2008) (The Complaint) (noting that labor conditions in Guatemala have remained unchanged or worsened since the ratification of the trade agreement).

127. *See id.* at 4 (alleging that the Guatemalan government failed to enforce its domestic laws with respect to freedom of association, the right to collectively organize and bargain, and provide acceptable working conditions); *see also* Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), art. 16.6(1), Aug. 5, 2004, http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text (stating that a party may request to consult with another party by delivering a written request to the other party's appointed contact point with respect to matters governed by this Chapter).

pany Workers (SITRAFRIBO); and the Federation of Food and Similar Industries Workers of Guatemala (FESTRAS).[128] The Complaint alleges that the employers

1. refused to bargain collectively with union members in violation of Article 51 of the Guatemalan Labor Code;
2. fired members of the unions' executive committees in violation of Article 223(d);[129]
3. engaged in "high-pressure" campaigns to force workers to cease their affiliation with the union using threats and incentives in violation of Article 62(c) of the Labor Code;[130]
4. failed to contribute to Social Security in violation of Article 100 of the Guatemalan Constitution and Article 102 of the Labor Code[131]; and
5. failed to pay the required one month severance to terminated employees in violation of Article 82 of the Labor Code.[132]

Under DR-CAFTA, a FTA partner that "fail[s] to effectively enforce its labor laws, through recurring course of action or *inaction*, in a manner affecting trade between the Parties"[133] is subject to investigation by a FTA partner country. This language is identical to that in all other FTAs previously ratified and currently under negotiation pursuant to TPA.[134] Thus, a cause of action exists against a trade partner for a failure to enforce domestic labor laws and cre-

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128. *See* The Complaint, *supra* note 126, at 2–3 (asserting that the five cases represent a small number of the many labor law violations in Guatemala).

129. Article 223(d) requires a court order before terminating a member of a union executive committee. *See* The Complaint, *supra* note 126, at 14–15 (Apr. 23 2008).

130. *See* The Complaint, *supra* note 126, at 15 (stating that an employer may not force or try to force workers to withdraw from or join a union or legal group).

131. *See* The Complaint, *supra* note 126, at 15 (explaining that employers and workers are required to contribute to the Social Security system and that employers are also required to keep and submit payroll records to IGSS). In addition to failing to contribute the employer portion to the national social security fund, the employers were also charged with exempting and confiscating employee contributions.

132. *See* The Complaint, *supra* note 126, at 15 (Apr. 23, 2008) (stating that workers must receive a severance payment of one month salary for each year of continuous service).

133. *See* Dominican Republic-Central America-United States Free Trade Agreement, art. 16.2, Aug. 5, 2004, Office of the United States Trade Representative (emphasis added), http://www.ustr.gov/sites/ default/files/uploads/ agreements/ cafta/asset_upload_file320_3936.pdf (enumerating parties' rights to enforce labor laws under DR-CAFTA).

134. *See* MARY JANE BOLLE, CONG. RESEARCH SERV., RS 22823, OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS 3–4 (2008) (discussing the "template language" found in all FTAs created after 1993); *see also* Paula Church Albertson, *The Evolution of Labor Provisions in US Free Trade Agreements: Lessons Learned and Remaining Questions Examining the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)*, 21 STAN. L. & POL'Y REV. 493, 496 (2010) (stating that such language is found in all the FTAs the U.S. negotiated under the TPA).

ates an affirmative duty for FTA partners to respond to alleged transnational labor violations.[135]

C. Significance of the Complaint for International Law and Labor Policy

The Obama administration's choice to charge Guatemala with labor violations pursuant to DR-CAFTA is a significant departure from the United States' labor policy in disputes arising under NAFTA. Critics of NAFTA have noted that in some cases, the United States' national labor laws were more lax than those of Mexico or Canada, and at the time of NAFTA's signing, the U.S. had ratified only one of the ILO core conventions.[136] At the time of NAFTA's signing, Mexico had ratified six of the eight core ILO conventions, and Canada had ratified four.[137] Developing countries that have higher levels of ratification than their wealthy FTA counterparts criticize the United States for its perceived hypocrisy in failing to commit to international labor standards.[138] Arguably, the United States has shown a commitment to reciprocal TDLR by including labor clauses in multilateral FTAs that theoretically bind the United States in upholding its own labor laws. However, the GSP is a *unilateral* instrument that confers benefits to recipient nations eager to improve their standing in the global marketplace.[139] Labor provisions in DR-CAFTA and other FTAs "provide for enforcement of each country's existing labor laws, but not for harmonization."[140] Moreover, the United States' current system of dealing with labor violations through FTA labor provisions is inadequate. Laura Glass-Hess pinpointed the problem of FTAs in Latin America and the failure of governments to uphold their treaty obligations as a matter of international law in her discussion of the

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135. *See* Albertson, *supra* note 134, at 495–96 (emphasizing the importance of congressional language in FTAs with regard to enforcing domestic labor laws); *see also* Eli J. Kirschner, *Fast Track Authority and Its Implication for Labor Protection in Free Trade Agreements*, 44 CORNELL INT'L L.J. 385, 400 (2011) (noting the important role domestic labor laws play under FTAs and the 2002 TPA).

136. *See* Lance Compa, *NAFTA's Labor Side Accord: A Three-Year Accounting*, 3-SUM NAFTA L. & BUS. REV. AM. 6, 7 (1997) (acknowledging foreign labor rights advocates' concern regarding the U.S. deregulatory model of labor relations); *see also* Katherine A. Hagen, *Fundamentals of Labor Issues and NAFTA*, 27 U.C. DAVIS L. REV. 917, 923–24 (1994) (asserting that the United States, unlike Mexico, had not ratified most major ILO conventions at the time of the NAFTA signing).

137. *See ILOLEX: Database of International Labour Standards*, INT'L LABOUR ORG., http://www.ilo.org/ilolex/english/index.htm (last visited Apr. 2, 2012) (displaying a database that contains ratification information and ILO related documents).

138. *See* Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1559 (1998) (explaining that some developing nations view the United States' enforcement regime as a hypocritical attempt to impose upon them international standards that the United States has not ratified); *see also* Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LAB. L. & POL'Y J. 199, 235 (2001) (discussing that the United States is hypocritical for enforcing international standards when it has yet to ratify ILO conventions regarding workers' rights).

139. See Wendy N. Duong, *Ghetto'ing Workers with Hi-Tech: Exploring Regulatory Solutions for the Effect of Artificial Intelligence on "Third World" Foreign Direct Investment*, 22 TEMP. INT'L & COMP. L.J. 63, 109 (2009) (explaining that the United States has unilaterally linked improvement of labor conditions in developing countries to the granting of the GSP benefit of duty-free exports into the U.S. market); *see also* Victor E. Tokman, *The Labor Challenges of Globalization and Economic Integration, in* G-24: THE DEVELOPING COUNTRIES IN THE INTERNATIONAL FINANCIAL SYSTEM. 261, 280 (Eduardo Mayobre ed., 1999) (discussing that the GSP is a unilateral instrument allowing the United States to apply trade sanctions in cases of noncompliance with labor standards).

140. *See* Harvard Law Review, *Legal Tools for Altering Labor Conditions Abroad*, 118 HARV. L. REV. 2202, 2214 (2005) (discussing the impact of labor chapters in free trade agreements on labor reform).

said that "[t]he NAALC is a classic example of an FTA that, while bolstering trade and promising to support labor rights, has done almost nothing to improve working conditions or promote compliance with, and effective enforcement of Mexico's labor law."[141] As the DR-CAFTA Complaint proceeds, it will be interesting to see whether Guatemala will demand reciprocity from the United States with regard to its recognition of the ILO core conventions, or if the two countries will agree on minimal standards or enforcement mechanisms acceptable to both countries.

IV. MNCs and Corporate Social Responsibility in Developing Countries

For all of the failures in international labor regulation, there have been some success stories both in Latin America[142] and Southeast Asia, a region the United States has simultaneously criticized for its lack of regard for labor and human rights principles and with which it has simultaneously pursued an aggressive free trade agenda.[143] What are the benefits, if any, of internal regulation? MNC conduct in developing countries became a topic of public interest beginning in the 1970s during the era of the Iran-Contra crisis, apartheid in South Africa, and the establishment of neoliberal economic policies administered by military-backed leaders in Latin America.[144] U2 lead singer Bono and other public figures have promoted the fair trade movement by marketing clothing and other goods produced in accordance with international labor standards. As many companies have gone public, executives increasingly answer to shareholders concerned mostly with revenues. But sweatshop exposés or allegations of labor and

141. See Laura Glass-Hess, *Ready or Not, Here Comes DR-CAFTA: Comparing the Right of Association in Mexico, Guatemala, and El Salvador*, 35 GA. J. INT'L & COMP. L. 333, 367 (2007).

142. *See* Ximena Abogabir, *Manos Unidas (United Hands): Together, It Is Possible*, *in* CORPORATE SOCIAL RESPONSIBILITY IN THE PROMOTION OF SOCIAL DEVELOPMENT 189, 200 (Manuel E. Contreras ed., 2004) (describing the success of Manos Unidas in Chile); *see also* Lance Compa, *Corporate Social Responsibility and Workers' Rights*, 30 COMP. LAB. L. & POL'Y J. 1, 1 (2008) (citing success of corporate social responsibility programs, particularly in Mexico).

143. *See* Wolfgang Frank, *Successful Partnership for CSR Activities in Thailand: The Nike Village Development Project*, *in* CORPORATE SOCIAL RESPONSIBILITY IN THE PROMOTION OF SOCIAL DEVELOPMENT 71, 78–79 (Manuel E. Contreras ed., 2004) (illustrating the beneficial effects the Nike Village Development Project had on multiple communities in Thailand); *see also* Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 673 (1995) (citing success of RUGMARK campaign in reducing child labor at carpet factories in Asian nations).

144. *See* Commission on Transnational Corporations, Draft United Nations Code of Conduct on Transnational Corporations: Report to the Special Session, U.N. ESCOR, Annex II, at 12-27, U.N. Doc. E/1983/17/Rev.l (1983) (attempting to provide either mandatory requirements or voluntary guidelines for transnational corporations to follow); *see also* PETER H. SMITH, DEMOCRACY IN LATIN AMERICA 119–20 (2005); *see also* Compa, *supra* note 142, at 2 (citing ultimate failure of the Sullivan Principles, an external code of conduct implemented in South Africa where CSR was a "veneer" for continued racism perpetrated against workers at MNCs).

human rights violations can severely damage a company's image.[145] There is growing demand from shareholders and consumers alike that companies produce their goods ethically.[146]

Corporate social responsibility codes can be categorized into external and internal codes of conduct. External codes of conduct may be sets of norms promulgated by the ILO, OECD or other multilateral international organizations, including labor provisions in FTAs, or they may be standards created by non-governmental entities.[147] Alternatively, corporations such as Nike and Levi Strauss & Co. have created and adopted their own internal corporate codes of conduct that executives, managers, subcontractors, supervisors and workers are expected to follow.[148] Although NGOs have no power per se to enforce labor norms, they have nonetheless played a key role in pressuring corporations to adopt socially responsible codes of conduct and have had some success in monitoring compliance with these norms.[149] In recent years, corpo-

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145. *See* Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 962 n.17 (1996) (detailing the scrutiny Kathie Lee Gifford came under after it was discovered her clothing line was produced in sweatshops with underage workers); *see also* Barry Bearak, *Kathie Lee and the Sweatshop Crusade*, L.A. TIMES, June 14, 1996, at A1, http://articles.latimes.com/print/1996-06-14/news/mn-14955_1_kathie-lee-epstein (detailing the negative criticism Kathie Lee Gifford received from her use of sweatshops, and her efforts to combat the problem); *see also* Joseph P. Fried, *"Sweatshop" Again Tied to Celebrity*, N.Y. TIMES, Sept. 4, 1996, at B3, http://www.nytimes.com/1996/09/04/nyregion/sweatshop-again-tied-to-celebrity.html (detailing the discovery and backlash faced by four Brooklyn sweatshops that are used to produced clothing for celebrity clothing lines such as the Kathy Ireland label).

146. *See* Compa & Hinchliffe-Darricarrere, *supra* note 143, at 675 (framing corporate social responsibility as a new expectation from shareholders and consumers); *see also* Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 531 (2001-2002) (addressing the recent increase in corporate-initiated codes of conduct in the past 20 years); *see also* JOEL MAKOWER, BEYOND THE BOTTOM LINE (1994) (offering a broad survey of company initiatives).

147. *See* Compa & Hinchliffe-Darricarrère, *supra* note 143, at 663 (categorizing codes of conduct into external and internal codes and differentiating between multilateral government initiatives and privately drawn external agreements); *see also* Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 962 (1996) (explaining NGOs' efforts to independently monitor adopted corporate standards).

148. Compa & Hinchliffe-Darricarrère, *supra* note 143, at 674 (describing corporations self-supervised internal codes of conduct); *see also* NIKE, CODE OF CONDUCT, http://www.nikebiz.com/responsibility.html (establishing a ban in all Nike factories on forced labor and discrimination, establishing a safe healthy work environment and mandating age 16 as the minimum age of employment); *see also* LEVI STRAUSS & CO., PUBLIC POLICY, http://www.levistrauss.com /about/public-policy (outlining the companies' public policies in regards to trade, workers rights, the environment and equality).

149. *See* Marisa Anne Pagnattaro, *The "Helping Hand" in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 FLA. J. INT'L L. 845, 852 (2004) (describing corporate codes of conduct adopted by apparel manufacturers operating in Latin America following anti-sweatshop campaigns by NGOs). Another technique that plaintiffs have used in an attempt to hold MNCs accountable for human rights violations, the Alien Tort Claims Statute (ATS), 28 U.S.C. § 1350, has been utilized by plaintiffs alleging corporate collusion. Corporate liability under ATS has been analyzed extensively in recent scholarship; a more comprehensive discussion of the topic is beyond the scope of this article. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (finding cause of action under ATS for torture committed by former military government official); *see also* Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001) (denying cause of action under ATS for lack of personal jurisdiction); *see also* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (denying jurisdiction in ATS cases against corporations).

rate social responsibility (CSR) codes have been implemented particularly well in Latin America.[150] The apparel industry is one of the most prevalent employers in the region, having transferred most of its manufacturing to Latin America, the Caribbean, and Southeast Asia.[151] But most of these employers use subcontractors to manage the day-to-day regulations of their workforce.[152] Is internal regulation a viable option at MNCs where violations are less visible? What about corporations that make no claims to "demonstrate leadership in satisfying [their] responsibilities to our communities and to society?"[153]

A. Corporate Social Responsibility in Latin America

Labor rights experts caution that CSR codes should supplement, not replace, existing and future international labor standards.[154] Moreover, CSR and codes of conduct are "mostly a Northern phenomenon" and have not been implemented in South America, Southeast Asia, or other regions where the United States does business.[155] Nike adopted a corporate code of conduct that pledges to pay its workers the minimum wage in the locality where the worker is employed and issues a ban on child labor by mandating a minimum employment age of 16.[156] While these requirements sound favorable on their face, they are difficult to enforce if Nike corporate managers are lax in their monitoring of subcontractors. Moreover, the local minimum wage standards in many countries where Nike operates are abysmally low and are often

150. *See* Compa, *supra* note 142, at 1–2 (citing recent success of CSR programs in Latin America); *see also* Jeremy Blasi, *Kukdong: A Case of Effective Labor Standards Enforcement*, THE JOHN F. HENNING CENTER FOR INTERNATIONAL LABOR RELATIONS (Mar. 4, 2012), http://henningcenter.berkeley.edu/gateway/kukdong.html (crediting global support for the success at Kukdong International in Mexico).

151. *See* David Spener et al., *Introduction: The Apparel Industry and North American Economic Integration*, *in* FREE TRADE AND UNEVEN DEVELOPMENT: THE NORTH AMERICAN APPAREL INDUSTRY AFTER NAFTA 4 (2002) (noting the increase in garment manufacturing and export-oriented production in East Asia and Latin America); *see also* GARY GERREFI & OLGA MEMEDOVIC, THE GLOBAL APPAREL VALUE CHAIN: WHAT PROSPECTS FOR UPGRADING BY DEVELOPING COUNTRIES vii (2003), http://www.unido.org/fileadmin/media/documents /pdf/Services_Modules/Apparel_Value_Chain.pdf (examining globalization of the apparel industry in East Asia, Mexico and the Caribbean).

152. *See* JANET L. ASHERSON, IOE HELPING EMPLOYERS MANAGE SAFE WORK WITH CONTRACTORS 3 (April 2011), http://www.ioe-emp.org/fileadmin/user_upload/documents_pdf/policy_area/osh/2011_IOE_Helping_Employers_-_Manage_safe_work_with_contractors_April_2011.pdf (stating that companies may hire contractors to help with day-to-day tasks); *see also* LEVEL WORKS LIMITED, WAGES, WORKING HOURS AND CHILD LABOR IN INDIA 5 (Jan. 2009), http://www.level-works.com/India-Paper.pdf (articulating the network of subcontractors used in the global apparel industry).

153. *See* RÉMI CLAVET ET AL., GOVERNANCE, INTERNATIONAL LAW & CORPORATE SOCIAL RESPONSIBILITY 61 (2008) (concluding that corporate social responsibility codes should not attempt to overrule local laws and regulations); *see also* Compa & Hinchliffe-Darricarrère, *supra* note 143, at 676 (quoting Levi Strauss Mission Statement).

154. *See* CLAVET ET AL., *supra* note 153, at 61 (concluding that corporate social responsibility codes should not attempt to overrule local laws and regulations).

155. *See* Lance Compa, *Corporate Social Responsibility and Workers' Rights*, 30 COMP. LAB. L. & POL'Y J. 1, 5 (2008) (noting that most CSR codes are drafted by the United States or European nations).

156. *See* Nike Code of Corporate Conduct, *supra* note 148 (detailing the standards of Nike contractors' employees).

inadequate to support a family.[157] The ideal corporate code of conduct would stipulate minimum wages linked to a sustainable standard of living in workers' communities. Nike's wage standards, while in compliance with local labor laws, provide the bare minimum.

1. The Avandia Coalition and Jones Apparel Group: An Attempt at CSR Gone Awry

In the case of Guatemala, an attempt at CSR went horribly awry. The complaint details the thwarted efforts of the Avandia Coalition, a group of workers employed at the Avandia factory, the owners of which had contracted with the Jones Apparel Group (JAG).[158] In January 2006, JAG implemented a voluntary employee training program whereby workers could learn occupational safety guidelines, the foundations of labor standards, and familiarize themselves with the JAG corporate code of conduct.[159] By October 2006, Avandia management had terminated almost all of the workers who had participated in the project.[160] Following a string of firings, in July of 2006, Avandia and the Coalition participated in a mediated joint management-labor discussion of how the program could be implemented at the factory.[161] The mediations were ineffective, and the firings continued, until a group of terminated employees filed lawsuits with the Public Prosecutor.[162] The employer subsequently offered settlements to all of the employees who pressed their lawsuits in exchange for dropping the charges.[163] At the time the complaint was filed, the Guatemalan government had not investigated the entirety of the workers' complaints, even though the charges, if proven, constitute at least three violations of the Guatemalan labor law.[164] The Avandia Coalition's struggles stemmed partly from the refusal of the corporation's subcontractor to comply with the corporate code of conduct. What can be done when subcontractors do not follow mandates from corporate management? The Avandia Coalition's struggle to unionize and the employer's subsequent retaliation exemplify the inherent difficulties in internal regulation. Although other companies have been successful in overseeing daily operations at their factories, the Avandia workers' claim demonstrates the

157. See Lena Ayoub, *Nike Just Does It—and Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 407 (1990) (selecting Nike for case study analysis because Nike pays its factory workers below minimum wage, in violation of its own code of conduct); see also Bob Herbert, In America; *Nike's Boot Camp*, N.Y. TIMES, Mar. 31, 1997, at A15, http://www.nytimes.com/1997/03/31/opinion/nike-s-boot-camps.html?src=pm (explaining how Vietnamese women who work for Nike factories are not compensated enough to pay for three meals a day).

158. *See* Am. Fed'n of Labor & Cong. of Indus. Orgs. et al., Public Submission to the Office of Trade and Labor Affairs (OTLA) Under Chapter 16 (Labor) and 20 (Dispute Settlement) of the Dominican Republic–Central America Free Trade Agreement CDR-CAFTA) at 16 (2008), http://www.dol.gov/ilab/programs/otla/GuatemalaSubmission2008.pdf (describing the circumstances leading to AFL-CIO's complaint).

159. *See id.* at 3 (enumerating AFL-CIO's allegations against the Coalition of Avandia under the Dominican Republic-Central America Free Trade Agreement).

160. *See id.* at 16 (discussing how Avandia SA unjustly terminated nearly all the workers who participated in the JAG pilot program, including workers from two groups who tried to form a union after their co-workers were terminated).

161. *See id.* (describing the commencement of a planned series of mediated labor-management discussions).

162. *See id.* at 16–17 (summarizing the failed attempts of Avandia workers before seeking legal recourse).

163. *See id.* at 17 (detailing Avandia's efforts to force workers to sign releases accepting payment in exchange for abandoning their right to legal recourse).

164. *See id.* at 18–19 (specifying the rules and laws violated in Guatemala and the lack of meaningful government investigation).

problem with applying a universal approach in a country with a documented history of anti-union violence.

B. Enforcement and Compliance

Some theorists support independent monitoring programs as a method of encouraging CSR and as a means of enforcement at MNCs.[165] These programs have been successful in certain instances. David Doorey argues that external modes of regulation are successful when governments "increase the risk associated with being linked to a suppliers' abusive labor practices" because this measure would "motivate some MNCs to establish more sophisticated internal management systems designed to track and respond quickly to potentially embarrassing labor-related situations."[166] However, it remains to be seen whether an independent monitoring program would work in a country like Guatemala, which has a history of violence against organized labor as opposed to intolerance. DOL-OTLA and the Office of the U.S. Trade Representative would need to work to create a system of TDLR that engaged Guatemalan law enforcement in working to address ingrained patterns of worker abuse at MNCs and their subcontractors.

Although most workers in the United States do not face the grave threats that workers in Guatemala have endured, the global "race to the bottom" will persist worldwide if there is no incentive for governments to implement basic labor standards or address alleged labor violations.[167]

V. Conclusion

It is evident that in developing countries like Guatemala where union leaders and industrial workers have been targeted in retaliation for exercising their right to organize, workers' rights are inextricably tied to human rights. "Future FTAs can learn from what has and has not worked under DR-CAFTA in these areas, and provide a more comprehensive response to

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165. *See* William B. Gould IV, *Labor Law Beyond U.S. Borders: Does What Happens Outside of America Stay Outside of America?*, 21 STAN. L. & POL'Y REV. 401, 422 (2010) (lauding success of monitoring programs aimed at protecting employees' right to freedom of association at FirstGroup PLC); *see also* Louis Uchitelle, *Globalization, Union Style*, AM. PROSPECT, Nov. 8, 2010, at 11 (indicating that independent monitoring can achieve the same results twice as fast).

166. *See* David Doorey, *In Defense of Transnational Domestic Labor Regulation*, 43 VAND. J. TRANSNAT'L L. 953, 999 (2010) (stating that the increase of risk linked to abusive labor practice will encourage more sophisticated internal management systems).

167. *See* Amy E. Belanger, Note and Comment, *Internationally Recognized Worker Rights and the Efficacy of the Generalized System of Preferences: A Guatemalan Case Study*, 11 AM. U. J. INT'L L. & POL'Y 101, 136 (1996) (discussing how countries that refuse to comply with labor standards can still receive the benefits of compliance, such as duty-free tariff treatment for exporting to the United States).

ensuring labor rights."[168] The Obama administration's affirmative decision to utilize dispute resolution techniques (and the potential use of enforcement mechanisms) to improve labor standards in Guatemala is a needed step in the development of binding customary international labor standards and the recognition of workers' rights as universal human rights.

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168. See Paula Church Albertson, *The Evolution of Labor Provisions in US Free Trade Agreements: Lessons Learned and Remaining Questions Examining the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)*, 21 STAN. L. & POL'Y REV. 493, 511 (2010) (explaining that future FTAs can learn from CAFTA-DR in order to provide a more comprehensive response to ensuring labor rights).

Whaling in the Antarctic: Case Analysis and Suggestions for the Future

Casey Watkins*

I. Introduction

Antarctic whaling stirs up an emotional fervor among activists and the global public unmatched by any other environmental issue. This international controversy has been a source of tension between states for the past century,[1] and today it is part of popular culture, garnering significant media attention around the world.[2] The pertinent legal issues are encapsulated in the conflict between Japan and Australia. In 2008, the Australian Federal Court ordered the Japanese whaling company Kyodo Senpaku Kaisha, Ltd., to be "restrained from killing, injuring, [or] . . . taking any Antarctic minke whale[s] . . . , fin whale[s] . . . , or humpback whale[s] . . . in the Australian Whale Sanctuary."[3] The judgment has had no effect on Japanese whaling operations, largely because Australia's territorial claim to an Economic Exclusionary Zone

1. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 223–24 (1986) (indicating multiple sources of international and U.S. regulation of Japan's whaling practices). *See, e.g.*, W.M. BUSH, ANTARCTICA AND INTERNATIONAL LAW: A COLLECTION OF INTER-STATE AND NATIONAL DOCUMENTS, VOLUME III 11 (1988) (noting that 1934–35 "Australian Whaling Regulations elicited a Japanese protest").

2. The most prominent example of this popularization is the activities of the Sea Shepherd Conservation Society that claims to "use[ ] innovative direct-action tactics to investigate, document, and take action when necessary to expose and confront illegal activities on the high seas." *See Who We Are*, seashepherd.org, http://www.seashepherd.org/who-we-are/ (explaining the Sea Sheperd Conservation Society's purpose as a non-profit wildlife conservation organization). *See, e.g.*, PETER HELLER, THE WHALE WARRIORS: THE BATTLE AT THE BOTTOM OF THE WORLD TO SAVE THE PLANET'S LARGEST MAMMALS (1st ed. 2007) (storytelling about a crew's journey aboard a whale-saving ship); Nikkii Joyce, *Raw Truth of Ship Sinking That Shocked World*, SUNSHINE COAST DAILY (Queensl.), Nov. 5, 2011 at 40; *see also* John Vidal, *'Whale War' Kicks Off as Japan Sends Strengthened Fleet to Antarctica*, GUARDIAN, Oct. 18, 2011, http://www.guardian.co.uk/environment/2011/oct/18/whale-war-japan-antarctica (reporting on a whale activist's onboard conflicts against Japanese whaling vessels); *see also* AT THE EDGE OF THE WORLD (Endeavor Media & WealthEffectMedia 2008) (depicting the experiences of "pirates" that seek to protect whale species on the high seas); *see also Whale Wars* (Animal Planet broadcast Nov. 7, 2008–Aug. 8, 2011) (broadcasting shows about the Sea Shepherd Conservation Society's activities against Japanese whaling in the Antarctic).

3. *See* Humane Soc'y Int'l Inc. v. Kyodo Senpaku Kaisha Ltd. (2008) FCR 3, ¶ 55 (Austl.) (declaring an injunction against Kyodo from killing, injuring, or taking certain species of whales in the Australian Whale Sanctuary); *see also* Natalie Klein & Nikolas Hughes, *National Litigation and International Law: Repercussions for Australia's Protection of Marine Resources*, 33 MELB. U. L. REV. 163, 182–83 (2009) (discussing the Australian Federal Court's injunction against Kyodo for whaling activity in the Australian Whale Sanctuary).

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(EEZ) in the Southern Ocean is contested.[4] Moreover, any enforcement action would heavily strain diplomatic relations[5] and may violate the Antarctic Treaty System (ATS).[6]

In 2007, upon taking control of Parliament, the Australian Labor Party stated that it would take action to end Japanese whaling in the Australian Whale Sanctuary.[7] The new government even dispatched Royal Australian Air Force airplanes and a customs vessel to observe the Japanese whaling fleet and "assess[ ] the merits of taking . . . international legal [action] against the whaling."[8] The Labor government appointed a Special Envoy on Whaling who embarked on a global campaign seeking a diplomatic solution to end the disputed scientific whaling.[9] The culmination of the diplomatic campaign was the Proposed Consensus Decision presented at the 62nd meeting of the International Whaling Commission (IWC). It was a compromise that would have allowed Japan to take a small number of whales while ending scien-

4. *See* Joint Standing Committee on the National Capital and the External Territories, Parliament of Australia, *Island to Islands: Communications with Australia's External Territories* (1999) [6.1–6.4], http://www.aph.gov.au/house/committee/ncet/communication/report/chapter6.pdf (outlining the legal bases for Australia's sovereignty over Australian Antarctic Territories); *see also* Cheryl Saunders, *International Regimes and Domestic Arrangements: A View from Inside Out*, *in* REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 55, 82 (Margaret Young, ed., 2012) (noting that the judgment was not enforced and that international and bilateral negotiations continued over Japanese whaling operations in Australian-claimed territories).

5. The Federal Court of Australia originally denied Humane Society International's application for leave to serve process in Japan, stating that "Japan would regard any attempt by Australia to enforce Australian law against Japanese vessels and its nationals in the Antarctic EEZ to be a breach of international law on Australia's part and would give rise to an international disagreement with Japan." *See* Humane Soc'y Int'l Inc. v. Kyodo Senpaku Kaisha Ltd. [2005] FCA 664, ¶ 13 (Austl.) (ruling against Humane Society International by denying its application for leave to serve process in Japan against Kyodo); *see also* Natalie Klein, *Whales and Tuna: The Past and Future of Litigation Between Australia and Japan*, 21 GEO. INT'L ENVTL. L. REV. 143, 180–81 (2009) (noting that the judge considered the impact of the case on international relations between Australia and Japan in the court's 2005 denial of Humane Society International's application for leave to serve process in Japan).

6. The ATS prohibits military activity, mandates freedom of scientific investigation, does not recognize territorial claims, limits a state's jurisdiction to its own citizens, and requires that all disputes be settled peacefully. *See* The Antarctic Treaty, arts. 1-2, 4, 8, 11, Dec. 1, 1958, 12 U.S.T. 794, 402 U.N.T.S. 71 (outlining, *inter alia*, the peaceful mandate of the Antarctic Treaty and its dispute resolution protocol); *see also* Donald K. Anton, *False Sanctuary: The Australian Antarctic Whale Sanctuary and Long-Term Stability in Antarctica,* 8 SUSTAINABLE DEV. L. & POL'Y 17, 20 (2008) (noting the sovereignty issues that arise when exercising jurisdiction in the Treaty Area over non-nationals). *But see* Chris McGrath, Australia Can Lawfully Stop Whaling Within Its Antarctic EEZ 27 (May 6, 2010) (seminar paper delivered at the Australian National University in Canberra), http://www.envlaw.com.au/whale24.pdf (concluding that Australia can lawfully enforce anti-whaling laws against Japan).

7. *See* Press Release, Australian Labor Party, Fed. Labor's Plan to Counter Int'l Whaling (May 19, 2007), http://www.greghunt.com.au/Articles/downloads/rudd-garrett-2-yo-whaling-promise.pdf (announcing the Labor Party's strategy to stop illegal whaling); *see also* Anton, *supra* note 6, at 19 (discussing the Labor government's promise to halt unlawful whaling in the Australian Whale Sanctuary).

8. *See Customs Ship to Shadow Japanese Whalers*, ABC NEWS (Dec. 19, 2007), http://www.abc.net.au/news/2007-12-19/customs-ship-to-shadow-japanese-whalers/992974 (stating that the Australian government dispatched a custom ship to track Japanese whalers); *see also The World Today: Gov't to Monitor Japanese Whaling Fleet*, ABC NEWS (Dec. 19, 2007), http://www.abc.net.au/news/2007-12-19/govt-to-monitor-japanese-whaling-fleet/993220 (elaborating on how the Australian government will monitor Japanese whalers).

9. *See* Press Release, Australian Minister for Foreign Affairs and Trade, Action on Japanese "Scientific Whaling" (Jan. 4, 2008), http://www.usdoj.gov/opa/pr/Pre_96/October95/542.txt.html (declaring that the Australian government appointed a special envoy to oppose Japanese whaling); *see also* Glenn Milne, *Garrett Axes Globetrotting Whale Envoy*, SUNDAY TELEGRAPH, May 24, 2009, at L7, http://www.dailytelegraph.com.au/news/garrett-axes-globetrotting-whale-envoy/story-e6freuy9-1225715198271 (explaining why the Australian government recalled its special envoy on whaling).

tific permitting and bringing all whaling under the IWC's regulatory authority.[10] However, the negotiations soon broke down with the commission unable to reach an agreement.[11] In anticipation of the unsuccessful IWC negotiations, in December 2009 the Australian Environment Minister, Peter Garrett, issued an ultimatum to the Japanese government—stop whaling within six months or face litigation.[12]

On May 31, 2010, Australia instituted proceedings against Japan in the International Court of Justice (ICJ) alleging that Japan's Program under Special Permit in the Antarctic (JARPA II) whaling operation violates "obligations assumed by Japan under the International Convention for the Regulation of Whaling (ICRW), as well as its other international obligations for the preservation of marine mammals and the marine environment."[13] Australia instituted these proceedings before the negotiations at IWC/62 had even begun.[14] This may signal that Australia does not intend to reach a compromise with Japan and is now relying solely on the ICJ decision to settle the dispute. The outcome of the case, however, is far from certain and the complicated treaty framework controlling the issue poses a difficult interpretive challenge.

This article will examine the claims raised by Australia and make the case for an ICJ judgment absolving Japan of the allegations leveled in the application. I will argue that Australia's claims, although representative of a majority of the global community, are not solidly grounded in treaty law binding upon Japan. The solution to the problem of Japanese scientific whaling lies in compromise and negotiations, not in the ICJ. Section II will discuss the historical exploitation of global whale stocks that led to the creation of the IWC. Section III will discuss Japan's obligations under and compliance with international law, with particular focus on the International Convention for the Regulation of Whaling (ICRW),[15] the Convention on International

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10. *See* Int'l Whaling Comm., PROPOSED CONSENSUS DECISION TO IMPROVE THE CONSERVATION OF WHALES FROM THE CHAIR AND VICE-CHAIR OF THE COMMISSION, IWC/62/7rev (Apr. 28, 2010); *see also* Donald K. Anton, *Dispute Concerning Japan's JARPA II Program of "Scientific Whaling" (Australia v. Japan)*, 14 ASIL INSIGHTS 20 (2010), http://www.asil.org/files/insight100707pdf.pdf (noting that Australia filed a suit with the ICJ when the proposed compromised seemed unlikely to succeed). *See generally* David Jolly, *Under Pressure, Commission Discusses Lifting Whaling Ban*, N.Y. TIMES, June 21, 2010, at A12 (detailing the terms of the compromise made by anti-whaling nations to limit whaling).

11. *Flexibility Needed on Whaling Issue,* JAPAN TIMES, July 8, 2010, 2010 WLNR 13673967.

12. *See* Justin McCurry, *Australia Threatens Legal Action Over Japanese Whaling*, GUARDIAN, Feb. 19, 2010, at 27 (explaining that Australia threatened to file suit against Japan if negotiations to end whaling failed); *see also* Alison Rehn, *Japan, See You in Court*, DAILY TELEGRAPH, Dec. 17, 2009, at 13 (reporting that the Australian government gave Japan an ultimatum to ending whaling or face litigation in international court).

13. *See* Whaling in the Antarctic (Austl. v. Japan), 2010 I.C.J. 148, ¶ 2 (May 31, 2010), http://www.icj-cij.org/docket/files/148/15951.pdf (illustrating Australia's proceedings against Japan over Japan's JARPA II Program of whaling); *see also* Donald K. Anton, *Dispute Concerning Japan's JARPA II Program of Scientific Whaling (Australia v. Japan)*, 14 AM. SOC'Y INT'L L. 20 (2010) (discussing the dispute over Japan's annual Southern Ocean whale hunt that was prompted by Australia's Application Instituting Proceedings against Japan in the Registry of the International Court of Justice).

14. The 62nd Annual Meeting of the IWC took place in Agadir, Morocco, from June 21 to 25, 2010. *See* Int'l Whaling Comm., Chair's Summary Report of the 62nd Annual Meeting (June 2010), http://iwcoffice.org/_documents/commission/IWC62docs/IWC62_Chair's_Summary_Report%20FINAL.pdf. Australia began proceedings against Japan on May 31, 2010.

15. *See* International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (ICRW) (establishing a system of international regulations on the whale fisheries to guarantee the conservation and development of whale stocks).

Trade in Endangered Species of Wild Fauna and Flora (CITES),[16] and the Convention on Biological Diversity (CBD).[17] Finally, I will discuss the need for a new regulatory system that can effectively limit and monitor whaling and suggest a new market-based regulatory system that could effectively regulate and eventually eliminate commercial whaling.

II. Overexploitation, Regulation, and Scientific Research Whaling

A. Overexploitation and the Rise of the International Whaling Commission

The regulation of whaling has not always been an environmental issue; until the latter half of the twentieth century, it was energy and resource policy.[18] The whaling industry was once as important to global commerce as the petrochemical industry is today. The Western world was centrally dependent on whale oil for light,[19] and baleen was the functional equivalent of modern plastics.[20] Thousands of commercial goods from soap and paint to industrial lubricants and cosmetics contained whale products.[21] One commentator has likened whales to "huge chunks of gold floating in the ocean."[22]

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16. *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249 (CITES) (regulating the trade of various specimens of wild fauna and flora such as the order *Cetacea* in class *Mammalia*, which includes various whale species).

17. *See* Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993 (CBD) (explaining the strive to conserve biological diversity and its importance for evolution and to maintain the biosphere by guaranteeing the sharing of the benefits from using genetic resources).

18. *See* CHARLOTTE EPSTEIN, THE POWER OF WORDS IN INTERNATIONAL RELATIONS: BIRTH OF AN ANTI-WHALING DISCOURSE 1 (2008) (discussing that whale by-products were vital to the world's economies and societies); *see also* J.N. TONNESSEN & A.O. JOHNSEN, THE HISTORY OF MODERN WHALING 5 (R.I. Christophersen trans., 1982) (describing that one blue whale was capable of producing up to 52 tons of oil).

19. *See* CAROL CARRICK & DAVID FRAMPTON, WHALING DAYS 4 (1993) (describing how the whale industry was created because of high demand for whale oil throughout Europe); *see also* EPSTEIN, *supra* note 18, at 1 (noting that whale oil was used to light New York City and London).

20. *See* EPSTEIN, *supra* note 18, at 1 (observing that petroleum plays the same role today as baleen did a century ago); *see also* TONNESSEN & JOHNSEN, *supra* note 18, at 6 (explaining that because baleen plates were flexible and retained their elasticity, they were used to make many different products).

21. *See* PETER J. STOETT, THE INTERNATIONAL POLITICS OF WHALING 28 (1997) (explaining that everything from industrial materials to corsets were made from whale parts); *see also* Lisa Kobayashi, Note, *Lifting the International Whaling Commission's Moratorium on Commercial Whaling as the Most Effective Global Regulation of Whaling*, 29 ENVIRONS: ENVTL. L. & POL'Y J. 177, 179 (2006) (describing all the different products that used to be made from whales).

22. *See* JOHN BRAGINTON-SMITH & DUNCAN OLIVE, CAPE COD SHORE WHALING: AMERICA'S FIRST WHALEMEN, 11 (2008) (noting that whale oil was described as the most important commodity for the northern colonies); *see also* Kobayashi, *supra* note 21, at 179 (stating that because so many goods could be made from whales the whales were compared to the value of gold).

Most early whaling took place in coastal waters, spawning boom-and-bust whaling communities that developed as new whale populations were discovered[23] and then collapsed as coastal stocks were hunted beyond commercial viability.[24] With local stocks collapsing, whaling fleets began venturing farther out to sea in search of new whaling grounds, eventually reaching the Southern Ocean. Antarctic pelagic whaling began in 1904.[25] The rise of global industrial whaling, with factory ships capable of processing whales at sea, led to a dramatic increase in whales harvested.[26] By spending more time actively hunting and processing at sea, the industrialized whaling fleets avoided the few existing municipal regulations, and increased yields.[27] In 1930, for example, just 205 ships took 37,500 whales—flooding the marketplace and collapsing the global whale oil market.[28]

With global stocks in crisis, a collection of whaling nations began an effort to foster international cooperation to protect the whaling industry.[29] These efforts ultimately culminated in the signing of the International Convention on the Regulation of Whaling (ICRW) and creation of the International Whaling Commission (IWC) in 1946 "to provide for the proper con-

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23. *See* ANDREW DARBY, HARPOON: INTO THE HEART OF WHALING 21–22 (Rosanne Fitzgibbon ed., 2007) (describing a whale hunter who sailed to North America after extinguishing the whale populations near Australia); *see also* ALEXANDER GILLESPIE, WHALING DIPLOMACY: DEFINING ISSUES IN INTERNATIONAL ENVIRONMENTAL LAW 3 (2005) (commenting that commercial whaling took whalers from Spain and Paris to Iceland and Greenland and then eventually what would become New England); *see also* STOETT, *supra* note 21, at 28–29 (describing how whale hunters would hunt different species of whales or move to new areas once they overexploited an area).

24. *See* GILLESPIE, *supra* note 23, at 3 (providing that in the 1920s sperm whale stocks plummeted because sperm whales were prime hunting targets); *see also* Stephen M. Hawkins, *The United States' Abuse of the Aboriginal Whaling Exception: A Contradiction in the United States' Policy and a Dangerous Precedent for the Whale*, 24 U.C. DAVIS L. REV. 489, 510 (1990) (discussing that in 1908 commercial whaling led to scarcity in bowhead whale stock, causing commercial whalers to move).

25. *See* PAUL ARTHUR BERKMAN, SCIENCE INTO POLICY: GLOBAL LESSONS FROM ANTARCTICA 160 (2002) (explaining the practice of taking whales aboard a ship and processing them at sea). *See generally* TONNESSEN & JOHNSEN, *supra* note 18 (discussing the development of modern whaling methods).

26. *See* BERKMAN, *supra* note 25, at 160 (informing that from 1921 to 1923 10,760 whales where taken but that with the new ability to process whales at sea, 37,500 whales were taken from 1930 to 1931); *see also* Howard Scott Schiffman, *The Protection of Whales in International Law: A Perspective for the Next Century*, 22 BROOK. J. INT'L L. 303, n.21 (1996) (citing JOHAN NICOLAY TONNESSEN & ARNE ODD JOHNSEN, THE HISTORY OF MODERN WHALING (R. I. Christophersen trans., University of California Press 1982) (remarking that the substantial increase in whale oil production can be attributed to the invention of the stern slipway).

27. *See* BERKMAN, *supra* note 25, at 160 (stating that whalers avoided government regulations and increased whale oil production by processing whales at sea); *see also* Lisa Kobayashi, Article, *Lifting the International Whale Commission's Moratorium on Commercial Whaling as the Most Effective Global Regulation of Whaling*, 29 SPG ENVIRONS ENVTL. L. & POL'Y J. 177, 182 (2006) (recognizing that the ability to process whales at sea increased the amount of time whalers could be at sea); *see also American Experience: Into the Deep: America, Whaling & the World* (PBS television broadcast May 10, 2010) (recounting the history of whaling in New England and Cape Cod from the 17th century until the Civil War).

28. *See* BERKMAN, *supra* note 25, at 160 (reporting that the whales taken in 1930 produced 570,000 tons of whale oil); *see also* Judith E. Koons, *Earth Jurisprudence and the Story of Oil: Intergenerational Justice for the Post-Petroleum Period*, 46 U.S.F. L. REV. 93, 106 (2011) (noting that the decrease in sperm whale stock and the discovery of kerosene also contributed to the collapse of the whale oil industry).

29. The International Convention on the Regulation of Whaling was preceded by the 1931 Convention on the Regulation of Whaling, the 1937 International Agreement for the Regulation of Whales, the Protocol Amending the International Agreement for the Regulation of Whales, and the 1945 Protocol Amending the International Agreement of 1937 for the Regulation of Whaling.

servation of whale stocks and thus make possible the orderly development of the whaling industry."[30] The ICRW relies on its Schedule to regulate whaling.[31] The Schedule may be amended by a three-quarter majority vote and may regulate

> (a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits for each species; (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; (g) methods of measurement; and (h) catch returns and other statistical and biological records.[32]

Any changes made to the Schedule must be "necessary to carry out the objectives . . . of th[e] Convention" and must "provide for the conservation, development, and optimum utilization of the whale resources."[33] Amendments must also take the interests of whale product consumers and the whaling industry into account.[34]

The IWC struggled for over two decades to manage and preserve stocks by setting quotas for the total catch allowed in the Schedule.[35] Political tensions hampered efforts by the scientific committee to reduce quotas, and many whaling nations refused to abide by the existing quotas.[36] The political influence of the whaling industry over the IWC resulted in quotas being set well above the levels recommended by the scientific committee.[37] When an effort to

30. *See* ICRW, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 74 (illustrating the signing of the ICRW in 1946 for the purpose of conserving whale stocks and properly developing the whaling industry).

31. *See* ICRW, *supra* note 30, at art. 1 (explaining the reliance on the Schedule to regulate whaling); *see also* ICRW Schedule, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 74 (amended 2011).

32. *See* ICRW, *supra* note 30, at art. 5 (discussing what the ICRW Schedule regulates and how it is amended).

33. *See id.* (requiring that only amendments that are necessary to carry out the objectives of the ICRW should pass).

34. *See id.* (indicating that amendments of the ICRW must consider interests of the whaling industry).

35. *See* ALEXANDER GILLESPIE, WHALING DIPLOMACY: DEFINING ISSUES IN INTERNATIONAL ENVIRONMENTAL LAW 4–7 (2005) (outlining the ICRW 20-year struggle with setting whaling quotas); *see also* Howard S. Schiffman, *The International Whaling Commission: Challenges from Within and Without*, 10 ILSA J. INT'L & COMP. L. 367, 368 (2004) (exemplifying the failures of the International Whaling Commission to set sustainable whaling quotas).

36. *See* STEINAR ANDRESEN ET AL., SCIENCE AND POLITICS IN INTERNATIONAL ENVIRONMENTAL REGIMES: BETWEEN INTEGRITY AND INVOLVEMENT 44, 64 n.15 (Mikael Skou Anderson & Duncan Liefferink eds., 2000) (discussing the political pressure to appoint certain scientists and the removal of restrictions on whaling in order to entice countries to return to the IWC); *see also* Andrew J. Siegel, *The U.S.-Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment*, 19 GEO. WASH. J. INT'L. L. & ECON. 577, 582–83 (1985) (highlighting the IWC's inability to enforce whaling quotas).

37. *See* ARNE KALLAND, UNVEILING THE WHALE: DISCOURSES ON WHALES AND WHALING 115 (2009) (detailing the ignored repeated concerns by the scientific committee regarding the whaling quotas); *see also* Anthony Matera, *Whale Quotas: A Market-Based Solution to the Whaling Controversy*, 13 GEO. INT'L ENVTL. L. REV. 23, 27 (2000) (exposing the high whale harvesting quota's lack of sustainability).

decrease the quota was made, Japan, Norway, and Holland threatened to withdraw from the IWC; and in 1959, Holland and Norway followed through with their threats.[38] In a political maneuver designed to convince Norway and the Netherlands to rejoin, the IWC uncapped the harvest quota for the 1960–63 seasons.[39] In the Antarctic, the humpback and blue whale populations collapsed, and fin and sei whales became the new target species.[40] Whaling nations were demonstrating a "lack of human restraint in harvesting whales."[41]

B. The Move Toward Preservation and Moratorium

Starting in the 1960s, the IWC made a series of reforms aimed at correcting its inadequacies.[42] Among the most important was a change in the standards used to set commercial whaling quotas. Quotas had previously been based on the Blue-Whale Unit (BWU), a unit of measurement based on whale oil potential that did not take into account the abundance or scarcity of individual species or total populations.[43] This economically focused classification allowed whalers to hunt any species but ultimately encouraged the killing of large whales because of the "[lower] cost-per-unit-of-effort . . . involved in achieving one 'blue whale

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38. *See* GERRY NATZGAAM, THE MAKING OF INTERNATIONAL ENVIRONMENTAL TREATIES: NEOLIBERAL AND CONSTRUCTIVIST ANALYSES OF NORMATIVE EVOLUTION 171 (2005) (explaining the threat of departure and the subsequent withdrawal of Norway and the Netherlands from the IWC in 1959); *see also* Greenpeace Japan, *History of the International Whaling Commission (IWC) and Whaling in the Antartic* [sic] *Ocean*, http://www.greenpeace.or.jp/campaign/oceans/factsheet/7_en_html (charting the 1959 exit of Norway and the Netherlands from the IWC).

39. *See* GILLESPIE, *supra* note 35, at 5–6 (rationalizing the return of Norway and the Netherlands to the IWC with the expanded quotas); *see also* NATZGAAM, *supra* note 38, at 171–72 (presenting specific negotiations prompting Norway's 1962 return to the IWC).

40. *See* PAUL ARTHUR BERKMAN, SCIENCE INTO POLICY: GLOBAL LESSONS FROM ANTARCTICA 160 (2002) (documenting the hunting movement from one whale species to another due to overhunting); *see also* ZYGMUNT PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: A COURSEBOOK ON NATURE, LAW, AND SOCIETY 1014–15 (Erwin Chemerinsky et al. eds., 3d ed. 2004) (quoting Richard Ellis) (affirming that the decrease in specific whale populations led to an increase in fin and sei whale hunting).

41. *See* BERKMAN, *supra* note 40, at 162 (alerting readers of the lack of restraint in hunting whales and the unfortunate consequences that will follow). *See generally* Michael Bhargava, *Of Otters and Orcas: Marine Mammals and Legal Regimes in the North Pacific*, 32 ECOLOGY L.Q. 939 (2005) (stating that great white whales were severely depleted by overhunting in the 1960s).

42. *See* ELIZABETH R. DESOMBRE, GLOBAL ENVIRONMENT AND WORLD POLITICS 129–30 (2002) (noting that during the 1960s, the IWC gradually amended its whaling quotas to protect specific whale stocks facing extinction); *see also* GILLESPIE, *supra* note 35, at 8–9 (illustrating the events leading up to the IWC's abandonment of the BWU system).

43. *See* GILLESPIE, *supra* note 35, at 8–9 (detailing the IWC's failure to effectively manage whale stocks using the BWU); *see also* Japan Whaling Association, *History of Whaling*, http://www.whaling.jp/english/history.html#04 (stating, "[O]ne blue whale was equal to two fin, two-and-a half humpbacks, or six sei whales.").

unit.'"[44] As a result, populations of large, profitable whales were overexploited and in crisis.[45] In 1972, the IWC agreed to replace the BWU with a per species quota system beginning in the 1974/75 harvest season.[46]

The New Management Procedure (NMP) was adopted in 1974 as an attempt to bring commercial whaling under control and appease a growing faction of nations calling for a moratorium on commercial whaling.[47] The NMP divided whale stocks into three categories: initial management stocks, sustained management stocks, and protected stocks. Harvesting from protected stocks was prohibited because, although not regarded as endangered, these populations were estimated to be below 54% of pre-industrial whaling numbers and were considered too scarce for optimum utilization.[48] The scientific data needed to effectively implement the NMP proved more difficult to obtain than expected, and political deadlock soon developed.[49] As the IWC remained incapable of setting meaningful quotas, two factions began to develop within the commission: the "preservationist" states seeking a permanent ban on all whaling and "conservationist" states advocating controlled whale hunting.[50]

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44. *See* BERKMAN, *supra* note 40, at 174 (showing that although the blue whale population had been nearly wiped out, the IWC continued to employ the BWU system for economic reasons); *see also* Kaye Anable, *NAMMCO Defies the International Whaling Commission's Ban on Commercial Whaling: Are Whales in Danger Once Again?*, 6 TRANSNAT'L LAW 637, 641 (1993) (demonstrating that the IWC's high quotas and inaccurate BWU calculations led to increased whale killings rather than whale preservation).

45. *See* BERKMAN, *supra* note 40, at 174 (noting that whalers targeted particular whale species based on whether there was a minimal cost-per-unit-effort); *see also* MARC CIOC, THE GAME OF CONSERVATION: INTERNATIONAL TREATIES TO PROTECT THE WORLD'S MIGRATORY ANIMALS 142–43 (2009) (explaining that the BWU quotas caused the whaling enterprises to attempt to kill as many whales as possible before the quota was reached).

46. *See* NICO SCHRIJVER, DEVELOPMENT WITHOUT DESTRUCTION: THE UN AND GLOBAL RESOURCE MANAGEMENT 84 (2010) (indicating that the BWU was replaced by a quota system for each whale species after the Antarctic whale population neared extinction); *see also History of Whaling*, *supra* note 43 (stating, "[O]ne blue whale was equal to two fin, two-and-a half humpbacks, or six sei whales.").

47. *See* MICHAEL BOWMAN ET AL., LYSTER'S INTERNATIONAL WILDLIFE LAW 164–65 (2d ed. 2010) (stating that instead of endorsing the UN's recommendation of a ten-year moratorium on commercial whaling, the IWC implemented the NMP, where quotas were set on a stock-by-stock basis); *see also* ALEXANDER GILLESPIE, WHALING DIPLOMACY: DEFINING ISSUES IN INTERNATIONAL ENVIRONMENTAL LAW 9 (2005) (indicating that the IWC adopted the NWP to replace the BWU system and to thwart any potential for a moratorium on commercial whaling).

48. *See* ARNE KALLAND, UNVEILING THE WHALE: DISCOURSES ON WHALES AND WHALING 116 (2009) (defining the three categories used by the NMP to classify stocks); *see also* William C. Burns, *The International Whaling Commission and the Future of Cetaceans: Problems and Prospects,* 8 COLO. J. INT'L ENVTL. L. & POL'Y 31, 42–43 (1997) (stating that in 1974 the IWC created the New Management Procedure, which classified all stocks of whales into three categories).

49. *See* KALLAND, *supra* note 48 (discussing the difficulties with obtaining the necessary data required to successfully implement the NMP); *see also* Pat W. Birnie, *International Legal Issues in the Management and Protection of the Whale: A Review of Four Decades of Experience*, 29 NAT. RESOURCES. J. 903, 924 (asserting that the lack of necessary scientific data required to successfully implement the NMP was a factor that contributed to its ineffectiveness).

50. *See The International Whaling Regime: An Interview with Peter Stoett*, WORLD POL. REV. GLOBAL INSIDER (Aug. 8, 2011), http://www.worldpoliticsreview.com/trend-lines/9710/global-insider-the-international-whaling-regime (explaining the division between conservationist and preservationist countries); *see also* Gerry Nagtzaam, *The International Whaling Commission and the Elusive Great White Whale of Preservationism,* 33 WM. & MARY ENVTL. L. & POL'Y REV. 375, 410 (2009) (discussing the development of the preservationist and conservationist factions in response to the NMP's ineffectiveness).

Spurred on by the growth of the international environmental and animal rights movements, the faction of member nations pushing for a moratorium grew in strength and number.[51] The number of whaling nations also decreased as the industry began to make less economic sense and by 1976, Japan and the USSR were the only nations actively whaling in the Antarctic.[52] Australia began its shift from a "conservationist" position toward a "preservationist" position in 1978 following the release of the Frost Report—a government commissioned independent inquiry that recommended the cessation of whaling.[53]

The number of signatories to the ICRW continued to grow throughout the 1970s even as the number of whaling nations decreased.[54] Many of the new non-whaling signatories belonged to the "preservationist" camp, and in 1982 a three-quarter majority vote amended the Schedule—setting the quota for all commercial whaling at zero starting in 1986.[55] "The moratorium" as it is known, added paragraph 10(e) to the Schedule, which stated "catch limits for the killing for commercial purposes . . . from all stocks for the 1986 coastal and 1985/86 pelagic seasons and thereafter shall be zero."[56] The Schedule and the effects of the moratorium were to be reviewed no later than 1990 and modification of the policy or the establishment of new catch limits were to be considered "based upon the best scientific advice."[57]

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51. *See* KALLAND, *supra* note 48, at 116–17 (indicating that whaling was an early target for the growing international environmental and animal rights movements in the 1970s); *see also* Lisa Kobayashi, *Lifting the International Whaling Commission's Moratorium on Commercial Whaling as the Most Effective Global Regulation of Whaling*, 29 SPG ENVIRONS ENVTL. L. & POL'Y J. 177, 196–98 (2006) (referencing the effect of environmental and animal rights movements on the growth of the "preservationist" movement).

52. *See* KALLAND, *supra* note 48, at 117 (observing that the number of active whaling nations decreased in the 1970s); *see also* S.J. Holt, *Sharing the Catches of Whales in the Southern Hemisphere*, *in* CASE STUDIES ON THE ALLOCATION OF TRANSFERABLE QUOTA RIGHTS IN FISHERIES 322, 362–63 (Ross Shotton ed., 2001) (noting that from 1976 to 1986 Japan and the USSR were the only remaining pelagic-whaling nations).

53. *See* SYDNEY FROST, WHALES AND WHALING: REPORT OF THE INDEPENDENT INQUIRY (1978); *see also* Donald K. Anton, *Antarctic Whaling: Australia's Attempt to Protect Whales in the Southern Ocean*, 36 B.C. ENVTL. AFF. L. REV. 319, 325–26 (2009) (identifying a shift from heavy whaling practice and establishment of numerous onshore whaling stations in Australian colonies from the early 19th century through the 1960s, to a policy in favor of the protection of whales in 1978).

54. *See* KALLAND, *supra* note 48, at 117 (2009) (reporting that while the number of active whaling nations declined, IWC membership rose from 14 in 1972 to 39 in 1982); *see also* Michael Bowman, *"Normalizing" the International Convention for the Regulation of Whaling*, 29 MICH. J. INT'L L. 293, 295–96 (2008) (noting a dramatic increase in IWC membership during the 1970s, occasioned by an influx of States that lacked any vested interest in whaling but were primarily concerned with averting the perceived risk of whale extinction).

55. *See* ALEXANDER GILLESPIE, WHALING DIPLOMACY: DEFINING ISSUES IN INTERNATIONAL ENVIRONMENTAL LAW 11 (2005) (highlighting that despite objections from Norway and Japan about the lack of scientific justification and assertions that the IWC was violating its responsibilities, proposals to suspend indefinitely all commercial whaling gained the three-quarter majority required to amend the Schedule at the 34th meeting of the IWC in 1982); *see also* KALLAND, *supra* note 48, at 117 (noting the whalers' argument that the IWC had been hijacked by protectionists who largely ignored scientists).

56. *See* ICRW, ¶10(e), Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 74 (establishing a zero quota catch limit for commercial whaling for the 1986 coastal and the 1985/86 pelagic seasons).

57. *See id.* (stating that a comprehensive assessment of the effects of the zero quota provision would be made by the Commission by 1990 at the latest).

Because the ICRW framework is based on "conservationist" principles, the moratorium was achieved by setting quotas in the Schedule to zero, rather than implementing a true moratorium on commercial whaling.[58] The moratorium was initially billed as a precautionary stopgap measure to prevent overexploitation while the Revised Management Procedure (RMP), the replacement for the NMP, could be finalized and implemented.[59] A permanent ban on commercial whaling would likely violate the stated goal of the Convention to "make possible the orderly development of the whaling industry" and the Article V(2) requirement that Schedule amendments provide for "optimum utilization of whale resources."[60]

Japan argued that any moratorium, even one of short duration, was a violation of Article V(2) and formally objected to Schedule paragraph 10(e) in conformance with Article V(3).[61] However, after the United States threatened Japan with economic sanctions that would have cost its fishing industry over $200 million, Japan agreed to phase out commercial whaling and withdrew its objection in 1988.[62]

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58. *See* Connie Dugger & Lawrence Watters, *The Hunt for Gray Whales: The Dilemma of Native American Treaty Rights and the International Moratorium on Whaling*, 22 COLUM. J. ENVTL. L. 319, 329–30 (noting the exceptions to the zero quota moratorium for scientific research and aboriginal subsistence, which in effect allowed countries such as Japan and Norway to maintain their commercial whaling activities); *see also* Natalie Klein, *Whales and Tuna: The Past and Future of Litigation Between Australia and Japan*, 21 GEO. INT'L ENVTL. L. REV. 143, 201 (2009) (noting one perspective that the zero quota set by the IWC goes beyond the realm of conservation that was accepted by states in becoming parties to the ICRW and that there should be no interpretation of the ICRW that taking whales for research should be outlawed or limited).

59. *See* ARNE KALLAND, UNVEILING THE WHALE: DISCOURSES ON WHALES AND WHALING 122 (2009) (explaining the genesis of the moratorium and its role as predecessor to the RMP); *see also* A. W. Harris, *The Best Scientific Evidence Available: The Whaling Moratorium and Divergent Interpretations of Science*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 375, 389–91 (2005) (detailing the inadequacies that led to the implementation of the moratorium).

60. *See* ICRW, *supra* note 56, art. 5(2) (providing that the amendments to the Schedule will be interpreted to carry out the objectives of the Convention); *see also* Donald K. Anton, *Dispute Concerning Japan's JARPA II Program of "Scientific Whaling" (Australia v Japan): A Backgrounder*, AUSTL. NAT'L U. C. L., Research Paper No. 33-10, at 2 n.10, 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632722 (indicating that there is nothing in the Convention that expressly provides a power to permanently end whaling).

61. *See* International Whaling Commission, Chair Report of the 34th Annual Meeting of the International Whaling Commission, (July 24, 1982) (on file with the International Whaling Commission); *see also* A. W. Harris, *Making the Case for Collective Rights: Indigenous Claims to Stocks of Marine Living Resources,* 15 GEO. INT'L ENVTL. L. REV. 379, 380 (2003) (reporting that Japan was one of the four countries that formally objected to the moratorium, effectively precluding it from abiding by its provisions).

62. *See* Judith Berger-Eforo, Note, *Sanctuary for Whales: Will This Be the Demise of the International Whaling Commission or a Viable Strategy for the Twenty-First Century?*, 8 PACE INT'L L. REV. 439, 471 (1996) (opining that due to the strong economic ties between the United States and Japan, secret negotiations were held to help Japan avoid the sanctions for opposing the moratorium and subsequently saving it millions of dollars); *see also* Martha Howton, Note, *International Regulation of Commercial Whaling: The Consequences of Norway's Decision to Hunt the Minke Whale*, 18 HASTINGS INT'L & COMP. L. REV. 175, 185–86 (1994) (attributing the withdrawal of Japan's objections of the moratorium to threats by the United States of sanctions); *see also* David S. Lessoff, Comment, *Jonah Swallows the Whale: An Examination of American and International Failures to Adequately Protect Whales from Impending Extinction*, 11 J. ENVTL. L. & LITIG. 413, 430 (1996) (declaring that Japan withdrew its objection to the moratorium only after facing possible sanctions by the United States).

C. Japanese Scientific Research Whaling

Following the withdrawal of its objection to Schedule paragraph 10(e), Japan commenced a scientific whaling program known as JARPA.[63] Article VIII of the ICRW allows a signatory nation to issue special permits authorizing the taking of whales to its nationals "for the purpose[ ] of scientific research."[64] JARPA consisted of randomized lethal taking of 400±10% minke whales annually and simultaneous line transect sighting surveys conducted in several research areas within the Southern Ocean.[65] The JARPA program ended after the 2004–2005 season.[66]

In 2005, Japan commenced JARPA II, a second phase of its scientific research whaling program with targets of 850±10% minke whales, 50 humpback whales, and 50 fin whales.[67] The program began with a two-year feasibility study before the full-scale study began in 2007.[68] JARPA II also involves sighting surveys and non-lethal biopsy sampling.[69] After concerns about the proposed harvest of humpback whales were raised by the international community, particularly Australia, the United States, and New Zealand, Japan agreed to suspend that

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63. *See* JUN MORIKAWA, WHALING IN JAPAN: POWER, POLITICS AND DIPLOMACY 52 (2009) (noting the fact that Japan's cessation from commercial whaling coincided with its start in whale scientific research); *see also* Maya Park, *Japanese Scientific Whaling in Antarctica: Is Australia Attempting the Impossible?*, 9 N.Z.J. PUB. & INT'L L. 193, 194 (2011) (commenting on the fact that JARPA went into effect right after Japan's withdrawal of its objections to the moratorium).

64. *See* ICRW, *supra* note 56, art. 8(1) (stating that a government can grant to its nationals the authority to kill whales for scientific purposes).

65. *See* Int'l Whaling Comm., Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II)—Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources 6, IWC Doc. SC/57/O1 (hereinafter Int'l Whaling Comm. Plan), http://www.icrwhale.org/eng/SC57O1.pdf (indicating that expanded research culminated in a sample size of 400 whales per year.); *see also* Int'l Whaling Comm., Scientific Permit Whaling: Information on Scientific Permits, Review Procedure Guidelines and Current Permits in Effect 3, June 22, 2010 (Int'l Whaling Comm. Permits), http://www.iwcoffice.org/conservation/permits.htm (indicating that their research examined the effect of environmental changes and the role of whales in the ecosystem).

66. *See* Anton, *supra* note 60, at 1, 2 (explaining that JARPA'S eighteen-year reign, ending in 2005, amounted to 6,800 Antarctic minke whales being taken under).

67. *See* Chris McGrath Barrister, *Japanese Whaling Case Appeal Succeeds*, 23 EPLJ 333, 334 (emphasizing that JARPA II represented an increase in the number of targeted whales); *see also* Int'l Whaling Comm. Permits, *supra* note 65, at 4–5 (providing that JARPA II's samples focused on Antartic minke, humpback and fin whales).

68. *See* Int'l Whaling Comm'n, Scientific Contributions of JARPA/JARPA II and JARPN/JARPN II 1, June 2010, http://iwcoffice.org/_documents/commission/IWC62docs/62-20.pdf (noting that feasibility studies took place from 2005 through 2007).

69. *See* Int'l Whaling Comm'n Plan, *supra* note 65, at 2 http://www.iwcoffice.org/conservation/permits.htm (stating that non-lethal research techniques were also used in the sampling); *see also* Virginia Morrell, *Killing Whales for Science?,* SCIENCE, April 27, 2007, at 534, http://www.sciencemag.org/content/316/5824/532.full.pdf (commenting that biopsy samples conducted in JARPA II provided valuable data).

aspect of JARPA II.[70] To date, no humpback whales have been taken as part of the program.[71] The specific provisions of Article VIII and facts concerning JARPA II relevant to Australia's application are discussed in part II below.

III. Australia's Application Instituting Proceedings

Australia's application to the ICJ alleges that Japan breached three of its treaty obligations under international law. The first and primary focus of the complaint is the International Convention for the Regulation of Whaling (ICRW); the second is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); and finally, Australia claims that Japan violated its obligations under the Convention on Biological Diversity (CBD). Australia filed its memorial with the Court on May 9, 2011, and Japan filed its counter-memorial on March 9, 2012.[72] The pleadings will remain sealed "until their public release is ordered by the Court."[73]

Australia is seeking a declaration from the Court that "Japan is in breach of its international obligations in implementing the JARPA II program." Additionally, Australia is seeking an order from the Court requiring Japan to "cease implementation of JARPA II," rescind any special permits it has issued for scientific whaling, and "provide assurances . . . that it will not take any further action under JARPA II . . . until . . . [it] has been brought into conformity

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70. *See* John Minnis, *Wayne Law International Studies Lecture: Today's Greatest Threat to Whales…Scientists*, INGHAM COUNTY LEGAL NEWS, Mar. 3, 2011, http://www.legalnews.com/ingham/918210 (noting that Australia brought proceedings against Japan in the International Court of Justice); *see also* Peter H. Sand, *"Scientific Whaling": Whither Sanctions for Non-compliance with International Law*?, 19 FINNISH Y.B. INT'L L. 93, 107 (2008) (emphasizing that pressure from the international community lead to the program's suspension).

71. *See* Sand, *supra* note 70 (detailing Japan's agreement in 2007 to not capture any humpback whales); *see also* 2011 Int'l Whaling Comm., ANN. REP. app. 1 (demonstrating that humpback whales were not caught by Japan in 2010 or 2011).

72. *Australia Submits Japan's Antarctic Whaling Program to the International Court*, MERCOPRESS (Uru.), May 9, 2011, http://en.mercopress.com/2011/05/09/australia-submits-japan-s-antarctic-whaling-program-to-the-international-court; *see also* Joint Media Release, Attorney-General for Australia, One Step Closer to Ending Japanese Whaling (March 10, 2012), http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/First%20Quarter/10-March-2012—One-step-closer-to-ending-Japanese-whaling.aspx.

73. *Id.* The pleadings will most likely be made available following the first oral hearing.

with . . . international law."[74] Although the exact content of Australia's memorial to the Court is unavailable, it is expected to parallel much of the Australian legal scholarship on the subject, and the application to the court provides an outline of the legal theories advanced. Each of these is dealt with below.

A. Japan's Obligations Under the International Convention for the Regulation of Whaling

1. Jurisdiction Over Alleged Breach of Obligations Under the ICRW

The Court's jurisdiction concerning the ICRW is not likely to be a point of contention.[75] Both Japan and Australia have deposited declarations with the Secretary-General of the United Nations recognizing the ICJ's compulsory jurisdiction under Article 36 of the Statute of the International Court of Justice.[76] Under Article 36, both parties recognize the "jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; [and] (c) the existence of any fact which, if established, would constitute a breach of international obligation."[77] The parties also agree that "the nature or extent of the reparation to be made for a breach of an international obligation" may be decided by the Court."[78] The case at hand without much doubt involves a legal dispute concerning the interpretation of several treaties—the ICRW, CITES, and CBD. Australia also seeks to establish that Japan is conducting commercial whaling, an allegation that, if established, would constitute a violation of the ICRW.

Australia renewed its current Optional Clause declaration on March 22, 2002 and accepted compulsorily jurisdiction with three reservations. Two of the reservations are common among Optional Clause declarations and state that Australia does not recognize compulsory

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74. *See* Whaling in the Antarctic (Austl. v. Japan), Application Instituting Proceedings, para. 41 (May 31, 2010), http://www.icj-cij.org/docket/files/148/15951.pdf (reciting the remedies sought by Australia); *see also* Michael White & Alex Molloy, *Australian Maritime Law Update: 2010*, 42 J. MAR. L. & COM. 315, 317 (2011) (detailing Australia's claims that Japan breached its obligations under the International Convention for the Regulation of Whaling).

75. *See* Statute of the International Court of Justice, art. 36, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (presenting Australia and Japan's consents to the compulsory jurisdiction of the International Court of Justice); *see also* Donald K. Anton, *Dispute Concerning Japan's JARPA II Program of "Scientific Whaling" (Australia v. Japan)*, 14 ASIL INSIGHT 20, July 8, 2010, http://www.asil.org/files/insight100707pdf.pdf (stating that the Court's jurisdiction in relation to the ICRW is "certain").

76. *See* Statute of the International Court of Justice, *supra* note 75 (providing each country's declaration agreeing to the jurisdiction of the International Court of Justice); s*ee also* RENATA SZAFARZ, THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 84 (1993) (listing Australia and Japan as countries whose declarations of compulsory jurisdiction are in force).

77. *See* Statute of the International Court of Justice, *supra* note 75 (detailing each country's agreement to the jurisdiction of the International Court of Justice's jurisdiction for any question of international law or breach of international obligation).

78. *See* Statute of the International Court of Justice art. 36(2)(d), June 26, 1945, 59 Stat. 1055, T.S. No. 993, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (quoting the parties' agreement under Article 36(2)(d) of the Statute of the International Court of Justice).

jurisdiction if the parties have agreed to another method of dispute resolution or if the opposing party filed its Optional Clause declaration in the previous twelve months.[79] The third reservation states that Australia does not submit to compulsory jurisdiction for "any dispute . . . relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation."[80] This condition of Australia's declaration may be one of the reasons it has not chosen to raise many of the issues decided in previous domestic litigation.[81]

Reservations refusing jurisdictional consent for specific subjects are permitted, but these reservations are read reciprocally.[82] Much of the whaling conducted under JARPA II takes place in the Australia Whale Sanctuary within Australia's claimed Exclusive Economic Zone (EEZ), and the dispute relates to the exploitation of the maritime zone surrounding Australia's contested Antarctic Territory. Any attempt to allege violations by Japan of Australia's rights within its EEZ would likely face a jurisdictional challenge and ultimately be dismissed. Australia appears to have carefully selected the alleged violations of international obligations to prevent this reservation from coming into play.

Japan renewed its Optional Clause declaration on July 9, 2007 with two reservations.[83] Its reservations are very similar to Australia's two commonplace reservations. The first excludes any matter from the Court's jurisdiction that the parties have agreed "to refer for final and binding decision to arbitration or judicial settlement."[84] The second prevents "hit and run" tactics by withholding jurisdictional consent if the opposing party has filed its Optional Clause declara-

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79. *See* Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice Under Article 36, Paragraph 2, of the Statute of the Court, http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20I/I-4.en.pdf (stating two of Australia's three reservations with compulsory jurisdiction); *see also* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 258–61 (3d ed. 2010) (discussing common reservations made to Optional Clause declarations).

80. *See* Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice Under Article 36, Paragraph 2, of the Statute of the Court, *supra* note 79 (noting Australia's third reservation regarding compulsory jurisdiction).

81. Australia was also likely attempting to avoid any possibility of any judgment on the status of the Australian Antarctic Territory and its claims to the surrounding waters. *See* Anton, *supra* note 75, at 8 (suggesting that Australia refrain from asserting rights it may have had in the Antarctic, where much of Japanese whaling takes place, in order to prevent jeopardizing its Antarctic claim).

82. *See* Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 27 (July 6) (indicating that by virtue of reciprocity, Norway is able to invoke the reservation contained in the French Declaration on March 1, 1949); *see also* Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 949–50 (2006) (illustrating that treaties secure foreign rights and benefits and in return reciprocal international obligations are expected).

83. *See* Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice Under Article 36, Paragraph 2, of the Statute of the Court, *supra* note 79 (detailing Japan's reservations with the Optional Clause declaration).

84. *See id*. (providing Japan's declaration that cases decided by arbitration or judicial settlement are not within the ICJ's jurisdiction).

tion only for the specific issue in dispute or within the previous twelve months.[85] Because neither reservation is relevant concerning a dispute arising under the ICRW, the exercise of jurisdiction by the ICJ appears to be appropriate.

2. Good Faith and JARPA II

The main thrust of Australia's application is that Japan is conducting commercial whaling under the auspices of Article VIII scientific research, a violation of Japan's obligation of good faith under Article 26 of the Vienna Convention on the Law of Treaties (Vienna Convention).[86] Australia alleges that Japan has breached its obligation under Schedule paragraph 10(e) "to observe in good faith the zero catch limit in relation to the killing of whales for commercial purposes," and "the obligation under paragraph 7(b) of the Schedule . . . to act in good faith to refrain from . . . commercial whaling of humpback and fin whales in the Southern Ocean Sanctuary."[87]

Japan's Article VIII whaling may not be politically popular among preservationist nations, but the program does satisfy the good faith requirement. The good faith component of the *pacta sunt servanda* principle implies that "it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application."[88] A party must apply the treaty in a "reasonable way and in such a manner that its purpose can be realized."[89] Article 31 of the Vienna Convention further mandates that "[a] treaty shall be interpreted in

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85. *See id.* (noting Japan's agreement to keep cases that have compulsory jurisdiction only outside of the ICJ's jurisdiction).

86. *See* Whaling in the Antarctic (Austl. v. Japan), Application Instituting Proceedings, 2010 I.C.J. 148, paras. 8, 36 (May 31) (establishing Australia's argument that Japan violated its duty of good faith pursuant to the Vienna Convention by engaging in commercial whaling); *see also* Declarations Recognizing as Compulsory the Jurisdiction of the ICJ Under Article 36, Paragraph 2, of the Statute of the Court, *supra* note 79 (indicating Japan's acceptance of the International Court of Justice's jurisdiction); *see also* Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 (citing Article 26, *Pacta Sunt Servanda*, of the Vienna Convention on the Law of Treaties); *see also* Stuart Harrop, *Climate Change, Conservation and the Place for Wild Animal Welfare in International Law*, 23 J. ENVTL. L. 441, 458 (2011) (addressing Japan's use of the scientific research exemption to engage in commercial whaling).

87. *See* Whaling in the Antarctic, *supra* note 86, at para. 36 (maintaining Australia's position that Japan violated specific sections of the Schedule to the International Convention for the Regulation of Whaling when it engaged in commercial whaling).

88. *See* (Hungary/Slovakia), 1997 I.C.J. 7, 79 (Sept. 25) (Gabčíkovo-Nagymaros Project) (stating the Court's interpretation of good faith, which includes considering the purpose and intention of the parties entering into the treaty); *see also* Skaftouros v. United States, No. 11-0462-CV, 2011 WL 6355163, at *7 (2d Cir. Dec. 20, 2011) (quoting earlier cases that state that satisfaction of good faith requires the consideration of intentions of parties entering into the treaty).

89. *See* Gabčíkovo-Nagymaros Project, *supra* note 88, at 79 (explaining that good faith requires applying a treaty so that its purpose is attained); *see also* Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1910, 1913 (2005) (quoting earlier Supreme Court cases stating that a treaty should be construed liberally in order to satisfy its purpose).

good faith in accordance with the ordinary meaning . . . [of] the terms . . . in their context and in light of its object and purpose."[90]

Although Australia's application alleges a breach of Schedule paragraph 10(e), the implication is that Japan is conducting commercial whaling under the guise of scientific research—a breach of the duty of good faith. This is a common allegation leveled against Japan by many government officials from preservationist states, environmentalists, and scholars. Australia makes this point by placing emphasis on the phrase "for the purposes of scientific research" within its description of Article VIII and by using "good faith" when describing Japan's obligations.[91] Unfortunately, whaling engenders a high level of emotion among many scholars, scientists, and politicians that can color the analysis.[92] A more objective text-based analysis of the Convention and its binding aspects demonstrates that Japan is acting in good faith.

An evaluation of Japan's good faith interpretation will turn on the definition of scientific research and the Court's interpretation of Article VIII of the ICRW. Article VIII does not contain any specific prerequisites for issuance of special permits, and "science" is not defined in the Convention. Taking a textualist approach, the ordinary meaning of the term "science" should be used to analyze Japan's special permit whaling.[93] Webster's Dictionary defines "science" as "systematized knowledge derived from observation, study, and experimentation carried on in order to determine the nature or principles of what is being studied."[94] Japan's special permit whaling operation may be unpopular, and even morally reprehensible, but it does fall within the ordinary meaning of scientific research.

Japan's stated purposes for JARPA II are to "monitor the Antarctic ecosystem," understand and model competition among whale species, "elucidate temporal and special changes in stock structure," and collect data for the improvement of minke whale management procedures.[95]

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90. *See* Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (mandating a plain-meaning approach to treaty interpretation that considers the signing parties' intentions).

91. *See* Whaling in the Antarctic, *supra* note 86, at para. 9 (indicating that Australia's argument against Japan's conduct rests upon Article VIII and Australia's description of Japan's obligations under that treaty).

92. *See* William Aron, William Burke & Milton Freeman, *Scientists Versus Whaling: Science, Advocacy, and Errors of Judgment*, 52 BIOSCIENCE 12, 1138 (2002) (recognizing that emotional reactions to whaling may influence scholarly analyses).

93. *See* Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 710 (1998) (explaining the textualist and plain-meaning theories of interpreting treaties).

94. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1284 (Michael Agnes et al. eds. 4th ed. 2002).

95. *See* Institute of Cetacean Research, *Research Results: JARPA/JARPA II Research Results*, Dec. 2011, http://www.icrwhale.org/JARPAResults.html (enumerating the purposes of JARPA II for estimating biological parameters, elucidating the role of whales, the effect of environmental change, and the stock structure of certain whales); *see also* International Whaling Commission, *Scientific Permit Whaling*, http://iwcoffice.org/conservation/permits.htm (citing the objectives of JARPA II as defined by Japan as estimating biological parameters, elucidating stock structure, and examining the role of Antarctic whales and the effect of environmental changes on cetaceans).

The Institute of Cetacean Research (ICR), a nonprofit research organization sponsored and subsidized by the Japanese government, manages the research program.[96] The data collected as a result of JARPA II is made available to the public, reported to the IWC, as required by Article VIII(3) of the ICRW, and published in peer-reviewed journals.[97] In addition to making data available, the ICR welcomes the participation of international scientists.[98]

JARPA II whaling is conducted under a research protocol developed by the ICR along a scientifically derived track within two research zones.[99] The target animals are sampled randomly and line transect sighting surveys are conducted within the sample zones.[100] If Japan was conducting a commercial whaling operation, it would not take whales in this manner. Commercial whaling would take place in known high-density areas and would focus on harvesting the largest whales rather than a random sample, sight surveys, or non-lethal biopsy testing.[101] While critics of JARPA II claim that its catch numbers amount to a commercial harvest, Japan maintains that the sample size is "the minimum required for statistical analysis and [needed to] detect changes [in the whale stocks] including sexual maturity age, pregnancy rate and blubber thickness."[102] The minke whale target of 850±10% seems large but constitutes less than one-third of one percent of the estimated Antarctic minke whale population.[103] The sample size was

96. *See Overview and Purpose,* THE INSTITUTE OF CETACEAN RESEARCH, http://www.icrwhale.org/abouticr.html (last visited Mar. 9, 2012) (outlining the role of the institute in helping research Japanese whaling).

97. *See* The Institute of Cetacean Research, *Papers Published in Peer-Reviewed Journals*, http://www.icrwhale.org/JARPA91paper.html (providing a list of policy position papers published by the Institute of Cetacean Research); *see also* The Institute of Cetacean Research, *Scientific Documents to the International Whaling Commission (IWC) Scientific Committee and other Scientific Meeting[s] of Intergovernmental Organizations*, http://www.icrwhale.org/JARPApaper.html (exhibiting documents based on scientific presentations at the Institute of Cetacean Research).

98. *See* Aron, Burke, & Freeman, *supra* note 92, at 1138 (displaying the large number of whaling and non-whaling scientists who contribute to the JARPA II program).

99. *See* Plan for the Second Phase of the Japanese Whale Research Program Under Special Permit in the Antarctic (JARPA II)—Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources, 12–13, SC/57/01 (2005) (hereinafter JARPA II Plan) (demonstrating the future for Japanese whaling within the parameters of JARPA II).

100. *See id*. (describing the plan for the next phase of the JARPA II program including zone sampling); *see also* Donald R. Rothwell, *Australia v. Japan: JARPA II Whaling Case Before the International Court of Justice,* THE HAGUE JUSTICE PORTAL, July 10, 2010, http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Portal%20HJJ_Rothwell_Aust_Japan_EN.pdf (explaining the method used to sample humpback whales in certain zones in compliance with JARPA II).

101. *See* Dan Goodman, *Japan's Research Whaling Is Not Unlawful and Does Not Violate CITES Trade Rules*, 13 J. INT'L WILDLIFE L. & POL'Y 176, 178 (2010) (explaining that commercial whaling involves methods that are different from Japan's whaling practices); *see also* The Institute of Cetacean Research, *Questions & Answers: The Second Phase of Japan's Whale Research Program Under Special Permit in the Antarctic*, http://www.icrwhale.org/QandA2.html (responding to inquiries regarding research practices and how they benefit scientific research).

102. *See* Goodman, *supra* note 101; *see also* The Institute of Cetacean Research, *Questions & Answers: JARPA II: The Second Phase of Japan's Whale Research Program Under Special Permit in the Antarctic*, http://www.icrwhale.org/QandA2.html (stating that the ICR's sample sizes are the minimum required to conduct effective research).

103. *See* Goodman, *supra* note 101 (justifying Japan's seemingly large sample size by comparing it with overall minke whale population); *see also* Glen Clancy, *Japanese Whaling: Why the West Is in the Wrong*, JAPAN TODAY (Nov. 10, 2011), http://www.japantoday.com/category/commentary/view/japanese-whaling-why-the-west-is-in-the-wrong (explaining that Japan's sample size does not amount to a significant percentage of the minke whale population).

chosen based on Norway's scientific research whaling that yielded imprecise results with a sample size of 288 whales.[104]

Sample size should not be relevant in the Court's analysis of Japan's Article VIII whaling. As Dan Goodman explains, "scale is not the determinant. Research of one whale and research on 1,000 whales is research. The determinant is the purpose."[105] Contracting governments set the number and conditions for scientific research whaling, and other sections of the Convention and the Schedule do not apply.[106] There appears to be no basis for a claim that JARPA II is really disguised commercial whaling based solely on the sample size.

Australia also asserts that Japan is noncompliant with IWC recommendations to limit special permit whaling to, *inter alia*, critically important needs, exceptional circumstances, and whaling conducted in a way that "ensure[s] the conservation of whales in sanctuaries."[107] These recommendations made under Article VI of the ICRW are non-binding, and do little to advance the claim that Japan is acting in bad faith. The argument can be made that the repeated recommendations and resolutions combined with the moratorium and 1994 creation of the Southern Ocean Sanctuary evidence subsequent practice in application of the Convention that indicates a change in its purpose. This line of reasoning stems from Article 31(b) of the Vienna Convention and calls for careful analysis.

The Vienna Convention states that the preamble of a treaty may be used to determine context.[108] The preamble to the ICRW states that its purpose is "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."[109] Article V also states that amendments to the Schedule "shall take into consider-

104. See JARPA II Plan, *supra* note 99; *see also* Benjamin van Drimmelen, *The International Mismanagement of Whaling*, 10 UCLA PAC. BASIN L.J. 240, 247 (1991-1992) (discussing the questionable results of using small sample sizes).

105. *See* Goodman, *supra* note 101.

106. *See* ICRW, art. 7(1), Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 74 (demonstrating that the ICRW's signatory nations regulate compliance with scientific whaling conditions); *see also* Donald K. Anton, *Dispute Concerning Japan's JARPA II Program of "Scientific Whaling" (Australia v. Japan)*, 14 ASIL INSIGHTS, 1, 7 (2010) (describing the varying degrees of regulation under the International Convention for the Regulation of Whaling).

107. *See* Whaling in the Antarctic (Austl. v. Japan), Application Instituting Proceedings, 2010 I.C.J. 148 (May 31) (describing Australia's complaint that Japan continued whaling under its research program despite violating multiple international agreements).

108. *See* Vienna Convention on the Law of Treaties art. 31(2), May 23, 1969, 1155 U.N.T.S. 331 (noting that preambles, annexes, agreements, and instruments relating to the conclusion of the treaty can all be used to determine the context of the treaty).

109. ICRW, *supra* note 106, at pmbl. (recognizing that the importance of whale stocks to some economies requires rules that allow the species to maintain a steady population).

ation the interests of the consumers of whale products and the whaling industry."[110] The text of the Convention makes it clear that its purpose is to ensure the preservation of the whaling industry, not whales. There has been a shift toward preservationist policies since 1947, but the power to issue special permits under Article VIII is an integral part of the ICRW that the IWC does not have the power to alter.

Australia's argument is that state practice has now elevated the principle of nonlethal research to a level obliging Japan to cease the lethal aspects of JARPA II research. This interpretation stretches the dynamic interpretation of the ICRW too far beyond the text and no longer reflects the purpose of the Convention. State practice is also not as overwhelmingly against the killing of whales as it may seem from many of the IWC recommendations. Several nations, including the United States, Russia, Denmark (Greenland), and St. Vincent and the Grenadines harvested whales under the aboriginal subsistence whaling exception last year.[111] As recently as 2007, Iceland also conducted lethal scientific whaling,[112] and as of 2009 Norway and Iceland are operating commercial whaling under objection to the Schedule 10(e) zero catch limit.[113] Even if the global politic has evolved away from harvesting whales, the Court is still likely to take a positivist approach to the Convention's interpretation. The World Court has stated that although changes in society might make text-based decisions counter-progressive, it is still the proper method of treaty interpretation.[114] Even if the ICJ were to take a teleological approach,[115] given the clear evidence of purpose, it would still find that JARPA II conforms with the text.

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110. *Id*. at art. V(2)(d) (stating that consumers' interests will be taken into account when creating amendments regarding regulation of species and unprotected species, open and closed seasons, and the designation of sanctuary areas).

111. *See* Int'l Whaling Commission, *Catches Taken: Aboriginal Subsistence Whaling Catches Since 1985*, http://www.iwcoffice.org/conservation/table_aboriginal.htm (noting that these four nations combined to harvest 406 whales last year); *see also* Brad Lennon, *Japan Vows to Resume Whale Hunt; Activists Promise Fight*, CNN, Oct. 4, 2011, http://news.blogs.cnn.com/2011/10/04/japan-vows-to-resume-whale-hunt-activists-promise-fight/ (naming Greenland, Russia, the United States and St. Vincent's and the Grenadines as territories where aboriginal whale hunts are still permitted).

112. *See* Int'l Whaling Commission, *Catches Taken: Special Permit Catches Since 1985,* http://www.iwcoffice.org/conservation/table_aboriginal.htm (asserting that Iceland was responsible for 39 hunted whales in 2007).

113. *See id*. (charting each country's commercial whaling catches from 1985 to 2010).

114. *See* Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 50 (Nov. 15); *see also* Susan Geha, Note*, International Regulation of Whaling: The United States' Compromise*, 27 NAT. RESOURCES J. 931, 937 (1987) (discussing that the Supreme Court of the United States, in addressing international commercial whaling cases, focused solely on statutory interpretation).

115. *See* Rachel A. Hird, *Thomas W. Wälde and Fair and Equitable Treatment*, 27 J. ENERGY & NAT. RESOURCES L. 377, 384 (2009) (explaining that a teleological approach determines the treaty's "ordinary meaning specifically in light of its text as interpreted in light of its object and purpose[ ]" because the treaty's general purpose is what really matters).

Australia alleges that the JARPA II program "lack[s] . . . any demonstrated relevance for the conservation and management of whale stocks," and poses an unjustifiable risk to the targeted species.[116] Data from JARPA has been acknowledged by the IWC Scientific Committee as "an important contribution[ ] to . . . stock management."[117] The IWC has recognized that some data can be obtained only through lethal sampling.[118] This data includes age, internal tissue samples, stomach contents, reproductive history, and contamination from pollutants.[119] This data is used to determine population growth rate, health, diet, and the level of competition between species—all of which is important information for the conservation and management of whale stocks. Research whaling also does not pose a significant risk to the whale stocks. Statistical analysis shows that no effect is likely on Antarctic minke whale populations,[120] and the ICR states that the effect on fin whale stocks is negligible.[121] While there is disagreement over scientific methods, and whether and to what extent lethal sampling should be used, it would be inappropriate for the ICJ to attempt to settle a scientific dispute within the IWC.

Australia's memorial is also likely to raise the fact that whale meat from the scientific research is sold commercially in Japan,[122] and a large portion of the ICR's funding comes from the commercial sale of whale meat.[123] These facts are often used to support claims that Japan is

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116. *See* Whaling in the Antarctic (Austl. v. Japan), Application Instituting Proceedings, 2010 I.C.J. 148, para. 37 (May 31).

117. *See* William Aron, William Burke, & Milton Freeman, *Scientists Versus Whaling: Science, Advocacy, and Errors of Judgment*, 52 BIOSCIENCE 1137, 1139 (2002) (showing that the JARPA program has significantly contributed to science); *see also* Michael I. Goulding, et al., *Japan's Whale Research Program and International Law*, 32 CAL. W. INT'L L.J. 151, 166 (2002) (arguing that the JARPA Workshop Report has contributed important and substantial research to the scientific community).

118. *See* Aron, Burke, & Freeman, *supra* note 117 (discussing the IWC Secretariat's statement that certain data can only be obtained through lethal means); *see also* Int'l Whaling Comm., *Scientific Permit Whaling*: *Information on Scientific Permits, Review Procedure Guidelines and Current Permits in Effect* (June 22, 2010), http://iwcoffice.org/conservation/permits.htm#guidelines (stating that certain data can only be obtained by using lethal methods).

119. *See* Int'l Whaling Comm., *Scientific Permit Whaling: Information on Scientific Permits, Review Procedure Guidelines and Current Permits in Effect* (June 22, 2010), http://iwcoffice.org/conservation/permits.htm #guidelines (listing the types of data that can only be obtained through lethal means, such as age, reproductive status, and reproductive history).

120. See Plan for the Second Phase of the Japanese Whale Research Program Under Special Permit in the Antarctic (JARPA II)—Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources, art. V(1) SC/57/01 (2005), http://www.icrwhale.org/pdf/SC57O1.pdf (stating that statistical analysis shows that there will be little effect on the population of minke whales).

121. *See id.*

122. *See DNA Analysis Suggests Whale Meat from Sushi Restaurants in L.A., Seoul Originated from Japan*, ScienceDaily.com, Apr. 13, 2010, http://www.sciencedaily.com/releases/2010/04/100413202638.htm (providing evidence that whale meat collected for scientific research is being sold commercially); *see also* Stuart Biggs, *Kyokuyo Joins Maruha to End Whale Meat Sales in Japan*, Bloomberg.com, May 30, 2010, http://www.bloomberg.com/apps/news?pid=21070001&sid=aPhG1CfyPue0 (reporting allegations that commercial whaling uses the guise of science to circumvent the ban on commercial whaling).

123. *See Japan's Whaling Subsidies: The Collapse of the Whale Meat Market*, Greenpeace, Mar. 2010, http://www.greenpeace.org/international/Global/international/publications/oceans/2012/Japan-whaling-subsidies.pdf (noting that "research" whaling run by the ICR is supported by sales of whale meat and taxpayer subsidies).

actually conducting commercial whaling under JARPA II.[124] While this sounds damning at first blush, the ICRW actually requires contacting governments to process whales taken under special permits "as far as practicable."[125] Additionally, Article VIII states that "the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted."[126] It is completely rational and reasonable that the proceeds from the sale of whale meat are used to fund scientific research aimed at conserving and managing whale stocks.

Turning to Japan's alleged breach of Schedule paragraph 7(b) for undertaking commercial whaling within the Southern Ocean Sanctuary (SOS),[127] it appears unlikely that this claim will succeed. Even if the Court were to hold that JARPA II was beyond the scope of Article VIII concerning minke whales because of the large sample size, Japan filed a reservation to the zero catch limit of minke whales within the SOS Sanctuary.[128] No humpback whales have been taken as part of JARPA II, and because Australia is not seeking an advisory opinion, there is no breach to discuss concerning humpback whales. The only possible breach of Schedule paragraph 7(b) would be for the taking of fin whales within the SOS. An annual lethal sampling of 50 fin whales is not likely to be regarded as commercial whaling even if the Court adopts most of Australia's arguments.

Even anti-whaling scholars have questioned the likelihood of Australia's success in bringing a claim for breach of good faith concerning the ICRW.[129] Japan appears to be in compliance with the few binding requirements under Article VIII for the issuance of special permits and the text of the Convention gives contracting governments a near absolute right to issue special permits at their discretion. The ICJ's decision will ultimately turn on its interpretation of science and the purpose of the Convention, all of which appear to favor a ruling for Japan.

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124. *See* Donald K. Anton, *Antarctic Whaling: Australia's Attempt to Protect Whales in the Southern Ocean*, 36 B.C. ENVTL. AFF. L. REV. 319, 321–24 (2009) (explaining that sales of meat by-products created international skepticism about JARPA II's scientific credibility).

125. *See* ICRW, art. 8(2), Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 74.

126. *See id*. (departing from the Convention in requiring that whales caught for research purposes are to be processed according to the direction of the government that issued the research permit).

127. *See* Whaling in the Antarctic (Austl. v. Japan), Application Instituting Proceedings, 2010 I.C.J. 148 (May 31) at para. 36 (showing that Australia accuses Japan of breaching its obligations under paragraph 7(b) of the ICRW to refrain from commercial whaling of humpback and fin whales); *see also* Marine Resources Committee, *Marine Resources 2010 Annual Report*, 2010 ABA ENV'T ENERGY & RESOURCES L. 220, 229 (2010) (reporting that Australia instituted a case against Japan in the ICJ alleging a breach of Japan's commitments under the ICRW).

128. *See* ICRW, *supra* note 125, at schedule, n. 3 (recording Japan's objection to paragraph 7(b) as applied to Antarctic minke whale quotas); *see also* Peter H. Sand, *Japan's "Research Whaling" in the Antarctic Southern Ocean and the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)*, 17 REV. EUR. COMMUNITY & INT'L ENVTL. L. 56 (2008), http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9388.2008.00587.x/pdf (noting that Japan submitted a reservation to the amendment of the Schedule thereby exempting itself from the minke whale quota).

129. See Donald K. Anton, *Dispute Concerning Japan's JARPA II Program of "Scientific Whaling" (Australia v. Japan): A Backgrounder*, AUSTL. NAT'L U.C.L., 1, 10–12, 14–16 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632722 (stating the uncertainty of Australia's claim against Japan).

Australia also alleges in its application that Japan is in breach of its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[130] Particularly, Australia alleges that JARPA II violates the "[f]undamental [p]rinciples contained in Article II" by "introduc[ing] from the sea . . . Annex I listed specimen" without justification under exceptional circumstances.[131] The application also alleges that Japan's proposed take of humpback whales constitutes a violation of Article III(5) of CITES.[132]

CITES was implemented in 1973 to provide a common set of standards for the international trade of flora and fauna.[133] CITES applies to four categories of species: Appendix I, species that are threatened by extinction; Appendix II, species that are not "now threatened with extinction [but] may become so unless trade . . . is subject to strict regulation"; Appendix III "look-alikes," species that look similar to Appendix I or II species; and Appendix IV, species subject to municipal regulation requiring international assistance.[134] Parties to the Convention agree to regulate the import, export, and introduction from the sea of all species listed in the Appendices.[135] All cetaceans are protected under CITES, but Japan has taken reservations to the listing of many whales.[136]

This allegation is likely to encounter several challenges by Japan. First, the ICJ's jurisdiction over a dispute arising under CITES is doubtful. Article XVIII of CITES provides that "[a]ny dispute . . . between . . . Parties with respect to the interpretation or application of the . . . Conven-

130. CITES, opened for signature Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S 243. *See* Whaling in the Antarctic (Austl. v. Japan), Application Instituting Proceedings, 2010 I.C.J. 148, para. 38(a) (May 31) (demonstrating Australia's application instituting proceedings against Japan under CITES).

131. *See* Whaling in the Antarctic, *supra* note 130 (indicating the provisions of CITES that Japan is violating).

132. *See id.* (indicating Australia's claim against Japan under Article III(5) of CITES); *see also* Joanna Mossop, *Australia v. Japan: Whaling International Court of Justice*, 7 N.Z. Y.B. INT'L L. 169, 171, 174–75 (2009) (analyzing Australia's claim against Japan under Article III(5) of CITES concerning Japan's take of humpback whales).

133. *See* W. Michael Young & Holly Wheeler, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora, in* ENDANGERED SPECIES ACT: LAW POLICY, AND PERSPECTIVES 317 (Donald C. Baur & Wm. Robert Irvin eds., 2d ed. 2010).

134. *See* CITES, *supra* note 130, at art. 1(b) (classifying the species within each category).

135. *See id.* at art. II (declaring that all parties to the Convention must agree to strictly limit the trade of species listed in its Appendices); *see also* Young & Wheeler, *supra* note 133, at 318 (explaining that countries party to CITES agree to enforce the Convention by regulating the species included in the Appendices of CITES).

136. *See* CITES, *supra* note 130, at app. I (Reservations Entered by Parties) (listing *cetacea* as a species protected by CITES Appendix I and noting Japan's reservation to the inclusion of various species of *cetacea* into Appendix I); *see also* Young & Wheeler, *supra* note 133, at 328 (indicating that several countries including Japan have taken reservations to the whale listings).

tion shall be subject to negotiations."[137] If negotiations fail to resolve the dispute, "the Parties may, by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at The Hague."[138] This arbitration is binding upon the parties.[139] Both Australia and Japan filed reservations to their respective Optional Clause declarations that deny compulsory jurisdiction to the ICJ if the parties have agreed to settle the dispute in some other peaceful manner.[140]

The ICJ will typically examine the parties' consent to jurisdiction in both the treaty and any Optional Clause declarations.[141] In this case, CITES mandates negotiation and arbitration as the exclusive means of dispute resolution.[142] The Court will then examine the two parties' Optional Clause declarations to determine whether jurisdiction is available notwithstanding Article XVIII of CITES. The ICJ has made clear that it will not hear a case on its merits if one or more parties have not granted consent. In *Armed Activities on the Territory of the Congo*, the Court refused to hear the case because Rwanda had filed reservations excluding the ICJ's jurisdiction in the implicated treaties and because the Democratic Republic of Congo had not sought a negotiated resolution to the dispute as required by the Convention on the Elimination of All Forms of Discrimination Against Women.[143] The dispute resolution clause in that case

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137. CITES, *supra* note 130, at art. XVIII, para. 1 (setting forth regulations for the resolution of disputes between parties to CITES).

138. *Id.* at art. XVIII, para. 2 (declaring that any disputes between parties to CITES may be mutually submitted to the Permanent Court of Arbitration at the Hague Convention).

139. *Id.* (proclaiming that parties to CITES will be bound by any arbitral disputes submitted to arbitration).

140. *See* Australian Declaration Under Paragraph 2 of Article 36 of the Statute of the International Court of Justice, Mar. 22, 2002, No. 38245 http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&lang=en#14 (asserting that Australia will not recognize compulsory jurisdiction to the ICJ when the parties have reached a peaceful settlement); *see also* Declaration of Japan Recognizing the Compulsory Jurisdiction of the International Court of Justice in Conformity with Article 36, Paragraph 2 of the Statute of the International Court of Justice, July 9, 2007, No. 4517, http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&lang=en#14.

141. *See* STANIMIR ALEXANDROV, RESERVATIONS IN UNILATERAL DECLARATIONS ACCEPTING THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 97–98 (1995) (discussing Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.), 1940 P.C.I.J. (ser. A/B) No. 80 (Feb. 26) to show that the Court may consider other sources of jurisdiction separately from a treaty).

142. CITES, opened for signature Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S 243, art. XVIII (allowing for arbitration only after negotiations between the two parties have failed to resolve the issue).

143. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, art. 29(1) (requiring any dispute between two or more states to be resolved in arbitration if negotiations have failed); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 126, 41 (Feb. 3) (arguing that Rwanda never notified the Secretary-General of any intention to withdraw its reservation to Article IX of the Genocide Convention).

expressed that ICJ jurisdiction would be appropriate after arbitration was attempted,[144] Article XVIII of CITES, however, does not express any form of ICJ jurisdiction. Both the reservations and the dispute resolution clause preclude the Court's jurisdiction.

There are other justiciability concerns involved in Australia's allegation. Japan has filed reservations concerning the Appendix I status of minke and fin whales.[145] Therefore, without even analyzing Japan's conduct regarding whether the whales have been "introduced," or the circumstances under which minke and fin whales were harvested, the only issue to consider is whether the taking of humpback whales violates CITES. Japan has upheld its agreement not to harvest humpback whales as part of JARPA II. Unilateral acts may create a legal obligation that essentially renders the controversy moot.[146] In the *Nuclear Tests* case, for example, France declared that it would not conduct further nuclear tests in the South Pacific and moved to dismiss the case.[147] The ICJ found that France's unilateral declaration was legally binding and in dismissing the case stated that "the claim of Australia no longer ha[d] any objection and that the Court is therefore not called upon to give a decision thereon."[148] Japan's declaration that it will not take humpback whales similarly renders Australia's allegation moot. The Court may conceivably render an advisory opinion on the proposed taking of humpback whales but Australia has not asked it to do so.

Australia's invocation of "introduction from the sea" under CITES may also have unintended consequences concerning its claimed Antarctic Territory and EEZ. Article I defines introduction from the sea as "transportation into a State of specimens of any species which were taken in the marine environment *not under the jurisdiction of any State*."[149] Much of the whaling alleged to be a violation of CITES trade rules takes place in waters claimed by Australia.[150]

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144. Armed Activities on the Territory of the Congo, 2006 I.C.J. 126 at 35–36 (finding that the DRC failed to show any attempt to commence arbitration proceedings before referring to the International Court of Justice, as required by Article 29 of the Convention on Discrimination Against Women).

145. Reservations to CITES, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (citing Japan as holding eight reservations concerning species of whales, specifically filing reservations concerning fin and minke whales in June 1981 and January 1986, respectively).

146. *See* Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, 267 (Dec. 20) (citing that a unilateral declaration by a state intended to be bound by its terms requires the state to act consistent with the legally binding declaration); *see also* George K. Walker, *Professionals' Definitions and States' Interpretative Declarations (Understandings, Statements, or Declarations) for the 1982 Law of the Sea Convention*, 21 EMORY INT'L L. REV. 461, 535 (2007) (arguing that a state's unilateral declaration on an issue qualifies as a state's binding position in international law).

147. Nuclear Tests, 1974 I.C.J. at 270–71 (discussing France's numerous statements indicating that it would cease nuclear testing).

148. *Id.* at 272 (proclaiming that once a state enters into a commitment regarding its future conduct it is no longer necessary for the court to rule on the matter).

149. CITES, *supra* note 142, at art. I (e) (stressing that marine animals are not under the jurisdiction of a state simply because they are brought into that state).

150. *See* Andrew Hoek, *Sea Sheperd Conservation Society v. Japanese Whalers, the Showdown: Who Is the Real Villain?*, 3 STAN. J. ANIMAL L. & POL'Y 159, 187–88 (2010) (explaining that only four countries, not including Japan, recognize Australia's claim over the Australian Antarctic Territory); *see also Anti-Whaling Protest Trio to Cost Taxpayers: PM*, SYDNEY MORNING HERALD (Jan. 10, 2012), http://www.smh.com.au/environment/whale-watch/antiwhaling-protest-trio-to-cost-taxpayers-pm-20120110-1psw4.html (reporting that Japanese whaling occurs in Australia's Antarctic territorial waters).

Japan may be able to invoke Australia's reservation to its Optional Clause declaration concerning maritime boundaries to deny the Court's jurisdiction, but Australia may not want to pursue this claim if it is forced to adjudicate the validity of its claimed EEZ.

It is highly unlikely the ICJ will make a ruling on the merits of Japan's alleged breach of its obligations under CITES. There are too many jurisdictional roadblocks and even if jurisdiction is found, the claim appears to have no object. Australia may pursue an advisory opinion on the issue at some point but has not thus far.

B. Japan's Alleged Breach of Obligations Under the Convention on Biological Diversity

The 1992 Convention on Biological Diversity (CBD) is designed to conserve biological diversity, promote the sustainable use of biological components, and promote equitable sharing of benefits derived from biological resources.[151] Australia signed the convention on June 18, 1993, and Japan Accepted the convention on May 28, 1993.[152] Australia contends that:

> [Japan has breached its obligations] under the Convention on Biological Diversity [to] . . . ensure that activities within [its] jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of [its] national jurisdiction (Article 3), to co-operate with other Contracting Parties, whether directly or through a competent international organization (Article 5), and to adopt measures to avoid or minimize adverse impacts on biological diversity (Article 10(b)).[153]

As other commentators have noted, it is not clear what facts and events, contended by Australia, amounted to a breach of Japan's CBD obligations.[154] Australia may have several ways to support this allegation in its memorial—provided the claim survives yet another probable challenge to the ICJ's jurisdiction.

Article 27 of the CBD mandates that disputes between contracting parties shall be resolved through negotiations, or through jointly sought mediation if negotiations are unsuccessful.[155] The Convention contains an optional compromissory clause that grants compulsory

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151. Convention on Biological Diversity (CBD) art. 1, June 5, 1992, 1760 U.N.T.S.79.

152. *List of Parties,* CONVENTION ON BIOLOGICAL DIVERSITY (Feb. 7, 2012, 8:30 PM), http://www.cbd.int/information/parties.shtml (providing a list of each country that ratified, accepted, and approved the CBD as well as the date that the actions occurred).

153. Whaling in the Antarctic (Austl. v. Japan), 2010 I.C.J. 148, para. 38(b) (May 31) (alleging that Japan breached a variety of obligations under the CBD).

154. *See* Andrew Hutchinson, *Baleen Out the IWC: Is International Litigation an Effective Strategy for Halting the Japanese Scientific Whaling Program?*, 3 MACQUARIE J. INT'L & COMP. ENVT'L L. 1, 19 (2006) (noting that Australia could contend that Japan's whaling practices endanger certain whale species); *see also* Donald K. Anton, *Dispute Concerning Japan's JARPA II Program of "Scientific Whaling" (Australia v. Japan): A Backgrounder* 14 (Austl. Nat'l Univ. Coll. L., Research Paper No. 33-10, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632722 (suggesting two possible grounds supporting Australia's claim).

155. CBD, *supra* note 151, art. 27, paras. 1–2 (permitting parties to either seek out a third party's good offices or request mediation).

jurisdiction to an arbitral tribunal and/or the ICJ.[156] Neither Japan nor Australia has declared an intention to grant compulsory jurisdiction under this provision, and the analysis concerning jurisdiction here is nearly identical to that considered in the CITES analysis.[157] The Court will most likely decline to hear this claim because Japan has not consented to jurisdiction under the Convention and both parties' reservations in their respective Optional Clause declarations withhold consent in cases where another means of dispute resolution is agreed.

If the Court were find it has jurisdiction to hear this claim, Australia may argue that whaling alone constitutes harm to biological diversity, or it may alternatively claim that incidents arising out of JARPA II have harmed the environment. For example, in 2007 an explosion onboard the *Nisshin Maru*, Japan's factory ship, left it disabled and hundreds of tons of fuel leaked into the Southern Ocean.[158] Success on these claims would also be unlikely unless Australia is able to show something "egregious on the part of Japan."[159]

Article 3 of the CBD states the general principle that states have a "responsibility to ensure that activities within their . . . control do not cause damage to the environment of . . . areas beyond the limits of national jurisdiction."[160] The jurisdictional oddities of the Antarctic Treaty System (ATS) may come into play under this claim. As a signatory to the ATS, Japan retains jurisdiction over its nationals in the Southern Ocean. Japan could successfully argue that the duty under Article 3 does not apply to its nationals in Antarctic waters.

Article 5 obliges parties to cooperate with other Contracting parties as far as possible.[161] Both Japan and Australia have taken part in negotiations under the umbrella of the IWC and independently; both have arguably undermined negotiations at different points as well. It is difficult to discern what facts Australia will proffer to back this claim. Concerning the alleged

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156. *See id.* at para. 3 (detailing means of dispute settlement).

157. *See* discussion *supra* section II.B.

158. *See* Michelle Coursey & Nicola Shepheard, *Crippled Ship Poses Environmental Threat*, N.Z. HERALD (Feb. 18, 2007), http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objected=10424530 (stating that the *Nisshin Maru* was carrying about 1,000 tons of fuel); *see also* Env't and Conservation Orgs. of Aotearoa N.Z., *Pulling Teeth to Get Resolutions*, PUBLICATION OF NON-GOVERNMENTAL ENVTL. ORGS. AT THE XXX CONSULTATIVE MEETING ANTARCTIC TREATY (April 30–May 11, 2007), www.asoc.org/storage/documents/ECOS/2007/unnumbered.5_atcm.pdf (explaining that the *Nisshin Maru* incident presented a huge potential risk to the environment).

159. Donald K. Anton, *20-Ton Canaries: The Great Whales of the North Atlantic*, 36 B.C. ENVTL. AFF. L. REV. 319, 322–23 (illustrating that despite numerous requests from the International Whaling Commission, Japan continues to deliver whaling permits under JARPA II); *see also* Anton, *supra* note 154 (stating that there is a lack of precedent supporting Australia's claim so anything short of a blatant violation on the part of Japan will be hard for Australia to prove).

160. CBD, *supra* note 151, at art. 3.

161. *See id.*, at art. 5 (illustrating that cooperation between countries is vital to the preservation of biological diversity).

violation of Article 10(b)'s obligation to "avoid or minimize adverse impacts on biological diversity," the facts alleged in Australia's memorial will, again, likely be determinative. This claim also seems tenuous, however, because Japan has demonstrated as part of its JARPA II proposal that its scientific research whaling does not have a significant impact on whale stocks and the total take of whales is less than one-third of one percent of total Antarctic whale population.[162] The claim under the CDB may give rise to some of the most intriguing issues of the case, but the jurisdictional roadblocks will likely prevent the Court from addressing them.

IV. The Need for a New Regulatory Framework

The ICRW is a "first generation" environmental treaty, with a focus on commercial exploitation of the whale resource. The IWC is limited by the framework of the Convention, and the persistent political deadlock on the Commission has prevented the implementation of the Revised Management Procedure[163] (RMP)—to the cheers of anti-whaling nations, and dismay of pro-whaling nations. The two camps within the IWC seem unwilling to budge ideologically, and it is possible that the continued deadlock will eventually lead to the breakup of the IWC. The future of the IWC has even become an annual topic of intercessional meetings in recent years.[164] It is clear that the current framework needs to be modified through compromise in order for the IWC to remain relevant and accomplish its goals.

The pending ICJ litigation underscores this point. Australia's anti-whaling position is popular and typically garners a slim majority in IWC votes, but the case is grounded on a convention that stacks the odds against them. Japan's reservations and narrow dispute resolution

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162. See Government of Japan, Plan for the Second Phase of the Japanese Whale Research Program Under Special Permit in the Antarctic (JARPA II)—Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources, 19 (2005), www.icrwhale.org/pdf/SC57O1.pdf (explaining that the number of whales that will be taken from minke and humpback populations is so small that they will have a negligible effect on the population of each species).

163. The RMP is the replacement for the NMP and utilizes computer simulation and an algorithm to set catch limits. The Scientific Committee has unanimously recommended its implementation but political division within the IWC has prevented its implementation. *See* Int'l Whaling Comm., *Revised Management Procedure*, REVISED MANAGEMENT PROCEDURE, http://www.iwcoffice.org/conservation/rmp.htm (noting that the Scientific Committee has unanimously recommended the RMP to the Commission but the decision is a political one, and thus the RMP has not been adopted); *see also* A.W. Harris, *The Best Scientific Evidence Available: The Whaling Moratorium and Divergent Interpretations of Science*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 375, 406 (opining that the political limbo surrounding adoption of the RMP is based mostly on the disagreement over the science relied upon to formulate the RMP).

164. *See* Arthur Max, *Effort to Limit Whale Hunting Breaks Down; 3 Nations Reject Phase-out Plan*, THE BOSTON GLOBE, June 24, 2010, at 3 (reporting on failures of the IWC and concerns about its future); *see also* Int'l Whaling Comm., *Meeting of the Small Working Group on the Future of the IWC and Associated Documents*, FUTURE OF THE IWC, http://iwcoffice.org/commission/future.htm (last visited Mar. 9, 2012) (providing a summary of past meetings of the Small Working Group and their discussions regarding the IWC).

clauses in many of the applicable treaties makes the ICJ an unlikely venue for a solution. Even in the unlikely event of a judgment for Australia in this case, Japan will still have the right to issue special permits under Article VIII. The parameters may be more defined if the ICJ decides to rule on the quality of Japan's science but the Court does not have the power to alter the text of the Convention. Whaling is—for better or worse—ingrained in Japanese culture, and the dangerous tactics adopted by some environmentalist groups, particularly Sea Sheperd, have actually increased support for whaling among the Japanese people.[165]

Compromise is necessary and a solution that eliminates all whaling—at least in the short term—is not a realistic possibility. An optional protocol to the ICRW, if backed by Japan and Australia, would be the most feasible way to alter the framework of the ICRW while keeping the IWC and Scientific Committee intact. The other contracting governments would presumably accept a protocol backed by both parties. A compromise solution may even bring Norway and Iceland's commercial whaling back under the supervision of the IWC.

I propose a protocol that takes many of the principles from the failed Proposed Consensus Decision and combines them with a market-based exchange for whaling permits. Similar to the proposed cap-and-trade emissions policy in the United States or the Australian Emissions Trading Scheme, this solution would attach a monetary cost to whaling and bring all whaling under one cohesive management scheme. Careful negotiations and drafting would allow this protocol to succeed. Japan has shown in the past a willingness to compromise and respond to international pressure and dialogue and would likely do so again if a true compromise could be found.

The first components to a new protocol should be definitional in nature. Optimum stock could be redefined to include whale watching as a factor. Moreover, whale watching and whale tourism could also be added to the list of Article V considerations that must be deliberated before amending the Schedule. The most controversial definitional change would be to alter the purpose of the ICRW in the preamble to focus on preservation of whale stocks rather than on commercial exploitation. I believe this change is possible if the new statement of purpose does not eliminate small-scale whaling as a legitimate undertaking.

All whaling, including commercial, scientific, and aboriginal subsistence whaling, should be brought under the regulatory authority of the IWC. This would eliminate the exceptions and perceived discrimination Japan feels it has been the victim of under the current system.[166] Commercial pelagic whaling would be allowed in waters not designated as sanctuaries for a short period of time. This would bring Norway and Iceland into compliance and allow Japan

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165. *See* Takehiko Kambayashi, *Why Is Japan So Adamant About Whaling?*, DEUTSCHE PRESSE-AGENTUR, Dec. 8, 2003 (examining how the anti-whaling methods of Sea Shepherd have drawn support for Japan's pro-whaling campaign); *see also Do Anti-Whaling Campaigns Backfire in Japan?*, TERRA DAILY (July 12, 2011), http://www.terradaily.com/reports/Do_anti-whaling_campaigns_backfire_in_Japan_999.html (discussing how some anti-whaling campaigns are creating support for scientific whaling).

166. Japan's requests for permission to conduct aboriginal subsistence whaling have been repeatedly denied while requests for larger takes from other nations, or those from communities with a shorter whaling history, have been granted. Accusations of ICW racism are also common in Japanese media. *See* ARNE KALLAND, UNVEILING THE WHALE: DISCOURSES ON WHALES AND WHALING 107–08 (2009) (describing how the IWC has, on occasion, accepted Russia's larger request for whaling, while denying Japan's request for lesser amounts).

to commence sustainable whaling, but allow the whaling industry time to wind down smoothly or transition to whale tourism. After the phaseout of commercial pelagic whaling, the permits would be available for small-scale coastal whaling. This was a central component of the Proposed Consensus Decision and was highly contentious among preservationist states;[167] it appears, however, to be a necessary concession in order to break the deadlock. Non-pelagic aboriginal subsistence whaling would also be allowed and the requirements should be clearly defined and drafted to allow Japanese whaling villages with a long history of whaling to qualify.

Under the market-based solution, species-specific permits would be issued by the IWC for the harvest of whales. The price and number of permits would be set by the Scientific Committee based on the computer modeling, economic calculations (Lagrange multiplier),[168] and algorithms similar to those already in place for the RMP. This system has the benefit of allowing anti-whaling states to purchase some of the permits—putting a monetary cost to both exploitation and conservation that would foster a more grounded and less absolutist dialogue. The price of permits would be directly correlated to abundance and catch limits, taking away the commercial incentive of whaling if stocks are depleted.

V. Conclusion

The pending litigation before the ICJ is unlikely to resolve the controversy surrounding Japanese scientific whaling in the Antarctic or whaling in general. Australia is unlikely to prevail and a victory would fail to put a permanent end to Antarctic pelagic whaling. Japan's actions may be politically unpopular and even morally questionable, but the aging framework that governs whaling gives Japan the legal right to conduct scientific whaling, and it is interpreting the ICRW in good faith. Political posturing is not an effective means of conservation or protecting fragile whale stocks. A new protocol is needed that protects the interests of both pro- and anti-whaling states while preserving whale stocks for generations to come.

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167. *See* Peter Alford, *Anger at Plan for Limited Whaling*, AUSTRALIAN, Feb. 4, 2009, at 9 (assessing Australian opposition to IWC compromises which allow Japanese small scale coastal whaling); *see also* John Yeld, *Whaling Plan Is a "Realistic Compromise,"* CAPE ARGUS, May 7, 2010, at 8 (detailing the proposed compromise before the IWC and the opposition of Greenpeace and New Zealand).

168. *See* Int'l Whaling Commission, *Information on Scientific Permits, Review Procedure Guidelines and Current Permits in Effect*, SCIENTIFIC PERMIT WHALING, http://iwcoffice.org/conservation/permits.htm (indicating the procedures employed by the Scientific Committee in calculating the number of permits to be issued). *See generally* Olusegun A. Omisakin, *Natural Gas Pricing: International Experience and Policy Options for Nigeria*, U.S. ASSOCIATION FOR ENERGY ECONOMICS, http://www.usaee.org/usaee2011/submissions/OnlineProceedings/USAEE%202011%20Paper%20Olusegun%20Omisakin.pdf (discussing proposed economic modeling concerning the price of natural gas in Nigeria).

In Re UBS Securities Litigation

2011 U.S. Dist. LEXIS 106274 (S.D.N.Y. Sept. 13, 2011)

The U.S.D.C. of New York granted defendants' motion to dismiss claims by plaintiffs alleging violations of federal securities laws arising out of purchases of UBS securities on foreign exchanges. The court applied the "transactional" test to the Securities Exchange Act of 1934.

I. Holding

In *In Re UBS Securities Litigation*,[1] Judge Richard J. Sullivan of the U.S. District Court for the Southern District of New York dismissed claims against UBS by both foreign-cubed and foreign-squared class action plaintiffs who had purchased shares on foreign exchanges. Relying on *Morrison v. National Australia Bank*,[2] the court rejected the plaintiffs' technical arguments of the securities' cross-listing on American exchanges as insufficient to fall within the scope of § 10(b) of the Securities Exchange Act of 1934 (Exchange Act).[3] Further, the court rejected the notion that the location of the buyer or location of injury suffered within the United States qualifies the purchase as a "domestic" transaction for purposes of § 10(b).

II. Facts and Procedure

The plaintiffs in this putative class action were a group of foreign and domestic institutional investors who brought the action against UBS AG and individual defendants on behalf of purchasers of UBS shares on foreign and domestic exchanges[4] between August 2002 and February 2009.[5] Three of the four lead plaintiffs were foreign institutional investors that had purchased shares of UBS stock on exchanges outside of the United States.[6] A U.S. entity, OPEB, also purchased UBS shares pursuant to purchase orders that were executed on a foreign exchange.[7]

The plaintiffs alleged violations of federal securities laws arose out of allegedly false and misleading statements concerning UBS's investments in mortgage-backed securities and other purportedly high-risk assets.[8] More specifically, the plaintiffs alleged that the defendants violated §§ 10(b) and 20(a) of the Securities Exchange Act of 1934, Rule 10b-5,[9] and other fed-

1. No. 07 Civ. 11225 (RJS), 2011 U.S. Dist. LEXIS 106274 (S.D.N.Y. Sept. 13, 2011).
2. 130 S. Ct. 2869 (2010).
3. 15 U.S.C. § 78a.
4. *In Re UBS*, 2011 U.S. Dist. LEXIS 106274, at *2 (noting that UBS's ordinary shares were listed on the New York Stock Exchange, as well as on the Swiss Exchange and the Tokyo Stock Exchange).
5. *Id*. at *1.
6. *Id*. at *3.
7. *Id*.
8. *Id*. at *1–2.
9. 17 C.F.R. § 240.10b-5.

eral securities laws[10] by issuing fraudulent statements with respect to (i) UBS's positions and losses in U.S. mortgage-related securities; (ii) UBS's positions and losses in auction-rate securities; and (iii) compliance with U.S. tax and securities laws by UBS's Swiss-based private wealth management business for U.S. clients.[11]

On December 13, 2007, a putative class action was filed against UBS AG and several individual defendants[12] and later consolidated with *Garber v. UBS AG*, No. 08 Civ. 969. The plaintiffs filed an Amended Consolidated Class Action Complaint containing new allegations and new claims under §§ 11, 12(a)(2) and 15 of the Securities Act of 1933[13] (Securities Act).[14] In light of the Supreme Court's decision in *Morrison*, the defendants moved to dismiss all claims arising out of the plaintiffs' purchases of stock on foreign exchanges.[15]

III. Discussion

A. Standard of Review

On a motion to dismiss, a court must accept all well-pleaded allegations contained in the complaint as true and draw all reasonable inferences in the plaintiff's favor.[16] To state a legally sufficient claim, the complaint must allege "enough facts to state a claim to relief that is plausible on its face."[17] Facial plausibility is reached when the plaintiff pleads factual content "to draw the reasonable inference" of liability on the part of the defendant.[18]

B. Categories of Claims

In deciding whether the plaintiffs' federal securities laws claims lacked subject-matter jurisdiction, the Supreme Court grouped the claims into two distinct categories: (i) claims asserted by foreign plaintiffs who purchased UBS stock on a foreign exchange (foreign-cubed claims) and (ii) claims asserted by the domestic institutional investor, OPEB, to the extent that the claims arose out of OPEB's purchase of UBS stock on a foreign exchange (foreign-squared claims).[19] Looking to precedent established in *Morrison*, the court addressed whether the "transactional test" precluded these specific groups from bringing unnecessary claims.

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10. Plaintiffs also alleged violations of 15 U.S.C. §§ 78j(b) and 78t(a).
11. *In Re UBS*, 2011 U.S. Dist. LEXIS 106274, at *4.
12. *Id*. at *4.
13. 15 U.S.C. § 77a.
14. *In Re UBS*, 2011 U.S. Dist. LEXIS 106274, at *5.
15. *Id*. at *8.
16. *Id*. at *7 (citing ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007)).
17. *Id*. (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
18. *Id*. (quoting Iqbal v. Ashcroft, 129 S. Ct. 1937, 1949 (2009)).
19. *Id*. at *7–8 & n. 3 (citing *Morrison*, 130 S. Ct. 2869, 2894).

C. The *Morrison* Decision

In *Morrison*, the U.S. Supreme Court addressed the extraterritorial reach of the Exchange Act and articulated the "transactional" test for determining whether § 10(b) provides a cause of action to "foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."[20] While affirming the decision of the lower courts, the Supreme Court rejected the previously used "conduct" and "effects" tests and adopted the "transactional" test.[21] The Court noted that the extraterritorial application of §10(b) was not a question of subject-matter jurisdiction, but instead presented a "merits question" regarding what conduct is prohibited by § 10(b).[22]

Under the transactional test, § 10(b) applies only to "securities listed on domestic exchanges[ ] and domestic exchanges transactions in other securities."[23] Stressing that the Exchange Act was not intended to regulate foreign securities exchanges, the Court reasoned that this test properly reflected the focus of the Exchange Act as not upon "the place where the deception originated, but upon purchases and sales of securities in the United States."[24]

D. Foreign-Cubed Claims

The plaintiffs argued that their foreign-cubed claims were not foreclosed because the securities purchased on foreign exchanges were cross-listed on the New York Stock Exchange.[25] In support of their "listing theory," the plaintiffs pointed to language from the *Morrison* decision ("securities listed on a domestic exchange") as being consistent with the intended scope of the Exchange Act.[26]

The court found the plaintiffs' interpretation of *Morrison* not persuasive, stating that it appeared consistent with *Morrison* only when read in isolation and not when read with the language of the opinion as a whole.[27] The court stated the plaintiffs ignored *Morrison*'s broader holding and the surrounding statements in which the Court made clear that its concern was with "the location of the securities transaction and not the location of an exchange where the security may be dually listed."[28] The court clarified that § 10(b) applies only to purchase-and-sale transactions executed in the United States and not to all securities that happen to be cross-listed on an American exchange.[29]

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20. *In Re UBS*, 2011 U.S. Dist. LEXIS 106274, at *8 (quoting *Morrison*, 130 S. Ct. 2869, 2875).
21. *Id*. at *11.
22. *Id*. at *10.
23. *Id*. at *8 (quoting *Morrison*, 130 S. Ct. at 2884).
24. *Id*. (quoting *Morrison*, 130 S. Ct. at 2884).
25. *Id*. at *11.
26. *In Re UBS*, 2011 U.S. Dist. LEXIS 106274, at *12.
27. *Id*. at *13–14.
28. *Id*. at *15.
29. *Id*.

The court further added that the plaintiffs' reading of *Morrison* could not be harmonized with the *Morrison* Court's clear intention to limit the extraterritorial reach of § 10(b).[30] It emphasized that the Supreme Court made clear that the Exchange Act limited its protection to domestic security transactions to avoid the "probability of incompatibility with the applicable laws of other countries."[31] The court rejected the plaintiffs' broad interpretation of *Morrison*, which would have allowed § 10(b) suits by any plaintiff who "purchase[s] stock on *any* securities exchange against *any* issuer, as long as the stock at issue was cross-listed on an American exchange."[32]

Although the plaintiffs nevertheless contended that the Exchange Act "would not be impermissibly regulating foreign stock exchanges" because the defendants consented to "regulation in multiple jurisdictions,"[33] the court responded by stating that the issue revolves not around whether defendants consented to regulation by the U.S. government, but whether Congress "intended a private right of action to apply extraterritorially such that it reaches transactions that are executed on foreign exchanges."[34] The court held that the *Morrison* Court unambiguously found that Congress had no such intention and found that countries ought to regulate securities exchanges and securities transactions occurring within their territorial jurisdiction.[35]

Finally, the court turned to the plaintiffs' remaining argument that an issuer's mere listing of a stock on an American exchange is sufficient "domestic conduct to avoid implication of the presumption against extraterritoriality."[36] This argument, the court held, merely articulated the principles underlying the "conduct test" rejected in *Morrison* as constituting sufficient domestic activity to fall within the scope of § 10(b).[37] The court cited other decisions[38] within the circuit that found the theories advanced by the plaintiffs to be inconsistent with the directives of *Morrison*. Furthermore, the court distinguished the facts of the case from that of *S.E.C. v. Credit Bancorp Limited*,[39] stating that the plaintiffs overstated and mischaracterized the holding by relying on a case involving SEC enforcement actions, not private claims asserted under § 10(b).[40]

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30. *Id.* at *15–16.

31. *Id.* at *16 (quoting *Morrison*, 130 S. Ct. at 2869, 2885).

32. *In Re UBS*, 2011 U.S. Dist. LEXIS 106274, at *16–17 (emphasis in original).

33. *Id.* at *17.

34. *Id.* at *17–18.

35. *Id.* at *18.

36. *Id.*

37. *Id.* at *19.

38. *In Re UBS*, 2011 U.S. Dist. LEXIS 106274, at *19–20 (citing In re Alstom SA Securities Litigation, 741 F. Supp. 2d 469 (S.D.N.Y. 2010), In re Vivendi Universal S.A. Securities Litigation, 765 F. Supp. 2d 512 (S.D.N.Y. 2011), and In re Royal Bank of Scotland Grp. PLC Sec. Litig., 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011)).

39. 738 F. Supp. 2d 376 (S.D.N.Y. 2010).

40. *In Re UBS*, 2011 U.S. Dist. LEXIS 106274, at *21.

E. Foreign-Squared Claims

The court similarly dismissed the plaintiffs' foreign-squared claims, stating that nothing in the text of *Morrison* suggested that the Court intended the location of the investor placing the order to be determinative. Instead, it reasoned that the *Morrison* Court sought to "bar claims based on purchases and sales on foreign exchanges," regardless of whether the purchasers were American.[41] Furthermore, the court also rejected the argument that injury in the United States would be sufficient to bring the investor's claims within the scope of § 10(b). Comparing the plaintiffs' argument to the "effects" test rejected by the *Morrison* Court, the court reasoned that a test measuring domestic effects such as location of injury would produce an "overly vague standard incapable of consistent application."[42]

IV. Conclusion

The district court granted the defendants' motion to dismiss the plaintiffs' claims that were based on purchases of UBS shares outside of the United States. The court held that foreign investors purchasing shares on foreign exchanges and a U.S. investor purchasing shares on a foreign exchange do not fall within the scope of § 10(b).

Limiting § 10(b) to private causes of action related to purchase-and-sales transactions executed within the United States is a reasonable exercise of jurisdiction. Although U.S. securities law seeks to accommodate foreign investment and boost investor confidence, the United States should not freely open itself to plaintiffs who hope to take advantage of the U.S. legal system while potentially creating conflict with the laws and regulations by other states. Inviting such causes of actions from foreign investors and from those who chose to transact in foreign jurisdictions would unnecessarily crowd the dockets of U.S. courts and potentially lead to opportunistic litigation. The district court's dismissal of the plaintiffs' claims demonstrated appropriate restraint in its denial of foreign investors the extraterritorial application of § 10(b).

Karol Kurzatkowski

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41. *Id.* at *24.
42. *Id.*

Constellation Energy Commodities Group Inc. v. Transfield ER Cape Ltd.

801 F. Supp. 2d 211 (S.D.N.Y 2011)

The U.S.D.C. for the Southern District of New York denied Transfield ER Cape Ltd.'s forum non conveniens and improper venue motions to dismiss, and upheld arbitration awards for Constellation Energy Commodities Group Inc. against ER Cape. The public and private interest factors that ER Cape attempted to raise were insufficient to overcome the deference to the plaintiff's home forum.

I. Holding

In *Constellation Energy Commodities Group Inc. v. Transfield ER Cape Ltd.,*[1] the court held that dismissal of Constellation Energy Commodities Group Inc.'s (Constellation) motion for summary confirmation of arbitration awards was not warranted by either the doctrine of forum non conveniens or improper venue.[2] The court then upheld the arbitration award against Transfield ER Cape Ltd. (ER Cape),[3] but declined to extend this award against its parent, the alleged "alter ego" company, Transfield ER Limited (ER Limited).[4] The court held that Constellation failed to state an adequate claim to pierce the corporate veil.[5] Finally, the court held that Constellation was not entitled to attorney fees and costs of enforcement because it failed to show any bad faith or frivolous defenses on the part of ER Cape.[6]

II. Facts and Procedural History

Constellation is a registered corporation of Maryland.[7] ER Cape and ER Limited are both British Virgin Islands (BVI) corporations. They were also previously registered with New York State until 2010, when they both became "inactive" in New York.[8] ER Cape was in the midst of liquidation proceedings in the British Virgin Islands at the time of this case.[9]

On May 23, 2008, Constellation and ER Cape entered into a contract of affreightment for a shipment of iron ore from Brazil to China.[10] Disputes arose concerning the scheduling of shipments, and the parties arbitrated the disputes in London pursuant to an arbitration clause

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1. 801 F. Supp. 2d 211 (S.D.N.Y. 2011).
2. *Id.* at 221.
3. *Id.* at 222.
4. *Id.* at 224.
5. *Id*. at 223.
6. *Id.* at 224.
7. *Constellation*, 801 F. Supp. 2d at 216.
8. *Id.*
9. *Id.*
10. *Id.*

in their contract.[11] The arbitration proceedings resulted in two awards in favor of Constellation.[12] The first was a $7,577,600 award, including a 4.5% interest rate; the second was a $7,467,608 award, including a 4% interest rate.[13] Both of these awards were unsuccessfully appealed by ER Cape in the United Kingdom High Court of Justice.[14]

On June 3, 2010, while still registered as a foreign corporation in New York,[15] ER Cape was served with process pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[16] and the court's admiralty and maritime jurisdiction.[17] Constellation's position was that this service also constituted service upon ER Limited, because Constellation alleged that ER Cape was its alter ego.[18] ER Limited did not appear in response to this action.[19]

Constellation filed two motions.[20] First, it moved to confirm the arbitration awards against ER Cape and ER Limited, relying on two causes of action: (1) enforcement both jointly and severally against ER Cape and ER Limited, and (2) alter ego liability for ER Limited. Next, Constellation separately moved both for confirmation of the arbitration awards and for associated attorney fees and costs of arbitration.[21] In response, ER Cape filed a motion to dismiss Constellation's claims for forum non conveniens, improper venue, and failure to state a proper claim.[22]

III. Discussion

A. Forum Non Conveniens Standard

In evaluating ER Cape's motion to dismiss, the court first turned to ER Cape's forum non conveniens claim.[23] The court has discretion when deciding whether to dismiss for forum non conveniens reasons.[24] In doing so, the court applied the established three-part analysis set forth in *Iragorri v. United Technologies Corp*.[25]

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11. *Id.* at 217.
12. *Id.*
13. *Constellation*, 801 F. Supp. 2d at 217.
14. *Id.*
15. *Id*.
16. 9 U.S.C. § 203.
17. 28 U.S.C. § 1331.
18. *Id.*
19. *Id.*
20. *Id.*
21. The court commented that this second motion "takes a somewhat unusual procedural posture." *Id.*
22. 28 U.S.C. § 1331.
23. *Constellation*, 801 F. Supp. 2d at 218.
24. *Id.* (quoting Wiwa v. Royal Dutch Petroleum Co. 226 F.3d 88, 101 (2d Cir. 2000)).
25. 274 F.3d 65 (2d Cir. 2001).

1. Deference to Plaintiff's Choice of Its Home Forum

First, the court determined the level of deference that is owed to the plaintiff's choice of forum.[26] Typically, a domestic petitioner should receive more deference than a foreign petitioner.[27] This preference is measured on a sliding scale, through which the court scrutinizes whether the choice of forum is based on a legitimate connection or is a calculated decision to inconvenience the opposing side.[28] The court rejected ER Cape's assertion that New York could not qualify as Constellation's home forum because Constellation was a Maryland company and, therefore, had no connection with New York.[29] The court concluded that the entire United States is considered to be the home forum when an American citizen sues a foreign defendant.[30] Furthermore, ER Cape's suggested forums, the BVI, the United Kingdom, and Hong Kong, would be seriously inconvenient for Constellation.[31] Here, the court found that any countervailing factors, such as the arbitration process occurring in London and the alleged breaches of contract occurring in Hong Kong, did not significantly limit the "substantial deference" owed to Constellation's choice of forum.[32]

2. The BVI, Hong Kong and the United Kingdom as Alternative Forums

The court then analyzed any possible alternative forums. In order to qualify as an alternative forum, the defendants have to be subject to service of process at that location, and the alternative forum must be capable of providing an adequate remedy.[33] ER Cape claimed that the BVI, the United Kingdom and Hong Kong met all of these requirements.[34] However, ER Cape failed to show how the BVI could provide a proper remedy, so the court recognized only the United Kingdom and Hong Kong as acceptable alternative forums.[35]

3. Balancing of Private and Public Factors

Finally, the court had to weigh the various public and private factors discussed by the Supreme Court in *Gulf Oil Corp. v. Gilbert*.[36] The private factors included "the relative ease of access to sources of proof, the availability of compulsory process for attendance of . . . witnesses, the possibility to view the premises at issue . . . and all other practical problems."[37] The court noted that there was no further evidence or witnesses that needed to appear before the

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26. *Constellation*, 801 F. Supp. 2d at 218.
27. *Id.* (quoting In re Matter of the Arbitration between Monegasque de Reassurances, S.A.M. v. NAK Naftogaz of Ukraine, 311 F.3d 488, 496 (2d Cir.2002)).
28. *Id.* (quoting *Iragorri*, 274 F.3d at 72).
29. *Id.*
30. *Id.*
31. *Id.* at 219.
32. *Constellation*, 801 F. Supp. 2d at 219.
33. *Id.* (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.22 (1981)).
34. *Id.*
35. *Id.* at 220.
36. 330 U.S. 501, 508–09 (1947).
37. *Constellation*, 801 F. Supp. 2d at 220 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947)).

court and the Southern District of New York could handle the arbitration confirmation without undue burden.[38]

However, the court was more concerned with the difficulties of handling the alter ego claim against ER Limited.[39] With respect to that claim, the court found that the private factors minimally favored Hong Kong, because ER Cape claimed that most of the relevant witnesses were located in that forum.[40] The first public factor the court considered was "administrative difficulties flowing from court congestion."[41] This did not favor dismissal, because the Southern District had the requisite materials and time to handle the arbitration claim.[42] The next factor was the "local interest in having controversies decided at home."[43] Local interest slightly favored dismissal; although the court recognized the interest of the United States in affirming the rights of "one of its citizens," the Maryland corporation, Hong Kong and the United Kingdom each had slightly stronger interests.[44] The third factor was "the interest in having the trial in a forum that is familiar with the law governing the action."[45] The fourth factor was "the avoidance of unnecessary problems of conflict of laws or in the application of foreign law."[46] This factor did not favor dismissal, because there was no basis for believing that the laws of Hong Kong or the United Kingdom would apply to this case.[47] The final factor that the court scrutinized was "the unfairness of burdening citizens in an unrelated forum with jury duty."[48] This did not support dismissal, because there was no jury request and therefore no burden on a jury.[49]

B. An Alien May Be Sued in Any District; the Southern District Is a Proper Venue

The court quickly dealt with ER Cape's improper venue claim by turning to the federal venue statute, which explicitly states that an "alien" defendant may be sued in any district within the United States.[50] ER Cape was a foreign corporation, so the Southern District was a proper venue.[51]

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38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* (citing *Gulf Oil Corp.*, 330 U.S. at 508–09).
42. *Id.* at 221.
43. *Constellation*, 801 F. Supp. 2d at 221 (citing *Gulf Oil Corp.*, 330 U.S. at 508–09).
44. *Id.*
45. *Id.* (citing *Gulf Oil Corp.*, 330 U.S. at 508–09).
46. *Id.* (citing *Gulf Oil Corp.*, 330 U.S. at 508–09).
47. *Id.*
48. *Id.* (citing *Gulf Oil Corp.*, 330 U.S. at 508–09).
49. *Constellation*, 801 F. Supp. 2d at 221.
50. *Id.* (citing 28 U.S.C. § 1391(d)).
51. *Id.*

C. Confirmation of Arbitration Awards Against ER Cape

After reaffirming the Southern District as a venue, the court discussed the actual arbitration award. ER Cape did not provide any reason to preclude summary confirmation of the awards, other than the unsuccessful challenge of the arbitration before the United Kingdom High Court of Justice, so the court granted Constellation's motion to recognize and enforce both arbitration awards against ER Cape.[52]

D. Alter Ego Claim Against ER Limited

In addition to enforcement of the awards against ER Cape, Constellation also sought to enforce the awards against ER Limited.[53] ER Limited was not a party to the arbitrations, but Constellation attempted to enforce the arbitration awards against ER Limited by piercing ER Cape's corporate veil under an alter ego theory.[54] ER Cape responded to the motion by moving to dismiss that claim.[55] The court recognized that piercing the corporate veil should not typically occur during a confirmation action, but this claim could proceed as a separate action.[56] The court then turned to the Federal Rule of Civil Procedure 12(b)(6) standard.[57]

The court acknowledged that the Rule 12(b)(6) standard demands that the court accept all alleged facts in a complaint as true and draw all reasonable inferences in the plaintiff's favor.[58] When viewed in this light, the complaint should be dismissed if it fails to state a plausible claim.[59] The Southern District was "sitting in admiralty," so the corporate structure had to be analyzed using federal common law.[60] Thus, Constellation had to show that the alleged alter ego was used to "perpetrate a fraud" or "primarily transacted [another entity's] business rather than [its] own corporate business."[61] Constellation failed to meet this high standard, because it merely copied and repeated allegations from an entirely unrelated lawsuit.[62] This type of adoption was criticized in *Texas Water Supply Corp. v. R.F.C.*[63] The adopted allegations were disregarded by the court, so what remained was only Constellation's claim that ER Cape was a

52. *Id.* at 222.

53. *Id.*

54. *Id.*

55. *Constellation*, 801 F. Supp. 2d at 222.

56. *Id.* (citing Overseas Private Inv. Corp. v. Marine Shipping Corp., No. 02 Civ. 475, 2002 WL 31106349 (S.D.N.Y. Sept. 19, 2002)).

57. *Id.*

58. *Id.* at 223 (citing FED. R. CIV. PROC. 12(b)(6)).

59. *Id.*

60. *Id.* (citing In re Matter of Arbitration between Holborn Oil Trading Ltd. and Interpol Bermuda Ltd., 774 F.Supp. 840, 844 (S.D.N.Y 1991)).

61. *Constellation*, 801 F. Supp. 2d at 223 (quoting Kirno Hill Corp. v. Holt, 618 F.2d 982, 985 (2d Cir. 1980)).

62. *Id.*

63. 204 F.2d 190, 196–97 (5th Cir. 1953).

"captive corporation" of ER Limited.[64] This failed to meet the standard of putting forth a plausible claim, and the court accordingly dismissed the action.[65]

Finally, the court turned to Constellation's request for attorney fees and costs. The court noted that traditionally each party must assume its own attorney fees, unless it can show bad faith or frivolous actions by the opposing party.[66] Constellation did not present any evidence of such bad faith or frivolous arguments, so this request was denied.[67]

IV. Conclusion

The court upheld Constellation's selected venue, affirming the ability of a domestic corporation to choose anywhere in the United States as a home venue when litigating against a foreign party. Public and private factors raised by ER Cape were not enough to outweigh this deference. However, the court was more stringent in handling the alter ego claim, which attempted to pierce ER Cape's corporate veil and reach ER Limited. The court held that this claim was inadequately pled; thus the confirmation of the arbitration awards was limited to ER Cape. Constellation's attempt to recover attorney fees was also denied, because ER Cape raised several meritorious defenses in response to the action.

This case exemplified the numerous procedural issues that may arise out of international disputes, even over something as straightforward as confirmation of an arbitral award. It also explained the analysis that is applied to issues such as venue selection, alter ego claims, and piercing the corporate veil.

This case further demonstrated that some hurdles to enforcing overseas arbitrations are easily overcome, such as choice of home forum, while others are considerably more difficult, such as obtaining attorney fees or piercing the corporate veil. The level of scrutiny given these obstacles makes sense, when one considers their consequences. It should be relatively easy for an American citizen to reach overseas to enforce an arbitration award, especially when that company is registered in an American state. Similarly, foreign companies should not be able to force American companies to litigate in an inconvenient forum, to simply enforce an award. As this court noted, the deference of a home forum belongs to the plaintiff. However, piercing any corporate veil has very serious consequences, as it essentially disregards the corporate structure and its benefits. Therefore, it should be and is more heavily scrutinized. As the court held in this case, without a showing of fraud this veil should not be pierced, especially not by adopting the claims of another, unrelated action.

Christopher Dooley

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64. *Constellation*, 801 F. Supp. 2d at 224.

65. *Id.*

66. *Id.* (citing Cruz v. Local Union No. 3 of the IBEW, 34 F.3d 1148, 1158–59 (2d Cir. 1994)).

67. *Id.*

Elfarnawani v. International Olympic Committee

[2011] O.J. No. 5059; 2011 ON.C. LEXIS 11846; 2011 ONSC 6784

The Ontario Superior Court of Justice held that it did not have jurisdiction over two foreign defendants who did not do business in Ontario and whose alleged misconduct took place outside the country.

I. Holding

In *Elfarnawani v. International Olympic Committee*,[1] the Ontario Superior Court of Justice dismissed a claim made by a Canadian citizen against two Swiss defendants for lack of jurisdiction.[2] The court determined there was no real or substantial connection between Ontario and the defendants, in that they maintained no presence in Canada and none of the alleged claims were committed within the province's borders.[3] A consideration of fairness also suggested that jurisdiction in Ontario would have been improper.[4] The court further elaborated that had the plaintiff established a real and substantial connection, it nonetheless would have declined to exercise jurisdiction because Switzerland clearly provided a more convenient forum.[5] Given that the plaintiff was free to pursue his claim in a Swiss tribunal, the court concluded by rejecting the plaintiff's contention that Ontario should grant jurisdiction under the forum of necessity doctrine.[6]

II. Facts and Procedural History

Mahmoud Elfarnawani (the plaintiff or Elfarnawani) was a prominent member of the Olympic movement. An Egyptian national with Canadian citizenship, he spent his summers in Egypt while maintaining his permanent residence in Ontario, Canada.[7] Founder of a sports souvenir store in Ontario, Elfarnawani also served as an agent for cities bidding to host the Olympic Games.[8] The International Olympic Committee (IOC), one of the two defendants in this case, accredited Elfarnawani for his involvement in several prior Olympic events.[9] The IOC is an international nonprofit organization that serves as the supreme body of the Olympic Movement and is headquartered in Lausanne, Switzerland.[10] The primary role of the second defendant, the Ethics Commission (EC) of the IOC, was to define and update the ethical

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1. [2011] O.J. No. 5059, 2011 ON.C. LEXIS 11846, 2011 ONSC 6784.
2. *Id.* at para. 1–3, 71.
3. *Id.* at para. 43–45.
4. *Id.* at para. 48.
5. *Id.* at para. 61.
6. *Id.* at para. 70.
7. *Elfarnawani*, 2011 ONSC 6784 at para. 2.
8. *Id.*
9. *Id.*
10. *Id.* at para. 3.

guidelines that govern the Olympic Community.[11] Although the IOC has several Canadian members, it maintains no physical presence in Canada.[12]

In 2004, the British Broadcasting Corporation (BBC) aired a documentary in which journalists covertly videotaped a meeting with Elfarnawani and other agents. During this meeting, Elfarnawani allegedly claimed he could procure key IOC votes for Olympic host bidders in exchange for payment.[13] Following the broadcast, the EC conducted an investigation and recommended that the IOC declare Elfarnawani persona non grata within the Olympic community.[14] The IOC posted its decision on its website and discouraged other members of the Olympic organization from interacting with Elfarnawani.[15]

Six years after the IOC posted its decision online, Elfarnawani commenced an action against the IOC and EC (collectively, the defendants) in the Ontario Superior Court of Justice, alleging defamation, breach of duty and abuse of process.[16] He claimed damages of $CAD 6.5 million.[17] The defendants moved for an order to stay or dismiss the claim for lack of jurisdiction.[18] Alternatively, they argued that the court should decline jurisdiction because Switzerland would provide a more convenient forum.[19] Elfarnawani opposed the motion on the grounds that he suffered the greatest amount of harm in Ontario and therefore should be entitled to proceed with his claim.[20]

III. Discussion

A. Jurisdiction

1. Burden of Proof

The court applied the *Van Breda* standard[21] to decide whether it should accept or decline jurisdiction.[22] Under this analysis, a court must first establish whether a claim falls within Rule 17.02 of the Ontario Rules of Civil Procedure[23] in order to determine whether there is a "real and substantial connection" between Ontario and the torts alleged.[24] The outcome of this first

11. *Id.* at para. 4.
12. *Id.* at para. 5.
13. *Elfarnawani*, 2011 ONSC 6784 at para. 6.
14. *Id.* at para. 9.
15. *Id*.
16. *Id.* at para. 22.
17. *Id*.
18. *Id.* at para. 23.
19. *Elfarnawani*, 2011 ONSC 6784 at para. 23.
20. *Id.* at para. 24.
21. Van Breda v. Village Resorts Ltd., 98 O.R.(3d) 721 (C.A. 2010).
22. *Elfarnawani*, 2011 ONSC 6784 at para. 25.
23. Ontario R. Civ. P. 17.02.
24. *Elfarnawani*, 2011 ONSC 6784 at para. 26.

step determines which party has the burden of proof.[25] If the plaintiff identifies one or more connections under rule 17.02, the burden lies with the defendant to prove that jurisdiction is improper.[26] Conversely, the plaintiff bears the burden in the event he fails to identify a connection pursuant to rule 17.02.[27] Here, the court ultimately determined that none of the alleged torts took place in Ontario, therefore placing the burden on Elfarnawani.[28]

2. Defamation

The plaintiff claimed the defendants tarnished his reputation within the Olympic movement.[29] In order to recover for defamation in Ontario, the plaintiff must prove that the controversial material was published within the province.[30] Given that the material was posted online and therefore available to anyone with access to the Internet, the defamatory material would be deemed published only if the plaintiff can show by a balance of the probabilities that it was "communicated to at least one other person other than the plaintiff" in Ontario.[31] The standard of proof for online defamation is somewhat higher than that for defamation in other means. Unlike in cases of newspapers and broadcasts, defamatory language is not presumed to be automatically published.[32] Rather, to establish defamation via the Internet, it must be shown that the necessary publication must have been accessed or downloaded by a third party.[33] The court concluded that Elfarnawani failed to provide any evidence that the controversial content was actually viewed by a third party in Ontario and therefore rejected his claim.[34]

3. Breach of Duty of Good Faith and Abuse of Process

The plaintiff asserted that he was wrongfully convicted and banished from the IOC without being granted a hearing, thus violating his right to due process.[35] Elfarnawani further alleged that the IOC breached its duty of good faith by failing to adhere to its own guidelines.[36] The court refused to assess the validity of these claims because none of the alleged torts took place in Ontario.[37] The IOC's decision regarding Elfarnawani's misconduct was rendered in Athens, Greece.[38] The plaintiff's sole justification for jurisdiction was that he was a resident of

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25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at para. 40.
29. *Id.* at para. 28.
30. *Elfarnawani*, 2011 ONSC 6784 at para. 29.
31. *Id.* at para. 30 (quoting Crookes v. Newton, 2011 SCC 47 (Can.), at para. 1).
32. *Id.* at para. 34.
33. *Id.* at para. 31.
34. *Id.* at para. 33.
35. *Id.* at para. 37.
36. *Elfarnawani*, 2011 ONSC 6784 at para. 37.
37. *Id.* at para. 38.
38. *Id.*

Ontario at the time the IOC posted its decision online.[39] The court rejected this reasoning, stating that "[c]omplaining about alleged misconduct in a foreign country does not somehow have the effect of transforming that foreign misconduct into a domestic tort."[40]

4. Establishing Whether There Is a Real and Substantial Connection Pursuant to the *Van Breda* Analysis

Having settled that the plaintiff bore the burden of proof, the second step of the *Van Breda* test dictates that the plaintiff must provide evidence that a real and substantial connection existed between the defendants and Ontario.[41] The doctrine requires the court to consider several factors.[42] These factors are not to be evaluated equally and given the same weight, but rather are to be regarded as "general legal principles that bear upon the analysis."[43] As previously stated, the court ultimately determined there was no real and substantial connection between the defendants and Ontario.[44] They maintained no offices or employees within the province.[45] The court found the relationship between the plaintiff's claim and Ontario to be similarly unconvincing.[46] Although Elfarnawani may have suffered damages in Ontario, there was no indication that the alleged torts took place there.[47]

5. Fairness

Fairness is also to be considered in the jurisdictional analysis, but it cannot be used as a "freestanding factor" to replace weak connections.[48] The court concluded that fairness pointed to declining jurisdiction, by elaborating on both the nature of the IOC and the Olympic movement in its entirety. The IOC is a nonprofit organization based in Switzerland, yet it operates worldwide.[49] It would be grossly unjust to expose the IOC to litigation across the globe.[50] It is widely known that the location of the IOC's headquarters is Switzerland and therefore it is far more reasonable to expect potential plaintiffs to file their claims in that location.[51]

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39. *Id.* at para. 39.
40. *Id.* at para. 39.
41. *Id.* at para. 41 (citing *Van Breda*, 98 O.R.(3d) 721 at para. 109).
42. *Elfarnawani*, 2011 ONSC 6784 at para. 41.
43. *Id.* at para. 42 (citing *Van Breda*, 98 O.R.(3d) 721 at para. 109).
44. *Id.* at para. 46.
45. *Id.* at para. 44.
46. *Id.* at para. 45.
47. *Id.*
48. *Elfarnawani*, 2011 ONSC 6784 at para. 43 (citing *Van Breda*, 98 O.R.(3d) 721 at para. 93-102, 109).
49. *Id.* at para. 50.
50. *Id.*
51. *Id.*

6. Enforcement of an Extraterritorial Judgment on the Same Jurisdictional Basis and Comity

The enforcement of foreign judgments is based upon the international law principles of comity and reciprocity.[52] The court asserted it must refrain from exercising jurisdiction over a foreign defendant if it would be unwilling to enforce a foreign judgment against an Ontario defendant on the same jurisdictional basis.[53] Applying a "mirror-image" analysis, the court concluded it likely would have declined to enforce a Swiss judgment given a similar set of facts.[54] The court also accepted defendants' argument that a Swiss tribunal would likely refuse to enforce an Ontario judgment based on the circumstances and therefore denied jurisdiction.[55]

B. The Most Convenient Forum

1. Factors of Analysis

Having declined to exercise jurisdiction, the court nonetheless proceeded to illustrate that had a "real and substantial connection" with Ontario been successfully identified, Switzerland would have been the more appropriate forum.[56] In reaching its conclusion, the court considered seven factors.[57] It concluded that the geographic factor was not applicable to the present case, but all the remaining six factors favored Switzerland as the most convenient forum.[58] Those other factors included: the location of the parties, the location of the evidence, the terms and conditions of use of the IOC webpage, the potential of multiple proceedings, the issue of factual and legal questions, and the existence of juridical advantages.[59]

2. Additional Considerations

Elfarnawani further contended that judicial compulsion to pursue his claim in Switzerland would be unduly burdensome.[60] Litigation in Switzerland would be significantly more expensive and have a detrimental impact on the plaintiff's ailing health.[61] The court rejected both arguments for two reasons.[62] First, the plaintiff presented no evidence to suggest that the cost of retaining a Swiss lawyer would be substantially higher than that of obtaining Ontario counsel.[63] Second, Elfarnawani had frequently traveled to Egypt in the past despite his health

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52. *Id.* at para. 43 (citing *Van Breda*, 98 O.R.(3d) 721 at para. 107-109).
53. *Id.* at para. 52.
54. *Elfarnawani*, 2011 ONSC 6784 at para. 54.
55. *Id.* at para. 57.
56. *Id.* at para. 61.
57. Muscutt v. Courcelles, 60 O.R. (3d) 20 (C.A.) at para. 41; Amchem Products Inc. v. B.C. (W.C.B.), [1993] S.C.J. No. 34; J.-G. CASTEL AND J. WALKER, CANADIAN CONFLICT OF LAWS (2005, 6th ed.), vol. 1, at § 13.5.
58. *Elfarnawani*, 2011 ONSC 6784 at para. 64.
59. *Id.*
60. *Id.* at para. 65.
61. *Id.*
62. *Id.*
63. *Id.* at para. 66.

concerns, and therefore would have little problem flying the comparatively shorter distance to Switzerland.[64]

3. Forum of Necessity

The forum of necessity doctrine states that jurisdiction may be proper regardless of a real and substantial connection between the claim and the forum, in the event there is no other forum available for the plaintiff to seek relief.[65] As repeatedly illustrated by the court, Switzerland provided not only an alternative forum, but the ideal forum to adjudicate the dispute.[66]

IV. Conclusion

The Ontario Superior Court of Justice ultimately held that the defendants were not amenable to suit in Ontario. The plaintiff's local domicile was insufficient to sustain a finding of a real and substantial connection between the forum and the alleged misconduct. Had a connection been present, the court would nonetheless have refused jurisdiction on the grounds that Switzerland was the more appropriate forum.

By declining to exercise jurisdiction over the IOC, the Ontario court sent an important message to the international legal community that Canadian courts would not disregard jurisdictional boundaries simply to allow recovery for a Canadian plaintiff. Strongly driven by concerns for comity and reciprocity, the court conceded it would have refused to recognize a Swiss judgment against an Ontario defendant based on a similar set of facts, and acknowledged that a Swiss tribunal would have likely declined to enforce a judgment in favor of Elfarnawani. New York courts have been similarly hesitant to overstep jurisdictional limitations and encroach upon the authority of foreign tribunals by questioning the extraterritorial validity of their judgments.[67] In a system governed entirely by uniformity and reciprocity, this sign of judicial restraint will likely have a positive impact on future international litigation. Courts should refrain from ignoring the basic principles of international law by blindly protecting local plaintiffs in dispute with foreign litigants, given the potential negative implications for international jurisprudence.

Justin Alexander Gambino

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64. *Elfarnawani*, 2011 ONSC 6784 at para. 67.

65. *Id.* at para. 69 (citing *Van Breda*, 98 O.R. (3d) 721 at para. 54, 100).

66. *Id.* at para. 70.

67. Chevron Corp. v. Naranjo, 2012 U.S. App. LEXIS 1463 (2d Cir. Jan. 26, 2012) (holding that New York's Uniform Foreign Country Money-Judgments Recognition Act prohibited a judgment-debtor from seeking declaratory judgment precluding recognition of a foreign judgment until the judgment-creditor seeks enforcement in the United States).

Community Finance Group, Inc. v. Republic of Kenya

663 F.3d 977 (8th Cir. 2011)

The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's order of dismissal, holding that under the FSIA, the foreign state-defendant was immune from jurisdiction. The Court based its decision on the plaintiff's failure to demonstrate that the defendants' acts amounted to the pleaded exceptions of commercial activity, expropriation, or tortious conduct.

I. Holding

In *Community Finance Group, Inc. v. Republic of Kenya*,[1] the Court of Appeals affirmed the district court's judgment, holding that the defendants' acts did not fall under commercial activity, expropriation, or tortious conduct.[2] Thus, none of the exceptions to sovereign immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA)[3] were applicable to the defendants.[4] As a result, the Court of Appeals held that it lacked subject matter jurisdiction over the defendants.[5]

II. Facts and Procedural History

Plaintiffs, Community Finance Group, Inc. (CFG) and its general manager Andrew Vilenchik were interested in purchasing gold from Kenya.[6] CFG contracted with Zilicon Freighters, Ltd. (Zilicon), to purchase Kenyan gold for $6 million.[7] CFG agreed to establish a $350,000 bank escrow account to cover Kenyan taxes, in addition to customs and storage fees.[8] In order to expedite customs payments and export, CFG wired this amount to one of Zilicon's holding companies.[9] Kenya Central Bank verified the $350,000 transaction on June 16, 2009.[10]

However, CFG became suspicious when two individuals claiming to be officials from the Nairobi United Nations office informed CFG that the gold had been confiscated by Kenyan customs officials.[11] The two individuals told CFG it would be required to purchase the entire confiscated consignment, which also included diamonds, in order to facilitate export of the

1. 663 F.3d 977 (8th Cir. 2011).
2. *Id.* at 980.
3. 28 U.S.C. § 1605(a)(2)–(3), (a)(5).
4. *Cmty. Fin. Group, Inc.*, 663 F.3d at 980.
5. *Id.* at 979.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Cmty. Fin. Group, Inc.*, 663 F.3d at 979.
11. *Id.*

gold.[12] CFG hired a Kenyan attorney and subsequently filed a complaint with the Kenya Central Bank Fraud Investigations Department.[13]

On June 26, 2009, Kenyan police brought CFG representatives to the Kenyatta International Airport.[14] CFG was told that the gold had been removed from the airport and was being stored at the Kenya Central Bank.[15] CFG, which had not heard from the Kenyan police since February 2010, did not receive any of the gold or any portion of its $350,000, which supposedly was being held in the escrow account.[16]

CFG brought suit against the Republic of Kenya, Kenya Revenue Authority, Kenya Department of Customs, and Kenya Central Bank for breach of duty, improper taking in violation of international law, conversion, conspiracy to commit a tort, aiding and abetting an improper taking and fraudulent scheme, and unjust enrichment.[17]

The defendants filed a motion to dismiss for lack of subject matter jurisdiction.[18] The district court granted the defendants' motion to dismiss, finding that none of the pleaded exceptions under the FSIA were applicable to the defendants.[19] The United States Court of Appeals for the Eighth Circuit affirmed the order of dismissal.[20]

III. Discussion

A. Plaintiff Bears Burden to Prove Pleaded Exceptions Under the FSIA

The Court of Appeals reviews *de novo* questions of subject matter jurisdiction.[21] The Court accepts all factual allegations in the pleadings as true and views them in the light most favorable to the nonmoving party.[22]

The FSIA provides the sole basis by which a United States court may obtain jurisdiction over a foreign state.[23] Under the FSIA, a foreign state is deemed "presumptively immune" from jurisdiction.[24] Unless a specific exception applies, a federal court lacks subject matter jurisdic-

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 979–80.
16. *Cmty. Fin. Group, Inc.*, 663 F.3d at 979–80.
17. *Id.* at 980.
18. *Id.*
19. *Id.* at 980–82.
20. *Id.* at 982.
21. *Id.* at 980 (citing Wells Fargo Bank, N.A. v. WMR E-Pin LLC, 653 F.3d 702, 705 (8th Cir. 2011)).
22. *Cmty. Fin. Group, Inc.*, 663 F.3d at 980 (citing Hastings v. Wilson, 516 F.3d 1055, 1058 (8th Cir. 2008)).
23. *Id.* (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989)).
24. *Id.* (quoting Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993)).

tion over a claim against a foreign state and its subdivisions, agencies and instrumentalities, and therefore the suit must be dismissed.[25]

Upon a foreign state's prima facie showing of sovereign immunity, the plaintiff seeking to subject the defendant to the court's jurisdiction has the burden of demonstrating that an exception to sovereign immunity is applicable to defendant.[26] The plaintiffs in the present case had the burden to prove that that any of three particularly alleged exceptions applied in order to override defendants' immunity: (1) the commercial activity exception under FSIA § 1605(a)(2); (2) the expropriation exception under § 1605(a)(3); and (3) the tort exception under § 1605(a)(5).[27]

B. The Commercial Activity Exception Under § 1605(a)(2)

Under the FSIA, a foreign state is not immune from suit where the action is based upon an act that (a) occurs outside the United States in connection with a foreign state's commercial activity elsewhere and (b) causes a direct effect in the United States.[28] When a foreign state acts in the manner of a private player within the market itself, the foreign sovereign's actions are rendered "commercial" within the parameters of the FSIA.[29]

Here, CFG alleged that the defendants failed to investigate and enforce (i) fraudulent commercial transactions between private parties, (ii) the manner in which the exported gold would be secured, and (iii) the criminal activities of the alleged wrongdoers, which all qualify as *governmental*, rather than commercial, activities.[30] Thus, the district court properly concluded that the defendants' alleged acts or breaches of duty were governmental in nature and not commercial in nature under 1605(a)(2).[31]

C. The Expropriation Exception Under § 1605(a)(3)

Under the FSIA, a foreign state is not immune from suit where rights in property taken in violation of international law are in issue and that property, or any property exchanged for such property is (a) related to a foreign state's commercial activity carried on in the United States *or* (b) owned or operated by a foreign state's agency or instrumentality that engages in a commercial activity in the United States.[32]

Here, although the complaint alleged that the defendants improperly retained plaintiffs' monetary funds and gold, neither of these actions constituted a taking.[33] The plaintiffs never

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25. *Id.*
26. *Id.* (citing Gen. Elec. Capital Corp. v. Grossman, 991 F.2d 1376, 1382 (8th Cir. 1993)).
27. 28 U.S.C. § 1605(a)(2)–(3), (a)(5).
28. 28 U.S.C. § 1605(a)(2).
29. *Cmty. Fin. Grp., Inc.,* 663 F.3d at 980 (citing *Gen. Elec. Capital Corp*., 991 F.2d at 1382).
30. *Id.* at 981.
31. *Id.* at 980.
32. 28 U.S.C. § 1605(a)(3).
33. *Cmty. Fin. Group., Inc.*, 663 F.3d at 981.

paid for or acquired the gold, nor did they allege that the $350,000 was ever actually transferred to the defendants.[34] Further, CFG could not establish that the property was present in the United States or that the defendants engaged in commercial activity within the United States.[35] Thus, the district court properly concluded that none of the defendants' acts amounted to expropriation under § 1605(a)(3).[36]

D. The Tort Exception Under § 1605(a)(5)

Under the FSIA, a foreign state is not immune if the foreign state or any foreign state's official or employee committed a tortious act or omission that (a) transpired within the scope of his office or employment, (b) resulted in personal injury or death *or* damage to or loss of property and (c) occurred in the United States.[37] However, the tort exception applies only to torts occurring within the United States' territorial jurisdiction, notwithstanding that the tort may have had effects within the United States.[38]

Here, defendants' alleged tortious conduct would have taken place only in Kenya.[39] The conspiracy alleged by CFG, in addition to the taking or conversion of CFG's funds or gold, also would have occurred only in Kenya and *not* within the territorial jurisdiction of the United States as required under § 1605(a)(5).[40] Thus, the district court properly concluded that none of the defendants' acts amounted to tortious conduct under § 1605(a)(5).[41]

IV. Conclusion

The defendants' alleged conduct fell outside the scope of the prescribed sovereign immunity exceptions under the FSIA,[42] so the court properly affirmed the defendants' motion to dismiss for lack of subject matter jurisdiction.

The Court of Appeals' decision in *Community Finance Group, Inc.* emphasizes the FSIA's substantial protection of foreign states so as not to excessively subject foreign parties to litigation in the United States. The decision also calls attention to the reasonably stringent application of the FSIA's exceptions, most notably the Commercial Activity Exception under § 1605(a)(2). Although the transaction in *Community Finance Group, Inc.* appeared commercial in nature, the Court keenly distinguished a mere commercial activity from a sovereign nation's failure to monitor the legitimacy of a transaction.

Gary V. Pustel

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34. *Id.*
35. *Id.*
36. *Id.*
37. 28 U.S.C. § 1605(a)(5).
38. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 441 (1989).
39. *Cmty. Fin. Group, Inc.*, 663 F.3d at 982.
40. *Id.*
41. *Id.*
42. *Id.* at 979.

Chevron Corp. v. Naranjo

2012 U.S. App. LEXIS 1463 (2d Cir. Jan. 26, 2012)

The U.S. Court of Appeals for the Second Circuit reversed the district court's decision granting a preliminary injunction to prohibit an Ecuadorian judgment from being enforced in any non-Ecuadorian court.

I. Holding

In *Chevron Corp. v. Naranjo*,[1] Judge Lynch of the the United States Court of Appeals for the Second Circuit held that because New York's Uniform Foreign Country Money-Judgments Recognition Act[2] (the Recognition Act) merely provided mandatory exceptions that would defeat a foreign-judgment enforcement action and did not provide affirmative authority to block such enforcement elsewhere, Chevron, a judgment-debtor, could not be granted a preliminary injunction precluding such an enforcement action in any non-Ecuadorian court.[3] A preliminary injunction would not only be contrary to the language and purpose of the Recognition Act, but would also offend notions of international comity.[4] Additionally, since the Recognition Act does not provide for an affirmative cause of action, the Court held that the federal Declaratory Judgment Act[5] (the DJA) cannot be used to expand a statute's authority to grant the legal predicate of a substantive cause of action.[6]

II. Facts and Procedure

The larger dispute, giving rise to the foreign judgment award,[7] concerns allegations of extensive pollution by Chevron's predecessor, Texaco, and its subsidiary Texaco Petroleum, and claims that Chevron, here the plaintiff, is now liable for the resulting damages.[8] Allegedly, from the mid-1960s to the early 1990s, Texaco and Texaco Petroleum extensively polluted the Lago Agrio region of Ecuador while engaged in oil extractions.[9] In 1993, the Lago Agrio Plain-

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1. 2012 U.S. App. LEXIS 1463 (2d Cir. Jan. 26, 2012).
2. N.Y. C.P.L.R. §§ 5301–09. In 1962, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Foreign Money-Judgments Recognition Act. It has since been adopted in some version by more than half of the states in the United States. For additional information and background, please see ROBERT E. LUTZ, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD (2007). For a brief history, see National Conference of Commissioners on Uniform State Laws, *Foreign-Country Money Judgments Recognition Act Summary*, http://www.nccusl.org/ActSummary.aspx?title=Foreign Country%20Money% 20Judgments%20Recognition%20Act.
3. *Id.* at *19–20.
4. *Id.* at *29.
5. 28 U.S.C. §§ 2201–02.
6. *Chevron*, 2012 U.S. App. LEXIS 1463, at *36.
7. The Court points out that a Westlaw search yields as many as 56 directly related cases. *Id.* at n 1. For some directly related cases decided in the Second Circuit, see *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); and *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).
8. *Chevron*, 2012 U.S. App. LEXIS 1463, at *4.
9. *Id.*

tiffs (LAPs), here the defendants, filed a suit in the Southern District of New York alleging a variety of environmental, health and tort claims.[10] These claims were eventually dismissed on grounds of international comity and forum non conveniens.[11] Texaco entered into a settlement in 1994 with the government of Ecuador and Petroecuador, the oil company owned by the government, in which environmental remediation projects were funded in exchange for a release from liability for environmental impacts falling outside of the scope of the settlement.[12] The settlement was finalized in 1998, after Chevron spent approximately $40 million on the remediation projects, but aspects of the dispute continue to be litigated before a Bilateral Investment Treaty arbitration panel.[13] The LAPs, following dismissal of their suit in the Southern District of New York, filed a suit in Ecuador against Chevron.[14] The trial court found Chevron liable for $17.2 billion, including $8.6 billion in damages and an additional $8.6 billion in punitive damages after Chevron failed to apologize within two weeks of the opinion's issuance.[15] Chevron alleged fraud, illegality, and a lack of impartiality in the litigation, including the selection of the expert and the expert's report, which is supposed to be neutral, various threats by the LAPs' lawyer against the Ecuadorian judiciary, and documentary footage solicited by the LAPs' lawyer to follow the progress of the LAPs' claim and "tell their story,"[16] portions of which suggested unethical procedures, which resulted only in the exclusion of the expert report.[17] Chevron and the LAPs appealed to an intermediate court, which upheld the lower court's ruling.[18]

Chevron filed its complaint in the Southern District of New York in February 2011, alleging a variety of claims including a permanent injunction under the DJA and the Recognition Act.[19] It was severed from the other claims in April 2011, and Chevron sought a bar of the enforcement, anywhere in the world outside of Ecuador, of any judgment rendered against it by the Ecuadorian courts.[20] The district court concluded that the Ecuadorian judiciary was incapable of producing judgments New York courts could respect under the Recognition Act.[21] The court also determined that there was ample evidence of fraud and granted the injunction.[22] The Court of Appeals reversed the district court decision, vacated the injunction, and

10. *Id.*

11. *Id.* at *5.

12. *Id.* at *7.

13. *Id.*

14. *Chevron*, 2012 U.S. App. LEXIS 1463, at *5.

15. *Id.* at *7–8.

16. For a more in-depth discussion of the disputed documentary by New York documentary filmmaker Joseph Berlinger at the request of LAPs attorney Stephen R. Donziger, *see* Erick Kraemer, *Recent Decision, Chevron Corp. v. Berlinger, 629 F.3d 297 (2d Cir. 2011)*, 24 N.Y. INT'L L. REV. 143 (2011).

17. *Chevron*, 2012 U.S. App. LEXIS 1463, at *9–12.

18. *Id.* at *12–13.

19. *Id.* at *13.

20. *Id.* at *13–14.

21. *Id.* at *14.

22. *Id.* at *16 (citing *Chevron Corp. v. Donziger,* 768 F. Supp. 2d 581, 633–34, 636 (2011)).

remanded the case to the district court with instructions to dismiss the claims for injunctive and declaratory relief under the Recognition Act.[23]

III. Discussion

A. Preliminary Injunctions Are Contrary to the Language and Purpose of the Recognition Act

The Recognition Act provides for the recognition and enforcement in a New York court of a judgment rendered in a non-U.S. jurisdiction, provided the circumstances of the foreign judgment do not trigger listed exceptions. Among the ten exceptions to the Recognition Act, there are two mandatory exceptions to the presumption of foreign judgment enforcement.[24] These are the exceptions on which Chevron asserted three arguments to support a worldwide injunction against enforcement.[25] The first mandatory exception to enforcement is triggered if "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[26] The second is triggered if "the judgment was obtained by fraud."[27] Chevron argued that the Ecuadorian judgment was fraudulently procured, that the country lacked impartial tribunals, and that there was a violation of domestic and international due process in procuring the judgment.[28]

The Court declined to comment upon the allegations of fraud and instead pointed out that the "clear" language of the Recognition Act does not "authorize[ ] a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor."[29] Chevron relied on the exceptions to urge that the foreign judgment be declared void prior to any attempt at enforcement, but the exceptions are to be used as an affirmative defense only after an enforcement suit is brought.[30] The Court found this conclusion supported by decisions of other courts with similar statutes, except for one case, *Shell Oil Co. v. Franco*,[31] which was distinguished by the Court because there the judgment-creditor had already sought judgment but failed to name an additional party who later successfully sought a declaration and injunction against enforcement.[32] In any event, the Court declined to follow any of the reasoning from *Shell Oil Co.* that would result in an interpretation of the Recognition Act allowing a judgment-debtor to challenge the validity of a foreign judgment prior to enforcement.[33]

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23. *Chevron*, 2012 U.S. App. LEXIS 1463, at *40–41.
24. *Id.* at *19.
25. *Id.* at *19–20.
26. N.Y. C.P.L.R. § 5304(a)(1).
27. N.Y. C.P.L.R. § 5304(b)(3).
28. *Chevron*, 2012 U.S. App. LEXIS 1463, at *20.
29. *Id.*
30. *Id.* at *21.
31. 2005 U.S. Dist. LEXIS 47557, 2005 WL 6184247 (C.D. Cal. Nov. 10, 2005).
32. *Chevron*, 2012 U.S. App. LEXIS 1463, at *21–22.
33. *Id.* at *23–24 (quoting language from the Recognition Act, N.Y. C.L.P.R. § 5303).

In addition to the language of the Recognition Act, the Court also stated that the purpose of the Recognition Act is to promote enforcements, not to create a cause of action that prohibits them.[34] By assuring that valid foreign judgments would be enforced in New York, New York promotes the enforcement of its own judgment awards abroad.[35] The Recognition Act serves to encourage legitimacy and trust among the nations and their judicial systems "by preventing one jurisdiction from using the trappings of sovereignty to engage in a sort of seignorage by which easy judgments are minted and sold."[36] Although Chevron alleged that the Ecuadorian courts were precisely the type of court to which the Recognition Act exceptions apply, the Second Circuit held that this is no reason to upset the purpose of the Recognition Act, because Chevron will have the ability to apply the exceptions if enforcement is ever sought.[37] Because enforcement has not yet been sought anywhere, it makes no difference that the Ecuadorian intermediate court's ruling is potentially final, because there is no legal basis for the injunction until judgment-creditors seek enforcement in an ambiguously phrased "court governed by New York or similar law."[38] The Court did not clarify whether an enforcement action initiated, for example, in California would be sufficient or insufficient to allow a judgment-debtor to properly seek application of a mandatory exception under the Recognition Act, creating grounds for an injunction in New York.

B. International Comity Concerns Support a Reading Against Injunctions or Declaratory Relief Under the Recognition Act

The Court held that the international comity concerns provide additional reasons to conclude that the Recognition Act does not permit injunctions or declaratory relief.[39] Both parties focused their discussions and arguments regarding international comity on the test articulated by the Second Circuit in *China Trade & Development Corp. v. M.V. Choong Yong*.[40] However, the Court held that this test related to anti-foreign-suit injunctions, which were largely unrelated to the anti-enforcement injunction Chevron sought. The latter was therefore not governed by the standards of the *China Trade* test, but by the standards of the Recognition Act.[41]

The Court held that it is a "weighty matter" for one nation's legal system to declare another nation's legal system corrupt and unfair and thus unfit for recognition, but stated that if a party of that nation seeks enforcement, then it may be unavoidable.[42] The Court was particularly concerned with the injunction of the lower court denying any other foreign court the ability to judge the enforceability of the Ecuadorian judgment award, as it implied a lack of trust in foreign courts to make their to their own legal conclusions and disrespected the legal

34. *Id*. at *24.

35. *Id.* (quoting CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V., 100 N.Y.2d 215, 215).

36. *Id*. at *25.

37. *Id*. at *25–26.

38. *Chevron*, 2012 U.S. App. LEXIS 1463, at *27.

39. *Id*. at *28–29.

40. 837 F.2d 33, 35 (2d Cir. 1987).

41. *Chevron*, 2012 U.S. App. LEXIS 1463, at *31–32.

42. *Id*. at *32–33.

systems not only of the Ecuadorian court, but also of courts around the world.[43] The Recognition Act is a New York statute, upheld and enforced by New York courts.[44] It cannot be used to transform the court into the "definitive international arbiter of the fairness and integrity of the world's legal systems."[45] At this point in the analysis, the Court ceased its inquiry into international comity concerns, holding that the Recognition Act does not authorize injunctive or declaratory relief.[46]

C. The Declaratory Judgment Act Does Not Expand Statutory Authority

Though Chevron argued that the injunction was merely a declaratory judgment action under the DJA,[47] the Court held that this argument misconstrued the purpose of the DJA, which permits a district court to declare legal rights or legal relations of an interested party seeking the declaration.[48] The Court held that the legal rights declared must be rights that currently exist at law.[49] The DJA does not create an affirmative cause of action[50] and is only procedural.[51] Therefore, if the Recognition Act does not provide a valid legal predicate, the Declaratory Judgment Act cannot be used to expand the statute's authority.[52] The Court refers to a "particularly instructive" Illinois case, *Basic v. Fitzroy Engineering, Ltd.*,[53] in which a judgment-debtor requested declaratory relief in a foreign judgment under the DJA and the court instructed that a "better approach" existed under the Recognition Act.[54]

Chevron then argued that the declaratory action is permitted under the test articulated by the Second Circuit in *Dow Jones & Co. v. Harrods, Ltd.*,[55] but the Court held that the *Dow Jones* test is largely irrelevant, considering that no test will allow the DJA to expand upon a statute's legal authority.[56] Nevertheless, even under the *Dow Jones* test, the district court abused its discretion in issuing a declaratory judgment.[57] The standards for the *Dow Jones* test include, among others, inquiries into whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court and whether there is a better or more effective remedy.[58]

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43. *Id*. at *33.
44. *Id*. at *34.
45. *Id*. at *33.
46. *Id*. at *35.
47. 28 U.S.C. §§ 2201–02.
48. *Chevron*, 2012 U.S. App. LEXIS 1463, at *35 (quoting Declaratory Judgment Act, 28 U.S.C. § 2201(a)).
49. *Id*.
50. *Id*. (quoting *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007)).
51. *Id.* (quoting Skelly Oil Co. v. Phillips Petroleum Co., 70 S. Ct. 876, 881 (1950)).
52. *Id*. at *36.
53. 949 F. Supp. 1333 (N.D. Ill. 1996).
54. *Chevron*, 2012 U.S. App. LEXIS at *36.
55. 346 F.3d 357, 359–60 (2d Cir. 2003).
56. *Chevron*, 2012 U.S. App. LEXIS 1463, at *37.
57. *Id*.
58. *Id*. at *38 (quoting *Dow Jones*, 346 F.3d at 359–60).

The Court noted that there was no indication that the LAPs will seek to enforce their judgment in New York, but should they do so, then the standards of the Recognition Act must apply, a far better and more effective remedy than any declaration.[59] A declaratory judgment would serve only to transform New York courts into a venue where disappointed parties with assets in New York could contest the validity of foreign judgment awards and New York courts would judge the legitimacy of foreign judiciaries and legal systems, a situation sure to create "extensive friction" and tense relations with other sovereign legal systems.[60] Thus the Court held that the DJA could not support a declaratory injunction where the Recognition Act does not grant such authority.[61]

IV. Conclusion

Judgment-debtors who wish to preclude enforcement of a foreign judgment award must wait until after the judgment-creditor seeks enforcement in the United States to raise the mandatory exceptions of the Recognition Act as an affirmative defense. The district court misconstrued the language and purpose of the Recognition Act when it granted Chevron, the putative judgment-debtor, a preliminary injunction against enforcement of an Ecuadorian judgment award anywhere in the world, in any non-Ecuadorian court, prior to judgment-creditors taking any action to enforce the award. This reasoning also supports international comity concerns, because the preliminary injunction was made not only to enjoin enforcement in New York courts, but also in any court in the world, essentially judging the courts of Ecuador on behalf of the world before any enforcement action is brought by the judgment-creditors in any jurisdiction. Finally, the DJA cannot be used to support an argument for preliminary injunctions or declarations under the Recognition Act, because the Recognition Act does not allow such actions and the DJA cannot be used to expand the legal authority of any statute.

The decision of the appellate court has corrected what might have been a grievous turn down a very difficult path for the United States. International comity concerns are of grave importance in a world where international connections abound. Courts worldwide are reluctant to apply domestic standards internationally and hesitate to exert authority on foreign individuals, entities, or states.[62] Allowing the New York courts to become an overseer of foreign judgments, determining which national courts should be respected and which should not, undermines the mutual respect and reciprocity goals that the Recognition Act seeks to establish. Additionally, such a policy would require the United States to assert additional authority in the international sphere, a step that most other non-U.S. courts are reluctant to take. A state's right to sovereignty is not to be taken lightly. Because Chevron is headquartered in San Ramon, California, an Ecuadorian judgment award would likely require enforcement in some

59. *Id*. at *39.

60. *Id*. at *39–40.

61. *Id*. at *40.

62. For a recent Canadian example of a court declining to exert authority over foreign individuals, see *Elfarnawani v. International Olympic Committee*, 2011 ON.C. LEXIS 11846 (2011).

part of the United States in order to target Chevron's assets. Mutual respect for judgment awards made in New York and the rest of the United States is more important than seeking a declaration or injunction to preempt enforcement when a proper solution already exists within the Recognition Act should enforcement ever actually be sought. The Recognition Act was well crafted and the United States Court of Appeals for the Second Circuit correctly upheld the letter of the law, while aptly balancing international comity concerns.

Jennifer Estremera

Sanders v. Szubin

2011 U.S. Dist. LEXIS 143474 (E.D.N.Y. Dec. 6, 2011)

The U.S.D.C. for the E.D. of New York held that the Office of Foreign Assets Control (OFAC) was not barred by the Fifth Amendment from penalizing the plaintiff for his refusal to respond to a request for further information regarding his suspected trip to Cuba.

I. Holding

In this case,[1] the United States District Court for the Eastern District of New York held that the imposition of a fine by OFAC for plaintiff's failure to comply with Cuban trade embargo regulations did not, in the circumstances, violate his Fifth Amendment privilege against self-incrimination.[2] Additionally, the $9,000 fine did not violate the Excessive Fines Clause of the Eighth Amendment.[3] Finally, OFAC's decision to increase the initial $1,000 fine imposed by the Administrative Law Judge (ALJ) to $9,000 was not arbitrary and capricious and did not violate the Administrative Procedures Act (APA).[4]

II. Facts and Procedural History

In November 1998, OFAC, which operates under the Department of the Treasury, received information from U.S. Customs Service officials in Nassau, The Bahamas, suggesting that the plaintiff Zachary Sanders (Sanders or the plaintiff) had traveled to Cuba without an OFAC license five months earlier.[5] Pursuant to the Trading with the Enemy Act (TWEA),[6] OFAC is responsible for imposing penalties on individuals who violate the regulations[7] of the Cuban trade embargo.[8] On March 1, 2000, OFAC sent Sanders a Requirement to Furnish Information (RFI), which demanded that he provide a written report concerning his suspected trip to Cuba.[9] The RFI advised Sanders that he was required to respond within 20 business days and that failure to do so could result in civil penalties.[10] Sanders never responded to the RFI.[11]

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1. No. 09-cv-3052 (ENV), 2011 U.S. Dist. LEXIS 143474 (E.D.N.Y. Dec. 6, 2011).
2. *Id.* at *23.
3. *Id.* at *30.
4. *Id.* at *36; 5 U.S.C. § 706(2)(A) (2011).
5. *Sanders*, 2011 U.S. Dist. LEXIS 143474, at *6.
6. 50 U.S.C. App. §§ 1–44 (2011).
7. 31 C.F.R. § 515.701 (1999).
8. *Sanders,* 2011 U.S. Dist. LEXIS 143474, at *3.
9. *Id.* at *6.
10. *Id.*
11. *Id.*

On February 13, 2002, OFAC issued a Prepenalty Notice (PPN) to Sanders.[12] The PPN warned him that OFAC intended to impose a civil fine of $10,000 for his failure to respond to the RFI.[13] Sanders replied and requested an administrative hearing.[14] On April 29, 2002, Sanders asserted in a supplementary response, for the first time, that OFAC's threatened fine implicated his Fifth Amendment rights.[15]

Almost three years later, on February 28, 2005, OFAC issued an Order Instituting Proceedings (OIP) against Sanders.[16] Sanders answered on April 20, 2005, contending that OFAC's proposed fine violated his right to be free from compelled self-incrimination.[17] After a hearing, an ALJ issued a decision on September 4, 2008, rejecting plaintiff's Fifth Amendment argument, but recommending a penalty of $1,000, rather than the $9,000 sought by OFAC.[18]

Both sides filed petitions with the Treasury Secretary's designee to review the ALJ's decision.[19] On January 16, 2009, the designee issued a Determination and Order modifying the penalty amount to $9,000.[20] The plaintiff brought this action on July 16, 2009, challenging the $9,000 penalty on Fifth and Eighth Amendment grounds, as well as asserting that the modification of the penalty on agency review was arbitrary and capricious.[21] Plaintiff subsequently moved for summary judgment and defendants cross-moved.[22]

III. Standards of Review

A district court must grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[23] The moving party bears the initial burden of demonstrating that there is no issue as to any material fact and the court resolves all ambiguities in favor of the party opposing the motion.[24] If the moving party meets its burden, the burden shifts to the nonmoving party.[25] In order to overcome summary judgment, the nonmoving party must establish some proof of the essential element of its case.[26]

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12. *Id.*
13. *Id.*
14. *Sanders*, 2011 U.S. Dist. LEXIS 143474, at *7.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at *7–8.
19. *Id.* at *8. The Treasury Secretary's designee is given authority to review agency decisions on appeal. 31 C.F.R § 501.741 (2011).
20. *Sanders*, 2011 U.S. Dist. LEXIS 143474, at *8.
21. *Id.*
22. *Id.* at *2.
23. *Id.* at *9 (quoting FED. R. CIV. P. 56(a)).
24. *Id.*
25. *Id.* at *10.
26. *Sanders*, 2011 U.S. Dist. LEXIS 143474, at *10.

In reviewing an agency's decision of constitutional issues, a district court must engage in *de novo* review.[27] The court "must hold unlawful and set aside any agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[28] However, the review is deferential, which means the scope of the review is narrow and the court should not substitute its judgment for that of the agency under review.[29]

IV. Discussion

A. The Fifth Amendment Claim

Sanders argued that his nonresponse to the RFI concerning his suspected trip to Cuba was an exercise of his right against self-incrimination.[30] He said that OFAC's imposition of a fine was unconstitutional, because it punished him for exercising his right not to testify against himself.[31] The government argued that Sanders did not actually invoke his privilege against self-incrimination at the time; he simply failed to respond to the RFI.[32] Accordingly, he waived his privilege and was fined solely for his failure to respond to the request.[33]

The Fifth Amendment privilege applies to disclosures to the government that are "incriminating and compelled."[34] This privilege prevents the government from using compulsion to elicit self incriminating statements.[35] The nature of a question, however, does not excuse a timely assertion of the privilege.[36]

Failure to assert Fifth Amendment privileges may be excused in favor of silence in certain situations.[37] Question-by-question invocation of the privilege is excused when compliance with a government reporting requirement would identify an individual as participating in an activity that could result in that individual's criminal prosecution.[38]

Sanders conceded that the general rule requires an affirmative invocation of the privilege.[39] However, he argued that his decision to remain silent fell within an exception where the act of compliance with a registration requirement would subject an individual to the possibility of criminal liability.[40]

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27. *Id.* at *10–11.
28. *Id.* at *11 (quoting Karpova v. Snow, 497 F.3d 262, 267 (2d Cir. 2007)).
29. *Id.*
30. *Id.* at *12.
31. *Id.*
32. *Sanders*, 2011 U.S. Dist. LEXIS 143474, at *12.
33. *Id.*
34. *Id.* (quoting Kastigar v. United States, 406 U.S. 441, 445 (1972)).
35. *Id.* at *15.
36. *Id.*
37. *Id.* at *18.
38. *Sanders*, 2011 U.S. Dist. LEXIS 143474, at *20.
39. *Id.* at *12–13.
40. *Id.*

The court found that Sanders' argument was flawed.[41] The exception applies only in situations where unknown and untargeted individuals are forced to make responses that would identify them to authorities.[42] Here, OFAC was already aware of Sanders's identity and had targeted him for investigation based on his suspected trip to Cuba.[43] Sanders could have invoked his Fifth Amendment privilege against self-incrimination on the RFI on a question-by-question basis.[44] However, by failing to respond to OFAC'S demand for information, Sanders waived his rights to the privilege and OFAC was not barred from penalizing him.[45]

B. The Eighth Amendment Claim

Sanders argued that OFAC's imposition of a $9,000 fine was prohibited by the Excessive Fines Clause of the Eighth Amendment.[46] The Excessive Fines Clause limits the government's power to extract payments for certain offenses.[47] The amount of the fine must be proportional to the gravity of the offense.[48] Plaintiff bears the burden of proving disproportionality.[49]

The court listed several factors to guide the analysis related to proportionality.[50] These factors included (i) the essence of the crime of defendant, (ii) whether the defendant fits into the class of persons for whom the statute was principally designed, (iii) the maximum fine that could have been imposed, and (iv) the nature of the harm caused by the defendant's conduct.[51]

The court emphasized that the TWEA and its implementing regulations were part of a foreign policy to commercially isolate Cuba.[52] Penalties for violations were necessary to enforce compliance with that policy.[53] Therefore, by failing to respond to the RFI, Sanders deserved to be penalized.[54] Second, Sanders fits within the class TWEA and the regulations were designed to oversee.[55] Third, the fine was not excessive in relation to the maximum fine allowable, $55,000.[56] Fourth, there was harm in that OFAC was unable to obtain information about

41. *Id.* at *20.
42. *Id.* at *21. *See also* Leary v. United States, 395 U.S. 6 (1969); Marchetti v. United States, 390 U.S. 39 (1968).
43. *Sanders*, 2011 U.S. Dist. LEXIS 143474, at *21.
44. *Id.* at *21–22.
45. *Id.* at *22.
46. *Id.* at *23.
47. *Id.* at *24.
48. *Id.*
49. *Sanders*, 2011 U.S. Dist. LEXIS 143474, at *25.
50. *Id.*
51. *Id.*
52. *Id.* at *26.
53. *Id.*
54. *Id.*
55. *Sanders*, 2011 U.S. Dist. LEXIS 143474, at *27.
56. *Id.* at *28.

Sanders' contacts with Cuba.[57] Overall, the parameters of proportionality were met and the Excessive Fines Clause of the Eighth Amendment was not violated.[58]

C. The APA Claim

Sanders argued that OFAC's decision to increase the ALJ's penalty from $1,000 to $9,000 was arbitrary and capricious,[59] because of untimeliness.[60] The court found that delay does not support setting aside an otherwise lawful agency action.[61] The court emphasized that the reasoning offered by the Treasury Secretary's designee was clear, complete and in conformity with the agency's rules and policy for such penalty proceedings.[62] Because the court found that OFAC's imposition of a $9,000 penalty for his willful failure to respond to an RFI was not arbitrary and capricious, there was no violation of the APA.[63]

V. Conclusion

The plaintiff's motion for summary judgment was denied and the defendants' cross-motion for summary judgment was granted.[64]

It is likely that the United States Court of Appeals for the Second Circuit will affirm the decision of the Eastern District of New York. The court properly balanced Sanders's right against self-incrimination with the government's legitimate need for information related to Cuban trade restrictions.[65] The court correctly held that the $9,000 fine was not excessive, because it was necessary to encourage compliance with the regulations of the Cuban trade embargo.

Terence Cremins

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57. *Id.* at *29.
58. *Id.* at *28–29.
59. 5 U.S.C. § 706(2)(A) (2011).
60. *Sanders,* 2011 U.S. Dist. LEXIS 143474, at *30.
61. *Id.* at *32.
62. *Id.* at *30.
63. *Id.* at *35.
64. *Id.* at *36–37.
65. California v. Byers, 402 U.S. 424, 427 (1970).