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Hidden Risks for Foreign Investment in Cuba

Osvaldo Miranda*

I. Introduction

After fifty-five years of bilateral conflict, Cuba and the United States moved towards an unexpected line of dialogue. The world was informed on December 17, 2014 that both countries had engaged in eighteen months of secret negotiations. Since then, both governments have kept an intense schedule of negotiations in an attempt to normalize political, social and economic relationships. President Obama visited the island in March of 2016, the first American President to do so in eighty-eight years, marking a pinnacle moment for United States-Cuba relations.

The changing relationship between the United States and Cuba has caught the attention of politicians, businesses, and tourists. Regulatory modifications to the economic embargo on Cuba have been made and the American Embassy in Cuba was reopened after fifty-four years on July 20, 2015. American travel agencies have been operating in Cuba under special licenses of Office of Foreign Assets Control ("OFAC").[1] The U.S. Government approved six U.S. airlines for direct flights to Cuba[2], as well as several ferry companies.[3] Persons subject to U.S. jurisdiction are authorized to engage in medical research and pharmaceutical imports into United States after obtaining approval from the United States Food and Drug Administration ("FDA") including all transactions incident to joint medical research projects with Cuban nationals, and/or marketing, sale, or other distribution in the United States of FDA-approved Cuban-origin pharmaceuticals.[4] Persons subject to U.S. jurisdiction are authorized to develop certain infrastructure projects in Cuba related to developing, repairing, maintaining, and enhancing Cuban infrastructure that directly benefit the Cuban people, as long as those services are consistent with the export or re-export licensing policy of the U.S. Department of Commerce. U.S. persons may export to Cuba items classified as EAR99 or controlled only for anti-terrorism reasons, so long as they are sold directly to individuals in Cuba for their personal use or their immediate family's personal use (other than prohibited Cuban Government officials).[5]

Other changes include the removal of dollar value limits on imports from Cuba of goods for personal use by authorized travelers (including no limits on tobacco or alcohol imports for

1. 31 C.F.R. § 515.572(a)(1).
2. Julie Hirshfeld Davis, *U.S. Approves 6 Airlines for Direct Flights to Cuba*, New York Times, Jun. 10, 2016, http://www.nytimes.com/2016/06/11/business/airlines-cuba-direct.html?_r=0.
3. Victoria Burnett, *Carnival Sails to Cuba*, New York Times, Apr. 22, 2016, http://www.nytimes.com/2016/04/22/travel/carnival-sails-to-cuba.html.
4. 31 C.F.R. § 515.547.
5. 31 C.F.R. § 515.591.

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personal use or gifts); U.S. travelers to third countries are permitted to acquire Cuban-origin goods and import them into the United States[6]; authorized travel and cargo carriers are permitted to transport goods in-transit by air through Cuba (so long as they are not removed from the aircraft); foreign vessels that entered Cuba from a third country carrying only items the equivalent of EAR99 (or controlled only for anti-terrorism reasons) are permitted to enter U.S. ports without the otherwise required 180-day waiting period from the date of departure from Cuba[7] – this change may especially benefit Cuba's efforts to develop the Port of Mariel. U.S. persons may make remittances to third country nationals for travel to, from, and within Cuba, provided the third-country traveler would meet one of the OFAC categories of authorized travel if the traveler were subject to U.S. jurisdiction;[8] OFAC has removed the provision limiting authorized re-exports of "100% U.S. origin items" to Cuba, to make clear that any re-exports authorized by the U.S. Department of Commerce are permissible (as long as the transaction is not between a U.S. owned or controlled firm in a third country and Cuba for the exportation to Cuba of foreign made commodities).[9]

Congress has not lifted the embargo in its entirety, hence the outcome of business relationships between Cuba and the United States are currently uncertain. Nevertheless, regression is unlikely.

Cuba has recently enacted a Foreign Investment Law and has created a Special Development Zone in the Mariel Area, with the purpose of attracting foreign capital investment to the country.[10] Nonetheless, foreign investment is not a new reality for Cuba. Foreign investment laws have been in force in Cuba for several decades, with the first Foreign Investment law being enacted in 1995.[11] This law followed three years of constitutional reform in Cuba and resulted in allowing foreign investment in the socialist country.[12] It is only a matter of time before American investors will have the freedom to establish their businesses in Cuba. When considering foreign investment in Cuba, it is important to assess the risks that the Cuban market may pose to investors.

This article seeks to discuss the problems that foreign investors may face resulting from this corporate structure and corresponding government involvement There are several identifiable risks for foreign investors in Cuba. Most originate from the government's involvement in the corporate entities operating within the Cuba. Cuban companies are highly dependent on the government, even though they seem to be wholly independent. Additionally, public officials often act as officers of Cuban companies, furthering government involvement in business

6. 31 C.F.R. § 515.560(c)(3).

7. 31 C.F.R. § 515.550.

8. 31 C.F.R. § 515.570 (i).

9. 31 C.F.R. § 515.559.

10. Law 118 "Foreign Investment," Oficial Gazette, Extraordinary edition No. 20, 04/16/2014, and Decree-Law 313 "Special Development Zone of Mariel", Oficial Gazette, Extraordinary edition No. 26, 02/25/2015, https://www.gacetaoficial.gob.cu/.

11. Law 77 "Foreign Investment," Oficial Gazette Extraordinary Edition No. 003, 09/06/1995. Repealed by Law 118 in 2014.

12. *See id.*

and foreign investment.[13] Furthermore, the Cuban legal and economic systems can be difficult to navigate, even for local lawyers. A proper understanding requires an assessment of the history of Cuban legislation and foreign investment, as well as an understanding of the regime's foundational principles.

II. Foreign Investment System in Cuba

The foreign investment system in Cuba is structured on a preference of partnership between the foreign investor and a Cuban entity. This principle is well developed in the recent Foreign Investment Law, which details three modalities or legal structures of foreign investment.[14] The first modality, "Contrato de Asociación Económica Internacional" (hereafter, "AEI"), is an international economic association agreement.[15] An AEI is a contract between a Cuban entity and a foreign sole proprietor or commercial entity (e.g., corporation or LLC).[16] The second modality is the "Empresa Mixta" (hereafter, "joint venture"). This is a corporation that is incorporated in Cuba by several shareholders.[17] The corporation must be comprised of one or more national investors and one or more foreign investors. This corporation may only be incorporated after the Cuban Government approves it.[18]

The third and final modality is "Empresa de Capital Totalmente Extranjero"[19] (hereafter, Totally foreign capital company). This is a commercial entity that is incorporated by foreign partners exclusively.[20] The stock is fully foreign capital.[21] This option is extremely rare and official public records detailing the number of these existing corporations in Cuba do not exist.[22] An example of one of such companies is PDVSA, a Venezuelan Oil corporation.[23] The company has operated in Cuba since 2005 as a fully foreign capital corporation.[24]

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13. *See generally* § 173 Penal Code, http://www.gacetaoficial.gob.cu/html/codigo_penal.html#A11; *See also* Decree law 197.
14. Law 118 "Foreign Investment," Oficial Gazette, Extraordinary edition No. 20, 04/16/2014.
15. *See id.* at § 3, art. 15.1.
16. *See id.*
17. *See id*. at art. 2(h).
18. Abogados Lombardi Aguilar Group, *Cuba Enacts New Foreign Investment Law*, https://www.hg.org/article.asp?id=36540.
19. Law 118 art. 13.1(c).
20. *See id.* at art. 2(g).
21. *See id.*
22. Registro Mercantil of Cuba is the Registered Office of the Foreign Investment entities or contracts, and it has no official information of statistics in a public access platform, hard copy, or walk in solicitude of statistics. Indeed, the office only discloses the information after the petitioner produces evidence of any material interest about a specific corporation. However, the Cuban government has a long story of not disclosing information. Furthermore, there is no official bulletin of Foreign Trade and Investment Ministry, nor of Corporations Registry Office of Ministry of Justice (Registro Mercantil), and there is no public access to any kind of online database of a Cuban agency that oversees this information.
23. Ministerio del Polder Popular de Petroleo y Mineria, *PDVSA Cuba*, http://www.pdvsa.com/index.php?tpl=interface.en/design/readmenu.tpl.html&newsid_obj_id=2155&newsid_temas=29.
24. *See id.*

Recently, Cuba has begun to allow foreign companies to develop projects in the Mariel Zone.[25] On September 23, 2013, the Cuban Government passed the Decree Law 313 where it structured and organized the Special Development Zone of Mariel, or "Zona Especial de Desarrollo del Mariel" (hereinafter ZEDM).[26] ZEDM is a territorial zone specially created to encourage foreign investors to open businesses in the jurisdiction.[27] The Cuban government gives a considerable amount of benefits and bonuses when companies decide to develop the project in the Mariel Zone, ZEDM,[28] such as a no labor force tax while the foreign investment outside ZEDM is taxed from 20% to 5% using a gradual reduction formula; income tax exempted during the first 10 years of the business operation while the income tax for foreign investment outside ZEDM is 35%; the sales or services tax for ZEDM investments is exempted the first years and then subsequently 1% while foreign investment outside ZEDM is 10%; plus there is not any contribution or tax for local area development.[29] This modality of investment is primarily intended to decrease imports by increasing manufacturing and production in Cuba.

ZEDM can bring a change in the amount of companies with a stock composed fully of foreign capital. Despite the lack of official records published in ZEDM or the Cuban Ministry of Foreign Trade and Investment of how many companies have been approved to operate a project in ZEDM, a recent interview published in *Granma* newspaper[30] announced that only 11 companies have been approved to operate and develop their project in ZEDM.[31] In contrast, another article in the same paper declares 19 projects approved and seven of them already operative. It is not clear whether each of the projects correspond to independent investors or some investors have more than one project.[32]

Law 118 also introduces the option of private cooperatives as partners in joint ventures or parties in AEI to foreigners.[33] However, Law 118 may cause certain problems to arise because of

25. Marc Frank, *Cuba: Port Upgrades and Free Trade Zones*, OUR CITIES, OUR FUTURE, (2014), http://www.americasquarterly.org/content/cuba-port-upgrades-and-free-trade-zones.

26. Decree-Law 313 "Special Development Zone of Mariel," Oficial Gazette, Extraordinary edition No. 26, 02/25/2015 at https://www.gacetaoficial.gob.cu/.

27. *See id.*

28. *See id.*

29. *See* Comparison Chart of Taxation Regime for both Foreign Investment in Cuba and ZEDM, http://www.zedmariel.com/pages/eng/Como_Invertir_Regimen.php.

30. Granma newspaper is the official bulletin of Communist Party in Cuba, which is the only Party in the country. The head of the Party is also the President of the country. There is no private press in Cuba.

31. *See* Arlin Alberty Loforte, *Mariel: in the vortex of Cuban economic development The Mariel Special Development Zone (ZEDM), aspires to be a regional leader in attracting foreign capital* (Jan. 14, 2016), http://www.granma.cu/cuba/2016-01-14/mariel-en-el-vortice-del-desarrollo-economico-cubano-14-01-2016-23-01-41.

32. *See* Yudy Castro Morales, *Zona Especial de Mariel crece tras tres años de creada* (Nov. 1st, 2016), http://www.granma.cu/cuba/2016-11-01/zona-especial-de-mariel-crece-a-tres-anos-de-creada-01-11-2016-15-11-08.

33. The new Law No. 118, defines "national investor" as any Cuban entity with local domicile which is a partner in a "Joint venture" or Party in an AEI. Law 118 "Foreign Investment" art. 2(m), Oficial Gazette, Extraordinary edition No. 20, 04/16/2014. The regulation of Cuban non-agriculture cooperatives as new entities in the Cuban legislation and market makes it possible for foreign investors to choose a cooperative partnership rather than Government companies because cooperatives are private.

the structure and organization of the Cuban government and financial institutions.[34] Private cooperatives in Cuba are also relatively new and this system is a result of Decree Law No. 305, which was introduced on December 11, 2012.[35] Private cooperatives are also highly complicated and they demand approval from a high level of the Cuban Government.[36] Problems may follow from Cuba's relatively minimal experience with associating a foreign entity and a cooperative.[37]

Regardless of the potential problems, it is likely that foreign companies will choose to operate in Cuba as a result of the new potential for such companies to operate without partnering with a Cuban-State company in ZEDM. Foreign entities are likely to become partners of Cuban State Companies especially because these entities will interact with Cuban State Companies in their ordinary course of business.[38]

III. The Evolution of Foreign Investment in Cuba

Foreign investment in Cuba began after the collapse of the Soviet Union in 1989.[39] The country found itself bankrupt and needed investment to improve its financial health.[40] In 1992, Cuba amended the Socialist Constitution of 1976 for the first time. This amendment allowed the country to receive foreign investment and detailed regulation of such investment.[41] For the first time, the Government was permitted to give entities or individuals the right to partake in transactions regarding importing and exporting goods to and from Cuba.[42]

The Cuban legislature enacted the Foreign Investment Law in 1995.[43] It created an investment structure that required international investors to partner with a Cuban company when developing a project or business in Cuba.[44] However, in practice, such partnerships were difficult to organize especially when such partnering entities were foreign corporations or limited liability companies. In 1999, the Foreign Trade Minister enacted Resolution 260,[45] which introduced a

34. *See generally* Law No. 118 Foreign Investment Act, http://www.cubadiplomatica.cu/LinkClick.aspx?fileticket=IsdG-CVp5To%3D&tabid=21894.

35. Decree Law No. 305 *De Las Cooperativas No Agropecuarias*, Oficial Gazette, Extraordinary Edition No. 053, 12/11/2012, https://www.gacetaoficial.gob.cu/codbuscadores.php.

36. See *id.* at arts. 11–16.

37. Larry Catá Backer, *The Cooperative as a Proletarian Corporation: The Global Dimensions of Property Rights and the Organization of Economic Activity in Cuba*, Vol. 33 Northwestern Journal of International Law & Business (2013), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1737&context=njilb.

38. *See id.* at 29.

39. *See id.* at 3.

40. *See id.*

41. Constitution Art. 23, https://www.gacetaoficial.gob.cu/html/constitucion_de_la_republica.html.

42. Constitution Art. 23 (before, only the Cuban Government itself could import or export, as an exclusive import/export operator in the Cuban market); *See also* Constitution Art. 18, https://www.gacetaoficial.gob.cu/html/constitucion_de_la_republica.html.

43. Foreign Investment Act Law No. 77, https://www.gacetaoficial.gob.cu/codbuscadores.php.

44. *See id.; See also* Foreign Investment Act Law No. 118 § 2(a)(i).

45. *See* Ministerio del Comercio Exterior, Res. No. 260 sec. II(1), Reglamento de constitución de sociedades mercantiles cubanas (1999), http://cict.umcc.cu/repositorioinstitucional/Derecho/Derecho%20Mercantil%20(3er%20a%C3%B1o)/C%C3%B3digos%20Extranjeros/legislacion%20sobre%20sociedades%20mercantiles.doc.

new business association structure, State corporations. So far, the only business associations in Cuba were the State-owned companies (empresas estatales). With Resolution 260, the Cuban Government gained a corporate structure homogeneous with the international market.

Historically, the Foreign Trade Ministry has had the power to create and control Cuban corporations.[46] Recently, Cuban corporations instead of Cuban state-owned companies have predominantly controlled international trade.[47] As a result, it is likely that foreign investors will engage in business dealings and negotiations with Cuban corporations instead of Cuban-State owned companies.

Accordingly, as a result of foreign investment, investors are more likely to engage in negotiations and arbitration in the Cuban courts. Under Cuban Law, parties in an international business contract may agree to resolve disputes in an international forum and in accordance with laws of a foreign state.[48] In most cases, however, Cuban companies have expressed a desire to use local laws to govern the terms of corporate contracts. To accommodate these companies, the International Arbitration Court was established in Havana.[49] This court belongs to the Cuban Chamber of Commerce, but has nevertheless been deemed an international arbitration court.[50] Additionally, this court does not have jurisdiction over local arbitration between Cuban companies.[51] In regards to international corporate disputes, Cuban companies tend to prefer using the Cuban Court of International Trade Arbitration as opposed to local courts.

IV. Assessing the Challenges Posed by Cuba's Corporate and Legal Systems

A. Who is an "Officer" under Cuban Law?

There is a substantial difference between public and private officials in Cuba. Anti-corruption laws are responsible for the majority of the differences between the two types of officials. Simple actions such as attending a business lunch or reception can be governed by different rules depending on whether the individual is a private or public official.[52] Conduct that is legal for a private officer could be a bribery offense for a public official.[53]

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46. Res. No. 260, *supra* note 45.

47. Res. No. 260 *supra* note 45; *see also* Gaceta Oficial Res. No. 50/14, Reglamento sobre la actividad de importación y exportación, Oficial Gazette, Extraordinary edition No.13, 03/12/2014, https://www.gacetaoficial.gob.cu/codbuscadores.php.

48. *See* Ley No. 59, Código Civil, art. 17 (Cuba), https://www.gacetaoficial.gob.cu/html/codigo%20civil%20lib1.html; *see also* De las Reglas Generales de Competencia en lo Civil y Mercantil art.318, Feb. 20, 1928, Convención de Derecho International Privado, Código de Derecho Internacional Privado, 86 L.N.T.S. 111.

49. Decreto-Ley No. 250 § 9, Oficial Gazette, Extraordinary edition, 037, (July 31, 2007), https://www.gaceta oficial.gob.cu/codbuscadores.php.; *See also generally* Resolution 21/2015.

50. Camara De Comercio De La Republica De Cuba. Cuban Court of International Trade Arbitration, http://www.camaracuba.cu/index.php/en/cuban-court-of-international-trade-arbitration/cuban-court-of-international-trade-arbitration.

51. Decreto-Ley No. 250 §9 [Decree Law 250 §9] (Cuba).

52. Codigo Penal § 173 (Official Gazette of the Republic of Cuba 2016), https://www.gacetaoficial.gob.cu/html/codigo_penal.html.

53. *See id.*

Cuban legislation does not offer a homogenous definition of public official.[54] Under Section 173 of the Penal Code, a public official will be deemed any person who has management authority or holds a position with duty of custody, preservation or watching over assets in a public entity, military institution, State office, company or subsidiary.[55] An important element of this definition is that it is only applicable under Title II of the Criminal Code, which governs crimes against the government and jurisdiction interests.[56]

In contrast, Decree Law 197 introduced a different definition to the Cuban legal system in 1999.[57] Decree Law 197's primary purpose is to govern the labor relationship between officials of Cuban entities and their workers.[58] It defines a public official or "funcionario" as any person who holds a professional position in the public service or in an entity with a purpose of manufacturing or providing services or the like.[59] Public officials are designated specific duties and they have authority within a limited scope to organize, distribute and control the work of a small group of people.[60] Examples of "funcionarios" include in-house lawyers, auditors, accountants, inspectors, and other specialists.[61]

The definitions of public official under Cuban criminal law and labor law have different consequences on the interpretation of what individuals are to be considered public officials. For example, under Criminal Law, only the higher officers with agency power and control of the company will be deemed as a Public Official, whereas under labor law they will not. A plain interpretation of Decree Law 197 indicates that a President or CEO of a Cuban Company will not be considered a public official, but an accountant in the company's finance department will be.[62]

This dilemma is reconciled in part by Decree Law 196's definition of a corporate officer.[63] The primary purpose of this statute is to determine the leaders of the Cuban regime and define their duties and rights.[64] The statute uses the word "Cuadro" when referring to the leaders of the

54. The term used in Spanish is "funcionario público."

55. Codigo Penal § 173 (Official Gazette of the Republic of Cuba 2016). Only two definitions are found in Cuban legislation and their applications are restricted to Criminal Law and Labor Law. Additionally, please note that the Cuban Penal Code is a single statute, not a compilation of statutes as in the United States.

56. Codigo Penal §§ 152(1), 156(1) (Official Gazette of the Republic of Cuba 2016). Examples of such crimes include: bribery, damage to the national economy, perjury, and battery and assault against a public official.

57. Decreto-Ley No. 197 [Decree Law 197] (Cuba). Official Gazette, Extraordinary edition No. 4, 10/18/1999.

58. Decreto-Ley No. 197 § 2 [Decree Law 197 § 2] (Cuba).

59. Decreto-Ley No. 197 § 2(b) [Decree Law 197 § 2(b)] (Cuba).

60. *See id.* "Funcionario" is used by the Cuban people as the local word for Government official.

61. Ministerio de Trabajo y Seguridad Social [Ministry of Labor] Resolución No. 16/2000 (Cuba), Official Gazette, Ordinary edition No.39, 04/28/2000.

62. See Decreto-Ley No. 197 § 2(b) [Decree Law 197 § 2(b)] (Cuba).

63. Decreto-Ley No. 196 § 3(c) [Decree Law 196 § 3(c)] (Cuba). Official Gazette, Extraordinary edition No. 4, 10/18/1999.

64. Decreto-Ley No. 196 art. 1 [Decree-Law No. 196 §1] (1999) (Cuba).

Cuban system.[65] Three types of "Cuadros" are identified by Decree Law 196: (1) high level leaders of the Government; (2) middle level leaders of the Government; and (3) officers.[66] Here, it is most important to understand the third category, officers. Officers are defined by the statute as any person in a Cuban entity who holds positions of importance and is delegated high authority.[67] These individuals make the most important decisions regarding, among other things, the company's finances, assets, human resources.[68] Officers also act as agents of the company.[69]

These individuals have a legal duty to follow a Code of Ethics furnished and enacted by the Executive Committee of the Council of Ministries, which is the highest regulatory authority in Cuba.[70] The Code of Ethics demands that "Cuadros" respect and remain loyal to the Cuban Communist Party and to defend, preserve, and be loyal to the Revolution[71] and Socialist System.[72] This poses a problem when a non-Communist Party wishes to become an officer of a Cuban company and is likely to affect foreign direct investment opportunities.

Foreign investors and traders may encounter difficulties when dealing with corporate entities in Cuba based on the definitions of the various types of officials in its corporate system. Even within the Cuban market, many of the rules are not completely understood because of a lack of statutory clarity. Cuba's corporate system varies greatly from many of the capitalist systems of international investors, dealers, and traders and its market may be difficult to navigate. Additionally, the Cuban government has created a strong veil to shield its corporations and therefore foreign investors may be misled about the corporate structure and market functions of Cuban entities.

B. Bribery as a Risk for Foreign Investors

Under the Section 152 of the Cuban Penal Code, bribery is a crime committed by both a public official and an individual, when an individual offers a gift or benefit of any value to a public official, and he or she uses his or her authority to partake in an act or omission in favor of the interests of the individual.[73] Bribery is a major risk for foreign investors because Cuban

65. *See id*. at art. 1–2 [§ 1-2].

66. The actual terms are (1) Dirigentes Superiores del Estado y el Gobierno (2) Dirigentes intermedios del Estado y del Gobierno, y (3) directivos. *Id*. at art. 3 [§ 3].

67. *Id*. at art. 3(c) [§ 3(c)]. Note that the definition of officer in Decree Law 196 is consistent with the definition of public officials in Section 173 of the Penal Code.

68. *See id*.

69. *See id.*

70. CODIGO DE ETICA DE LOS CUADROS DEL ESTADO Y DEL GOBIERNO (CEC) art. 3050 07-24-1996 (Cuba). The Code of Ethics, named "Codigo de Etica de los Cuadros del Estado y del Gobierno" was issued by the Executive Committee of Council of Ministers, which is the highest Governmental Authority in Cuba.

71. *See id*. Revolution is a historic term used in Cuba to refer to the Government established by Fidel Castro since 1959. Tom Gjelten, *The Cuban Days: Inscrutable Nation*, WORLD AFFAIRS, http://www.worldaffairsjournal.org/article/cuban-days-inscrutable-nation.

72. CODIGO DE ETICA DE LOS CUADROS DEL ESTADO Y DEL GOBIERNO (CEC) art. 3050 07-24-1996 (Cuba).

73. CODE PENAL [C.PEN.][PENAL CODE] art. 152.1 (Cuba).

legislation is inconsistent as to the definition of public official.[74] Additionally, actions that are commonplace in other countries such as business lunches,[75] Christmas gifts, or even payment for hospitality expenses[76] may be deemed a gift or benefit for purposes of the crime of bribery.[77] Cultural differences and the varying marketplace norms of different countries may pose problems for foreign direct investors in Cuba.

Even more troubling is the possibility that all things of value given by an investor to an officer of a Cuban entity may be deemed bribery, even if they were given during the ordinary course of business.[78] In the Case 257/11 held in the 8th Penal Chamber of the Havana Provincial Court, the Cuban Criminal Court held that money given by the President of a corporation to its agents in different countries constituted bribery.[79] In this case, Cubason S.A. was a travel agency with offices in several countries.[80] At least one sales agent was employed in each office.[81] The President of Cubason, S.A., Marcel Marambio, delivered monthly payments to these agents for the purpose of covering their personal expenses.[82] The money given to the agents was found not to have been accounted for in the balance sheet, but instead, was distributed from the personal funds of the President.[83] In this case, the court used a broad interpretation of Section 173 of the Penal Code and found that the sales agents were public officials. It held that the sales agents had the authority to represent the company in the sale of its services and that the payments made to them were beneficial to them in violation of Section 152 of the Penal Code.[84] Thus, the court found the President, Marcel Marambio, guilty of bribery.[85]

C. "Acts to the Detriment of the National Economy"

1. Section 140 of the Cuban Penal Code

Section 140 of the Cuban Penal Code states that an individual who "purposely or knowingly affects the economy or credit of the Cuban State" shall be punished by three to eight years in prison.[86] An individual will be considered to have violated Section 140 if he or she: (1) alters reports or presents or uses false information on economic plans; or (2) fails to comply with the

74. *See generally* Cuban Penal Code § 173; *see also* Cuban Decree Law No.197.

75. *See* Causa 23/14 Sala 2da Penal TPP Habana.; Here the court held that three business dinners between two joint venture presidents and gifts of perfume constituted bribery under Section 152 of the Penal Code.

76. *See* Causa 213/13 Sala 2da Penal TPP Habana; here the court held that the payment of an officer's flight tickets, hotel accommodations, and other business expenses were a bribery offenses under Section 152 of the Cuban Penal Code.

77. Cuban Penal Code § 152.

78. Case 257/11 8th Penal Chamber of Havana Provincial Court.

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.*

86. Código Penal [C.Pen.] [Criminal Code] art. 140.1 (Cuba), http://www.gacetaoficial.gob.cu/html/codigo_penal.html#A10.

regulations established for economic management or execution, control or liquidation of the State Budget, or those relating to contract, or issuance or use of financial documents.[87] In the case that injury is caused by an individual's actions, he or she may be sentenced to eight to twenty years in prison.[88]

The Cuban Government has used the Section 140 of Penal Code against foreign investors for alleged commercial misconduct.[89] Such misconduct includes breach of contract, violations of administrative regulations, and unfair negotiation tactics.[90] Under Section 140, to find an individual guilty, two elements must be satisfied: (1) a violation of a commercial law, statute, or regulation must have occurred; and (2) the violation must be committed with the purpose of damaging the economy of the Cuban State.[91]

A recent case has provided some insight into the judicial interpretation of Section 140 by the Cuban Criminal Court. Case 23/14, more commonly known as the Tokmakjian case, was brought before the Second Penal Chamber of Havana Provincial Court.[92] The Court found that a group of Cuban companies had suffered damages as a result of the defendants' violations of Cuban commercial regulations.[93]

To make its determination whether a violation had occurred, the court referenced a contract signed by the defendants for the purchase of mining machinery which totaled $10,522,598.[94] As mandated by the contract, the Cuba Company paid the required 15% down payment and then paid the defendants $8,726,130.30 at a later date.[95] The alleged breach occurred after defendants failed to deliver machinery in accordance with the contractually agreed upon date.[96] The court held that defendants' breach was a purposeful violation of Cuban contract law.[97] It found that both elements of Section 140 of the Penal Code were met by the actions of the defendants and found the Presidents of both companies guilty of "Acts to the Detriment of the National Economy."[98]

2. Confiscation as a Remedy

Section 140 of the Penal Code poses risks to foreign investors.[99] As seen in Case 23/14, breach of contract may have dire consequences and may be considered by the Cuban Criminal

87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.*
92. Case 23/14, Second Penal Chamber of Havana Provincial Court.
93. Verdict 205, September 22, 2014, Case 23/14 Second Penal Chamber of Havana Provincial Court.
94. Case 23/14 (note that all monetary values are in USD).
95. Case 23/14, Second Penal Chamber of Havana Provincial Court.
96. *See id.*
97. *See id.*
98. *See id.*
99. Código Penal [C.Pen.] [Criminal Code] art.140.1 (Cuba).

Court as a detriment to the national economy.[100] Additionally, foreign investors must be aware of the fact that the government is permitted to confiscate property as a remedy for criminal violations.[101] However, confiscation is not available as a remedy in commercial or civil courts or administrative proceedings.[102] This encourages the Cuban government to continue to use criminal remedies for violations in private commercial activities.[103]

D. Certificate of Liquidity

1. What is a Certificate of Liquidity?

In 2009 the Cuban Central Bank enacted the Instruction 3/09 which provided that any Cuban Company with a payment obligation in foreign currency to a foreign creditor was required to apply for a Certificate of Liquidity (hereinafter C/L) as a mandatory payment condition.[104] The Instruction requires that upon payment, the Cuban company (debtor) must file a petition for a C/L in the Ministry which has jurisdiction over industry sector in which the company operates. [105] For example, a construction company that bought equipment from a Chinese seller, must apply for a C/L with the Ministry of Construction.[106]The Ministry will then file a petition on behalf of all entities of the sector to the National Commission of Liquidity.[107]

The purpose of Instruction 3/09 was to control payment to foreign entities. Before 2009, Cuba had a serious illiquidity problem.[108] Cuban companies sold their products or services in the local markets using local currency and purchased products on the international market using foreign currency.[109] The Cuban currency was not recognized in the international market and therefore the country fell behind on its ability to pay foreign companies for vital imports.[110]

The debtor must receive a C/L before making the payment and banks must require that the certificate is presented before payment is made.[111] Foreign creditors deal with long delays in payment under the application of Instruction 3/09 and are not provided with a remedy.[112] To make matters worse, deadlines for the Commission to approve payment, remedies, or appeals

100. Case 23/14, Second Penal Chamber of Havana Provincial Court.

101. Código Penal [C.Pen.][Criminal Code] art. 28.1, 44.1 (Cuba).

102. *See id.*

103. *See generally* Case 23/14 Second Penal Chamber of Havana Provincial Court; here the court confiscated more than $91 million, including accounts, assets, and inventory. The property was seized at the beginning of the investigation in 2011.

104. Instruction 3/09 Cuban Central Bank.

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.;* Cuban companies commonly avoid paying for imports in advance and often delay payments 180 to 360 days after delivery.

are not explicitly defined by Instruction 3/09.[113] Under this system, the debtor company has the ability to suspend its obligations by requesting a C/L but the creditor is not ensured payment or certain remedies. This is a substantial risk for foreign investors, dealers and traders in the Cuban market and has the potential to allow tremendous instances of fraud to occur.

2. Court Remedies

The Cuban judicial system may offer certain protections in regards to Instruction 3/09. The Supreme Court of Cuba held that bank branches were "to make payments in foreign currency, under decree of Cuban courts in favor of foreign creditors, without the need for it of letters of liquidity (CL) of Ministries."[114] In making its decision, the Supreme Court of Cuba relied upon an instruction that the Vice President of the Cuban Central Bank circulated on July 21, 2010 in an attempt to bring some clarity to this issue.[115] The instruction suggested that the payment of foreign creditors' accounts did not require solicitation of the C/L.[116]

Cuban courts other than Supreme Court, have also interpreted the communication from the Vice President of the Central Bank of Cuba. In certain jurisdictions, when the Court grants a plaintiff a judgment and the debtor does not satisfy the payment, the creditor has the remedy of filing a motion of judicial seizure of any property the debtor might have, including the debtor's bank accounts.[117] However, payment can only be made in international currency if the bank account has at least the same amount of money in local Cuban Currency.[118] There may be instances where creditors with C/L cannot get paid because the money in the debtor's account it has not enough money to cover the C/L amount or the money in the account is attached by a different creditor without C/L who attached first.[119]

V. Conclusion

Foreign Investment laws in Cuba do not reveal the current risks for foreign investors. The more dangerous risks are hidden in the Penal Code or in regulations that have not been published for the international community to view. In Cuba, criminal law and commercial, civil and administrative jurisdictions overlap. This allows remedies such as confiscation of property to be used in cases where there are violations of commercial or civil issues such as breach of contract, employment contracts or commercial torts are alleged.

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113. *See id.*; There is a practice in Cuba to omit the duty of publishing statues and regulation. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CUBA [CONSTITUTION] 1976 § 77 (Cuba). Banking and Immigration regulations are the most likely not to be published. This constitutes per se a risk for every entity or person, local or foreigner under Cuban Law.

114. Sentence 81, November 30, 2010. Case 118/10, Economic Chamber of Supreme Cuban Court (Third CONSIDERANDO).

115. The Instruction letter was not published. Nevertheless, the Supreme Court cited the Instruction in Sentence 81, 11/30/10, Case 118/10, Economic Chamber of Havana Provincial Court.

116. *Id.*

117. Law 7/77 § 474.

118. Instruction 3/09.

119. *See id.*

The relationship between the financial and contractual obligations of Cuban companies and the Cuban government exemplifies one of the many challenges that foreign investors will have to face. Recent court cases, such as the *Tokmakjian* case have revealed that while Cuban-State-owned companies and Cuban corporations are independent of the Government, foreign investors may find themselves held liable to the government for violations of the Penal Code. Foreign investors are likely to engage in business relationships with Cuban companies structured under principles of private law. While this partnership may have the appearance of independence, there is still a present risk that the Government will bring a public cause of action should a violation of Cuban law occur. The Government is likely to continue to intervene on behalf of Cuban companies for violations of foreign investors or entities.

Additionally, the status of public officials of Cuban companies as officers is a risk to foreign investors. Foreign investors are likely to organize joint ventures with Cuban Companies. Under Cuban law, the directors or trustees of these joint ventures will be partially Cuban officials and will owe fiduciary duties to the Revolution, Socialist System, Government, and Communist Party. Public officers are also major players in regards to the importing and exporting ability of such joint ventures and foreign investors must be wary of the legal consequences that accompany doing business with these individuals.

Finally, foreign investors and creditors must understand that they will have limited or no control over money owed to them by a Cuban company as a debtor. Any provision of a contract regarding monetary payment will be void under Cuban law and creditors may be left without a remedy for an extended period of time. Cuban debtors are also protected by their ability to suspend payment with the application of the C/L. This poses a major risk for foreign investors and creditors and may deter some from partaking in opportunities in Cuba.

The Right to Water in International Arbitration: A Narrow Case Study of the Kishenganga Arbitration

Julia H. Purdy*

"In an age when political scientists predict the onset of 'water wars' and debate rages about rapid climate change, water usage has become an essential element of international relations . . ."[1]

I. Introduction

At present, the relationship between human rights and international arbitration is often thought of as tenuous.[2] Although infrequently connected, in actuality the right to water and arbitration have an existing relationship,[3] as will be highlighted by looking at the Permanent Court of Arbitration and its recent decision in *The Islamic Republic of Pakistan v. The Republic of India*, (also called the Kishenganga Arbitration or *Pakistan v. India)*.[4] This paper argues that the right to water must be incorporated further in international arbitration.

The portrayal of the Kishenganga Arbitration is by no means meant to be exhaustive. The contents are merely used to communicate the major issues related to the distribution of water. This article aims to take a contemporary approach to examining this topic and case.

Part I shows the reasons for international arbitration to further incorporate the right to water and the relationship between water and international arbitration. Part II explores the risks of water conflicts. Part III discusses the Permanent Court of Arbitration and its role in environmental conflicts, including water conflicts. Part IV applies the information in the previous sections to analyze the recent Kishenganga Arbitration and the role of the right to water. Finally, Part V offers the conclusion.

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1. *See* Thomas E. Robins, *Defusing Hydroelectric Brinkmanship: The Indus Waters Treat's Alternate Dispute Resolution Provisions and Their Role in the Tenuous Peace Between India and Pakistan*, 5 Y.B. On Arb. & Mediation 389, 390 (2013).
2. *See* James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 Duke J. Comp. & Int'l L. 77, 100, 103–07, 147 (2007).
3. *See infra* Part II.B. (discussing the nexus between the right to water and international arbitration).
4. *See The Islamic Republic of Pakistan v. The Republic of India*, Final Award (Perm. Ct. Arb. Dec. 20, 2013).

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II. The Human Right to Water and Sanitation

A. What Is the Right to Water?

After years of advocacy significantly led by Bolivia,[5] on July 28, 2010, the United Nations General Assembly formalized the right to water and sanitation through Resolution 64/292.[6] The right to water refers to a sufficient supply of clean, accessible water for each person's basic survival, which is between fifty and one hundred liters per person per day.[7]Preserving the environment and maintaining water resources are essential elements of the protecting the right to water.[8] Governments must do more than simply promise to preserve this right and must make a conscious effort to protect those who are at risk of losing their right to water. [9]

1. Why Does the Right to Water Matter?

Upon formalization of the right to water, the United Nations stated that the right to water is essential to recognizing all other human rights, as it "is a prerequisite for the realization of other rights."[10] Further, water is not only significant for basic survival and human rights, it is also:

> indispensable to the very existence of human beings and to the ecosystems, agriculture, industry, and development which sustain the modern world. Unfortunately, freshwater is both scarce and unevenly distributed. Only about 2.5% of the world's water is fresh, with only 0.3% of that being accessible to humans. This means that less than one tenth of one percent of the world's water is available to sustain human life. To make matters worse, nine countries hold 60% of the world's fresh water resources, while many others are forced to depend almost entirely on foreign water resources. This scarcity and inequitable distribution is currently causing 29 countries to experience sever water shortages, leaving 1.1 billion people without clean drinking water and 2.4 billion without water for sanitation. For this reason, water could very well become the source of significant international conflicts in the future.[11]

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5. *See* General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Rights, by Recorded Vote of 122 in Favour, None against, 41 Abstentions, United Nations Meeting Coverage, http://www.un.org/press/en/2010/ga10967.doc.htm; *infra* note 36 (explaining *Bechtel v. Bolivia*).

6. *See* G.A. Res. 64/292 A/RES/64/292 (July 28, 2010), http://www.un.org/es/comun/docs/?symbol=A/RES/64/292&lang=E;). *See also* Universal Declaration of Human Rights Article 25(1) (1948), http://www.un.org/en/documents/udhr/.

7. *See* United Nations Water for Life Decade, Human Right to Water and Sanitation, http://www.un.org/waterforlifedecade/human_right_to_water.shtml.

8. For an interesting discussion of the need to promote environmental law in arbitration, see Christina L. Beharry & Melinda E. Kuritzky, *Going Green: Managing the Environment Through International Investment Arbitration*, 30 Am. U. Int'l L. Rev. 383 (2015).

9. *See* Christine A. Klein, *Water Bankruptcy*, 97 Minn. L. Rev. 560, 563 (2012).

10. *See* United Nations Water for Life Decade *supra* note 7.

11. *See* David M. Quealy, *Bayview Irrigation District et al. v. United Mexican States: NAFTA, Foreign Investment, and International Trade in Water—A Hard Pill to Swallow*, 17 Minn. J. Int'l L. 99, 99–100 (2008). *See also* Manfred Lenzen et al., International trade of scarce water 78 (2013); UN Water Statistics detail, http://www.unwater.org/statistics/statistics-detail/en/c/246462/.

Evidently, the right to water merits global attention, more so in water scarce times. Indeed, "[w]e are facing a fresh water crisis during this century. In less than two decades, by 2030, the requirements for fresh water are expected to exceed the currently available and accessible fresh water supplies by 40%."[12] While some progress has been made to achieve the right to water for all, much work remains to be done.[13] Because there is so little water available and it is inequitably distributed, any decisions affecting the water sector involve the right to water. Thus, the urgency of the situation impresses upon international arbitration to promote the right to water.

B. The Nexus Between the Right to Water and International Arbitration

As the world comes to the harsh realization that water resources are dwindling and inadequately distributed, international arbitral awards related to water will continue to play an important role in the future. International arbitration is one of the mechanisms available to solve water conflicts, and because of its prominence and important cases international arbitration often receives, it is important to discuss utilization of the right to water within this field.[14] International arbitration and the right to water relate in four general ways: (1) water scarcity influences decisions involving water; (2) rights-based arguments are already used; (3) relatedly, the right to water is already law in some places; and (4) because arbitration is already a large area of dispute resolution, it involves water resources affecting the right to water. Thus, it is imperative that these awards take the right to water into consideration.

The application of rights-based legal arguments, including the right to water, is increasingly accepted in legal arenas.[15] Some international arbitral awards already refer to human rights,[16] and courts around the world are applying the right to water in their national legislations and decisions. For example, in *General Secretary, West Pakistan Salt Miners Labour Union v. The Director, Industries and Mineral Development*, the Indian court decided in 1994 that

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12. *See* Edith Brown Weiss & Lydia Slobodian, *Virtual Water, Water Scarcity, and International Trade Law*, 17 J. INT'L ECON. L. 717 (2014).

13. *See* Water in the Post-2015 Agenda, Global Thematic Consultation on Water and the Post-2015 Development Framework, BEYOND 2015 (2013), http://www.beyond2015.org/sites/default/files/Position%20paper%20Water.pdf; Millennium Development Goals, Goal 7C, UNITED NATIONS (2000), http://www.un.org/millenniumgoals/environ.shtml.

14. *See* Charles Qiong Wu, *A Unified Forum? The New Arbitration Rules for Environmental Disputes Under the Permanent Court of Arbitration*, 3 CHI. J. INT'L L. 263, 269 (2002).

15. *See* Philippe Cullet, *Right to Water in India, Plugging Conceptual and Practical Gaps*, 17/1 INT'L J. OF HUM. RTS., 56, 56 (2013), http://www.ielrc.org/content/a1301.pdf.

16. *See* Fry *supra* note 2, at 82.

access to dirty water for human consumption was insufficient to the right to water, and ordered measures to protect the water sources from contamination.[17] Thus, the right to water already plays a role in the legal field and will increasingly do so.[18]

Human rights, particularly the right to water and sanitation, and international arbitration are actually interrelated topics. Pointedly, and as exemplified in investment disputes, "[i]nvestors have raised human rights arguments to support their claims that treaty provisions have been breached. In turn, governments have used the human rights of their citizens to defend allegations of treaty breaches."[19] Also, much investment in developing countries surrounds natural resources; therefore, it is to be expected that international arbitration encompasses human rights law related to the environment, such as the right to water.[20]

It is important to discuss arbitration and the right to water because of the frequency with which this form of dispute resolution is used.[21] A 2006 study by the Queen Mary University of London shows that arbitration will continue to be used by corporations, stating "95% of the corporations currently employing international arbitration will continue to use it" and expect its usage to expand in the future.[22] The increase in usage of international arbitration and growth of arbitration centers result from "[i]ncreased international trade, reduced political and trade barriers, the growth of multinational law firms, and the expansion of alternative dispute resolution have all contributed to the growth of international arbitration."[23]

Arbitrations usually occur in three forms at the international level: commercial, investor-state, and state-state. Commercial arbitration refers to disputes arising from commercial transactions, investor-state arbitrations are disputes between these two entities, and finally, state-state arbitration arise from disputes between states. The right to water is applicable to all types of arbitrations, but for the purposes of this paper the scope is limited to state-state arbitration in the Kishenganga Arbitration.[24]

Arbitration was once referred to as an alternative dispute resolution; however, now many argue that arbitration is no longer an alternative because of its attractiveness in transactional

17. *See The Human Rights to Water and Sanitation in Courts World Wide, A Selection of National, Regional and International Case Law*, WATERLEX AND WASH. UNITED, 3, 188 (2014), http://www.waterlex.org/new/wp-content/uploads/2015/01/Case-Law-Compilation.pdf. To this point, some countries, like Bolivia have gone so far as to include the right to water in their national constitutions. *See* Dr. Ranee Khooshie Lal Panjabi, *Not a Drop to Spare, The Global Water Criss of the Twenty-First Century*, 42 Ga. J. Int'l & Comp. L. 277, 359 (2014).

18. *See International Arbitration: Corporate attitudes and practices 2006*, QUEEN MARY UNIV. OF LONDON, 1, 22 (2006), http://www.pwc.be/en_BE/be/publications/ia-study-pwc-06.pdf.

19. *See* Cherie Booth, *Is There a Place for Human Rights Considerations in International Arbitration?*, 24 ICSID REV. – FOREIGN INV. L. J., 109, 111 (2009).

20. *See* Mark Bezant et al., *Trends in International Arbitration in the New World Order* in The European, Middle Eastern and African Arbitration Review 2015, Global Arbitration Review, http://globalarbitrationreview.com/reviews/67/sections/232/chapters/2683/trends-international-arbitration-new-world-order/).

21. *See id*.

22. *See* International Arbitration: Corporate attitudes, *supra* note 18.

23. *See* Richard M. Mosk, *Trends in International Arbitration*, 18 Sw J. Int'l L. 103, 105, 106 (2011).

24. *See The Islamic Republic of Pakistan v. The Republic of India*, Final Award (Perm. Ct. Arb. Dec. 20, 2013).

disputes.[25] It follows that arbitration will be used to resolve transactional water disputes related to water, that necessarily implicate the right to water. Water, being an inherently cross-border resource, it is easily discussed in international transactions and their related arbitrations.[26]

International arbitration is a prominent form of dispute resolution in cross-border transactions, and the number of water conflicts resolved through this mechanism is expected to increase.[27] Beharry and Kuritzky go so far as to say, "[i]ndeed, a new generation of cases is on the horizon springing from [water conflicts]."[28] Because of increased water scarcity concerns and rights-based arguments, the right to water is already found in some legal doctrines and the realm of arbitration encompassing water conflicts. Arbitration and the right to water have a definitive past, present, and future.[29]

C. Water Conflicts

1. What are Water Conflicts, and Why Do They Occur?

At the international and subnational levels, water conflicts are disagreements over the utilization of the same water resource. Water can be the cause, tool, or target of conflicts that have varying degrees of severity.[30] Water conflicts have existed throughout time and continue to be a part of today's political climate.[31] Water conflicts have been on the rise at the international level

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25. *See* Simon Greenberg, Clifford Chance, Introduction to International Arbitration, ICC Summer Course on International Commercial Arbitration Summer 2015 (July 6, 2015). *See generally* Francisco Orrego Vicuña, *Dispute Resolution Mechanisms in the International Arena: The Roles of Arbitration and Mediation, Arbitration in a New International Alternative Dispute Resolution System*, 57-JUL DISP. RESOL. J. 64 (2002).

26. *See infra* Part II.C.2. (discussing transboundary waters). Mikhail Kalinin, *Transboundary Waters: Sharing Benefits, Sharing Responsibilities*, UN Water Thematic Paper (2008), http://www.unwater.org/downloads/UNW_TRANSBOUNDARY.pdf.

27. *See generally* Greenberg *supra* note 25. This is a summer course and there are no files on the website that support the citation. http://www.iccwbo.org/Training-and-Events/All-events/Events/2016/2016-ICC-Summer-Course-on-International-Commercial-Arbitration/; International Chamber of Commerce, Statistics, http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/.

28. *See* Beharry *supra* note 8at 386–87; *infra* Part II.C (discussing water conflicts). Christina L. Beharry & Melinda E. Kuritzky, *Going Green: Managing the Environment Through International Investment Arbitration*, 30 AM. U. INT'L L. REV. 383, 386–87 (2015).

29. Further examples include *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1 (June 19, 2007); Lake Lanoux Arbitration Case, 24 Int'l L. Rep. 101 (1957); Zarumilla River Case, Arbitral Award renderered by the Chancellery of Brazil (July 14, 1945). *See* International Water Law Project, Other Tribunals – International Water Law Cases, http://www.internationalwaterlaw.org/cases/othertribunals.html.

30. *See* Simon J. A. Mason (Center for Security Studies, ETH Zurich), Tobias Siegfried (hydrosolutions GmbH), Sustainable Sanitation and Water Management, http://www.sswm.info/content/water-conflicts.For a very interesting and meticulous look at water conflicts, consult the Water Conflict Chronology List, which dates the first water conflict to 3,000 B.C. *See* Water Conflict Chronology List, Pacific Institute, http://www2.worldwater.org/conflict/list/.

31. Jerome Delli Priscoli & Aaron T. Wolf, *Managing and Transforming Water Conflicts*, 1 (Cambridge University Press 2009).

with many of the recent cases arising from "competition for a resource that is reaching peak limits," further demonstrating the need for protection of the environment and water resources.[32]

Water conflicts manifest themselves in various forms, including conflicts over the control of water resources, using water as a military and political tool, and those originating from development disputes.[33] Notably, some water conflicts do not result in physical violence, but instead are seen through violations of other human rights, such as forced displacement.[34] Some examples of modern water conflicts resulting in international arbitration include disputes over construction of hydroelectric dams,[35] privatization of water resources,[36] and arguments over the commodification of water.[37]

There are various reasons why water conflicts exist, of which global water scarcity is a leading cause.[38] Other examples of causes include population increases, climate change, and political tensions between upper riparian and lower riparian countries.[39] There is no one route to resolution, and clearly the preferred option is to avoid water conflicts altogether.[40] However, when disputes arise there are various means to resolve them, of which international arbitration is one.

2. Transboundary Waters

Areas with transboundary waters are particularly ripe for water conflicts. Transboundary waters are water sources that transcend territorial boundaries.[41] There are 263 transboundary

32. *See* Peter Gleick & Matthew Heberger, Water and Conflict, Pacific Institute 168, http://worldwater.org/water-conflict/. Please refer to Appendix A for a Graph Displaying the Rise of Water Conflicts, page (i) herein.

33. *See id.*

34. *See infra* Part IV.B.3 (discussing the outcomes of the Kishenganga Arbitration).

35. *See infra* Part IV. (discussing the Kishenganga Arbitration).

36. In the infamous case of *Bechtel v. Bolivia*, sometimes referred to as Bolivia's "water war," the water supply in the city of Cochabamba, Bolivia, was privatized by the company Aguas del Tunari in 1999. In 2000, the residents of Cochabamba revolted against the privatization having taken place without their knowledge and the extreme increase in water tariffs, sometimes from 25% to 200%. This was a violation of the right to water, and ultimately led Cochabamba to end its contract with Aguas del Tunari. This led the company to request an ICSID arbitration, but the case eventually settled before the tribunal rendered an award. This result led Bolivia to leave ICSID and advocate for the formalization of the right to water and sanitation at the United Nations. *See* Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over Privitization*, 31 Berkeley J. Int'l L. 89, 97–98 (2013).

37. In *Bayview*, the issue concerned water grabbing of the Rio Grande, resulting in an investor-state arbitration under ICSID, made under article 1120 of NAFTA, by Texan water users and irrigation districts, alleging Mexico, in violation of NAFTA, captured water from the Rio Grande for Mexican farmers. ICSID eventually denied jurisdiction over this case. *See* Julien Chaisse & Marine Polo, *Globalization of Water Privatization: Ramifactions of Investor-State Disputes in the "Blue Gold" Economy*, 38 Boston College Int'l & Comp. L. R. 1, 21 (2015); *Bayview Irrigation Dist. et al. v. United Mexican States*, ICSID Case No. ARB(AF)05/01 (June 19, 2007); Quealy *supra* note 11 at 101, 120.

38. *See* Joseph W. Dellapenna, *The Law of International Watercourses: Non-Navigable Uses*, 97 Am. J. Int'l Law 233 (2003).

39. *See infra* Part IV. (discussing the Kishenganga Arbitration).

40. *See infra* Part V. (concluding with some suggestions for improving the right to water in arbitration).

41. *See* Transboundary Waters: Sharing Benefits, Sharing Responsibilities, UN Water Thematic Paper 1 (2008).

lakes and river basins in the world, and approximately 300 transboundary aquifer systems.[42] This number results in an astonishing 145 sovereign states with transboundary waters with at least one other state.[43]

Inevitably, with this many water resources at stake and so many participants in their maintenance, transboundary waters require particular attention because they are more vulnerable to water conflicts. Transboundary waters present unique issues because ownership over the resource must be shared.[44]

III. The Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA) is one of the oldest and largest international dispute resolution facilitators in the world. Established from the 1899 Hague Peace Conference and the resulting 1899 and 1907 Conventions for the Pacific Settlement of International Disputes, the PCA is inherently a creature of the nineteenth century peace movement.[45] The PCA consists of 121 member states that have signed at least one of the 1899 and 1907 Conventions."[46] Despite its name, the PCA is not permanent, nor is it a court, nor does it conduct arbitrations. [47] Instead, the PCA facilitates arbitrations.

As an institution, the PCA's duties include providing administrative, legal, and secretarial services to parties that availed themselves to the PCA's dispute settlement instruments.[48] The PCA has played a large role in developing customary international law.[49] Historically, the PCA has not assisted with many cases of international significance.[50] Since 1995, however, the PCA has been servicing more cases, with an annual filing rate of approximately six cases per year.[51] The PCA services parties involving states, state-controlled entities, intergovernmental organiza-

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42. *See id.;* United Nations Water for Life Decade, Transboundary Waters, http://www.un.org/waterforlifedecade/transboundary_waters.shtml. *See also* SIWI, Transboundary Waters, http://www.siwi.org/media/facts-and-statistics/5-transboundary-waters/.

43. *See id.*

44. *See* David N. Cassuto & Romulo S.R. Sampaio, *The Guarani Aquifer and the Challenges of Transboundary Groundwater*, 24 COLO. J. INT'L ENVT'L L. & POL'Y 1, 29 (2013).

45. *See* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 795 (2012).

46. *Member States*, PERMANENT COURT OF ARBITRATION, https://pca-cpa.org/en/about/introduction/member-states/.

47. Born, *supra* note 45, at 796. *See also* David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L., 4, 18 (2000) (quoting Dutch scholar T.M.C. Asser) ("Instead of a permanent *court* . . . the Convention of 1899 gave only the phantom of a court, an impalpable specter or, to speak more precisely, it gave a secretariat and a list.").

48. Yulia Andreeva et al., *Report of the International Courts Committee*, 2009 A.B.A. SEC INT'L L. REP. 43, 425, 434 ("[A]dministrative support services such as an updated list of leading scholars and practitioners to be appointed as arbitrators or conciliators; a channel of communication between the parties; holding and disbursing deposits for costs; safe custody of documents; efficient secretarial, language and communications services; and, a courtroom and office space, if needed."). *See also* Lee M. Caplan et al., *International Courts and Tribunals*, A.B.A. SEC INT'L L. REP. 41, 291, 297 (2007).

49. *See* Born *supra* note 45 at 797.

50. *See id.* at 797–98.

51. *See id.* at 798.

tions, as well as private parties.[52] Because of its relationship to peace, it is appropriate that some of the disputes the PCA helps to resolve involve human rights and environmental disputes, and it is anticipated that it will continue to assist in more international water disputes.[53]

To this respect, in 2001 the PCA adopted Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources.[54] The next year, in 2002, the PCA adopted the Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment.[55] The PCA's Rules of Procedure[56] and the "Environmental Rules" are based off of UNCITRAL to, *inter alia*, "reflect the particular characteristics of disputes having a natural resources, conservation, or environmental protection component; [and] reflect the public international law element which pertains to disputes which may involve States and utilization of natural resources and environmental protection issues, and international practice appropriate to such dispute."[57] The Environmental Rules set an important precedent to aggrandize the right to water. The PCA is an institution especially prepared to assist parties in resolving international water disputes. Appropriately therefore, the parties in the Kishenganga Arbitration elected this institution.

IV. Pakistan v. India: The Kishenganga Arbitration

The Kishenganga Arbitration is one example of rising water conflicts in the region between Pakistan and India.[58] Pakistan and India share transboundary waters, of which the Indus River basin is one of the larger.[59] This region of the Kashmiri border is rife with historical and modern animosity, and abundant natural resources, including fresh water.[60]

One must understand the situation of the right to water in Pakistan and India to understand how the decision of the Kishenganga Arbitration fits into the region itself. This section first discusses the right to water in Pakistan and India, the water resources involved, and the Indus Water Treaty will be discussed in the following pages. Following this introduction, the dispute and outcome of the arbitration are explored. Finally, contentions of hydroelectric dams are discussed to give a further context for this dispute and award.

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52. *See Arbitration Services*, PERMANENT COURT OF ARBITRATION, https://pca-cpa.org/en/services/arbitration-services/.

53. *See id.*; INTERNATIONAL LAW AND FRESHWATER: THE MULTIPLE CHALLENGES, 345 (Laurence Boisson de Chazournes et al. eds., 2013).

54. *See* Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, Permanent Court of Arbitration, http://www.pca-cpa.org/environmental(3)d0a4.pdf?fil_id=590.

55. See Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, http://www.pca-cpa.org/ENV%20CONCbcf6.pdf?fil_id=589; *see also* Natalie L. Bridgeman & David B. Hunter, *Narrowing the Accountability Gap: Toward a New Foreign Accountability Mechanism*, 20 Geo. Int'l Envtl. L. Rev. 187, 216 (2008).

56. See Permanent Court of Arbitration, Arbitration Rules (2012), http://www.pca-cpa.org/PCA%20Arbitration%20Rules%202012_20130804%20Enga61a.pdf?fil_id=2309.

57. *See supra* note 55.

58. *See generally supra* Part II.C. (discussing water conflicts).

59. *See supra* Part II.C.2.

60. Robins, *supra* note 1, at 389.

A. The Right to Water in Pakistan and India

Both Pakistan and India are facing difficulties in realizing the right to water for their respective citizens.[61] These difficulties are multi-layered and include, for example, navigating climate change, fast-growing populations, worldwide economic crises, inadequate infrastructure, and unstable political regimes, each of which affects the right to water in these countries.[62] First, this section presents the status of the right to water in Pakistan, followed by a discussion of the same in India.

1. The Right to Water in Pakistan

In Pakistan, 16 million people do not have safe water accessible to them, and approximately 68 million do not have access to adequate sanitation.[63] The past sixty years present a decrease in per capita water availability; despite the plentiful resources scattered among the country, many citizens are deprived of clean water.[64] Pakistan's difficulty with its water resources surrounds corruption at the governmental and local level, a "lack of accountability and transparency of water-based regulatory authorities," and inconsistent decisions on the best course of action between governmental levels to realize the right to water.[65] Pointedly, "water shortages present the greatest future threat to the viability of Pakistan as a state."[66] Pakistan is one of the few nations in the world, where the right to water "has been recognized constitutionally, legislatively, and judicially,"[67] but obtaining water in a tangible form remains a serious issue.

Even though there is water within its borders, the Pakistani government, in 2013, found that "80% of water samples collected throughout the country were unsafe for human consumption."[68] Further, nearly 90% of the country's water is reserved for agriculture production.[69] This consumption practice leaves very little for human consumption for health or sanitation use.[70] Also, water-use patterns[71] and flooding are two large problems for Pakistan's

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61. *See supra* II.A. and B.

62. *See* Nicole Livanos, *Grab for Water Could Spark Conflict in Pakistan and India*, 19 PUB. INT. L. REP. 24, 25 (2013); Sikander Shah, *The Human Right to Water: Its Provision and Violation in Pakistan*, Inst. For Social Policy and Understanding (2012), http://www.ispu.org/pdfs/ISPU_Brief_Shah_Water.pdf; United Nations Water for Life Decade, Asia and the Pacific, http://www.un.org/waterforlifedecade/asia.shtml.

63. *See* Water Aid, Pakistan, http://www.wateraid.org/us/where-we-work/page/pakistan.

64. *See* Livanos *supra* note 62 at 27.

65. *See* Shah *supra* note 62.

66. *See* Livanos *supra* note 62 at 25.

67. *See* Shah *supra* note 62.

68. *See* United Nations Water Best Practices Database, http://www.unwaterbestpractices.org/component/tags/tag/20-india. *See* Livanos, *supra* note 64, at 27; *Over 80% Pakistanis drink contaminated water*, KHALEEJ TIMES (Sept. 8, 2016), http://www.khaleejtimes.com/international/pakistan/20160908/over-80-pakistanis-drink-contaminated-water.

69. *See* Livanos, *supra* note 62 at 27.

70. *See id.*

71. *See* Water for Life Decade, *supra* note 62.

right to water.[72] For example, in 2010, 20 million people were affected by a flood along the Indus River.[73]

Pakistan is one of the countries previously deemed least likely to reach its obligations to the Millennium Development Goals[74] pertaining to the right to water and sanitation.[75] However, the country has made some progress; for example, the Clean Drinking Water for All project is a result of Pakistan's commitment to the MDGs, and is an important step in attaining the right to water in this country.[76] Unfortunately, the reality remains that even with some positive steps in the water sector, Pakistan's future promises more water difficulties for the country, so much so that the United Nations indicators used to track water progress will likely downgrade Pakistan from "water stressed" to "water scarce" by 2030.[77]

2. The Right to Water in India

When compared to Pakistan, India is somewhat more on track in regards to achieving the right to water for all.[78] However, India is particularly unprepared for the anticipated natural disasters and consequences of climate change. [79] Presently, the right to water and sanitation is not seen by approximately 76 million people in India who do not have access to safe water, and there are 770 million people who do not have adequate sanitation.[80] The Indian city Delhi, for example, is at a severe risk of running dry in three to five years.[81] Similar to Pakistan, different levels of government have disparate ideas on the correct way to implement the right. Another similarity with Pakistan is that India has water resources but those available for human consumption are of inadequate quality because of their lack of cleanliness.[82]

On paper, India consistently recognizes the right but effectively implementing it is often difficult.[83] Pointedly, there is no legislation to implement the right to water.[84] However, judicial action is advancing the right in small steps. For example, in 2014, the High Court in Mumbai declared that under the 'Right to Life' in Article 21 of the Indian Constitution, illegal

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72. *See* Shah, *supra* note 62.

73. *See* Water for Life Decade *supra* note 62.

74. *See* Millennium Development Goals, *supra* note 13 (Created in 2000, the Millennium Development Goals (MDGs) set forth a pathway towards reducing the number of people without "sustainable access to safe drinking water and basic sanitation" by 2015). *See also* Water in the Post-2015 Agenda, *supra* note 14 (Significant progress has been made to reach the water goals, and in the post-2015 agenda the international community continues to work towards ensuring the right to water for all).

75. *See* Shah *supra* note 62, at 1.

76. *See id* at 9.

77. *See* Livanos, *supra* note 62, at 25.

78. *See* United Nations Water for Life Decade, *supra* note 62; s*ee also* Shah, *supra* note 62, at 4.

79. *See* United Nations Water for Life Decade, *supra* note 62.

80. *See* U.N. Water-International Conference, 1, Oct. 3–5, 2011, http://www.un.org/waterforlifedecade/green_economy_2011/pdf/session_3_sustainable_financing_cases_india.pdf.

81. *See* Livanos *supra* note 62 at 25.

82. *See* United Nations Water Best Practices Database *supra* note 68.

83. *See* Cullet *supra* note 15.

84. *See id.* at 65.

slum dwellers have a right to water and municipalities should create systems to promote the right.[85] This decision follows India's trend to recognize the right to water at the judicial level, even though the Indian Constitution does not recognize the right itself.[86] In addition to judicial means, India is promoting the right through state legislation and policy instruments by union governments in rural areas.[87] India is also strengthening its participatory groundwater management and promoting community collaboration in water management, which are essential for the right to water.[88]

Demonstrably, and while there is some noteworthy progress in Pakistan and India, much work remains to be done to achieve the right to water in these countries. This brief introduction into the water situations of these countries shows the need to include the right to water at the forefront of major decisions affecting the whole of the countries.

B. Indus River Basin: The Disputed Water Resource

The Indus River basin is a transboundary water resource between Pakistan and India, making this region disposed for water conflicts.[89] Pakistan and India share a large border, which includes sharing six rivers, the Indus, Chenab, Jhelum, Sutlef, Beas, and Ravi.[90] The Indus River[91] comes from the Himalaya Mountains,[92] traveling across India through to Pakistan,[93] and is the largest source of water for all of Pakistan and north-western India.[94] Pakistan

85. *See* THE RIGHTS TO WATER AND SANITATION, Historical judgment on the Right to Water in India, http://www.righttowater.info/historical-judgement-on-the-right-to-water-in-india.; *See also* Videh Upadhyay, *Water Rights and the 'New' Water Laws in India, Emerging Issues and Concerns in a Rights Based Perspective* in India Infrastructure Report 2011, 56 (2012), http://www.idfc.com/pdf/report/2011/Chp-5-Water-Rights-And-The-New-Water-Laws-In-India.pdf.

86. *See* Cullet, *supra* note 15, at 61.

87. *See id.*

88. *See* United Nations Water Best Practices Database *supra* note 68 for more discussions on how to successfully achieve the right to water.

89. *See* Indus Focus Area Strategy: 2013–2017, South Asia Water Initiative, http://www.southasiawaterinitiative.org/IndusContext.

90. *See* Fazilda Nabeel, Transboundary Water Resource Management – Indus Basin and Beyond, presented at Water Conference 2013: Water cooperation in action—from the global to the grassroots, Dec. 4th – 5th, Karachi, http://mhhdc.org/wp-content/themes/mhdc/reports/Transboundary_Water_Reousrce_Management%20_%20Indus_Basin_and_Beyond.pdf.

91. A river basin is the term used to describe an inter-connected system of water that cumulatively flow to a central river or larger body of water. *See* River Basin, North Carolina Dep't of Env't and Natural Res., http://www.ncstormwater.org/pages/workbook_riverbasin.html.

92. The temperature of the Himalaya Mountains has been much higher than the rest of the world as a result of climate change and other factors, which results in a greater negative impact on the Indus River basin and the people that depend on it. Climate change related challenges present new opportunities for conflict to arise, but also for solutions to form. *See* Ashok Swain, *The Indus II and Siachen Peace Park: Pushing the India-Pakistan Peace Process Forward*, 98 THE ROUND TABLE 569, 572 (2009).; Lauren Herzer, *How to Create a New Climate for Peace: Preventing Climate Change from Exacerbating Conflict and Fragility*, New Security Beat (June 19, 2015), http://www.newsecuritybeat.org/2015/06/create-climate-peace-g7-report-aims-prevent-climate-change-exacerbating-conflict-fragility/; *see also* Debate by Anton Earle & Ana Elisa Cascau et al., Transboundary Water Management and the Climate Change Debate (2015).

93. *See Swain, supra* note 92, at 571.

94. *See id.*

and India have a historically complex and sensitive relationship since partition in 1947, which can make sharing water a complicated political strategy.[95]

With increasing stressors, it is important that transboundary water relations are not only maintained but also improved. As previously demonstrated, Pakistan and India each have many concerns regarding the right to water, and some of their concerns about sharing the Indus River are alleviated by the Indus Water Treaty.

1. Indus Water Treaty

The Indus River basin has been divided for many years; the modern boundary lines were first drawn by the government of British India.[96] The issues surrounding sharing the resource only became international after a war and partition, when Pakistan and India were no longer under the same authority.[97] At that time, the 1947 Indian Independence Bill created each country based on the dominant religions of the land (i.e., "Muslim-majority Pakistan and Hindu-majority India"[98]). The division did not take into account hydrological concerns like the Indus River basin.[99]

Unlike other transboundary waters, the Indus River basin is more complicated because of the flow of the water: the rivers flow into and out of each country, instead of a one-way flow that is more often found in transboundary river basins.[100] To help resolve this problem and share the Indus River basin, the Indus Water Treaty (IWT) of 1960 between Pakistan and India with the help of the World Bank.[101] The IWT manages the water shared between the countries based off of a division of the "Eastern Rivers," which includes the Ravi, Beas, and Sutlej, to India, and the "Western Rivers" to Pakistan, the Indus, Jhelum, and Chenab.[102]

Even enduring two wars fought between the countries, Pakistan and India remain participative in the IWT.[103] Most of the disputes under the IWT originate under Article IV, which prohibits "the flow in any channel to the prejudice of the uses on that channel by the other

95. *See* Neal A. Kemkar, *Environmental Peacemaking: Ending Conflict Between India and Pakistan on the Siachen Glacier Through the Creation of a Transboundary Peace Park*, 25 STANFORD ENVTL. L.J. 67, 72 (2006).

96. *See* Aaron T. Wolf & Joshua T. Newton, *Case of Transboundary Dispute Resolution: The Indus Water Treaty*, THE PROGRAM IN WATER CONFLICT MANAGEMENT AND TRANSFORMATION, http://www.transboundarywaters.orst.edu/research/case_studies/Indus_New.htm, for a more extensive look into the history and development of the Treaty.

97. *See id.*; Robins *supra* note 1 at 390.

98. *See* Shweta Desai, Pakistani Hindus 'unwelcome' in India, ALJAZEERA, Feb. 18, 2014, http://www.aljazeera.com/indepth/features/2014/02/pakistani-hindus-unwelcome-india-201421063012210386.html?utm=from_old_-mobile.

99. *See* Wolf & Newton *supra* note 96.

100. *See* Robins *supra* note 1 at 390.

101. *See* Kemkar *supra* note 95 at 74–75; Robins *supra* note 1 at 390.

102. *See* Swain *supra* note 92; Robins *supra* note 1 at 389–90. Please refer to Appendix B for Map of the Indus River Basin, page (ii) herein.

103. *See* Kemkar *supra* note 95 at 74–75; Bharat H. Desai & Balraj K. Sidhu, *The Kishenganga Final Award, Is the Indus Waters Treaty at the Crossroads?*, Vol. XLIX No. 7 ECONOMIC & POLITICAL WEEKLY (Feb. 15, 2014).

Party."[104] The IWT covers many potential disputes, however, hydropower is one area that is not covered.[105] Generally though, the Treaty has been an effective tool in dividing the water resources.[106]

The significance of successfully sharing the Indus River basin is predicted to serve a key role in improving relations between the countries at a larger political level, and to serve as an example for other countries.[107]

The IWT is recognized as a "model for future regional cooperation,"[108] in no small part because of the dispute resolution clauses it contains. The dispute resolution tools available under Article IX are mediation, negotiation, and arbitration.[109] Indeed, "[w]ithout the availability of recourse to alternative dispute resolution, the [IWT] would be largely unenforceable," and the temptation for unfriendly dispute settlement could arise.[110]

i. Dispute Resolution under the Indus Water Treaty

Titled 'Settlement of Differences and Disputes,' Article IX Section Five of the IWT provides the available dispute resolution mechanisms.[111] To summarize,

> [t]he Indus Water Treaty identifies three levels of disputes, each of which has its own dispute settlement mechanism. The first level is a question, which the Permanent Indus Commission under Article VIII is meant to resolve. The Commission is made of two individuals: one from Pakistan and India. The second level is a difference: a difference is made when the Commission cannot resolve the question. At this point, if the difference involves technical issues a neutral expert is appointed. If this process does not solve the difference, then the difference reaches the third level, a dispute. Disputes are dealt with according to Articles IX(2)(b) – IX(5), which instruct the Commission to send all relevant documents to the respective governments and allow a government to invite the other to agree on a solution under Article XI(4). If this invitation does not develop, then arbitral proceedings begin.[112]

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104. *See* Robins *supra* note 1 at 390 (quoting Indus Water Treaty, art. IV sec. 2, Sept. 19, 1960, 419 U.N.T.S. 125).
105. *See id.* Thus, the Treaty is an important tool to have in managing this water resource, but it is by no means the ultimate solution to potential problems.
106. *See generally id.*
107. *See* Swain *supra* note 92 at 571.
108. *See* Robins *supra* note 1 at 390.
109. *See id.* at 389–91.
110. *See id.* at 391.
111. *See* Indus Waters Treaty *supra* note 104, at 18.
112. *See* Valentin Jeunter, *Let flow all the waters? – The Indus Waters Kishenganga Arbitration,* Cambridge J. of Int'l & Comparative Law, http://cjicl.org.uk/2012/12/05/let-flow-all-the-waters-the-indus-waters-kishenganga-arbitration-2/.

Thus, arbitration is merely one of the options available for parties to resolve their disputes. Disputes involving fundamental legal questions are usually reserved for arbitration.[113] Before 2010, a neutral expert or negotiations were sufficient to resolve a dispute under the treaty.[114] However, on May 17, 2010, Pakistan initiated arbitration under Article IX and Annexure G of the IWT against India.[115]

2. The Dispute

The dispute raised under the IWT in 2010 is known as the Kishenganga Arbitration. The project raising this arbitration is the Kishenganga Hydro-Electric Project (KHEP) that India planned to construct. Pakistan opposed its construction because the water to be used for the KHEP would divert the waters of the Kishenganga/Neelum rivers, (Neelum is the name given to the Kishenganga rivers in Pakistan.[116]), which would adversely affect Pakistan's downstream hydro-electric construction, the Neelum-Jhelum Hydroelectric Project (NJHEP).[117]

The KHEP project involves a 37-meter-high concrete dam to divert the Kishenganga river.[118] The water would still reach Pakistan via a different route. However, supply would be limited and frustrate Pakistan's plan to build its own hydroelectric project, the NJHEP.[119] Pakistan sought arbitration while the KHEP was still under construction. Pakistan wanted to construct the Neelum-Jhelum Hydroelectric Project (NJHEP) and other downstream hydroelectric projects, and the reallocation of water from the KHEP threatened would prevent the necessary amount of water from reaching the NJHEP.[120]

The dispute is based on two main issues: (1) whether India's hydropower dam breaches its legal obligations to Pakistan under the Indus Water Treaty to "let flow all the waters of the Western rivers and not permit any interference with those waters" and the maintenance of natural channels ("minimum flow"); and (2) whether India may deplete or eliminate the dead storage level.[121]

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113. *See id.*

114. *See* Tamar Meshel, *The Indus Waters Kishenganga Arbitration – Reviving the Indus Waters Treaty and Arbitration of Interstate Water Disputes*, Kluwer Arbitration Blog (Jan. 21, 2014), http://kluwerarbitrationblog.com/blog/2014/01/21/the-indus-waters-kishenganga-arbitration-reviving-the-indus-waters-treaty-and-arbitration-of-interstate-water-disputes/.

115. *See* Desai *supra* note 103, at 10.

116. *See id.*

117. *See* Steven Arrigg Koh, *Hague Court of Arbitration Rules in Indus Waters Kishenganga Arbitration (Pakistan v. India) (December 20, 2013)* (Jan. 23, 2014), http://www.asil.org/blogs/hague-court-arbitration-rules-indus-waters-kishenganga-arbitration-pakistan-v-india-december.

118. *See* Jeunter *supra* note 112.

119. *See id.*

120. *See* John R. Crook, *In re Indus Waters Kishenganga Arbitration (Pakistan v. India)*, 108 Am. J. Int'l L. 308, 310 (2014).

121. *See* Robins *supra* note 1 at 399, referencing Articles III(2) and IV(6) of the Treaty. "Dead storage capacity" refers to the "portion of reservoir capacity which is not used for operational purposes," and "dead storage" is the corresponding volume of water below which the reservoir does not operate. *See* Indus Waters Treaty (1960), http://siteresources.worldbank.org/INTSOUTHASIA/Resources/223497-1105737253588/AnnexureE.pdf.

The Permanent Court of Arbitration was the Secretariat for the Kishenganga Arbitration.[122] As of December 17, 2010, the panel (also referred to as the Court of Arbitration) consisted of Jan Paulsson and Judge Bruno Simma, appointed by Pakistan, and Lucius Caflisch and Judge Peter Tomka, appointed by India.[123] The IWT requires the parties to have three mutually decided upon umpires, but the parties were unable to agree, so the umpires were selected by the Secretary-General of the United Nations, the Lord Chief Justice of the England and Wales, and the Rector of the Imperial College, London.[124] These individuals selected Howard S. Wheater, Judge Stephen Schwebel, and Franklin Berman as umpires.[125]

3. The Outcomes

The dispute resulted in three outcomes made by the Court: An Interim Order, a Partial Award, and a Final Award. On September 23, 2011, the Court issued its Order on the Interim Measures Application of Pakistan dated 6 June 2011.[126] The Court held that some of the dam construction would necessarily be enjoined, such as the dam's actual construction because it would "eventually enable India to exercise a certain degree of control over the volume of water that will reach Pakistan."[127] The Court continued to say that, "it is the dam that would eventually place India in a position to divert parts or all of the waters of the Kishenganga/Neelum river . . .[128] thus potentially affecting water supplies in downstream areas of the Neelum valley."[129]

The Partial Award was delivered on February 18, 2013, in which the Court held, in regards to the first issue, that India could divert the Kishenganga waters for hydroelectric power.[130] This decision was, however, limited by the Final Award that would set a minimum flow maintenance.[131] The Partial Award determined that India could not permit depletion of the water resource below a dead storage level.[132]

The Court rendered its Final Award on December 20, 2013. With respect to the first issue, the Court held, *inter alia*, that India must release a minimum flow of "9 cumecs into the Kishenganga/Neelum River below the KHEP at all times at which the daily average flow in the Kishenganga/Neelum River immediately upstream of the KHEP meets or exceeds 9 cumecs."[133] Practically speaking, the Court allowed the KHEP's construction because water

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122. *See* Robins *supra* note 1 at 400.

123. *See* Crook *supra* note 120 at 309; Final Award *supra* note 4.

124. *See* Robins *supra* note 1 at 399–400.

125. *See* Crook *supra* note 120 at 309.

126. *See* Final award *supra* note 4.

127. *See* Robins *supra* note 1 at 400–01; In the Matter of the Indus Waters Kishenganga Arbitration (Pak. v. India), PCA Case Repository, Interim Order 146 (Perm. Ct. Arb. Sept. 23, 2011).

128. *See* Final award *supra* note 4.

129. *See* Matter of the Indus Waters, *supra* note 127.

130. *See* Final Award *supra* note 4 at 2.

131. *See id.*

132. See Final Award, *supra* note 4 at 3; Robins *supra* note 1 at 401.

133. *See* Final Award *supra* note 4 at 43. A cumec is a cubic meter per second. *See* Conversion Units of Flow Rates, *available at* http://orefa.net/flow_rate.html.

diversion for power generation is permissible under the IWT. This holding is limited because India must still maintain the minimum flow, so as not to disadvantage its neighbor.[134] The conclusion held in the Partial Award regarding the dead storage level issue was upheld in the Final Award.

Essentially, the panel "split the victories," meaning that India won on the first issue, and Pakistan won on the second issue.[135] The award was expected to be a "prime example of the peaceful settlement of disputes."[136] However, in resolving this dispute, the Court did not consider the right to water.[137]

4. Contentions Regarding Hydroelectric Dams

Both Pakistan and India are constructing their dams. Dams are a technical topic, but for brevity's sake this section will illuminate as to why dams are often harmful to the environment and thus a hindrance to the right to water.[138] Water and energy more generally are inextricably linked and as "90% of energy production relies on intensive and non-reusable water models that are not sustainable."[139] Dams are criticized for the loss of biodiversity, cultural and historic sites, social disruption,[140] and even some massacres of local communities to create them.[141]

Dams negatively affect sedimentation, flow, habitats, biodiversity, [142] changing this much of the environment affects the quality of water as well as its availability, which negatively affects the right to water.[143] Despite the renewable part of this energy, the way hydroelectric dams are currently constructed are hazardous to the water sources they divert and the surrounding environment. There is no reason to believe that the KHEP nor the NJHEP will be any different; in fact, there are already instances of environmental and human rights violations.[144] Thus, the decision to construct dams must not be undertaken lightly as the risks implicating the right to water are enormous.[145]

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134. *See* Desai *supra* note 103.

135. *See* Robins *supra* note 1 at 398–401.

136. *See* Jeunter *supra* note 112.

137. *See* Final Award *supra* note 4 at 17, 43.

138. *See* Rep. of the UNITED NATIONS WORLD WATER ASSESSMENT PROGRAMME [hereinafter WWAP] *The United Nations World Water Report 2014: Water and Energy Vol. 1,* at 78–79, http://unesdoc.unesco.org/images/0022/002257/225741e.pdf.

139. *See* Irina Bokova, *Foreword* to WWAP at v.

140. *See* WWAP *supra* note 138 at 38.

141. *See Rio Negro Massacres*, GUATEMALAN HUMAN RIGHTS COMMISSION, http://www.ghrc-usa.org/our-work/important-cases/rio-negro/.

142. *See* WWAP *supra* note 138 at 79.

143. *See* Missy Davenport, *The Downside of Dams: Is the Environmental Price of Hydroelectric Power Too High?*, SCI. AM. (Sept. 18, 2012), http://www.scientificamerican.com/article/how-do-dams-hurt-rivers/.

144. *See Kishanganga Hydro Electric Power Project (KHEP), India,* Environmental Justice Atlas, https://ejatlas.org/conflict/kishanganga-hydro-electric-power-project-khep-india.

145. *See generally id.*

The construction of these dams is negatively impacting the right to water, among other rights, of people who traditionally relied on these waters for survival. Pointedly, the Dard-Shina tribe will be forced to relocate, and it is expected that this relocation will result in the tribe's extinction.[146] The decision of the Kishenganga Arbitration to allow construction of the dams without taking into consideration the human rights implications makes this decision dangerous.

Even if the right to water is not given the prominence it should, in other ways the outcomes of the Kishenganga Arbitration may be characterized as positive. To summarize, there are essentially two general outcomes of this arbitration. First, the positive outcome, which is that both parties agreed to enforce the award. To this point, importantly, each country has agreed to enforce the award.[147] In fact, "[o]fficials of both parties have expressed public satisfaction with the results, and the tribunal's rulings should provide a framework to guide future upstream hydroelectric development by India."[148] Second, as already explained, the negative outcome, entails that the right to water was not given the impact it should be. The results of this arbitration are a momentous occasion in the realm of transboundary water governance and dispute resolution.[149]

5. Conclusions of Section

The Indus Water Treaty's dispute settlement mechanisms resulted in solutions that work for each party's interests, and demonstrate the Treaty's continued relevance in resolving transboundary water disputes, and arbitration's important role therein. This decision can be seen as a basis from which future peaceful dispute settlements can arise, and improves the relationship between the countries. The arbitral clause in the Indus Water Treaty provided a successful implementation of peaceful dispute resolution, proving international arbitration's effectiveness in solving water conflicts. What remains to be seen, as noted, is the right to water itself.

However, the Outcomes certainly do not solve all of the problems related to transboundary hydroelectric dam construction and its costs on the water resource itself.[150] For example, and quite notably, the right to water and sanitation did not influence the Kishenganga Arbitration decisions. Furthermore, the environmental consequences of such construction, international environmental law (like the "duty not to cause transboundary harm" and sustainable development), and the capacities of tribunals to "settle complex disputes on shared water resources with environmental consequences" are not considered in this case.[151] Going forward, "[i]t is hoped that wiser counsels will prevail to resolve bilateral water sharing disputes in the larger interest of the millions of citizens in the two."[152]

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146. *See id.*

147. *See* Crook *supra* note 120 at 313. For a more detailed summary of the arguments, please visit this article.

148. *See id*; *see also* Meshel *supra* note 114.

149. *See* Desai *supra* note 103.

150. *See id.*

151. *See id.*

152. *See id.*

Consequently, the right to water is somewhat promoted through the Kishenganga Arbitration. Evidently, however, more for the environment and the right to water should be done. Some say the award did as much as it could for the environment considering the technologies and parties involved.[153] Admittedly, the panel could have done even less for the environment, and at least there is a minimum flow and dead storage level assigned.

V. Conclusion

As shown, international arbitration must incorporate the right to water because the relationship between international arbitration and the right to water is definite and substantial. The importance of protecting water resources has been a theme throughout this article because the right to water necessitates water be available and of good quality. A greater emphasis is needed on protecting water resources, and thus the right to water is imperative as climate change and other factors negatively affect human rights and international business.

The PCA has set a precedent for more environmental and human rights oriented arbitrations,[154] but further recommendations to improve the relationship between arbitration and the right to water include: (1) stronger enforcement of international laws regarding human rights and the environment;[155] (2) reference to protecting human rights in international treaties;[156] and (3) the right to water should always be considered an authoritative doctrine impacting international arbitral decisions.

The Kashmiri region between Pakistan and India has an effective mechanism in the IWT for peaceful resolution of water conflicts. Indeed, issues surrounding water are going to become more common and the solution for allocating water is not a technical one "but a negotiated one,"[157] so the IWT is critical to have and utilize.

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153. *See* Meshel, *supra* note 114. Visit this piece for more discussion of the environmental impacts of this award.

154. *See* Catherine Zengerling, *Greening International Jurisprudence: Environmental NGOs before International Courts, Tribunals, and Compliance Committees*, 258 (David Freestone, ed., 2013).

155. *See* Maria McFarland Sánchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 FORDHAM INT'L L.J. 1663, 1778 (2004).

156. *See* Fabrizio Marella, *The Human Right to Water and ICSID Arbitration: Two Sides of a Same Coin or an Example of Fragmentation of International Law?*, Current Issues of Public International Law: Proceedings of conference. Moscow, April 9–10, 2010 Vol. II – Moscow: PFUR, 2011. 11, 27–28, file:///E:/Quick%20Folders/Summer%202015/Independent%20Study/2011%20-%20BL2%20-%20Fabrizio.pdf.

157. *See generally* Taylor McNeil, *Avoiding Conflicts Over Water Rights*, (Oct. 26, 2012), http://now.tufts.edu/articles/avoiding-conflicts-over-water-rights.

The award in the Kishenganga Arbitration is important because it involves water and as demonstrated, the right to water, in this region in particular, needs as much support as it can get. Specifically, because the right to water is so vulnerable, it is pivotal that international arbitration promote this right: international arbitral awards are felt throughout levels of societies and since arbitral tribunals will be faced with more water-related disputes in the future, legal arguments for the right to water must be heard and acted upon in arbitration.[158]

This article has given the reader a glimpse into the extensive relationship between the right to water and international arbitration. By exploring the right and water conflicts, this article highlighted the great risks at stake, which gave a context to better understand the importance of the Kishenganga Arbitration. Without delving extensively into this topic, the author hopes the reader gained a new perspective to international arbitration.

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158. *See* Michael D. Goldhaber, *The Rise of Arbitral Power Over Domestic Courts*, 1 Stan. J. Complex Litig. 373 (2013). An example of an international arbitral tribunal using human rights is the Roussalis case determining a dispute over the Greece-Romania bilateral investment treaty. *See* Paula F. Henin, *The Jurisdiction of Investment Treaty Tribunals Over Investors' Human Rights Claims: The Case Against Roussalis v. Romania*, 51 Colum. J. Transnat'l L. 224, 247–48 (2012).

Appendix A: Graph Displaying the Rise of Water Conflicts[159]

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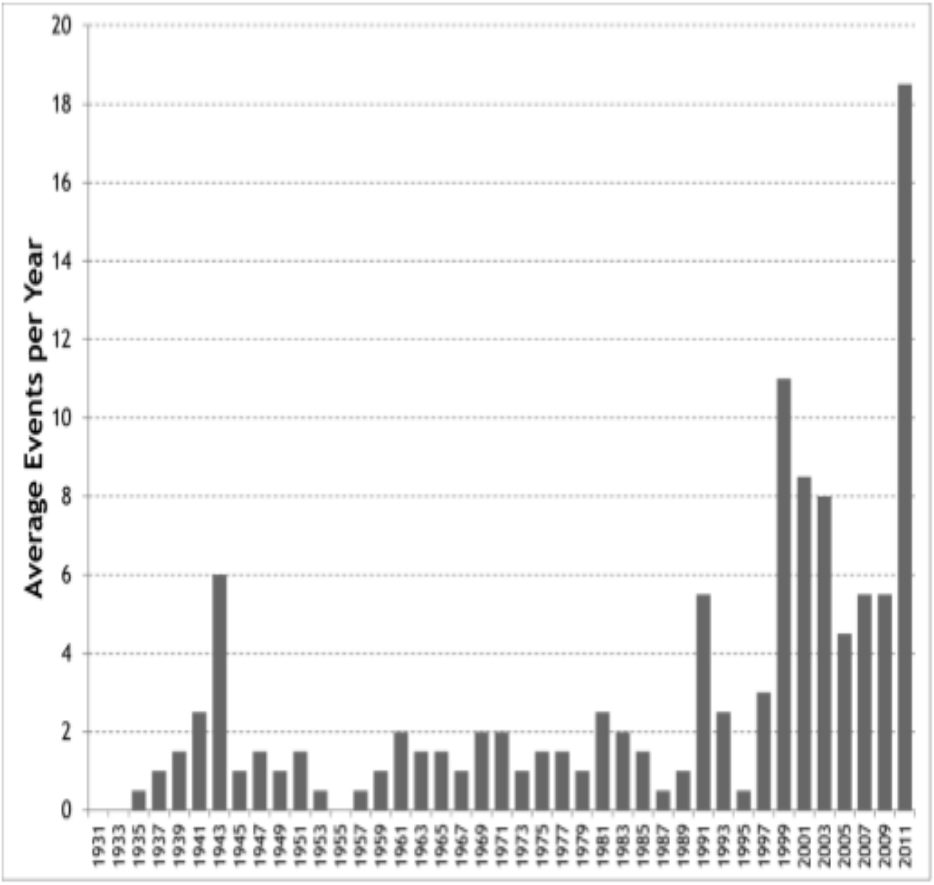

FIGURE WB 3.1 NUMBER OF REPORTED WATER CONFLICT EVENTS PER YEAR, 1931–2012 (AVERAGED OVER TWO-YEAR PERIODS TO SMOOTH FOR CROSS-YEAR EVENTS AND UNEVEN REPORTING)

159. *See* Water Conflict Chronology List, *supra* note 30, http://worldwater.org/water-conflict/.

Appendix B: Map of Indus River Basin[160]

160. *See* Indus Basin, Food and Agriculture Organization of the United Nations, http://www.fao.org/nr/water/aquastat/basins/indus/index.stm (select "Detailed map" option).

The Planet of the Drones: Comparing the Regulation of Commercial Drones in the United States and the United Kingdom

Katharine Suominen*

I. Introduction

On a warm and rainy January morning in the nation's capital, an inebriated off-duty government intelligence employee decided to operate his friend's drone, a 2-foot by 2-foot "quadcopter" that is very popular among drone hobbyists.[1] Unfortunately, the drone operator lost control of the unmanned aircraft and it crashed onto the White House lawn. The next morning, upon learning of the results of his 3 a.m. drone adventure, the drone operator immediately contacted his employer, the National Geospatial-Intelligence Agency, and the Secret Service. Fortunately for him, being a government employee the incident was characterized as a "drunken misadventure" of a "non-dangerous drone."[2]

With unmanned aircrafts entering the U.S. airspace in significant numbers, an incident like the one described above will likely become a normal occurrence without significant regulation. Although the use of unmanned aircrafts is not new, the technology has made substantial advances. Unlike its predecessor, the remote-controlled helicopter, drones have more autonomy and can hover, fly, or navigate with little input from the drone operator.[3] With the introduction of inexpensive and easy-to-operate drones in the marketplace, the skies are now open for everyone who has a desire to operate an aircraft.

The pervasive use of drones blurs the lines between the application of these aerial vehicles as toys, models, and professional aerial instruments.[4] For example, a drone taking photographs for a personal photo album can suddenly be classified as a commercial aerial instrument merely by selling one of those photographs.[5] Thus, the legal complexities of drone law are increasing more than ever as their use becomes more widespread and diverse.[6]

This article employs a comparative approach to understanding the challenges of commercial drone regulation in the U.S. by looking to the regulatory scheme in the U.K. The U.K.

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1. Michael Shear and Michael Schmidt, *White House Drone Crash Described as a U.S. Worker's Drunken Lark*, NEW YORK TIMES (Jan. 27, 2015), http://www.nytimes.com/2015/01/28/us/white-house-drone.html?_r=0
2. *Id.*
3. John Patrick Pullen, *This Is How Drones Work*, TIME (April 3, 2015), http://time.com/3769831/this-is-how-drones-work/.
4. Donna A. Dulo, UNMANNED AIRCRAFT IN THE NATIONAL AIRSPACE CRITICAL ISSUES, TECHNOLOGY, AND THE LAW, 4 (Donna A. Dulo, 2015).
5. *See id.*
6. *See id.*

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provides valuable insights because of its significantly more stringent privacy laws and its ability to pass legislation prior to the increased usage of commercial and recreational drones. By contrast, the U.S. has taken the "regulate from behind" approach, which has both stifled innovation, on the one hand, and allowed for hundreds of drone incidents, on the other.

The goal of this article is to demonstrate how the U.S. can increase safety and privacy protections while continuing to support technological innovation of both personal and commercial drones. The first part will provide an overview of the most commonly used commercial and personal drones, including how they work, their primary uses, and potential privacy and safety concerns posed by their usage. The second part will assess the approach of the U.S., including the recent regulations passed by the Federal Aviation Administration.[7] The third part will discuss commercial drone law in the U.K. And finally, the last part will consider the differences in the approaches taken by the U.S. and the U.K. Most importantly, this part will also address the legal implications of these approaches.

II. Drones: The Good, the Bad, and the Technical

As with most technology, there are both advantages and disadvantages to the use of drones. Before discussing these advantages and disadvantages, it is important to draw a distinction between the drones most people think of first when they hear "drone" from the drones that will be discussed in this article. This article will discuss hobbyist and commercial drones, and civilian sector drones that are not the same as military drones, like MQ-1 Predator or MQ-9 Reaper.[8] By definition, a drone is an unmanned aerial vehicle (UAV) or system (UAS) or a remote piloted aircraft (RPA), both of which are used military and commercial settings.[9] UAVs or UASs are preprogrammed prior to flight to do a specific set of tasks on that flight. RPAs, however, are controlled remotely either by a short-range remote control or from a more sophisticated remote base station.[10]

This section will discuss advantages of drone use, such as the ability to monitor large farming fields or enter environments that are dangerous for human beings. It will also address the disadvantages, including privacy and safety concerns. Additionally, this section will provide an overview of what types of drones currently exist, how they work, and how they fit into the FAA regulatory framework.

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7. As of this publication, the FAA has issued new regulations, which went into effect at the end of August 2016, *see* Part 107, http://www.faa.gov/uas/media/RIN_2120-AJ60_Clean_Signed.pdf; *See also* Press Release—DOT and FAA Finalize Rules for Small and Unmanned Aircraft Systems, FEDERAL AVIATION ADMINISTRATION, June 21, 2016, https://www.faa.gov/news/press_releases/news_story.cfm?newsId=20515.

8. Kelsey Atherton, *Flying Robots 101: Everything You Need to Know About Drones*, Popular Science (Mar. 7, 2013), http://www.popsci.com/technology/article/2013-03/drone-any-other-name.

9. Kacey Kroh, *WHAT ARE DRONES?*, Dummies (Sept. 8, 2016), http://www.dummies.com/consumer-electronics/drones/what-are-drones-2/

10. *See id.*

A. The Advantages to the Use of Unmanned Aerial Systems

The use of unmanned aircrafts presents several important advantages, such as low-cost operation and conducting operations that reduce the risk to human life. Currently, drones are used for many things, such as carrying out military attacks, aiding law enforcement in crowd control operations, making deliveries to ground troops and soon private consumers, assisting in monitoring city streets or a farmer's fields, and enhancing the art world by taking aerial photographs or video. However, as the recreational drone market continues to expand, many operators use drones for no other purpose than the entertainment of flying the unmanned devices. For example, there are drone races in NFL stadiums,[11] as well as other drone competitions throughout the world.[12]

Drones are also able to enter environments that are dangerous to human beings and can stay up in the air for several hours and perform precise and repetitive tasks, including geological surveys or visual and thermal imaging of a region. Consider the first FAA-approved commercial drone, ScanEagle. In 2013, ScanEagle began collecting data to send back to industrial scientists and ConocoPhillips.[13] Another FAA-approved commercial drone, Puma, is used to monitor oil spill sites and ice floes in the Arctic.[14] Given Alaska's remote location and its strategic value as an oil reserve, it makes sense that the FAA granted the oil industry the earliest commercial drone permissions.[15]

Drones also provide significant economic advantages. The Association for Unmanned Vehicle Systems International 2013 Report anticipated that the UAV market would add $80 billion to economic activity and add over 100,000 jobs in the first ten years.[16] With companies like Amazon gaining approval to test delivery drones and the FAA considering adjusting the line of sight requirement, this does not appear to be an unrealistic expectation.[17] Industry experts believe that software and service providers will benefit the most from the growth of the drone industry.[18] Additionally, agriculture will benefit through more timely, cost-effective, and efficient crop monitoring.[19]

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11. DRONE RACING LEAGUE (Feb. 6, 2016), http://thedroneracingleague.com/races/.
12. DRONES FOR GOOD COMPETITION IN DUBAI (Feb. 6, 2016), https://www.dronesforgood.ae.
13. Carney, Elizabeth, *Game of Drones: The Huge Upside Behind This New Commercial Industry*, WALL STREET DAILY (Sept. 9, 2013), http://www.techandinnovationdaily.com/2013/09/09/commercial-drones/.
14. *See id.*
15. *See id*.
16. AUVSI Membership, *More than 20 Industries Approved to Fly Commercial UAS in the U.S.*, AUVSI (July 30, 2015), http://www.auvsi.org/blogs/auvsi-membership/2015/07/31/section333report2; http://auvsilink.org/advocacy/Section333.html.
17. Tasha Keeney, *Who Will Benefit When Commercial Drones Take Off?*, ARK INV., (July 28, 2015), http://ark-invest.com/industrial-innovation/who-will-benefit-when-commercial-drones-take-off#fn-7857-1.
18. *See id*.
19. Lucas Reaves, *6 Arguments in Favor of the Commercial Use of Drones*, INDEP. VOTER PROJECT (May 6, 2013), http://ivn.us/2013/05/06/6-arguments-in-favor-of-the-commercial-use-of-drones/.

B. The Dark Side to the Use of Unmanned Aerial Systems

While there are great advantages to technological innovation, there is also a dark side to new technology. This is no different in the context of the use of unmanned aerial systems. As the Presidential memorandum on "Domestic Use of Unmanned Aircraft Systems" noted, the federal government must take into consideration not only economic competitiveness and public safety, but also the privacy, civil rights, and civil liberties concerns that these new systems may raise.[20]

Public safety concerns with the use of unmanned aerial systems are somewhat self-evident. For example, there is a risk that smaller unmanned aerial systems (UAS) or drones could collide with manned aircrafts, such as commercial airlines carrying hundreds of people.[21] Another concerning example is that of individuals attaching weapons to their drones, such as the 18-year-old Connecticut student who attached a handgun to a drone and created a YouTube video showing the handgun firing in a field.[22]

However, even more troubling are the privacy concerns at stake. According to the presidential memorandum noted above, at the President's direction, agencies "shall, prior to deployment of new UAS technology and at least every 3 years, examine their existing UAS policies and procedures relating to the collection, use, retention, and dissemination of information obtained by UAS, to ensure that privacy, civil rights, and civil liberties are protected."[23] Thus, it is undeniable that there is more at stake than just public safety.

Additionally, there is an ever-growing concern about hacking within the digital age, which overlaps both safety and privacy concerns. Maldrone is a particular type of malware that is aimed at unmanned aerial systems.[24] Since drones are essentially flying computers, hackers can use the Internet to disrupt flight paths by physically taking them over or steal the data that is stored within drone.[25]

C. The Technical Side of the Use of Unmanned Aerial Systems

To understand UAS, it is important to remember that they are considered aircrafts under the FAA regulations and they conform to the same aerodynamic principles and laws of physics

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20. *Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems*, THE WHITE HOUSE (Feb. 15, 2015), https://www.whitehouse.gov/the-press-office/2015/02/15/presidential-memorandum-promoting-economic-competitiveness-while-safegua.

21. Steve Gorman, *Lufthansa Reports Near Miss with Drone Over Los Angeles*, REUTERS (Mar. 19, 2016), http://www.reuters.com/article/us-california-drone-lufthansa-idUSKCN0WL01B.

22. Michael Martinez, *Handgun-Firing Drone Appears Legal In Video, But FAA, Police Probe Further*, CNN (July 21, 2015), http://www.cnn.com/2015/07/21/us/gun-drone-connecticut/.

23. *Supra*, note 20.

24. Chris Opfer, *Can You Hack A Drone?*, HOW STUFF WORKS, http://computer.howstuffworks.com/hack-drone.htm.

25. *See id.* Exploring the problems with the current regulatory framework and the failures to address this particular danger is the topic for another article, but nonetheless worth briefly noting here.

as a manned aircraft.[26] The FAA defines an aircraft in the FAA Regulations § 1.1 (2015) as "a device that is used or intended to be used for flight in the air." Clearly, this definition is broad enough to cover both manned and unmanned aircrafts. The regulations also define "airplane" and "rotorcraft" which also apply to unmanned aircrafts, since they can be composed of either fixed wing (an airplane) or rotorcraft form (e.g., helicopters). Under the FAA Modernization and Reform Act of 2012, § 331, an unmanned aircraft is defined as "an aircraft that is operated without the possibility of direct human intervention from, within, or on the aircraft." Thus, the only difference between an unmanned and manned aircraft is the absence of a pilot onboard the aircraft. However, this distinction should not be undervalued, as it is an essential legal distinction.

In addition to UAV and RPA designations, there are several ways to further classify unmanned aircrafts in the civilian sector. First, the unmanned aircraft is classified according to the three specific criteria: (1) FAA Operational Categories; (2) General Airframe Technologies; and (3) Functional Size Categories.[27] Under the first criteria, there are three types of civilian operational categories as defined by the FAA: (1) Experimental Unmanned Aircraft; (2) Model Unmanned Aircraft; (3) Public Unmanned Aircraft.[28]

An experimental aircraft in many respects is exactly what it sounds like. Essentially, they serve various scientific and engineering purposes, such as airframe testing, payload testing, research and development, pilot and aircrew training, academic and educational training, and systems demonstrations.[29] These unmanned aircrafts require special approval from the FAA under the Federal Aviation Regulation § 21.191.[30] One can think of this category as the innovation side of unmanned aerial systems. These are the aircrafts exploring and advancing the technology through the use of new aeronautical design and enhanced development methodologies.

Model unmanned aircrafts are recreational drones regulated by the FAA Modernization and Reform Act of 2012 § 336. Under § 336, a model-unmanned aircraft is one that is (1) capable of sustained flight in the atmosphere, (2) flown within visual sight of the person operating the aircraft, and (3) flown for hobby or recreational purposes.[31] In other words, model unmanned aircrafts are what one thinks of when they want to give a drone as a gift. They tend to be smaller, weighing less than 55 pounds according to the FAA regulations, and are not operated in a manner that interferes with manned aircrafts.[32]

Finally, public unmanned aircrafts, which are covered by § 334, are essentially drones that are flown within the national airspace.[33] This Section does not set the ultimate size and limits, but it does permit the government public safety agencies to operate small-unmanned systems.

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26. Dulo, *supra* note 4 at 23.
27. *Id* at 26–27.
28. *See id*. at 27.
29. *See id*.
30. *See id*.
31. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 336, 126 Stat. 11 (2012).
32. *See id.*
33. FMRA § 334; *see also supra* note 4, 28.

This category essentially covers small drones used to aid in crowd control. The drone must: (1) weigh 4.4 pounds or less if operated within sight of the operator; (2) fly less than 400 feet above the ground; (3) fly only during daylight hours; (4) fly within G class airspace; and (5) not fly outside of 5 statute miles from any airport, heliport, seaplane base, spaceport, or other location with aviation activities.[34]

The classifications of unmanned aircrafts are essential for legal practitioners to understand because each classification and design carries with it specific legal challenges and issues. Additionally, drafters of the laws and regulations that deal with privacy, security, and safety issues are better informed to ensure proper drone operation and integration into the national airspace. For example, UAS have a greater risk because with their small size comes lower visibility and their use in the national airspace will require precise "sense and avoid systems" in order to avoid many hazards associated with their small size.[35]

III. Wait and See: Commercial Drone Law in the United States

It may seem unusual for innovators to seek regulatory guidance to oversee their activities. Regulation often inhibits innovation because it is often reactionary and ill-equipped to anticipate or understand the technical underpinnings of a new technology.[36] However, in the unmanned aircraft industry, innovation was stalled due to the lack of regulatory guidance. While Congress passed the FAA Modernization and Reform Act of 2012 (FMRA), the relevant agencies have moved at a remarkably slow pace in meeting the goals of the FRMA. The rules and regulations passed have been criticized as insufficient and have led to new proposals, such as Representative Earl Blumenauer's proposed Commercial UAS Modernization Act.

This part will explain the FAA regulations to date. These regulations are constantly under review and new proposals and amendments could be announced at any time. Nonetheless, it is important to understand what the FAA regulations are at this time. This part will also look at some of the more recent proposals put forth by some members of Congress.

A. FAA Regulations as of January 2016

In 2012, Congress passed the FMRA, which tasked the FAA, NASA, and the Federal Communications Commission (FCC) with finding a way to incorporate civil unmanned aircrafts into U.S. airspace. Each agency looks at the incorporation of unmanned aircrafts from a different perspective. The FAA governs the operation of drones through the Federal Aviation Regulations, while the FCC regulates the use of electromagnetic spectrum for communication systems.[37] However, regulators did not think about unmanned aircraft systems when these two distinct sets of regulations were devised.[38] Thus, a new body of regulations has been implemented and con-

34. *See* FMRA § 334.

35. *See id*. at 38.

36. *See id*. at 101.

37. *See id*. at 4.

38. Press Release—FAA Announces Small UAS Registration Rule, FAA, (Dec. 14, 2015), https://www.faa.gov/news/press_releases/news_story.cfm?newsId=19856.

tinues to evolve as the use of drones expands.[39] The FMRA allows for a "phased-in" approach for civil unmanned aircraft integration, but with established target dates or ranges. For example, the FMRA requires the FAA to implement a plan not later than September 30, 2015.

1. Evolution of the FAA Regulations

In September 2013, the relevant federal agencies released a joint comprehensive plan.[40] The plan set out strategic goals for the phased-in integration unmanned aircrafts into the national airspace. The plan gave priority to the public unmanned aircrafts, discussed above, but with a framework for civil unmanned aircraft integration by 2015.[41] The plan set forth the goals of studying acceptable levels of automation for UAS in the national airspace and coordinating UAS operation via international protocols. In addition, the plan also addressed non-safety concerns such as privacy and national security. While the plan contemplated the use of small-unmanned aircraft systems, it did not include commercial UAS.

Prior to the June 2016 regulations, commercial operators, those who fly for profit, were required to obtain specific authorization from the FAA, through either a Certificate of Authorization or Waiver (COA) or by obtaining a special airworthiness certificate from the FAA in the experimental category.[42]

Under the first option, a COA is an "authorization issued by the Air Traffic Organization to a public operator for a specific UAS activity."[43] The application process for a COA involves "a comprehensive operational and technical review." If necessary, provisions or limitations may be imposed as part of the approval to ensure the UAS can operate safely with other airspace users. In most cases, the FAA will provide a formal response within 60 days from the time a completed application is submitted.[44]

The second option requires users to obtain a special airworthiness certificate from the FAA in the experimental category.[45] These certificates prohibit "carrying people or property for compensation or hire, but do allow operations for research and development, flight and sales demonstrations, and crew training."[46] Given that this special airworthiness certificate is limited to training and research, commercial operators have no choice, but to apply for a COA.

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39. *See id.*

40. *See Unmanned Aircraft Systems (UAS) Comprehensive Plan: A Report On The Nation's UAS Path Forward*, The Joint Planning and Development Office, (Sept. 2013), http://www.faa.gov/about/office_org/headquarters_offices/agi/reports/media/uas_comprehensive_plan.pdf.

41. *See id.*; *see also* UNMANNED AIRCRAFT IN THE NATIONAL AIRSPACE 110 (Donna Dulo ed. 1st ed. 2015).

42. *See* UNMANNED AIRCRAFT IN THE NATIONAL AIRSPACE 111 (Donna Dulo ed. 1st ed. 2015).

43. *See* FAA, CERTIFICATES OF WAIVER OR AUTHORIZATION (COA), at https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/aaim/organizations/uas/coa/.

44. *See supra,* note 38.

45. FED. AVIATION ADMIN., *Experimental Category*, SPECIAL AIRWORTHINESS CERTIFICATION, (June 7, 2011), http://www.faa.gov/aircraft/air_cert/airworthiness_certification/sp_awcert/experiment/.

46. *See id.*; *see also* UNMANNED AIRCRAFT IN THE NATIONAL AIRSPACE, 112.

Under § 333 of the FMRA, Congress also gave the FAA the authority to exempt UAV operators from the total ban on private and/or commercial UAV operations where the authority was satisfied that safe operations could be assured. However, the §333 exemption only applies to the operator.[47] The civil operator would still have to apply for and obtain a COA for civil operations allowed under this section.[48] Likewise, prior to the UAS NPRM 107 taking effect in August 2016, §333 required that the drone operator have, at a minimum, a sport or recreational pilot license. However, under the FAA's new small UAS NPRM 107, the pilot license requirement has been removed and replaced with an "Operator Certification and Responsibilities" section, which requires, among other things, that the operator pass an aeronautical knowledge test at an FAA-approved testing center.[49] It appears that these proposed rules apply to all operators and not just commercial operators.

In February 2015, the FAA proposed a framework of regulations that would allow the routine use of certain small drones (under 55lbs), subject to various safety rules, such as limiting flight to daylight and visual-line-of-sight operations.[50] By December 2015, the FAA announced a Small UAS registration rule, which required operators to register their small UAS. According to the FAA press release,

> [r]egistration is a statutory requirement that applies to all aircraft. Under this rule, any owner of a small UAS who has previously operated an unmanned aircraft exclusively as a model aircraft prior to December 21, 2015, must register no later than February 19, 2016. Owners of any other UAS purchased for use as a model aircraft after December 21, 2015 must register before the first flight outdoors. Owners may use either the paper-based process or the new streamlined, web-based system. Owners using the new streamlined web-based system must be at least 13 years old to register.[51]

The purpose of the registration is to provide the FAA an opportunity to work with operators on safely flying their small UAS. In other words, the registration is focused on educational purposes rather than on enforcement.[52] However, once again the rule only applies to small UAS that are flown for recreational purposes. The press release goes on to say that commercial regulations are expected in the spring of 2016.[53]

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47. UNMANNED AIRCRAFT IN THE NATIONAL AIRSPACE, 115.

48. *See id.*

49. FED. AVIATION ADMIN., OVERVIEW OF SMALL UAS NOTICE OF PROPOSED RULEMAKING, http://www.faa.gov/regulations_policies/rulemaking/media/021515_sUAS_Summary.pdf (as of this publication, these rules went into effect on August 29, 2016).

50. DULO, *supra* note 4, at n.2.

51. FED. AVIATION ADMIN., *FAA Announces Small UAS Registration Rule*, PRESS RELEASE, https://www.faa.gov/news/press_releases/news_story.cfm?newsId=19856.

52. Miriam Mcnabb, *FAA Announces Drone Registration Rules*, DRONE LIFE (Dec. 14, 2015), http://dronelife.com/2015/12/14/faa-announces-drone-registration-rules/.

53. *Supra*, note 51. *See also* note 7 for a discussion of the new regulations.

2. Enforcement Under the FMRA

As it concerns the enforcement of the FMRA, the FAA is currently the sole enforcement agency. Under §336(b) of the FMRA, the FAA has the authority to pursue legal action against persons operating a model aircraft in a manner that endangers the national airspace system.[54] Traditionally, there are five types of enforcement actions the FAA employs to enforce the Federal Aviation Act and the Federal Aviation Regulations. These actions are administrative action, re-examination, certificate action, civil penalty, and criminal action. Despite its authority to bring an enforcement action, the FAA has rarely done so. When the FAA does bring an enforcement action, the most common action used for UAS violations is the administrative action.[55]

In 2014, the FAA brought an action against Raphael Pirker for operating a small-unmanned aircraft for a commercial purpose.[56] The FAA levied a $10,000 fine against Mr. Pirker, but this was later reduced to $1,100 after settlement negotiations.[57] This case proved much more challenging for the FAA when a NTSB administrative law judge held that model aircrafts, including drones, are exempt from FAA regulation. Since the FAA never went through the usual notice and comment process to officially regulate drones, the FAA was unable to bring enforcement actions against drone operators. This decision was ultimately overturned, but for nearly a year, commercial drone operation was legal and unregulated.[58] After the NTSB held that the FAA does have the authority to levy penalties against commercial operators, the FAA imposed modest penalties against other individual operators.[59]

More recently, the FAA has brought an enforcement action against SkyPan International, Inc. of Chicago and proposed a civil fine of $1.9 million for reckless operation.[60] However, it is unclear how this case will proceed. Although the FAA might look to the U.S. Department of Justice to bring a civil complaint against SkyPan, that has yet to happen. Interestingly enough, SkyPan was one of the first companies to receive a §333 exemption under the FMRA, which raises questions about some of the violations the FAA has charged SkyPan with in the present action.[61]

While the regulations provide some guidance on the legal operation of small UAS and the FAA has exercised its enforcement power, the FAA has made no movement towards streamlin-

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54. FMRA § 336(b), at https://www.faa.gov/uas/media/Sec_331_336_UAS.pdf.

55. *SkyPan: FAA Takes Drone Enforcement Seriously,* Law360 (Nov. 25, 2015), http://www.law360.com/articles/730595/skypan-faa-takes-drone-enforcement-seriously.

56. Huerta v. Pirker, National Transportation Safety Board, Docket CP-217, EA-5730 (Nov. 18, 2014).

57. Jason Koebler, *Commercial Drone Pilot Who Ruined The FAA's 2014 Has Settled His Case*, Motherboard, (Jan. 22, 2015), http://motherboard.vice.com/read/the-commercial-drone-pilot-who-ruined-the-faas-2014-has-settled-his-case.

58. Jason Koebler, *Here's Why Commercial Drones Just Got Legalized*, Motherboard, (Mar. 7, 2014), http://motherboard.vice.com/read/commercial-drones-just-got-legalized-heres-why.

59. *See supra,* note 54.

60. Ashley Hasley, *FAA Proposes $1.9 Million Fine Against SkyPan For 'Reckless' Drone Operations*, WASHINGTON POST, (Oct. 2, 2015), https://www.washingtonpost.com/local/trafficandcommuting/faa-wants-to-fine-skypan-19-million-for-reckless-drone-operations/2015/10/06/2050ca2e-6c34-11e5-aa5b-f78a98956699_story.html.

61. *See supra*, note 49.

ing the approval process for small commercial drone operators. As mentioned above, regardless of the size of the drone, all commercial operators must apply for either a COA or a §333 exemption. Additionally, all individuals flying for hobby or recreation are required to register their drone with the FAA. Likewise, anyone flying a model aircraft for hobby or recreation must: (1) fly below 400 feet and remain clear of surrounding obstacles[62]; (2) keep the aircraft within the visual line of sight at all times[63]; (3) remain well clear of and not interfere with manned aircraft operations; (4) not fly within 5 miles of an airport unless they contact the airport and the control tower before flying; (5) not fly near people or stadiums; (6) not fly an aircraft that weighs more than 55lbs; (7) not fly carelessly or recklessly; and (8) not fly for a profit or for a commercial purpose.[64]

B. A More Comprehensive Approach: Commercial UAS Modernization Act

Although the FAA has not taken any definitive steps towards streamlining the regulations, other organizations have made proposals. In February of 2016, Representative Earl Blumenauer of Oregon introduced the Commercial UAS Modernization Act, which seeks to promote innovation and the safe integration of UAS into the National airspace.[65]

In the short, the Act:

> creates an interim rule that provides basic guidelines for commercial use and testing of small UAS and micro UAS during the period the FAA finalizes rules covering commercial UAS; strengthens the FAA's oversight authorities by creating a deputy administrator exclusively responsible for the safe integration of UAS in U.S. airspace, while also streamlining regulations that currently slow industry's ability to innovate new aircraft technologies; directs the FAA to explore the feasibility of transporting packages and other property by small UAS; and ensures that FAA test sites are being used to the maximum extent to facilitate research into new technologies, including developing an air traffic management system for UAS, in partnership with industry and other relevant government agencies, such as the National Aeronautics and Space Administration.[66]

The goal of this Act seems quite similar to the goal of the current FAA regulatory framework; however, unlike the FAA approach, this proposal is uniform and comprehensive.[67]

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62. FED. AVIATION ADMIN, *Fly for Fun*, https://www.faa.gov/uas/getting_started/fly_for_fun/.
63. *See id.*
64. *See id.*
65. Earl Blumenauer, *Blumenauer Introduces Legislation to Support Innovation for Commercial Drone Industry*, (Feb. 2, 2016), https://blumenauer.house.gov/media-center/press-releases/blumenauer-introduces-legislation-support-innovation-commercial-drone.
66. *See id.*
67. *See id.*

According to Blumenauer, "[t]he FAA approach is piecemeal at best"[68] in that it treats drones differently depending on the primary motivation for use. In other words, the FAA has approved small hobbyist drones, but has not extended the same right to micro-UAS operated with a commercial purpose. The piecemeal approach has led to a lag in American innovation as corporations in Canada, Europe, and Asia surpass American companies.[69] He further argues that the U.S. used to be the leader of technological innovation, but in light of the growing public fears about safety and privacy, legislators have continuously added more layers of regulation to UAS operation. This additional regulation, according to Blumenauer, further stalls the ability of innovators to advance the technology and reap the growing economic benefits of the industry.[70]

Under Blumenauer's proposed Act, which was referred to the subcommittee on aviation on February 3, 2016, small commercial drones, less than 4.4 pounds, would be treated in the same manner as small hobbyist drones.[71] With pragmatic exemptions, such as the micro UAS exemption, this Act could potentially lift the U.S. to the forefront of UAS innovation and development.[72]

C. Is the United States Getting It Right?

It is a difficult task for both consumers and regulators to keep up with the ever-changing landscape of technology. However, it is the regulators who are specifically tasked with that job. To a layperson, the move from a remote controlled helicopter to a small UAS operating in the national airspace does not seem too farfetched, as it was a progressive development over several years. Thus, it is confusing as to why the FAA adopted such a piecemeal approach to the integration of drones.

While the piecemeal approach is confusing, it is understandable that safety concerns posed by the increased presence of drones needed to be addressed immediately. Accurate drone sales figures are hard to establish, but according to a January 2015 report on Forbes, drone sales soared past $16 million on eBay alone between February 2014 and January 2015.[73] Of those sales, the majority took place, unsurprisingly, between Thanksgiving and Christmas.[74] During that period, an average of 7,600 drones per week were sold, a rate which was more than five times the rate six months prior.[75] A comprehensive approach may have delayed addressing the immediate safety consequences created by the influx of so many hobbyist drones.

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68. *See id.*

69. *See id.*

70. *See id.;* "The UAS industry expects to produce more than 100,000 U.S. jobs, with an $82 billion in economic impact, within a decade after these regulations are complete."

71. UAO Staff, *Congressman's Commercial UAS Modernization Act Includes Micro Drone Rule*, Unmanned Aerial Online (Feb. 3, 2016), http://unmanned-aerial.com/congressmans-commercial-uas-modernization-act-includes-micro-drone-rule/.

72. See *id*.

73. Bi, Frank, *Drone Sales Soar Past $16 Million on eBay*, Forbes (Jan. 28, 2015), http://www.forbes.com/sites/frankbi/2015/01/28/drone-sales-soar-past-16-million-on-ebay/#17b84a34e6e5.

74. *See id*.

75. *See id*.

However, a comprehensive approach may have avoided some of the issues that the FAA has to address and clarify as time goes on. For example, it is very unclear what constitutes "commercial use" of a small drone. It is true that an operator who flies a drone for no other purpose, but to capture aerial footage for their own personal use can violate the ban on commercial use if they later sell that footage for a profit. On March 3, 2015, Steven Girard of Portland, Maine, received an "ominous" voicemail from Bobby Reed, a manager of the FAA's Flight Standards District Office in Portland, "We're looking at your website, and an investigator will be in touch with you regarding the limitations which you may be exceeding in regard to advertising drones and aerial footage. They'll be looking for you to pull down the website. … There are serious implications, and there are fines and penalties associated with this activity."[76] Likewise, a man in Tampa, Florida received a letter from the FAA on March 9, 2015 stating that the FAA had reviewed a complaint they had received, which alleged that his YouTube website featuring drone footage violated the ban on the commercial use of drones. The letter goes on to explain the laws and regulations regarding UAS operations.[77]

The broad definition of "commercial" is inevitably leading to the confusion. As one lawyer from Covington & Burling notes, "the FAA has traditionally adopted a very broad view of activities that constitute commercial operations. When traditional regulatory interpretations designed for aircraft are applied to drones, it often leads to strange results."[78] In traditional aviation what matters is the intent of the operator at the time of flight, not necessarily whether a profit was made on the later sale of the footage or photography. However, that does not mean that hobbyists can fly and sell the footage, and claim they were only flying for fun. According to Loretta Alkalay, an aviation attorney and adjunct professor at Vaughn College of Aeronautics, "it can be used as evidence. If you're constantly flying and selling your photos, at some point the FAA could say you're in the business of selling them."[79]

The problem is that hobbyist operators do not have any clear indication from the FAA as to what they consider "commercial." But the FAA letter sent to Mr. Haynes makes clear that the FAA may retroactively designate the use of a drone as commercial if the footage is ever sold or displayed on a website that offers monetization in the form of advertising.[80] The ability to retroactively designate a hobbyist drone operator further exacerbates the problem and might have a chilling effect on the recreational use of drones. The laws should seek to provide clarity, not add further confusion to a growing industry.

If the UAS industry is to expand in both the hobbyist and commercial markets, the FAA needs to clarify what constitutes "commercial" operation, sooner rather than later.

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76. SCOTT DOLAN, *Legal Experts Question FAA's Move to Ground Gorham Man's Drone Website*, PORTLAND PRESS HERALD (Mar. 14, 2015), www.pressherald.com/2015/03/14/faa-orders-gorham-man-to-close-drone-website.

77. FAINE GREENWOOD, *Flight Pattern: The FAA is Completely Confused About What Constitutes "Commercial" Drone Use*, SLATE (Mar. 19, 2015), http://www.slate.com/articles/technology/future_tense/2015/03/faa_is_confused_about_what_constitutes_commercial_drone_use.html;*see also* JASON KOEBLER, *FAA Youtube*, SCRIBD (Mar. 12, 2015), https://www.scribd.com/doc/258492727/FAA-YouTube.

78. Greenwood, *supra* note 77.

79. *See id.*

80. Jason Koebler, *The FAA Says You Can't Post Drone Videos on YouTube*, MOTHERBOARD (Mar. 12, 2015), http://motherboard.vice.com/read/the-faa-says-you-cant-post-drone-videos-on-youtube.

IV. Commercial Drone Law in the United Kingdom

The rise of the UAS industry is not unique to the U.S. The industry is also on the rise in Europe and in particular, the U.K. In the U.K., UAS operators are permitted to use drones for both private leisure and, since January of 2010, for commercial "aerial work" so long as the business entity obtains special permission from the Civil Aviation Authority.[81] In 2010, the U.K. announced regulations that would allow for the safe integration of commercial UAS in the national airspace. However, it would not be until a few years later that recreational UAS regulations and guidance, known as "Dronecode" would be introduced. The laws in the U.K. are still developing as the technology and its usage expands. Nonetheless, it is useful to look to compare the U.K. and the U.S. because of the similarities between the two legal and regulatory systems. The U.S. could therefore learn from and implement some of the regulations the U.K. has enacted.

A. Civil Aviation Authority UAS Regulations

In the U.K., the Civil Aviation Authority (CAA) is the primary agency responsible for the regulation of manned and unmanned aircrafts and model aircrafts. However, the European Aviation Safety Agency (EASA) also governs the U.K. due to its membership in the European Union.[82]

There are three primary concerns when it comes to UAS operation in the U.K.: (1) insurance, (2) safety, and (3) privacy.[83] The first stems largely from an EASA regulation, Regulation EC 785/2004, which states that any small-unmanned aircraft (weighing between 20kg and 500 kg) weighing no more than150kg but not less than 20kg) must have adequate insurance coverage.[84] This regulation applies regardless of the purpose of operation. This is not currently a requirement in the U.S. As to the safety of drone operation, the CAA regulations are codified in Civil Aviation Publication (CAP) 393 Air Navigation Order.[85] The CAP defines a small-unmanned aircraft as any aircraft weighing no more than 20kg.[86] This order is fairly comprehensive, but the most relevant sections are Parts 19 and 22, more specifically, subsections 138, 166, and 167.

Under subsection 138 of CAP, UAS operators are prohibited from flying recklessly or negligently so as to endanger the safety and wellbeing of any person or property. Subsection 166 addresses the small-unmanned aircrafts specifically. Under this subsection, operators must (1)

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81. Civil Aviation Auth., *Unmanned Aircraft Requirements for Operating in the Airspace*, http://www.caa.co.uk/Commercial-Industry/Aircraft/Unmanned-aircraft/Unmanned-Aircraft/.

82. *EU & UK Drone Regulations, An Inside Look*, UAV Coach, http://uavcoach.com/eu-uk-drone-regulations-an-inside-look/.

83. *See id.*

84. U.K. Parliament, Civilian Use of Drones in the EU - European Union Committee, Third Party Liability, http://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/122/12210.htm.

85. Civil Aviation Auth., CAP 393: Air Navigation: The Order and the Regulations 2009 (Aug. 1, 2016), http://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=226.

86. Civil Aviation Auth., *Small Unmanned Aircraft: Specific Regulations About Small Drones*, https://www.caa.co.uk/Commercial-Industry/Aircraft/Unmanned-aircraft/Small-unmanned-aircraft/.

"not cause or permit any article or animal to be dropped from a small unmanned aircraft so as to endanger any person or property;" (2) fly the aircraft only if they are reasonably satisfied that the flight can be made safely; (3) maintain direct and unaided visual contact with the aircraft for the purpose of avoiding collisions; and 4) follow the rules on restricted airspace.[87] Subsection 167 addresses the privacy concerns associated with the operation of small-unmanned surveillance aircrafts.[88] Under this subsection, any small-unmanned aircraft that is equipped with data acquisition or surveillance equipment must receive a license from the CAA.

For commercially flown UAS, the operator must receive a special license from the CAA. The Permission for Aerial Work (PFAW) license removes the restrictions on flying over congested areas, and is subject to additional safety based representation. Operators can apply for a one-time license or ongoing permit.

The CAA website provides a simplified version called "The Dronecode," which states in short, "Make sure you can see your drone at all times and don't fly higher than 400 feet; Always keep your drone away from aircraft, helicopters, airports and airfields; Use your common sense and fly safely; you could be prosecuted if you don't. And drones fitted with cameras must not be flown: within 50 meters of people, vehicles, buildings or structures; over congested areas or large gatherings such as concerts and sports events."[89] This over simplification has been criticized in British media following dozens of near misses around the Heathrow airport and a recent drone crash.[90]

While the CAA provides the regulations, they are no longer the sole agency in charge of the enforcement of the rules. In April of 2015, the U.K. Police announced that they would take responsibility for investigating the irresponsible or illegal use of drones.[91]

B. New Proposals: A-NPA 2015-10

In July 2015, EASA announced a proposed amendment to the regulatory framework governing the use of unmanned aircrafts. The purpose of the amendment was to streamline the process and establish a risk-based system. In other words, the greater the risk, the higher the regulation.[92]

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87. *Supra*, note 82.

88. *See id*.

89. CAA, The Drone Code Simple Steps to Ensure You Fly Safely and Legally, https://www.caa.co.uk/Consumers/Model-aircraft-and-drones/The-Dronecode/Rule 18.1.

90. David Hastings Dunn, *Unregulated Drones Are Accidents—and Worse—Waiting To Happen*, THE GUARDIAN, Mar. 7, 2016, http://www.theguardian.com/commentisfree/2016/mar/07/drones-near-miss-heathrow-disaster-unregulated-accident-terror-aircraft*; Drone Hits British Airways Plane Approaching Heathrow Airport*, BBC, Apr. 17, 2016, at http://www.bbc.com/news/uk-36067591.

91. Mary-Ann Russon, *Civil Aviation Authority Admits UK Drone Laws Are Out of Date*, INTERNATIONAL BUSINESS TIMES (Apr. 24, 2015), http://www.ibtimes.co.uk/civil-aviation-authority-admits-uk-drone-regulations-are-out-date-1498216.

92. EUROPEAN AVIATION SAFETY AGENCY, *Advanced Notice of Proposed Amendment 2015-10*, https://www.easa.europa.eu/system/files/dfu/A-NPA%202015-10.pdf.

According to the Technical Opinion published in December of 2015, the proposed regulatory framework sets forth three categories for unmanned aircrafts: Open, Specific, and Certified.[93] The "Open" category is the lowest risk category and safety is ensured through "compliance with operational limitations, mass limitations as a proxy of energy, product safety requirements, and a minimum set of operational rules."[94] The "Specific" category is a medium risk category, which requires authorization of a national aviation authority and a risk assessment performed by the operator.[95] Finally, the "Certified" category is the highest risk category, which would have requirements comparable to those for manned aviation, such as oversight by a national aviation authority through the issuance of licenses and approval of maintenance, and by the EASA through design and approval of foreign organizations.[96] This risk-based framework promotes public safety, but is flexible enough to promote industry growth.

This new proposal differs from the current system in that it is focused on risk, as opposed to the weight and purpose of the UAS. Of course the weight and purpose of the UAS factor into the risk classification, but it is no longer the primary concern under this framework. The framework is based on the risk posed by UAS operations.[97] The risk depends on (1) the energy; (2) the size and complexity of the UAS; (3) the population density of the overflown area; and (4) the design of the airspace, the density of traffic, and the services provided therein.[98]

V. Comparative Analysis: U.S. vs. U.K.

The U.S. and U.K. have very distinct approaches to the integration of UAS in the national airspace. The U.S. has taken a very strict and slow approach to integration. The U.K., on the other hand, has taken a more lenient and industry favorable approach. Both regulatory schemes have positive and negative attributes, but the U.K. framework strikes an appropriate initial balance between supporting industry innovation and protecting public safety and privacy. It is this balance that the U.S. should consider borrowing as they move forward in regulating UAS operation.

A. FMRA vs. CAP: Textual Comparison

First, in simply comparing the regulations as they are, there is a significant difference that stands out — in the U.K. commercial drone operation is permitted, subject to CAA licensing.[99] By contrast, in the U.S. commercial drone operation is grounded absent a § 333 exemption, which is more stringent and subjective than the CAA PFAW license.[100] Licensing in the U.K. is relatively straightforward and simple, albeit the entire process takes approximately two

93. EASA, *Opinion of a Technical Nature* 9, (2015), https://www.easa.europa.eu/document-library/opinions/opinion-technical-nature.

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.* at 7.

98. *See id.* at 6–7.

99. *Air Navigation: The Order and Regulations 2016*, CAP 393, art. 94, para. 5 (Eng.), http://publicapps.caa.co.uk/modalapplication.aspx?catid=1&pagetype=65&appid=11&mode=detail&id=7523.

100. FMRA § 333, https://www.faa.gov/uas/media/Sec_331_336_UAS.pdf.

months.[101] The process requires that an applicant become educated in air law and the safe operation of their UAS. They have to build an operations manual, undertake a ground exam and a flight test, and apply for permission from the CAA.[102] Absent a commercial use, there is no compulsory registration requirement for recreational UAS.[103] The House of Lords has called for such compulsory registration, but to date there has been no updated requirement of that kind.[104]

By contrast, the U.S. does not have the same licensing process for commercially used UAS. The FAA regulations have a Section 333 exemption, which, as discussed above, allows the FAA to exempt some operators from the total ban on commercial drones. However, this is made on a case-by-case basis.[105] At the beginning of 2015, only a dozen companies had received approval for commercial flight.[106] By the end of March 2016, the FAA Administrator granted 4,400 Section 333 petitions.[107] Despite the dramatic increase in the number of granted exemptions, the wait is approximately three to six months, according to some drone operating insiders,[108] and the U.S. is still attempting to catch up to other countries, such as the U.K. that have a longer record of permitting commercial drone flight. In 2014, the Obama Administration took significant steps towards the use of commercial drones by granting six Hollywood studios and production companies the ability to operate drones commercially.[109] However, at that time, the U.K. already had approximately 400 companies or individuals operating commercially, many of which had been operating since or around 2010 when the CAA announced the commercial drone laws.[110] In that time, the U.S. lost a tremendous amount of business as production companies were forced to film abroad in countrieslike the U.K. that had more lenient commercial drone laws.[111]

Unfortunately, the U.S. waited for the technology to arrive before legislators decided to act. As a regulatory matter, the U.S. could learn a lot from the U.K. approach. The U.K.'s first attempt at regulating commercial UAS was comprehensive in terms of focusing on both safety and privacy. Additionally, because the U.K clearly established what constitutes "commercial"

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101. *Become a UAV Pilot*, Droneflight, http://shop.droneflight.co.uk/pages/become-a-uav-pilot.

102. *See id*.

103. Sophie Curtis, *Drone Laws in the UK—What Are the Rules?*, THE TELEGRAPH, (Apr. 18, 2016), http://www.telegraph.co.uk/technology/2016/04/18/drone-laws-in-the-uk--what-are-the-rules/.

104. Sophie Curtis, *House of Lords Calls for Compulsory Registration of Drones*, THE TELEGRAPH, (Mar. 5, 2015), http://www.telegraph.co.uk/technology/news/11451167/House-of-Lords-calls-for-compulsory-registration-of-drones.html.

105. FMRA § 333, https://www.faa.gov/uas/media/Sec_331_336_UAS.pdf.

106. Ben Popper, *These are the Companies Allowed to Fly Over the United States*, THE VERGE, (July 7, 2015), http://www.theverge.com/2015/7/7/8883821/drone-search-engine-faa-approved-commercial-333-exemptions.

107. FAA, SECTION 333 (Jun. 24, 2016), https://www.faa.gov/uas/beyond_the_basics/section_333/.

108. UAVCOACH.COM, Drone Certification: A Step-by-Step Guide to FAA 333 Exemption for U.S. Commercial Drone Pilots, http://uavcoach.com/drone-certification/#paperwork.

109. Adrian Pennington, *Drones On The Up: The Difference Between US and UK Regulations*, THE BROADCAST BRIDGE, https://www.thebroadcastbridge.com/content/entry/776/drones-on-the-up-the-difference-between-us-and-uk-regulations.

110. Ben Quinn, *Drone Permits to UK Operators Increase by 80%,* THE GUARDIAN (Oct. 26, 2014), https://www.theguardian.com/world/2014/oct/26/drones-permit-uk-british-airline-pilots-association-unmanned-aircraft-house-of-lords.

111. *See id*.

operation, there is less confusion over the legal distinction between recreation and commercial operation—a distinction that is not as clear in the U.S. In the U.K., commercial operation is any operation in which the operator receives "valuable consideration" from flying their UAS.[112] A relatively simple and straightforward definition, which arguably would not prohibit hobbyists from posting drone footage captured in accordance with the U.K. laws.

B. Policy Principles Underlying UAS Regulation

In addition to the text of the regulations, the policy goals that underlie the laws and regulations are quite different. It is no secret that the data protection and privacy are of the highest concern in the "European Union ("E.U."), tantamount to public safety. Thus, it is not surprising that the UAS regulations in the U.K. reflect that concern. The U.S., however, does not address privacy concerns in the FAA regulations.

1. Policy Concern: Privacy

The use of UAS in the national airspace implicates several privacy rights and the need for enhanced privacy protections. Surveillance is the first and most notable privacy interest resulting from UAS operations. Surveillance arguably takes place in almost all flights. The collection of visual information is one of the most prominent uses of UAS. Whether it is the government monitoring the U.S. border or a farmer surveying his farmland, surveillance is used in almost every flight.[113] This surveillance implicates many privacy concepts such as personal control, secrecy, autonomy, and anonymity.[114]

Privacy rights are also implicated post-surveillance. In other words, the surveillance itself might not implicate privacy rights, but the subsequent storage and manipulation of the data may implicate privacy rights.[115] The post-surveillance privacy risks that would most likely arise from the use of UAS are: improper use of the data, retention concerns, and the aggregation or extensive collection of personal information.[116] For example, improper use of the data might result if a company obtains personal address information through the use of a commercial UAS and later sells the information to a marketing firm, which then solicits business from those individuals.

Privacy issues are clearly at the forefront of the CAA regulations in the U.K. The CAP regulations make explicit reference to privacy and data concerns in Subsection 167 of CAP. This subsection deals expressly with unmanned surveillance aircrafts and sets specific guidelines for their safe operation. Operators of small unmanned surveillance aircrafts are prohibited from flying over or within 150 meters of any congested area; an organized open-air assembly of more than 1,000 persons; or within 50 meters of any vessel, vehicle, or structure which is not under

112. Safety and Airspace Regulation Group, *Unmanned Aircraft System Operations in UK Airspace – Guidance*, Civil Aviation Auth. 722 9, 34 (2015), http://publicapps.caa.co.uk/docs/33/CAP%20722%20Sixth%20Edition%20March%202015.pdf.

113. Richard M. Thompson II, *Domestic Drones and Privacy: A Primer*, CONGRESSIONAL RESEARCH SERVICE (Mar. 30, 2015), https://fas.org/sgp/crs/misc/R43965.pdf.

114. *See id.*

115. *See id.*

116. *See id.*

the control of the person in charge of the aircraft.[117] Most importantly, the Civil Aviation Authority has relied on this Article in letters to operators, which expressly state that operators should be careful to note that, "collection of images of identifiable individuals, even inadvertently, when using surveillance cameras mounted on a small unmanned surveillance aircraft, will be subject to the Data Protection Act."[118]

The Data Protection Act of 1998 (DPA) controls how organizations, businesses, or the government uses the personal information of individuals in the U.K.[119] The DPA requires everyone responsible for using personal data to follow very strict rules called "data protection principles." These principles include making sure the information is: "used fairly and lawfully; used for limited, specifically state purposes; used in a way that is adequate, relevant, and not excessive; accurate; kept for no longer than is absolutely necessary; handled according to people's data protection rights; kept safe and secure; not transferred outside the European Economic Area without adequate protection."[120]

In the U.S. regulations, however, there is no data and privacy provision.[121] Although the FAA announced that consistent with President Obama's memorandum, noted above, the National Telecommunications and Information Administration will lead a "multi-stakeholder engagement process" to develop and communicate best practices for privacy, accountability, and transparency issues regarding commercial and private UAS use in the NAS, the privacy issue has largely been unaddressed.

The lack of privacy and data protection in this UAS area might simply be because "privacy" is a particularly difficult issue for the U.S. because the term "privacy" has been left undefined since it can mean many different things depending on the context in which it is used.[122] While there is a great deal of legislation concerning Internet privacy, medical record privacy (e.g. HIPAA), and law enforcement surveillance, it is unclear how the FAA can apply the legislation in those areas to drone surveillance. Some of the privacy concerns include, but are not limited to, the mass collection of unsolicited data, criminal stalking, harassment, and whether a property owner can defend their property from a trespassing drone. To date, neither the FAA nor any other agency has an answer for this complex question. In March 2013, Senator Markey introduced the Drone Aircraft Privacy and Transparency Act of 2015, which directs the Secretary of Transportation to "study and identify any potential threats to privacy protections posed by the integration of unmanned aircraft (drone) systems into the national airspace system,

117. CAA, *Unmanned Small Aircrafts*, Article 167, http://publicapps.caa.co.uk/docs/33/CAP393OLD.pdf.

118. Civil Aviation Authority, *Civil Aviation Authority Air Order 2016*, https://thedrone.co/wp-content/uploads/2016/09/20160922TheUKDroneCompanyLtdPAndEUAV781.pdf; *see also* Information Commissioner's Office, *Drones*, at https://ico.org.uk/for-the-public/drones/.

119. *See generally Data Protection Act*, https://www.gov.uk/data-protection/the-data-protection-act; *see also* Data Protection Act of 1998 (full text) at http://www.legislation.gov.uk/ukpga/1998/29/contents.

120. *See id*.

121. Adrian Pennington, *Drones On The Up: The Difference Between US and UK Regulations*, THE BROADCAST BRIDGE, https://www.thebroadcastbridge.com/content/entry/776/drones-on-the-up-the-difference-between-us-and-uk-regulations.

122. *See id*.

including any potential violations of privacy principles."[123] It authorizes states to "bring a civil action on behalf on of state residents in state or U.S. district court for injunctive relief against violations of this Act or related regulations if the state attorney general has reason to believe that an interest of state residents has been or is threatened or adversely affected by a prohibited act or practice."[124] Likewise, it grants enforcement authority to the Federal Trade Commission.[125] While this effort is precisely what is needed, hearings were not held until March 10, 2016, more than a year after the bill was introduced. The multi-stakeholder engagement plan and Senator Markey's proposed bill are steps in the right direction, but a comprehensive approach, like that of the U.K., would have addressed this issue more quickly.

A second issue surrounding drone usage and privacy in the U.S. is who is ultimately responsible for regulating drones in the context of privacy and privacy violations. Practically speaking, Congress has the widest authority to set standards for UAS privacy regulation.[126] However, some have argued that the states should be left to experiment with various schemes to protect privacy rights in their respective state.[127] As of the end of 2015, 45 states have considered enacting restrictions on UAS.[128] While the courts can be expected to apply the traditional rules from Fourth Amendment jurisprudence, it is unclear how these rules will be applied to UAS operations because UAS operation has been so limited.[129] Regardless of where the privacy regulations come from, there is grave need for a directive on this issue in light of the FAA's relatively passive role in this area.[130]

The privacy issue was brought to the forefront of the discussion following President Obama's February 2015 memorandum entitled "Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems." As discussed earlier, this memorandum set forth two new frameworks relating to the potential privacy implications of UAS operations by both government and private actors.[131] The framework for government operations is detailed above. As for private UAS use, the President charges the Department of Commerce with the task of initiating a "multi-stakeholder engagement process to develop a privacy framework regarding privacy, accountability, and transparency for commercial and private UAS use."[132]

It is evident that up until the last year, privacy concerns surrounding the operation of UAS were minimal and left wholly unaddressed. Now, with thousands, if not hundreds of thousands

123. Drone Aircraft Privacy and Transparency Act of 2015, https://www.congress.gov/bill/114th-congress/senate-bill/635.

124. *See id*.

125. *See id*.

126. Richard M. Thompson II, *Domestic Drones and Privacy: A Primer*, Congressional Research Service (Mar. 30, 2015), https://fas.org/sgp/crs/misc/R43965.pdf.

127. *See id*.

128. FAA, UAS Fact Sheet, http://www.faa.gov/uas/regulations_policies/media/UAS_Fact_Sheet_Final.pdf.

129. *See supra*, note 120.

130. The FAA's passive role in privacy concerns is to be expected, as that is not their area of expertise.

131. Reaves, Lucas, *6 Arguments in Favor of the Commercial Use of Drones*, Independent Voter Project (May 6, 2013), http://ivn.us/2013/05/06/6-arguments-in-favor-of-the-commercial-use-of-drones/; *see also* note 120.

132. *See supra*, note 17.

of private and commercial drones actively in the national airspace, it will be difficult to bring those drones into compliance when the FAA or another agency announces additional rules and regulations concerning privacy interests.

2. Policy Concern: Safety

Unlike privacy concerns, which are nuanced and complicated, an interest in public safety in the context of UAS operation is self-evident. The news media, both nationally and internationally, has covered UAS "close calls" and crashes since they entered the national airspace. Despite the obvious safety concerns posed by UAS operation, the regulations have a long way to go before individuals can feel comfortable with the existence of hundreds of thousands of UAS in our skies, let alone the thought of Amazon or any other major retailer employing drones to deliver packages on our doorsteps.

The CAA regulations clearly reflect the U.K.'s significant concern about public safety. As noted above, subsection 166 governs the safe operation of unmanned aircrafts. These regulations were once criticized for being too lenient, but following the successful prosecution of a U.K. operator, that sentiment has dissipated to some degree. In August 2013, a UAS fitted with a camera was found in the waters near a nuclear submarine testing facility operated by BAE Systems in the U.K. BAE subsequently turned it over to British police, who analyzed the video footage. The footage revealed that the UAS had nearly crashed into the busy Jubilee Bridge over the Walney Chanel and flown through restricted airspace before it crashed into the waters in which it was found. The police were able to track down the UAS's owner, Robert Knowles, who admitted to building and operating the UAS.[133] Mr. Knowles was then charged with one count of flying a small-unmanned surveillance aircraft within 50 meters of a structure (Article 167 of the Air Navigation Order 2009) and one count of flying over a nuclear installation (Regulation 3(2) of the Air Navigation (Restriction of Flying) (Nuclear Installations) Regulations 2007).[134] He was found guilty on both counts. He was fined £800 plus costs of £3,500, or approximately $6,100 USD.[135] In addition to the steep fines, individuals can also face up to five years imprisonment for flying a drone near an airport.[136]

This was a case of first impression and demonstrates the seriousness with which the U.K. system handles violations of their UAS laws and regulations. It sent a clear warning to other UAS operators that public safety is of the utmost concern for the U.K. Nonetheless, close calls continue to persist in the U.K. and many have called for a national registry of all drones since thousands have been unaccounted for due to the lack of compulsory registration.

When it comes to the issue of safety, the U.S. places more emphasis on public safety and education. Many in the EU, including the House of Lords in the U.K., have pointed to the

133. CAA, *First Conviction for Illegal Use of an Unmanned Aircraft* (Apr. 2, 2014), http://www.caa.co.uk/News/First-conviction-for-illegal-use-of-an-unmanned-aircraft/.

134. *See id.*

135. Charles Arthur, *UK's First Drone Conviction Will Bankrupt Me, Says Cumbrian Man*, THE GUARDIAN (Apr. 2, 2014), http://www.theguardian.com/world/2014/apr/02/uk-first-drone-conviction.

136. Leo Kelion, Drone Hits British Airways Plane Approaching Heathrow, BBC (Apr. 17, 2016), http://www.bbc.com/news/uk-36067591.

compulsory registration mandate in the U.S. as an example of what other countries should adopt as well.[137] In addition to compulsory registration, there are several Centers that focus on drone study and produce reports, which aid in educating regulators on the issues involving increased use of drones in the National Airspace System.

For example, in a recent report by the Center for the Study of the Drones at Bard College, there have been 921 incidents involving drones and manned aircrafts within the National Airspace System between December 2013 and September 2015.[138] Of those, 35.5 percent were considered "Close Encounters" and 64.5 percent were "Sightings," meaning a manned aircraft pilot or air traffic control spotted a drone flying within or near the flight paths of manned aircrafts.[139] Given that the FAA regulations are heavily focused on educating individuals on how to use their drones safely, it is surprising to learn that 90 percent of the incidents occurred above the maximum altitude of 400 feet.[140] Likewise, a majority of the incidents occurred within 5 miles of an airport, which is also prohibited airspace for drones.[141]

While these numbers indicate a need to improve the regulations and educational outreach, the compulsory registration for all drones is a strong initial step. Of course, it will be difficult to confirm that all drones that entered the airspace prior to the pronouncement of the registration rule have been registered. Nonetheless, unlike the U.K., the U.S. has a national registration for all drones that conceivably will allow the government to trace any recovered drone back to the purchaser or registrant. In the case of Robert Knowles from the U.K., the only reason authorities found him was because he voluntarily put his name, address, and phone number on the drone.[142] The U.S. correctly recognized that widespread, voluntarily disclosure of drone operators' names and addresses was unlikely. Therefore, in light of the rapidly increasing number of drone operators, compulsory registration allows the FAA to keep track of the number of drones and to reach out to drone operators directly to provide them with information on the regulations and important safety information.

As a policy matter, the U.S. appears to be on the right track in terms of safety. Although the U.S. lags behind other countries in terms of commercial operations, the reasoning seems to be rooted in a concern for public safety, which is understandable. The U.S. has one of the busiest and most complex national airspaces in the world. With London and New York consistently trading places for the world's busiest city airspace, the U.K. might want to follow some of the safety measures implemented by the FAA.

The U.S., however, needs to enhance enforcement actions. With the U.K. police taking over investigations of reckless or careless drone operation, individuals will be more likely to

137. Samuel Gibbs, *Lords Urge Compulsory Registration of All Civilian Drones*, THE GUARDIAN (Mar. 5, 2015), http://www.theguardian.com/news/2015/mar/05/lords-urge-compulsory-registration-of-all-civilian-drones.

138. Dan Gettinger and Arthur Holland Michel, *Drone Sightings and Close Encounters: An Analysis*, CENTER FOR THE STUDY OF THE DRONE AT BARD COLLEGE (Dec. 11, 2015), http://dronecenter.bard.edu/files/2015/12/12-11-Drone-Sightings-and-Close-Encounters.pdf.

139. *See id.*

140. *See id.*

141. *See id.*

142. *See First Conviction for Illegal Use of an Unmanned Aircraft, supra*, note 133.

abide by the laws. The FAA does not appear to be utilizing all of the resources at their disposal for the strong enforcement of the drone laws and regulations, outside of fining individuals. For example, despite earlier statements by FAA spokesperson Jim Williams,[143] the Connecticut student who built a "gun drone" did not face any criminal charges because officials in charge of the investigation could not find any laws prohibiting the operator's conduct. Additionally, many U.S. states and major U.S. cities, like Los Angeles and Manhattan, are passing state and local laws governing the use of drones, which the FAA is concerned might result in a lack of uniformity in drone laws.[144] As a result, the FAA has asked many of the states and cities to back off from their stricter rules. However, as many local lawmakers have noted, every city and state is different and faces different threats, "'New York City is different from the cornfields of Iowa,' Mr. Garodnick said. 'That should be obvious to everyone, but that isn't reflected in F.A.A. rules.'"[145] The FAA might benefit from allowing the states to craft legislation that addresses both safety and privacy concerns.

VI. Conclusion

The unmanned aircraft industry is not an entirely new industry when considering the military or the government's use of UAS. However, its expansion into the civilian market and the rapid rate at which it has grown has been difficult for U.S. lawmakers and regulators to keep up with. It presents complex legal issues and safety concerns that are slowly being addressed. As the FAA and the U.S. government continue to study and assess the commercial UAS industry, they might look to the U.K. for valuable insight since U.K. commercial regulations have been around for nearly six years.

As it stands today, commercial operation of UAS is limited in the U.S., but the FAA expects to provide new rules in 2016. Hopefully, the rules will clarify the distinction between commercial and recreational operation and provide for a more streamlined and simplified approach to licensing and integrating small commercial UAS in the national airspace.

The use of civilian UAS can be fun, economically advantageous, and safe provided that clear and reasonable regulations are established and more importantly, enforced.

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143. *See* Ben Wolfgang, *FAA Official: No Armed Drones in U.S.*, THE WASHINGTON TIMES (Feb. 13, 2013), http://flightlines.airforcetimes.com/2013/02/13/faa-no-armed-drones-in-u-s-airspace/ (In 2013, Jim Williams stated that the FAA prohibits individuals from attaching a weapon to a civilian aircraft, including unmanned aircrafts).

144. Cecilia Kang, *F.A.A. Drone Laws Start to Clash With Stricter Local Rules*, THE NEW YORK TIMES (Dec. 27, 2015), http://www.nytimes.com/2015/12/28/technology/faa-drone-laws-start-to-clash-with-stricter-local-rules.html?_r=0

145. *See id.*

Ali Hamza Ahmad Suliman al Bahlul v. U.S.

2016 WL 6122778 (D.C. Cir. 2016)

The United States Court of Appeals for the District of Columbia affirmed the judgment of the U.S. Court of Military Commission Review, which upheld the U.S. military commission's conviction of Ali Hamza Ahmad Suliman al Bahlul for conspiracy to commit war crimes.

I. Holding

In the recent case, *Ali Hamza Ahmad Suliman al Bahlul v. U.S.*,[1] the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, upheld the conviction of Ali Hamza Ahmad Suliman al Bahlul ("Bahlul") by a 6-3 vote.[2] On October 20, 2016, Judges Henderson, Brown, Griffith, and Kavanaugh concluded that Articles I and III of the U.S. Constitution did not limit Congress's authority to grant military commissions jurisdiction to try conspiracy offenses.[3] Judge Millet concurred, but believed that a plain error standard of review applied, and thus, that it was unnecessary to reach the question of whether Congress had the authority to make an inchoate conspiracy offense triable by military commission.[4] Likewise, Judge Wilkins did find it appropriate to reach the question of whether it is constitutional for an inchoate conspiracy offense to be tried in a military tribunal, because he decided that Bahlul was not convicted of an inchoate conspiracy, but rather, a conspiracy under a vicarious liability theory.[5] Judges Rogers, Tatel, and Pillard dissented on the basis that Article III barred Congress from making inchoate conspiracies triable by a military commission.[6] Bahlul also raised First Amendment Free Speech and Fifth Amendment Equal Protection Clause challenges, which the court rejected without discussion.[7]

II. Background

Bahlul, originally a native of Yemen, traveled to Afghanistan to join the terrorist group al-Qaeda in the late 1990s.[8] Bahlul worked closely with Osama bin Laden as his personal assistant and secretary of public relations.[9] Specifically, he created a recruiting video for al-Qaeda celebrating the terrorist attack of the USS *Cole,* which killed 17 American sailors on October 12, 2000.[10] Additionally, Bahlul participated in the preparation for the terrorist attacks on September 11,

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1. 2016 WL 6122778 (D.C. Cir. 2016) (en banc).
2. *Id.* at *1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at *18.
9. *Id.*
10. *Id.*

2001.[11] For example, Bahlul made "martyr wills" for plane hijackers Mohammad Atta and Ziad al Jarrah and used them as propaganda declarations that documented the terrorists' role in the attacks.[12] Bahlul volunteered to participate in the attacks himself, but Osama bin Laden found him "too important to lose."[13] After the World Trade Center attacks, Bahlul fled to Pakistan.[14] In December of 2001 he was captured in Pakistan and turned over to the U.S. military.[15]

In 2008, Bahlul was tried and convicted by a U.S. military commission at Guantanamo Bay and sentenced to life imprisonment.[16] Bahlul was convicted pursuant to the Military Commission Act of 2006 ("2006 Act")[17] for providing material support for terrorism, soliciting others to commit war crimes, and conspiring to commit war crimes.[18] The U.S. Court of Military Commission Review upheld the conviction and Bahlul appealed to the U.S. Court of Appeals for the District of Columbia Circuit.[19] On July 14, 2014, the Court of Appeals, sitting en banc, vacated his convictions for providing material support for terrorism and soliciting others to commit war crimes because the convictions violated the Ex Post Facto clause of the U.S. Constitution.[20] The court remanded the conspiracy charge against Bahlul for a panel review.[21]

In June 2015, the three-judge panel vacated the conspiracy conviction finding that conspiracy is not an international law of war crime and therefore not appropriate to be tried by military commission.[22] However, a few months later, in September 2015, the D.C. Circuit granted the Government's petition for a rehearing en banc and vacated its previous panel judgment.[23]

On October 20, 2016 the en banc D.C. Circuit decided the present case in which it upheld the conspiracy convictions by a 6-3 vote, with four judges concluding that Congress had the authority to make crimes—such as inchoate conspiracy—triable before a military commission, even if those crimes were not recognized as international law of war crimes.[24]

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11. *Id.*
12. *Id.* (Mohammad Atta and Ziad al Jarrah were two plane hijackers who flew planes into the World Trade Center on September 11, 2001. Their "martyr wills" were made in preparation for the attacks which identified them as members of al-Qaeda and documented their role in the violent attacks.).
13. *Id.* at *18.
14. *Id.*
15. Bahlul v. United States, 767 F.3d 1, 6 (D.C. Cir. 2014).
16. *Bahlul*, 2016 WL 6122778 at *2, *19.
17. 10 U.S.C. §§ 950v(b)(25), (28), 950u.
18. *Id.* at *16.
19. United States v. Al Bahlul, 820 F. Supp. 2d 114 (U.S.C.M.R. 2011) (en banc) *conviction vacated and reh'g granted*, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013) (per curiam).
20. *See* Art. 1, Secs. 9, 10; *Bahlul*, 767 F.3d at 1.
21. 767 F.3d 1(D.C. Cir. 2014).
22. 792 F.3d 1 (D.C. Cir. 2015).
23. *Bahlul*, 2016 WL 6122778, at *18.
24. *Id.*

III. The Court's Plurality Decision

A. Plurality Opinion of Judges Henderson, Kavanaugh, Brown, and Griffith

The four-judge plurality opinion concluded that Article I of the U.S. Constitution does not limit Congress's authority in determining which crimes can be tried by a military commission to only those crimes that are recognized under international law.[25] The D.C Circuit also found that the Article III exception for military commissions to try enemy war crimes is not restricted to international law of war offenses.[26]

1. Article I: The Define and Punish Clause

The en banc District of Columbia Circuit held that Article I of the U.S. Constitution does not limited Congress's authority to establish only international law offenses as triable by military commission.[27] The court considered five factors to support its decision: (1) the text and original understanding of the Constitution; (2) the structure of the Constitution; (3) Supreme Court precedent; (4) longstanding congressional practice; and (5) executive branch practice.[28]

a. Text and Original Understanding

The Court construed the text and original understanding of Article I as demonstrating that congressional authority is not limited by international law of war.[29] Therefore, Congress has the authority to establish offenses that go beyond the recognized scope of international law of war crimes triable by military commission.[30] More specifically, Congress has the authority to give military commissions jurisdiction to try conspiracy offenses. Bahlul argued that the Define and Punish Clause of Article I is the only Constitutional source that allows Congress to give military commissions jurisdiction to try certain war crimes.[31] The Define and Punish Clause of Article I provides that "Congress shall have Power to . . . define and punish . . . offences against the Law of Nations . . . ."[32] Bahlul argued that "[l]aw of [n]ations" in this provision means international law, and that "conspiracy" is not recognized as an offense under international law.[33] Accordingly, Bahlul argued, because conspiracy is not an international law of war offense, Congress does not have the power to make conspiracy a crime triable by military commission.[34]

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25. *Id.* at *3.
26. *Id.* at *11.
27. *Id* at *4.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at *4.
32. U.S. CONST. Art. I, Sec. 8, cl. 10.
33. *Bahlul,* 2016 WL 6122778, at *4.
34. *Id.*

The D.C. Circuit rejected this argument because Congress's authority is not derived solely from the Define and Punish Clause.[35] Rather, for example, the Declare War Clause[36] and the Captures Clause,[37] in conjunction with the Necessary and Proper Clause,[38] provide additional Congressional powers both to establish military commissions, and to make certain offenses triable by those military commissions.[39] Furthermore, the Declare War Clause does not mention international law and does not impose international law as a limit in making offenses triable.[40] Thus, the Court concluded, the literal text of the clauses in Article I do not limit military commissions to prosecuting solely international law of war offenses.[41]

b. Structure of the Constitution

Second, the Court analyzed the structure of the Constitution to support its conclusion that international law does not does limit congressional authority to determine which crimes may be tried by military commission.[42] The Court noted that the Framers did not intend to give "foreign nations any constitutional power over the wartime decisions of the United States."[43] More specifically, were the defendant's argument brought to its the logical conclusion, the U.S. should be restrained by the influence of other nations through international law when prosecuting war crimes.[44] The Court found that this cannot be so.[45] Therefore, the panel concluded that the Constitution "does not give foreign nations a de facto veto over Congress's determination of which war crimes may be tried by U.S. military commissions."[46]

c. Supreme Court Precedent

The opinion relied on the landmark Supreme Court decision of *Ex Parte Quirin*[47] ("*Quirin*") to support its holding that Congress is not limited by international law when deciding which offenses may be prosecuted by military commissions. In *Quirin*, the Court found constitutional the use of military commissions to prosecute war crimes.[48] There, the Court specifically considered the offense of spying, and acknowledged the longstanding history of

35. *Id. See* U.S. CONST. Article I, Sec. 8, cl. 10 (granting Congress the authority to define and impose punishment for "[o]ffenses against the Law of Nations").

36. *Bahlul*, 2016 WL 6122778, at *4; *see* U.S. CONST. Art. I, Sec. 8, cl. 11 (stating Congress has the power to initiate formal declarations of war).

37. *Bahlul*, 2016 WL 6122778, at *4; *see* U.S. CONST. Art. I, Sec. 8, cl. 11 ("Congress shall have Power To . . . make Rules concerning Captures on Land and Water . . . .").

38. U.S. CONST. Article I, Sec. 8, cl. 18 ("Congress shall have Power To . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .").

39. *Bahlul*, 2016 WL 6122778, at *4.

40. *Id.* at *5.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at *6.

47. 317 U.S. 1 (1942).

48. *Bahlul*, 2016 WL 6122778, at *6.

congressional authorization to try charges of spying by military commission.[49] However, in the instant case, the D.C Circuit emphasized that spying "was not and has never been an offense under international law of war."[50] The D.C Circuit also noted that the *Quirin* Court never held that military commissions were constitutionally permitted to try only international law of war offenses.[51] However, the *Quirin* Court did not address whether Congress was constitutionally limited from establishing non-international law of war crimes that could be tried by military commission.[52]

Nevertheless, the *Quirin* Court implicitly indicated that Congress was not limited by international law because it upheld the constitutionality of prosecuting spying offenses—which are not international crimes of war—by military commission.[53] Accordingly, relying on *Quirin*, the D.C Circuit held that Congress has authority under Article I to make offenses triable by military commission, even if those offenses are not war crimes under international law of war.[54]

d. Longstanding Congressional Practice

The D.C Circuit concluded that longstanding congressional practice also supported the conclusion that Congress is not limited in its authority to make crimes triable by military commission.[55] The opinion cited to writings from 1776, when the Continental Congress codified "spying" and "aiding the enemy" as offenses triable by military tribunal, despite the charges being "non-international law offense[s]."[56] As to more recent authority, the Court relied on the Military Commissions Act of 2006 and 2009, which made solicitation and material support of terrorism offenses triable by military commission, even though both were not international law of war crimes.[57] Thus, the Court concluded that it was well established in congressional practice to make non-international war crimes, like conspiracy, triable by military commission.[58]

e. Executive Branch Practice

Finally, the D.C. Circuit concluded that it was deeply rooted in U.S. history for military commissions to try conspiracy offenses.[59] The court illustrated two historical examples to support this conclusion: (1) the military trials of Confederate conspirators who plotted to kill President Abraham Lincoln in 1865; and (2) the military commission trial of eight Nazi conspirators who planned to attack U.S. infrastructure and military facilities during World War

49. *See Quirin*, 317 U.S. at 41–42; *see also Bahlul,* 2016 WL 6122778, at *6.
50. *Bahlul*, 2016 WL 6122778, at *6.
51. *Id.* at *7.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at *8.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

II.[60] First, in 1865, President Andrew Johnson specifically decided to have the conspirators tried by military commission rather than by "civilian court."[61] Like Bahlul, the Lincoln conspirators were charged and convicted of conspiracy.[62] Second, Nazi conspirators who planned to destroy U.S. infrastructure during WWII were also charged and convicted of conspiracy by military commission.[63] President Franklin D. Roosevelt reviewed and approved the convictions, and upon habeas corpus review, the Supreme Court upheld the convictions and constitutionality of the military commission trial.[64] The D.C Circuit concluded that the historical use of military commissions to hear non-international-law offenses indicated that it was an accepted practice in the U.S. that should be followed.[65] Thus, the Court found Bahlul's trial before a military commission constitutional under Article I because there was sufficient support of executive-branch practice that conspiracy charges could be prosecuted before military commissions.[66]

2. Article III: The Judicial Power Clause

Bahlul also claimed that he had a constitutional right to have the conspiracy charges against him adjudicated in a jury trial before an Article III judge.[67] The Court rejected this argument, however, holding that the Supreme Court has recognized an exception to Article III for military commissions to try enemy-of-war crimes.[68]

Bahlul argued that any exception to Article III for military commission trials was limited to crimes recognized under international law of war crimes.[69] The D.C. Circuit again turned to *Quirin*, concluding that because U.S. military commissions are not confined to hearing only international law of war offenses, Article III does not bar a military commission from trying conspiracy offenses.[70] The court did note, however, that although Congress has the authority to make non-international law of war crimes triable by military commission, this power is not unlimited.[71] The court explained that the "charges must at least involve an enemy combatant who committed a proscribed act during or in relation to hostilities against the United States."[72] Therefore, the plurality opinion concluded that a historical record of an offense tried by U.S. military commission is "sufficient to uphold Congress's constitutional authority" to give military commissions jurisdiction to try the conspiracy offense.[73]

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60. *Id.* at *8–9.
61. *Id.* at *8.
62. *Id.*
63. *Id.* at *9.
64. *Id.*
65. *Id.*
66. *Id.* at *10.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at *12.
71. *Id.*
72. *Id.*
73. *Id.*

B. Concurrence 1: Judge Patricia Millet

Judge Millet concurred on narrower grounds concluding that plain-error review was the appropriate standard of review in this case.[74] The plain-error standard "warrants reversal only when the error is clear and obvious at the time it is made," and from there, the decision to correct the error "lies in the sound discretion of the court of appeals."[75] Judge Millet acknowledged that an appellate court may review a claim for "plain-error" when a criminal defendant fails to preserve an issue.[76] She argued that it was not necessary to address the constitutional challenges raised because the claims were not properly preserved in the prior proceedings.[77] Since Bahlul refused to participate in the proceeding below, he failed to preserve the current claims.[78] As a result, Judge Millet concluded Bahlul "forfeited" these constitutional challenges because he failed to raise them before the military commission.[79] Based upon a plain-error review, therefore, Judge Millet concluded that the 2006 Act explicitly granted military commissions jurisdiction to try conspiracy offenses and that a reversal was not warranted.[80]

Additionally, Judge Millet explained in detail that Bahlul was not charged with inchoate conspiracy, but rather, "a different and distinct statutory conspiracy offense" pursuant to the 2006 Act.[81] The offense consisted of several elements that were proven "beyond a reasonable doubt" before the military commission.[82] Based upon the substantive elements of the charge, Judge Millet concluded that Bahlul was not charged with inchoate conspiracy, and thus, did not exceed the scope of Article III judicial power.[83]

C. Concurrence 2: Judge Robert Wilkens

Judge Wilkens upheld Bahlul's conviction without reaching the Article III constitutional issue of whether Congress can make inchoate conspiracy triable by military commission, concluded that Bahlul was not prosecuted for inchoate conspiracy.[84] The Judge took an "as-applied" approach to the defendant's particular challenge and made a *de novo* review of the offenses that formed the basis of the criminal conviction.[85] Judge Wilkins distinguished conspiracy as a stand-alone crime, which is the inchoate crime, from conspiracy as a form of vicarious liability, as set forth in *Pinkerton v. U.S.*[86] *Pinkerton* established that a conspirator can be held liable for his co-conspirator's substantive criminal offenses if those offenses are "reasonably foreseeable and

74. *Id.* at *16 (Millet, J., concurring).
75. *Id.* at *20.
76. *Id.*
77. *Id.* at *21.
78. *Id.* at *20.
79. *Id.* at *16.
80. *Id.* at *21–22.
81. *Id.* at *30.
82. *Id.* at *29.
83. *Id.* at *30.
84. *Id.* at *36 (Wilkins, J., concurring).
85. *Id.*
86. Pinkerton v. U.S., 328 U.S. 640 (1946); *Bahlul*, 2016 WL 6122778, at *36.

committed in furtherance of the conspiracy's objectives, all while the defendant was a member of the conspiracy."[87] Judge Wilkins concluded that Bahlul was convicted of things he did as part of the overall al-Qaeda plots to kill civilians.[88] These actions made Bahlul criminally liable for substantive war crimes under the *Pinkerton* doctrine of conspirator vicarious liability, not of an inchoate conspiracy offense.[89] Significantly, Judge Wilkins cited the incorporation of the *Pinkerton* doctrine in international law as a "joint criminal enterprise" theory of vicarious liability.[90]

D. Dissent

The dissent by Judges Rogers, Tatel, and Pillard argued that the exception to Article III for trials by military commission must be read narrowly to permit only trials for offenses against the international laws of war—and that inchoate conspiracy is not such an offense.[91] The dissent made point-by-point rebuttals of the opinions of the majority and discusses the potential dangers of expanding the government's authority to abridge the judiciary's constitutional power to preside over criminal trials.[92] In a short, but significant, discussion in closing, the dissent noted that there was not a majority on the rationale for upholding the defendant's conviction, and therefore this case lacks precedential value for whether conspiracy or other non-international law of war offenses can be tried in a military tribunal.[93]

IV. Conclusion

Despite the D.C. Circuit's attempt to finalize the constitutional issues concerning military commission jurisdiction, the consistently divergent views throughout this case's history makes Supreme Court review likely. The D.C Circuit relied on multiple rationales in reaching its conclusion, leaving the law unsettled, as highlighted by the dissent. Challenging the authority of military commissions to try conspiracy offenses is becoming a more pressing issue facing presidential administrations.[94] The en banc court failed to address the nature of terrorism in modern warfare and did not explore the role of international law of war as it applies to modern terrorism and other non-traditional warfare. The complicated procedural history of this case and the lengthy separate opinions manifest the D.C Circuit's difficulty in retrofitting traditional constitutional law and the international law-of-war to the challenges of terrorism and the new realities of modern warfare. Consequently, there are many conflicting views on fundamental constitutional issues, ripening Supreme Court review.

Mia Piccininni

87. *Bahlul*, 2016 WL 6122778, at *39.

88. *Id.* at *40.

89. *Id.* at *40–41.

90. *Id.* at *40.

91. *Id.* at *41 (Rogers, J., Tatel, J., and Pillard, J., dissenting).

92. *Id.* at *67.

93. *Id.* at *68.

94. Reema Shah & Sam Kleiner, *Running Out of Options: Expiring Detention Authority and the Viability of Prosecutions in the Military Commissions Under Hamdan* II, 32 YALE L. & POL'Y REV. 465, 468 (2014) (discussing the challenges that Obama administration faced concerning the prosecution of Guantanamo Bay detainees and arguing how Article III jurisdiction is more suitable to try conspiracy charges against enemy combatants).

Alstom Brazil Energia e Transporte Ltd. v. Mitsui Sumitomo Seguros S.A.,

2016 WL 3476430 (S.D.N.Y 2016).

The United States District Court for the Southern District of New York confirmed petitioner's arbitration award pursuant to 9 U.S.C. § 207 and subsequently denied respondent's motion to dismiss for lack of jurisdiction, holding that the respondent as an insurer-subrogee was equally bound to the arbitration clause in the supply contract between its insured and the petitioner.

I. Holding

In the recent case *Alstom Brazil Energia e Transporte Ltd. v. Mitsui Sumitomo Seguros S.A.,*[1] Judge Hellerstein of the United States District Court for the Southern District of New York granted Alstom Brasil Energia Transporte Ltda.'s ("Alstom") petition to confirm its arbitration award, pursuant to 9 U.S.C § 207,[2] and therefore denied Mitsui Sumitomo Seguros S.A's ("Mitsui") motion to dismiss the petition.[3] The court held, upon independent review of the arbitration panel's decision, that because Mitsui removed the matter under chapter two of the Federal Arbitration Act ("FAA"), Mitsui as an insurer-subrogee was in fact bound by its insured's, Alumina do Norte do Brasil S.A ("Alunorte"), supply contract with Alstom.[4] Therefore, Mitsui inherited no greater rights than what its insured maintained under federal law.[5] Consequently, pursuant to the supply contract, Mitsui was bound to arbitrate as an insurer-subrogee through the International Chamber of Commerce ("ICC") in New York City, and the court possessed the proper authority to confirm the award of the arbitral court.[6]

II. Facts and Procedure

Petitioners are Alstom Power, Inc., incorporated in the United States, and its subsidiary Alstom Brasil Energia Transporte Ltda., incorporated in Brazil ("Alstom").[7] Each company provides power generation equipment and services to their respective country.[8] Respondent, Mitsui Sumitomo Seguros S.A ("Mitsui"), is an insurance company incorporated in Brazil and

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1. *See* Alstom Brazil Energia e Transporte Ltd. v. Mitsui Sumitomo Seguros S.A., 2016 WL 3476430 (S.D.N.Y 2016).
2. 9 U.S.C.A. § 207 (West) ("Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.").
3. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *8.
4. *See id.*
5. *See id.* at *3–*4.
6. *See id.* at *6.
7. *See id.* at *1.
8. *See id.*

provides insurance products globally.[9] Alumina do Norte do Brasil S.A ("Alunorte"), an aluminum refiner located in Brazil, was insured by Mitsui and maintained a supply contract with Alstom up until July of 2009.[10]

Both the insurance contract and the supply contract are of crucial importance to this case. Clause 24.1 of the supply contract between Alunorte and Alstom sets out that disagreements arising from the contract, which cannot be settled through good faith negotiation, will be arbitrated.[11] Clause 24.1 goes on further to specify that the location of arbitration will be the ICC and that the rules to govern will be the ICC rules.[12] Finally, the clause 24.1 specifies that the law to govern the arbitrators will be based "solely on the Articles"[13] of the contract, and if the subject matter for the decision is not provided in the contract, then Brazilian law will be used.[14] Clause 10(1) of the insurance agreement between Mitsui and Alunorte allowed for Mistui to obtain subrogation rights against third parties who caused the indemnified damage once the indemnity was paid.[15] Clause 10(2) of the agreement also prevents the insured from carrying out any act which prejudices the insurer's subrogation right.[16]

The cause of the underlying dispute stems from the supply contract between Alstom and Alunorte.[17] Alstom sold and delivered two steam generation units to Alunorte, as required under the supply contract.[18] However, two incidents, resulting in substantial damage and a loss of profits, occurred after the delivery of Alstom's units. These two incidents were (1) a forced shutdown of Alunorte's facility in August of 2007, resulting from ruptures in each unit's freeboard tubes, and (2) a fire upon restart of Alunorte's facility, due to debris in the units, which resulted in additional damage to Alunorte's facility that same year.[19] Accordingly, Alunorte and Alstom entered into a final release agreement, a "Certificate of Conclusion and Final Receipt,"[20] on July 20, 2009 in which each party released the other from "all or actual potential

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9. *See id.*

10. *See id.*

11. *See id.* at *2 (citing Dkt. No. 20(2), p.15.) "The disagreements and *casus omissus* arising under this contract that cannot be amicably settled by the good faith negotiation of the parties, shall be submitted to the arbitral court . . . . "

12. *See id.* "The Arbitral Court . . . shall conduct the arbitration according to the Rules of the International Chamber of Commerce (ICC) at a site in New York City, New York, USA."

13. *See id.* (citing Dkt. No. 20(2), p.16.) "Any decision or award of the arbitrators shall be based solely on the Articles of this Agreement. If the subject matter for the decision or award is not provided for in such Articles, it shall be based on the law of Brasil, but only to the extent such law is consistent with the Articles of this Agreement."

14. *See id.*

15. *See id.* at *2 (citing clause 10(1) of Mitsui's insurance agreement with Alunorte, "The Insurer, once the indemnity of the loss has been paid, will be subrogated, up to the fulfillment of this indemnity, to the Insured's rights and actions against third parties whose acts or deeds have led to the cause of the indemnified damage, being able to demand from the Insured, at any time, the assignment agreement and the appropriate documents for the exercise of these rights.").

16. *See id. (*citing clause 10(2) of Mitsui's insurance agreement with Alunorte, "The Insured cannot carry out any act which prejudices the Insurer's right of subrogation or come to an agreement or settle with third parties responsible for the loss, except with previous and express authority from the Insurer.").

17. *See id.* at *1.

18. *See id.*

19. *See id.*

20. *See id.*

claims through that date."[21] Additionally, Alunorte made a claim under its insurance agreement and recovered from Mitsui a total of $24,558,073.11 through indemnification.[22] Mitsui, in turn, sought to recover its indemnity claim against Alstom in Brazil through its subrogation rights.[23] However, Alstom responded by invoking the arbitration clause of its supply contract, moving to dismiss the suit in Brazil, in order to be heard before the ICC in New York City, in accordance with clause 24.1.[24] Mitsui made a special appearance to challenge the jurisdiction of the arbitration tribunal.[25] However, under Articles 6(3) and 6(4) of the ICC rules, the ICC court ruled that the arbitration would proceed in New York.[26]

The arbitrators held that they did in fact have jurisdiction to decide the dispute because under "both Brazilian law and under federal common law or New York law, Mitsui was bound by the arbitration agreements set out in clause 24.1."[27] They found that Mitsui was also bound by the release between Alunorte and Alstom.[28] The arbitrators therefore issued their award on July 10, 2015[29] and determined that "Alstom was not responsible under the supply contract for the debris in the freeboard tubes that caused the 2007 incidents."[30] The panel therefore dismissed Mitsui's claim against Alstom and the counterclaim of Alstom for damages, holding that each party was to bear its own costs.[31]

On August 6, 2015, Alstom accordingly petitioned the Supreme Court of the State of New York, New York County pursuant to NY CPLR 7510.[32] Mitsui removed this action under chapter two of the Federal Arbitration Act ("FAA"), which implemented the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), to the

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21. *See id.* at *2.
22. *See id.*
23. *See id.*
24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.*

United States District Court for the Southern District of New York.[33] While Alstom still sought to confirm the arbitration award granted by the ICC, Mitsui filed a motion to dismiss.[34] Mitsui argued that "it was not a party to, and was not bound by, the arbitration agreement, that the court lacked personal jurisdiction, and that the petition should be dismissed on grounds for forum non conveniens." [35]

III. Discussion

A. Judicial Review of Arbitration Awards

When the parties submit their matter to arbitration, a court must give deference to the arbitration panel's decision.[36] The arbitration panel in this case held that "since Alunorte had the obligation to arbitrate disputes with Alstom, Mistui, as subrogee of Alunorte had the same obligation."[37] The arbitrators applied Brazilian law in determining Mitsui's subrogation right, pursuant to the supply contract's choice of law clause.[38] Specifically, the panel applied Article 786 of the Brazilian Civil Code[39], in tandem with clause 10 of Mitsui's insurance policy, which gave Mistsui the authority to subrogate "into the rights and actions which the insured had against the third party."[40]

However, the court took issue because Mitsui was not a signatory to the agreement, and therefore acknowledged Mitsui's argument that there should be no deference given to the arbitration panel.[41] Because Mitsui "did not clearly agree to submit the question of arbitrability to arbitration,"[42] the question of whether they were bound to the arbitration provision was sub-

33. *See id. See also* 9 U.S.C.A. § 201 (West) (providing that, "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."); *See also* 9 U.S.C.A. § 203 (West) (providing that, "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy."); *See also* 9 U.S.C.A. § 205 (West) ("Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.").

34. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *2.

35. *See id*.

36. *See id*.

37. *See id*. at *3.

38. *See id*.

39. *See id.* at *5 (summarizing Article 786 of the Brazilian Code, "After the indemnity is paid, the insurer will acquire by subrogation, within the limits of the respective value, the rights and actions that would be entitled to the Insured against the one committing the damage.").

40. *See supra* note 15 (citing to Clause 10(1) of Mitsui's insurance policy).

41. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *3.

42. *See id*.

ject to "independent review."[43] The court therefore held that independent review would be required to determine which state contract law would apply to the dispute.[44]

1. Selection of State Contract Law

Arbitration is a matter of contract, and therefore the court must determine which state contract law to apply to the dispute regarding Mitsui's obligation to arbitrate.[45] Under the Restatement (Second) of Conflict of Laws ("Restatement Second") § 3[46], a federal court must look to the choice of law rules of the forum state, in this case the United States District Court for the Southern District of New York.[47] However, because Mitsui removed the case under § 202[48] and § 203[49] of the FAA, the case was one of federal question, not diversity. Therefore the court was required to apply the federal common law choice of law rule to determine the governing state contract law.[50]

Applying federal law requires the court to determine the intentions of the parties.[51] In analyzing the intentions of the parties, the court looked to both Restatement Second § 187[52] and § 218.[53] Under Restatement Second § 187, the law which the parties choose to govern their contractual rights will be applied if the issue at bar could have been resolved within the parties' contract.[54] The contract between Alunorte and Alstom contained a choice-of-law clause, which selected Brazilian law to be applied.[55] In the event that good faith negotiations could not resolve the dispute, the contract determined that arbitration proceedings would take

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43. *See id*.

44. *See id*.

45. *See id*.

46. Restatement (Second) of Conflict of Laws § 3 (1971) (providing "Except when federal law otherwise provides or requires, a federal court will apply the law, including the rules of Conflict of Laws, of the State in which the case is brought. A case involving a Conflict of Laws problem may raise questions of great difficulty as to the precise area of application of State or federal law.").

47. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *3.

48. 9 U.S.C.A. § 202 (West) (providing, "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.").

49. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *2.

50. *See id*. at *3.

51. *See id*. at *4.

52. Restatement (Second) of Conflict of Laws § 187 (1971) (providing "The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.").

53. Restatement (Second) of Conflict of Laws § 218 (1971) (providing "Provision by the parties in a contract that arbitration shall take place in a certain state may provide some evidence of an intention on their part that the local law of this state should govern the contract as a whole.").

54. *See supra* note 52.

55. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *2.

place in front of the ICC.[56] The court, therefore, held that the contract carried the expectation that the dispute would be settled in front of the ICC, rather than Brazilian courts.[57] Additionally, Restatement Second § 218 states that contract provisions regarding arbitral procedures should provide evidence of intention.[58] Therefore, the arbitration clause in 24.1 of the supply contract confirms the parties' intentions that federal arbitration law should govern the dispute.[59] However, although the contract provides clear evidence of the intentions of both Alunorte and Alstom, indicating federal law applies, the issue regarding whether Mistui can be bound to the contract as a non-signatory remains.

2. Binding a Non-Signatory to Arbitration Through Subrogation Rights

Under federal law, a non-signatory can be bound by an arbitration agreement.[60] A tantamount of federal case law indicates that an insurer "stands in the shoes of its insured," and therefore inherits the insured's rights as subrogee.[61] Mistui's insurance agreement with Alunorte gave respondent a subrogation right "once the indemnity of the loss has been paid."[62] Therefore, by pursuing its insured's rights under the agreement, Mitsui gained only the rights that Alunorte had, and was therefore subject to the supply contract agreement between Alunorte and Alstom.[63]

Therefore, the court rejected both of Mistui's arguments that (1) the dispute arose from a tort claim and therefore Mistui was not bound, as the arbitration clause was limited to contract disputes and (2) that Brazilian law governs, and under such law, subrogated parties are not subject to arbitration.[64] The court discredited Mitsui's first argument because there were no third parties involved in the dispute, so the dispute remained as an issue of contract.[65] Additionally, the court discredited Mitsui's second argument, and deemed it "not relevant,"[66] because of its

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56. *See id*. at *1–*2.

57. *See id*. at *4.

58. *See id*. at *2.

59. *See id.* at *4.

60. *See id*.

61. *See id*. (quoting Am. Bureau of Shipping v. Tencara Shipyard S. P. A., 170 F.3d 349, 353 (2d Cir. 1999)). *See also* McAllister Bros. v. A & S Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980) (citing A/S Custodia v. Lessin International, Inc., 503 F.2d 318 (2d Cir. 1974); Fisser v. International Bank, 282 F.2d 231, 235 (2d Cir. 1960)); Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995), Gibbs v. Hawaiian Eugenia Corp., 966 F.2d 101, 106 (2d Cir. 1992).

62. *See id*. at *2.

63. *See id*. at *4.

64. *See id*. at *5.

65. *See id*.

66. *See id*.

previous determination that federal law was to be applied and that Mistui was bound to the arbitration clause.[67]

B. Personal Jurisdiction Through Subrogation

Mitsui objected to personal jurisdiction on two grounds: (1) that it lacked any contacts with the forum state, and (2) that Mitsui was not served properly under N.Y. B.C.L. § 307[68] because it is not subject to general jurisdiction in New York, and because Alstom additionally did not file proof of process.[69]

The court rejected both of Mitsui's arguments.[70] In regards to Mitsui's first argument, the court focused on the process and practicality of arbitral agreements.[71] It held that, in accordance with second circuit precedent, federal courts applying New York law have personal jurisdiction over parties who agree to arbitrate their disputes in the state.[72] Because Alunorte and Alstom agreed to arbitrate in New York, and because Mitsui as an insurer-subrogee "is governed by the same terms as the insured's right of recovery,"[73] Mistui is similarly bound by the forum selection provision in the contract; to hold otherwise would undermine the arbitral process.[74]

In regards to Mitsui's second argument, the court focused on the "sole function of process"[75] and efficiency, rather than the strict procedural filing requirements mandated under N.Y. B.C.L. § 307.[76] Mitsui argued that service through the Secretary of New York State, along with mailed documents and a requested return receipt, was improper as Mitsui lacked general jurisdiction in New York.[77] Mitsui additionally argued that without filing proof of process, service was improper.[78] However, the court rejected this argument and reasoned that since Mitsui

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67. *See id*. Mitsui argued using lower and intermediate Brazilian case authority that "arbitration is a procedural remedy, and a subrogated insurer, advancing a substantive right, is not bound to follow the procedural remedy." *Id*. Alstom opposed this argument citing an intermediate Brazilian court, which stated that the insurer as a subrogee was bound by an arbitration clause in a succeeding contract. *Id*. Although the arbitrators sided with Alstom, the court in this case ultimately dismisses both arguments and determines that the question of the application of Brazilian law is irrelevant. *Id*.

68. N.Y. Bus. Corp. Law § 307 (McKinney).

69. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *5–*6. Mitsui cites to Walden v. Fiore, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014) and Daimler AG v. Bauman, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) for its first argument. For Mitsui's second argument it cites to Flick v. Stewart-Warner Corp., 76 N.Y.2d 50, 54–55, 555 N.E.2d 907, 909 (1990) as a source of authority.

70. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *5–*6.

71. *See id*. at *5.

72. *See id*. (citing to *Am. Bureau of Shipping*, 170 F.3d at 352; *see also* Merrill Lynch, Pierce, Fenner & Smith v. Lecopolus, 553 F.2d 842, 845 (2d Cir. 1977)). *See also* Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes, 336 F.2d 354, 363 (2d Cir. 1964).

73. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *5.

74. *See id*. at *6.

75. *See id*.

76. *See id*.

77. *See id*.

78. *See id*.

was not arguing that it lacked actual notice, and because it was not prejudiced by the manner in which it was served, Alstom's service was sufficient.[79]

C. Forum Non Conveniens

Mitsui's final argument was made under forum non conveniens. Mitsui argued that New York was an improper forum for this action, citing to second circuit case law.[80] However, this argument was also rejected by the court.[81]

Considering Mitsui's argument, the court again deferred to the arbitration agreement between Alunorte and Alstom.[82] The court reasoned that arbitral procedures under the FAA require a high level of deference, which allows for parties to freely choose their choice of forum.[83] In considering whether New York was an adequate forum under the forum non conveniens doctrine, the court attempted to balance both private and public interest factors.[84] Considering the private factors, the court reasoned that because the litigants had already arbitrated in the forum, Mitsui could not argue that it was inconvenient.[85] Additionally, considering the public interest factors, the court found that applying federal law to this dispute required it to be deferential to the arbitration agreement in order to comply with public policy.[86] Therefore the court held that New York was a proper forum, and dismissal was not warranted on forum non conveniens grounds.[87]

D. Confirmation of the Arbitration Award

Under 9 U.S.C. § 207,[88] a petitioner may seek that an arbitral award falling under the New York Convention be confirmed.[89] A court may confirm such an award so long as the court does not find grounds for refusal.[90] Because the court found that it has jurisdiction under 9 U.S.C. §

79. *See id*. *See also Victory Transp*., 336 F.2d at 364.

80. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *7. Mitsui supports its argument by citing to Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384, 386 (2d Cir. 2011) (holding that the United States was an improper forum because of both public and private interests)*;* Mitsui also supports its argument by citing to In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 499 (2d Cir. 2002) (holding that the United States was an improper forum because to litigate the complex issues of the case there would cause an inconvenience to the parties).

81. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *7.

82. *See id*.

83. *See id*. *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,* 473 U.S. 614, 631 (1985).

84. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *7. The court cites to Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 503, 67 S. Ct. 839, 840, 91 L. Ed. 1055 (1947) (providing both public and private interests factors that a court should consider when analyzing grounds for dismissal under forum non conveniens).

85. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *7.

86. *See id*.

87. *See id*.

88. *See supra* note 2.

89. *See Alstom Brazil Energia e Transporte*, 2016 WL 3476430 at *8.

90. *See id*.

207, and additionally found that Mitsui was correctly bound to Alunorte's arbitration clause, the court confirmed Alstom's award, and subsequently denied Mitsui's motion to dismiss.[91]

IV. Conclusion

In this case, the court clearly acknowledged the United States' strong federal policy in which arbitration clauses should be given "the broadest possible effect."[92] In implementing this federal policy, the court has provided yet another example of the common non-signatory issue - the difficulty in balancing the competing interests of protecting a party who claims they did not agree to arbitrate, while simultaneously protecting the enforcement of a valid arbitral award under the New York Convention.[93] This decision therefore, correctly holds that insurers who wish to recover their paid indemnity claims through subrogation on behalf of their insured, have no greater rights than the insured itself. An important take-away from this decision is that insureds may bind the insurer-subrogee to their own detriment in regards to future recovery of claims. Going forward, it would be beneficial for insurers to be wary of any third party contracts which its insured agrees to, and to address such third party contracts in the initial insurance agreement. It may also be beneficial for insurers to impress upon its insureds that careful drafting of arbitration clauses, with respect to binding non-signatories, is crucial to a satisfactory insurance agreement.[94] In regards to the particular parties in this case, although Alunorte's contract with Alstom prevented Mitsui from recovering its indemnity payment, it appears that Mitsui may have an alternative recourse available. Rather than pursuing recovery against Alstom, it appears that Mitsui may be able to argue that Alunorte, pursuant to clause 10(2) of its insurance agreement, may have prejudiced its right of subrogation.[95] Therefore, Mitsui may be able to recover in that respect. However, this alternative theory of recourse demonstrates the grave implications of this case. Unfortunately, it appears that such limited rights through subrogation, holding an insurer at the mercy of third parties, may strain the relationship between an insurer and its insured by alternatively forcing the insurer to seek recovery elsewhere, or to become more hesitant to contracting in the first place.

Angela Cipolla

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91. *See id*. at *8.

92. *See* Enforcing Arbitration Against Nonsignatories, 65 Tex. B.J. 802 (2002).

93. *See* Katherine Belton, *Game, Set, and Match: Enforcement of Arbitral Awards Against Non-Signatory Parties*, 24 Am. Rev. Int'l Arb. 161 (2013).

94. *See* comment, *Nonsignatories in Arbitration: A Good-Faith Analysis*, 14 Lewis & Clark L. Rev. 953 (2010).

95. See discussion *supra* at note 16.

Ardell v. Ardell

34 N.Y.S. 3d 106 (N.Y. App. Div. 2016)

The Supreme Court, Appellate Division for the Second Department of New York granted a father's motion to dismiss a petition to modify a previous support order made by his ex-wife because the court could not use the bases for jurisdiction in order to modify a foreign support order unless it fell under an exception of the Interstate Family Support Act.

I. Holding

In the recent case, *Ardell v. Ardell*,[1] The Supreme Court, Appellate Division of the Second Department of New York held that the court lacked jurisdiction to modify a Swedish support order under the Interstate Family Support Act ("UIFSA").[2] The wife, who had been divorced from husband in a Swedish proceeding, filed suit seeking to modify the support order.[3] Under UIFSA, a court is unable to modify foreign child support orders if the obligee remains a resident of the foreign country where the order was issued, unless an exception applies.[4] Since no exception applied in this case, this judgment reversed in part and vacated in part the holding of the lower court.[5]

II. Facts and Procedural History

In July 2015, the Respondent Diane Ardell (hereafter, Respondent) commenced a proceeding in the Family Court of Suffolk County. She was seeking a de novo award of child support or a modification of the previously obtained Swedish support order.[6] Petitioner Mikael Ardell (hereafter, Petitioner) moved to dismiss for lack of jurisdiction.[7] The Support Magistrate denied the motion on December 4, 2015.[8] On December 24, 2015, the Family Court denied Petitioner's objections to the Support Magistrates order.[9] Petitioner appealed to the Appellate Division.[10]

Respondent, an American citizen and Petitioner, a Swedish citizen, had three children together in New York.[11] The family moved to Sweden in 2004 where Respondent obtained Swedish citizenship in February of 2011.[12] In June of that same year, the parties obtained a

1. Ardell v. Ardell, 34 N.Y.S.3d 106 (N.Y. App. Div. 2016).
2. *See id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 107.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

divorce from the Attunda District Court in Sollentuna Sweden.[13] The Svea Court of Appeal in Stockholm, Sweden issued joint legal custody of the children in July of 2012.[14] The court gave Respondent primary physical custody, and Petitioner visitation.[15] Respondent moved to New York with the children in October 2012.[16] Petitioner remained in Sweden and although he later moved to Singapore for employment reasons, he retained his Swedish citizenship and kept his home address registered in Stockholm.[17] A Swedish support order was entered by the Attunda District Court on September 23, 2013.[18] Petitioner made child support payments to Respondent's New York bank pursuant to that order.[19] Thus there was no evidence that Petitioner was in arrears.[20]

III. Discussion

A. The Uniform Interstate Family Support Act (UIFSA)

The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter "the Convention"), to which Sweden is a party, was signed by the United States at The Hague, Netherlands on November 23, 2007.[21] Since establishment, enforcement and modification of family support are matters of state law, the medium in which the Convention was sought to be enforced was through the revision of The Uniform Interstate Family Support Act (hereafter, UIFSA).[22] New York enacted UIFSA on September 25, 2015 through Article 5-B of the Family Court act.[23] Article 5-B became effective on January 1, 2016 and applies to all actions or proceedings filed on or after that date.[24] However, Family Court Act § 580-903 provides that the new version "shall apply to any action or proceeding filed or order issued on or before the effective date."[25] Thus, the new version of the UIFSA was applied here.[26]

1. Personal Jurisdiction

The Family Court Act § 580-201(a) provides that, in a proceeding to establish or enforce a support order, a tribunal of New York may exercise personal jurisdiction over a nonresident individual if: (1) the individual resided with the child in New York; (2) the individual resided

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. Law & The Family NY Forms § 131:1 (2d).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Ardell*, 34 N.Y.S.3d at 107.
26. *See id.*

in New York and provided prenatal expenses or support for the child; or (3) the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse.[27] The court found it undeniable that the children were conceived and born in New York, that Petitioner lived with them in New York, and that he presently provides support for the children in New York.[28]

However, the bases for personal jurisdiction set forth in Family Court Act § 580-201(a), may not be used by a court to acquire personal jurisdiction in order to modify a foreign support order unless the requirements of Family Court Act § 580-615 are met.[29]

2. Modification

Any child support order issued after a prior child support order has been issued constitutes a modification of the prior child support order within the meaning of the UIFSA.[30]

a. *Spencer v. Spencer*

The court cited *Spencer v. Spencer* in this decision to determine what it meant to modify a child support order.[31] Under 28 USCS § 1738B, a modification is "a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order.[32] New York's version of UIFSA states, "[a] tribunal of this state may not modify any aspect of a child support order that may not be modified under the law of the issuing state."[33] Thus, a subsequent order made by the family court would be considered a modification.[34]

b. Exceptions

The Family Court Act allows tribunals to modify foreign child support orders in certain circumstances except as otherwise provided in Family Court Act § 580-711(a), which provides that a court may not modify a Convention child support order if the obligee remains a resident of the foreign country where the support order was issued unless: (1) the obligee submits to the jurisdiction of a tribunal of this state, either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity; or (2) the foreign tribunal lacks or refuses to exercise jurisdiction to modify its support order or issue a new support order.[35]

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27. N.Y. FAMILY LAW § 580-201(a) (McKinney 2016).
28. *See Ardell*, 34 N.Y.S.3d at 107.
29. *Id.*
30. Spencer v. Spencer, 10 N.Y.3d 60, 67–68 (2008).
31. *Id*.
32. *Id*.
33. *Id*. (citing N.Y. FAMILY LAW § 580-611(c) (McKinney 2016)).
34. *Id*.
35. *Ardell*, 34 N.Y.S.3d at 108.

Respondent argued that once Petitioner moved to Singapore, he was no longer a resident of Sweden, where the support order was issued.[36] Respondent therefore contended that Family Court Act §580-711(a) did not apply to this case.[37]

The court found that because Petitioner submitted evidence that he remained registered as a resident of Stockholm pursuant to the laws of Sweden, his move to Singapore was irrelevant.[38] Therefore, the court had to determine whether one of the exceptions applied.

The petitioner did not submit to the jurisdiction of the New York court expressly or by defending on the merits without objecting to the jurisdiction.[39] Contrastingly, he did object to the jurisdiction at the first opportunity.[40] Therefore, the court could not modify this child support order under Family Court Act §580-615(a)(1).[41] Furthermore, under (a)(2) of the same section, there was no evidence submitted that showed the courts of Sweden lacked or refused to exercise jurisdiction to modify the Swedish support order or issue a new order.[42]

3. Public Policy Concerns

Courts should recognize registered support orders issued by courts located in countries that are members of the Convention because the Convention was executed for that exact purpose: to promote internal recognition and enforcement.[43] There are certain specified circumstances in which courts will not support recognition. These situations include where recognition of the order "is manifestly incompatible with public policy, including the failure of the issuing tribunal to observe minimum standards of due process, which include notice and opportunity to be heard.[44]

Since the definition of "due process" tends to vary in different parts of the world, it is hard to identify what could define "opportunity to be heard" when the obligor resides in a foreign country.[45] Therefore, when this defense is asserted, it might be difficult for a court to determine whether or not the order is against public policy.[46] This is because the determination may be based upon evidence that is only available in the foreign country.[47] Here, the court found

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. See N.Y. FAMILY LAW § 580–708 (McKinney 2016).
44. *Id.* (citing Family Court Act § 580-708[b][1]).
45. Merril Sobie, Practice Commentary, McKinney's Cons Laws of NY, 2016 Electronic Update, Family Court Act § 580-708.
46. *Id.*
47. *Id.*

that the respondent failed to demonstrate that the recognition of the Swedish support order was incompatible with public policy.[48]

IV. Conclusion

The court held that Petitioner was still a resident of Sweden and therefore the Family Court Act § 580-711(a) applied.[49] Petitioner did not submit to the jurisdiction of New York, nor was there any evidence set forth showing that the Swedish court refused to exercise jurisdiction to modify the support order. Thus, the New York court lacked proper jurisdiction to modify the support order.[50]

The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance was implemented in order to set forth internal recognition and enforcement of child and spousal orders issued by a country that is part of the Convention.[51] UIFSA §580-711 restricts the ability of New York courts to modify a Support order made in a country that is a member of the Convention.[52] This restriction was made for the sole purpose of not allowing a court to overstep its boundaries.[53] The Swedish court that originally made the child support order may modify it if they see fit.[54]

This is the first case decided in this jurisdiction that focuses on the new implementation of UIFSA which was enacted in New York in 2015 through Article 5-B of the Family Court act. Since this case might implicate future cases also governed by this law, it is pertinent that the court lay out its reasoning for every legal conclusion.

In this case the court did not lay out a rule for what constitutes a residency. This holding serves to demonstrate that the courts are hesitant to assert jurisdiction in a family matter decided by a foreign tribunal. Respondent argued that the Petitioner should not be considered a resident of Sweden since he moved to Singapore. This argument could have been analyzed more by the courts. The court stated that since he remained a resident of Sweden under Swedish law that his move did not change his residency. A future case with a different set of facts might raise some issues as to what constitutes a residence. Thus, the court should come forth with guidelines for determining whether or not someone should be considered a resident of a country for these purposes.

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48. *Ardell*, 34 N.Y.S.3d at 108.
49. *Id*.
50. *Id*.
51. Merril Sobie, Practice Commentary, McKinney's Cons. Laws of NY, 2016 Electronic Update, Family Court Act § 580-708.
52. N.Y. FAMILY LAW § 580-711 (McKinney 2016).
53. *See Ardell*, 34 N.Y.S.3d at 108.
54. *Id*.

Finally, the court did not analyze the public policy argument. Respondent contended that recognition of the support order was manifestly incompatible with public policy, however, the court disagreed. They did not delve into the details as to what would be incompatible with public policy and therefore the court offers no assistance to future courts in their decisions on the same matter.

Jenna Bontempi

Dynamic International Airways, LLC v. Air India Ltd.

2016 WL 3748477 (S.D.N.Y. 2016)

The United States District Court for the Southern District of New York granted the Defendant's motion for arbitration pursuant to Clause 9 of the 2013 and 2014 agreements. Also, the court denied the Plaintiff's cross-motion for arbitration per the December 16 letter and injunctive relief to enjoin the Defendant from proceeding with arbitration in India.

I. Holding

In this recent case, Judge Castel of the United States District Court for the Southern District of New York granted the Defendant's motion for arbitration pursuant to Clause 9 of the 2013 and 2014 agreements. Also, the court denied the Plaintiff's cross-motion for arbitration per the December 16 letter and injunctive relief to enjoin the Defendant from proceeding with arbitration in India.[1]

II. Facts

The Plaintiff Dynamic International Airways, LLC (hereafter, Plaintiff) filed a breach of contract claim against Air India Limited (hereafter, Defendant).[2] The Plaintiff is a Limited Liability Company that was formed under the laws of the Commonwealth of Virginia. [3] The company owns and operates aircrafts that are used for domestic and international tour and cargo operators.[4] The Defendant was formed under the laws of India and is owned and controlled by India's Government.[5]

In 2013 and 2014, Plaintiff and Defendant entered contracts that provided that the Plaintiff would transport pilgrims during the Hajj pilgrimage. [6] Plaintiff asserted that it upheld its end of the contract but Defendant refused to pay for the two contracts. [7] In its complaint, the Plaintiff contended that the Defendant owed them $74,000 for the 2013 contract, $8.3 million for the 2014 contract, $445,000 for failure to return a surety bond, and $84 million in additional damages because the Plaintiff relied on the Defendant's promise to enter into contracts in 2015 and 2016, which they later rescinded.[8]

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1. *See* Dynamic Int'l Airways, LLC v. Air India Ltd., 15-cv-7054 (PKC), 2016 WL 3748477, at *11 (S.D.N.Y. 2016).
2. *Id.* at *1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

The 2013 and 2014 contracts included a "Settlement of Disputes" clause (hereafter, "Clause 9").[9] Clause 9 stated "In case of any difference/dispute, the parties shall resort to amicably resolve it through negotiations/discussions across the table, failing which it shall be finally resolved by a designated Authority determined by the Ministry of Civil Aviation, whose decision shall be final and binding on both the parties."[10]

The Plaintiff filed this diversity action in September 2015.[11] The Defendant filed a pre-motion letter on December 7, 2015, that asked the court for permission to file a motion to compel arbitration according to Clause 9 or a motion to dismiss for *forum non conveniens,* and for failing to state a claim.[12] The Plaintiff then responded and argued that Clause 9 was not an agreement to arbitrate.[13] Instead, the December 7 letter was an offer to arbitrate, which the Plaintiff accepted.[14] The Defendant sent another letter to the court on December 16, 2015, requesting an adjournment of a pending conference in order to allow the parties to agree on a location of the arbitration.[15] While the letter was only signed by the Defendant's counsel, the Plaintiff's counsel was involved in drafting parts of the letter.[16] During this time, the parties attempted to negotiate without the involvement of the court, under the terms of the arbitration agreement.[17] The Defendant proposed to arbitrate in India using procedural laws in the Indian Arbitration and Conciliation Act of 1996. Plaintiff rejected this proposal and proposed to arbitrate in New York.[18] The Defendant also rejected Plaintiff's proposal.[19]

When the parties could not come to an arbitration agreement, the Defendant moved to compel arbitration according to Clause 9 on April 5, 2016.[20] The Plaintiff then cross-moved for arbitration according to the December 16 letter, and asked to enjoin the Defendant from seeking arbitration in India.[21] On June 7, 2016, a preliminary arbitration meeting was held in India and a representative for the Plaintiff was present, but according to the Plaintiff, the representative was present "for settlement purposes only."[22]

III. Analysis

The Plaintiff and Defendant both moved to compel arbitration, however, they disagreed as to whether Clause 9 or the letter on December 16 were binding arbitration agreements. The

9. *Id*. at *2.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*.

Defendant raised two arguments that were in favor of Clause 9 being a binding arbitration agreement.[23] Their first argument was that it is for the arbitrator, and not the court to decide, if Clause 9 is an enforceable arbitration clause. [24] The second argument was that even if the court ruled that they should decide the Clause 9 question, Clause 9 is a binding clause "…that provides for arbitration in India with an arbitrator appointed by the Ministry of Civil Aviation of India."[25] However, the Plaintiff argued that Clause 9 was not a binding arbitration agreement.[26] Instead, the Plaintiff argued that December 16 was a "*ex post* agreement" that bound them to arbitrate, the terms of which should be decided by the court.[27] Therefore, the Plaintiff asked the court to enjoin the pending arbitrate and to compel arbitration in New York. [28]

A. The Legal Standard

The court first discussed the legislative and legal history and found that there was a federal policy that favors arbitration.[29] The Federal Arbitration Act (hereafter, FAA) was created in 1925 in response to a history of judicial hostility to arbitration agreements. [30] The FAA creates a body of federal substantive law that is applicable to any arbitration agreement. [31] According to the FAA, the court's role is "limited to determining two issues i) whether a valid agreement or obligation to arbitrate exists, and ii) whether one party to the agreement has failed, neglected or refused to arbitrate."[32] Because of the presumption in favor of arbitration, when there is doubts concerning arbitration, the doubt should be resolved in favor of arbitration.[33] However, the court declared that this presumption does not apply when the doubt deals with who should decide arbitrability.[34] Instead, people or cannot be compelled to arbitrate if they have not agreed to arbitrate them[35] The court declared that an issue would only be referred to an arbitrator if "there is clear and unmistakable evidence from the arbitration agreement, as construed by the relevant state law, that he parties intended that the question of arbitrability shall be decided by the arbitrator."[36] The court concluded that because the contracts between the Plaintiff and Defendant dealt with international commerce, they are governed by the FAA presumptions.[37] Also, due to the fact that there was no material facts in dispute, the cross motion to compel arbitration is also suitable to be decided at this time.[38]

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23. *Id*. at *3.
24. *Id*.
25. *Id*.
26. *Id*.
27. *Id*.
28. *Id*.
29. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
30. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2013).
31. *See Moses*, 460 U.S. at 24.
32. *See* PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1198 (2d Cir. 1996).
33. *See Moses*, 460 U.S. at 24–25.
34. *Id*.
35. *Id*.
36. *See Bybyk*, 81 F.3d, at 1998–99.
37. *See Dynamic Int'l Airways*, 2016 WL 3748477, at *4.
38. *Id*.

B. The Choice of Law

Next, the court analyzed which substantive law applies to the questions of contract formation.[39] The questions presented in this case were: (1) is the Defendant's December 16 letter an enforceable arbitration agreement; (2) whether it is the job of the court or an arbitrator to decide if Clause 9 is an enforceable arbitration clause; and finally, (3) whether, if the court decided that they should decide the arbitration question, Clause 9 is an enforceable clause.[40]

The Plaintiff argued here that the court should apply federal common law to these questions.[41] In its argument, the Plaintiff relied on cases where jurisdiction was based on a federal question, while here, jurisdiction was based on diversity.[42] However, the cases cited by the plaintiff talked about using state-law in cases like this one with diversity jurisdiction.[43]

On the other hand, the Defendant argued that state-law applied and the court should use New York choice-of-law rules to determine which laws to use.[44] The Defendant cited newer Second Circuit cases to support its argument that the court should apply state-law.[45] The Defendant argued that when deciding if a obligation to arbitrate exists, courts should generally apply state-law principles that deal with the formation of contracts.[46] The Defendant also cited to *First Option of Chicago v. Kaplan Supreme Court* that held "courts … generally should apply ordinary state-law principles that govern formation of contracts."[47] The court concluded that because there was diversity jurisdiction and state law should apply.[48]

The court then had to decide if New York or Indian law applied.[49] "The court held that a federal court sitting in diversity must apply the law of the forum state when deciding the choice-of-law.[50] Here, New York is the forum state and the first question to resolve in determining whether to undertake a choice of law analysis is whether there is a conflict of law.[51] In regards to the enforceability of the December 16 letter, the court stated that neither party argued that there was a conflict between the laws of New York and India.[52] Also, because the letters forming

39. *Id*.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*.; *see* In re Salomon Inc. Shareholders' Derivative Litig., 68 F.3d 554, 559 (2d Cir. 1995) ("Were our jurisdiction predicated upon diversity, there might be an argument that we should defer to the New York courts when constructing the choice of law/forum provision.").
44. *See Dynamic Int'l Airways*, 2016 WL 3748477, at *4.
45. *Id*.
46. *See* Applied Energetics, Inc. v. NewOak Capital, 645 F.3d 522, 526.
47. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).
48. *See Dynamic Int'l Airways*, 2016 WL 3748477, at *4.
49. *Id*. at *5.
50. *See* Fieger v. Pitney Bowes Credit Corp., 251 F.3d 386, 393 (2d Cir. 2001).
51. *See* Curley v. AMR Corp., 153 F.3d 5, 12 (2d Cir. 1998).
52. *See Dynamic Int'l Airways*, 2016 WL 3748477, at *5.

the agreement were submitted to the court in New York, the contract created in those letters was formed in New York.[53] Therefore, the court decided that New York law applied.[54]

The court then decided if the issue should be referred to an arbitrator.[55] The Defendant argued that there was a conflict between Indian and New York law, and under New York choice-of-law rules, Indian law applied.[56] Per the Defendant, New York law favors judicial determinations while Indian law puts jurisdiction to rule on questions of arbitrability in the hands of an arbitrator.[57] [58] The court determined that these differences are not relevant because "federal law provides the operative presumptions on arbitrability: namely, that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[59] Also, courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear evidence that they did. [60]

The court then decided if Clause 9 was an enforceable arbitration agreement.[61] The court decided that they must apply state-law principles that deal with the formation of contracts.[62] The Defendant argued that the laws conflict and New York choice-of-law applies, and stated that Indian law should apply.[63] The court disagreed with the Defendant and held that New York law should apply here, namely because there were no relevant differences between New York and Indian law.[64]

C. Application

1. The December 16 Letter

In its discussion of the Plaintiff's arguments regarding the December 16 letter, the court held that the letter was not a binding agreement because the parties did not agree to any material terms.[65] In order to "create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms."[66] However, the court stated that a contract is not void if it leaves some terms to be decided in the future.[67] In that case you have to look at the intent of the parties and

53. *Id*.
54. *Id*.
55. *Id*.
56. *Id*.
57. *Id*.
58. *Id*.
59. *Id*.
60. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).
61. *See Dynamic Int'l Airways*, 2016 WL 3748477, at *5.
62. *Id*.
63. *Id*.
64. *Id*.
65. *Id*. at *6.
66. *See* Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 95 (2d Cir. 2007).
67. *See Dynamic Int'l Airways*, 2016 WL 3748477, at *6.

whether the parties intended to be bound.[68] The court found that the December 6 letter left out three critical terms to the arbitration: the location, forum, and rules of the arbitration.[69] The court determined that under New York law, a contract is unenforceable when there has been no agreement on some essential terms and instead there has only an agreement to agree in the future.[70] Ultimately, the court held that the December 16 letter was an "agreement to agree" in the future, and therefore, was not binding or enforceable on the parties.[71]

The Plaintiff drew attention to two types of preliminary binding agreements in this case. [72] The first type of agreement exists when the parties have reached a complete agreement but have not finalized the agreement.[73] The second type of the agreement exists when the parties have decided some major terms but have not decided some terms.[74] The court declared that this agreement does not fall into either of these two types of agreement.[75] The agreement here, lacked the location, forum, or rules of the arbitration and "[w]ithout those critical terms, it [could not] be declared that the parties reached complete agreement on all of the issues that require negotiation."[76]Therefore, the court denied the Plaintiff's motion to compel arbitration.[77]

2. Clause 9 of the 2013 and 2014 Agreements

Next, the court decided if Clause 9 was a binding arbitration clause.[78] The Defendant argued that the clause was an enforceable arbitration clause.[79] Also, they argued that the question of if Clause 9 is an enforceable clause should be decided by an arbitrator.[80] The Plaintiff argued that the clause was not an enforceable arbitration clause because it did not use the word arbitrate and is ambiguous.[81]

The court ruled that it is the one who should decide whether Clause 9 is an enforceable arbitration clause.[82] The court declared that when deciding if a motion to compel arbitration should be granted a court must

> [F]irst, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory

68. *See* Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc., 145 F.3d 543, 548 (2d Cir. 1998).
69. *See Dynamic Int'l Airways*, 2016 WL 3748477, at *6.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at *7.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*

> claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration.[83]

The Court disagreed with Defendant and found that if the issue was sent to an arbitrator, this would interfere with the Court's responsibility to determine whether the parties have agreed to arbitration.[84] Also, Second Circuit courts have stated that "the issue of arbitrability may only be referred to the arbitrator if there is clear and unmistakable evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by an arbitrator." [85] Further, the court had not found any cases that say that a court should grant a motion to compel arbitration even though the parties disagree about whether the clause actually requires arbitration at all.[86] Moreover, the court declared that if they had did what the Defendant asked for, that would create a risk that the Plaintiff would be forced to submit to arbitration when it is not clear that they had contracted to do so.[87] Therefore, the court ruled that it, and not an arbitrator, should decide if Clause 9 is enforceable or not.[88]

3. Is Clause 9 an Enforceable Arbitration Clause?

Next, the Court decided whether Clause 9 was an enforceable arbitration clause. According to New York law, "an arbitration clause in a written agreement is enforceable ... when it is evident that the parties intended to be bound by the contract."[89] There are certain principles of New York law relevant to arbitration agreement.[90] These principles are:

> (1) [i]n interpreting a contract, the intent of the parties governs; (2) [a] contract should be construed so as to give full meaning and effect to all of its provisions; (3) words and phrases in a contract should be given their plain meaning; and (4) ambiguous language should be construed against the interest of the drafting party.[91]

After applying these principles to the agreements, the Court decided that Clause 9 was an enforceable arbitration clause.[92] The clause stated that the parties would submit "any difference/dispute to be finally resolved by a designated Authority determined by the Ministry of

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83. *See* JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 169 (2d Cir. 2004).
84. *See Dynamic Int'l Airways*, 2016 WL 3748477, at *7.
85. *See* Bell v. Cedant Corp., 293 F.3d 563, 566 (2d Cir. 2002).
86. *See Dynamic Int'l Airways*, 2016 WL 3748477, at *8.
87. *Id*.
88. *Id*.
89. *See* Fiveco, Inc. v. Haber, 11 N.Y.3d 140, 144 (2008).
90. *See Dynamic Int'l Airways*, 2016 WL 3748477, at *8.
91. *See* PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1199 (2d Cir. 1996).
92. *See Dynamic Int'l Airways*, 2016 WL 3748477, at *8.

Civil Aviation, whose decision shall be final and binding on both the parties."[93] The court declared that this language demonstrates that Clause 9 was a clear agreement to arbitrate.[94]

The Plaintiff made two arguments as to why Clause 9 was not an enforceable arbitration clause.[95] First, it stated that Clause 9 did not use the word "arbitrate".[96] Second, it argued that the clause was ambiguous.[97] The Court disagreed with the Plaintiff and determined that even though the clause did not use the word "arbitration" or "arbitrator," the only interpretation of the clause was that it was a binding agreement.[98] Moreover, the court stated that this clause was not ambiguous when it was read in context with the rest of the clauses, as the term "authority" refers to a non-judicial decision maker. Also, the phrase "whose decision shall be final and binding on both parties" was not ambiguous as it only referred to the effect of the resolution of the party's dispute.[99] Therefore, the court found that Clause 9 was a valid and enforceable agreement to arbitrate.[100]

4. Does Clause 9 Encompasses the Plaintiff's Claims Against the Defendant

The Court then decided if the Plaintiff's claims against the Defendant fit within the scope of the clause.[101] The court stated that a strong federal policy favoring arbitration existed and this policy generally required that any doubts about the scope of arbitrable issues' should be resolved in favor of arbitration.[102]

Courts should use a three-part test in order "to determine whether a particular dispute falls within the scope of an agreement's arbitration clause."[103] First, a court should classify the arbitration clause as either broad or narrow.[104] Normally, if language is expansive then it would be seen as broad.[105] Clause 9 stated that "any differences/disputes" should be sent to an arbitrator.[106] Here, the court held that Clause 9 was a broad clause as it did not say if those difference or disputes need to come from the contract.[107] Next, the court had to determine if the claims that are at issue come directly from the contract itself or are collateral to it.[108] If the claims come from the contract itself, then a presumption of arbitrability would apply.[109] The court declared

93. *Id*.
94. *Id*.
95. *Id*.
96. *Id*.
97. *Id*.
98. *Id*.
99. *Id*.
100. *Id*.
101. *Id*.
102. *See Moses*, 460 U.S. at 24–25.
103. Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir. 2001).
104. *See Dynamic Int'l Airways*, 2016 WL 3748477, at *10.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id*.
109. *Id*.

that the claims here all relate to the Defendant's performance under the terms of the two agreements and therefore, fall under the scope of the agreements.[110] Finally, where a claim is collateral and an arbitration clause is broad, arbitration can still be ordered "if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it."[111] However, here, the Plaintiff had not shown that the promissory estoppel claim was collateral to the agreement. Even if the court found that they were collateral, the claim was rightly brought under the terms of Clause 9.[112] Therefore, the court decided that Clause 9 was an enforceable agreement and for those reasons they granted the Defendant's motion to compel arbitration.

5. Should the Court Enjoin the Arbitration in India

Finally, the court had to decide if they should enjoin the Defendant from proceeding with Arbitration in India.[113] The court declared that the Plaintiff have not offered reasons to why the court should do so.[114] The Plaintiff argued that the court should enjoin the Defendant to "enforce the court's own jurisdiction and to prevent vexatious parallel proceeding."[115] However, "having already decided that the arbitration should go forward…" the Plaintiff's concerns are not relevant.[116] Therefore, the court decided to not enjoin the pending arbitration.[117]

IV. Conclusion

In this case, the court found that the Defendant has clearly established that the motion to compel should be granted. Therefore, the court decided to grant the Defendant's motion to compel arbitration and deny the Plaintiff's cross motion for arbitration and injunctive relief. This case affirms a precedent in the Southern District of New York for the federal policy favoring arbitration. This strengthens the legal effect of an arbitration agreement and it would be even harder for a court to strike down an agreement to arbitrate. Also, this case created affirmed the rule seen in the JLM Industry case for determining if a motion to compel arbitration should be granted. This makes it easier for courts in the future to determine if a motion to compel arbitration should be granted. Finally, this case has affirmed the rule in New York when there is an enforceable arbitration clause. The rule that this court affirmed makes it easier for the court to find arbitration clauses enforceable. This case overall emphasizes and affirms the belief that contracts should be taken at their word and only found unenforceable in the most extreme cases. This case also makes it much more likely for United States companies to be compelled to arbitrate in foreign countries and that may change the way New York companies create arbitration agreement in the future.

Cristen McGrath

110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*

Georges v. United Nations

834 F.3d 88 (2d Cir. 2016)

The United States Court of Appeals for the Second Circuit held that the Plaintiffs, who were citizens of the United States or Haiti, lacked subject matter jurisdiction for their allegation that the United Nations and its public officials were responsible for the illnesses or deaths of Plaintiffs' relatives by exacerbating the cholera epidemic in Haiti. The court further found that Plaintiffs' contentions were unpersuasive, and the United Nations did not surrender its immunity pursuant to Section 2 of the Convention on Privileges and Immunities of the United Nations.

I. Holding

The United States Court of Appeals, Second Circuit, considered all three of the Plaintiffs' arguments and found them to be without merit: (1) Fulfillment of its obligation Section 29 of the CPIUN was not a condition precedent to the UN's immunity under Section 2 of the CPIUN; (2) Plaintiffs lacked standing to raise the argument of material breach; and (3) the court rejected the argument that the U.S. citizen plaintiff was deprived the constitutional right of access to federal courts.[1] The Court of Appeals affirmed the District Court's judgment and dismissed Plaintiffs' cause of action for lack of subject matter jurisdiction pursuant to the CPIUN.[2]

II. Facts

In October 2010, the United Nations (UN) deployed peacekeeping troops from Nepal, a cholera-ravaged country, to Haiti, which also suffered a catastrophic cholera outbreak.[3] Plaintiffs alleged that by sanctioning this deployment, the UN "knowingly disregarded the high risk of transmitting cholera," when it was aware "that Nepal was a country in which cholera [was] endemic and where a surge in infections had just been reported."[4] Plaintiffs further alleged that Defendants failed to screen the personnel prior to their entry, and allowed troops to import the Nepalese strain of cholera into Haiti.[5] Once the Nepalese troops reached Haiti, the UN stationed them on the banks of the Meille Tributary, which flowed into the Artibonite River. [6] A primary water source for tens of thousands of Haitians, the Artibonite River was usually bustling with bathers, clothes-washers, and locals bringing water to their homes.[7] Those who flocked to the river in October 2010 were unaware that its waters were teeming with toxicity.[8] Due to faulty sanitation systems, the troops stationed upstream deposited raw sewage and dis-

1. Georges v. United Nations, 834 F.3d 88 (2d Cir. 2016).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Deborah Sontag, *In Haiti, Global Failures on a Cholera Epidemic,* THE NEW YORK TIMES, Mar. 31, 2012, http://www.nytimes.com/2012/04/01/world/americas/haitis-cholera-outraced-the-experts-and-tainted-the-un.html.
8. *Id.*

posed of untreated human waste into the Artibonite River, contaminating it with cholera.[9] Ultimately, the contaminated water source resulted in "explosive and massive outbreaks of cholera . . . throughout the entire country."[10]

In this putative class action, Plaintiffs were citizens of the United States and Haiti, who claimed they had been sickened, or had family members who had died, as a direct result of the 2010 Haitian cholera epidemic.[11] Plaintiffs alleged causes of action in tort and contract against Defendants, the UN, the UN Stabilization Mission in Haiti (MINUSTAH), former Under-Secretary-General of the United Nations Stabilization Mission in Haiti, Edmond Mulet ("Mulet"), and Secretary-General of the United Nations, Ban Ki-moon ("Ban").[12]

III. Procedure

Defendants did not appear before the District Court.[13] Pursuant to the UN Charter, the Convention on the Privileges and Immunities of the United Nations (CPIUN),[14] and the Vienna Convention on Diplomatic Relations (VCDR),[15] the Executive Branch of the United States government took the position that Defendants were immune from legal process and suit.[16] The District Court affirmed the decision of the Executive Branch and dismissed Plaintiffs' cause of action for lack of subject matter jurisdiction.[17]

The District Court dismissed the Plaintiffs' cause of action based on CPIUN § 2.[18] Section 2 of the CPIUN provided that the UN "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."[19] The District Court held that because none of the parties to the matter contended that the UN had expressly waived its immunity, the UN remained immune from Plaintiffs' allegations.[20]

Regarding Ban and Mulet's immunity, the District Court referred to Article 31 of the VCDR, which stated that a "diplomatic agent shall enjoy immunity . . . from a [receiving State's] civil and administrative jurisdiction," except in circumstances that were not present in this case.[21]

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9. *Id.*
10. *Georges*, 834 F.3d at 91.
11. *Id.*
12. *Id.*
13. *Id.*
14. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16 [hereinafter CPIUN].
15. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S., 95 [hereinafter VCDR].
16. *Georges*, 834 F.3d at 91.
17. *Id.*
18. *Id.*
19. CPIUN art. II, §2.
20. *Georges*, 834 F.3d at 91.
21. VCDR art. 31 § 1.

Since Ban and Mulet both held their positions as diplomatic agents when the Plaintiffs filed the action, the District Court concluded that they both were immune from the allegations.[22]

On appeal, Plaintiffs raised three arguments.[23] First, Plaintiffs argued that the District Court erred in holding that the UN and MINUSTAH were immune from the suit because the UN fulfilled its CPIUN obligation to provide for appropriate dispute-resolution mechanisms as a condition precedent to its CPIUN § 2 immunity.[24] Second, they argued that the UN materially breached the CPIUN by failing to fulfill its § 29 obligation, and the UN therefore forfeited its statutory immunity.[25] Plaintiffs' third principle argument was that the District Court's application of the CPIUN in dismissing their cause of action was a violation of the US citizen plaintiff's constitutional right of access to the federal courts.[26]

IV. Questions Presented

This case presented three issues for determination before the court: (1) whether fulfillment of its Section 29 obligation was a condition precedent to the UN's Section 2 immunity pursuant to the CPIUN; (2) whether, pursuant to the CPIUN, the UN breached a material term under Section 29, and thereby forfeited its Section 2 immunity; and (3) whether the U.S. citizen Plaintiff was deprived the constitutional right of access to federal courts.[27]

V. Discussion

A. Condition Precedent

In order to unravel the Plaintiffs' allegation that the dispute-resolution mechanism was a condition precedent to immunity under CPIUN § 2, the court turned to the fundamental principles of treaty interpretation.[28] The court reasoned that the interpretation of a treaty, like the interpretation of a statute, must begin with its text.[29] Where the language of a treaty is plain, a court must refrain from amending it, because amending it would result in creating an entirely distinct treaty, rather than construing the treaty at issue.[30] A treaty is a contract between state participants and is to be interpreted upon the principles that govern the interpretation of contracts in writing between individuals.[31] Considering the nature of the document and its implications on the relationships between nation states, the court gave great deference to the Executive Branch's interpretation of a treaty.[32]

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22. *Georges*, 834 F.3d at 91.
23. *Id.* at 92.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 92–93.
32. *Id.* at 93.

1. General Principles of Contract Law

In this case, the court relied on two fundamental principles governing contract interpretation, and found that Plaintiffs' first argument failed in the face of both principles.[33]

a. Expressio Unius Est Exclusio Alterius

Expressio unius est exclusio alterius, also known as the negative implication canon, indicates that the express mention of one thing excludes all others.[34] Federal courts have relied on the principle of *expressio unius est exclusion alterius* to interpret treaties for over a century.[35]

Section 2 of the CPIUN provides that the UN "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."[36] CPIUN § 2 mentions the UN's express waiver as a circumstance in which the UN "shall [not] enjoy immunity," and negatively implies that any and all other circumstances, including the UN's failure to fulfill its § 29 obligation, are excluded.[37] This reasoning becomes especially true when the provision incorporates "shall," which is "universally understood to indicate an imperative or mandate."[38] It followed that the UN's fulfillment of its obligation under CPIUN § 29 was not a condition precedent to its immunity under CPIUN § 2.[39]

b. Conditions Precedent Must Be Expressed in Plain Unambiguous Language

The court's treaty analysis proceeded to incorporate a second principle of contract interpretation: "conditions precedent to most contractual obligations . . . are not favored and must be expressed in plain, unambiguous language."[40] In order to manifest intent to create a condition precedent, contracting parties often use language such as "if," "on condition that," "provided that," "in the event that," and "subject to."[41] CPIUN §§ 2 and 29 were not linked by any language that imposed a condition precedent to immunity.[42]

Plaintiffs further contended that foreign signatories to the CPIUN held that the availability of alternative dispute settlement was a material condition to an international organization's entitlement to immunity.[43] This assertion fell short. In interpreting treaties, the Supreme

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33. *Id.*
34. *Id.*
35. *Id.*
36. CPIUN art. II, § 2.
37. *Id.*
38. *Georges*, 834 F.3d at 93.
39. *Id.* at 94.
40. *Id.*
41. *Id. See also* Ginett v. Comput. Task Grp., Inc., 962 F.2d 1085, 1100 (2d Cir. 1992).
42. *Georges*, 834 F.3d at 94.
43. *Id.* at 95.

Court of the United States has given weight to the opinions of foreign signatories.[44] However, the court only gave deference to the opinions of states that were parties to the treaty that was being interpreted regarding that same treaty.[45] Here, Plaintiffs' argument hinged on the opinions of states that had ratified the treaty at issue regarding an entirely unrelated treaty.[46]

In an attempt to reinforce their argument, Plaintiffs drew parallels between the CPIUN and the agreement at issue between France and UNESCO in *UNESCO v. Boulois.*[47] The Court of Appeals found that although the agreement in that case presented textual similarities to the CPIUN, the French court's interpretation of the treaty was not relevant to the instant case.[48] The France-UNESCO agreement was a bilateral agreement between both parties, whereas the CPIUN was a multilateral treaty with several nation states.[49] The French court's finding that an agreement between France and a UN agency required the establishment of an alternative forum for dispute resolution was unrelated to interpreting the CPIUN in this case.[50]

B. Material Breach

Plaintiffs' second principle argument averred that the District Court's finding of immunity was in error because CPIUN § 29 was a material term to the entire charter.[51] According to Plaintiffs' allegations, because the UN breached its material obligation under CPIUN § 29, it waived its right to immunity under CPIUN § 2.[52] The Court of Appeals held that Plaintiffs lacked standing to raise this argument.[53]

United States v. Garavito-Garcia established that "absent protest or objection by the offended sovereign, [an individual] has no standing to raise the violation of international law as an issue."[54] In this case, Plaintiffs failed to identify a sovereign that objected to the UN's alleged material breach.[55] In fact, no other country expressed interest in litigating this case.[56]

An exception to *Garavito-Garcia* exists where a treaty provides express language that creates privately enforceable rights, or some other indication that the treaty was intended to

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44. *Id.*
45. *Id.*
46. *Id.*
47. UNESCO v. Boulois, Cour d'Appel [CA][Court of Appeal] Paris (Fr.), June 19, 1998.
48. *Georges*, 834 F.3d at 96.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. United States v. Garavito-Garcia, 827 F.3d 242, 246–47 (2d Cir. 2016); *See also* United States v. Emuegbunam, 268 F.3d 377, 390 (6th Cir. 2001) (affirming that individuals have no standing to challenge violations of international treaties in the absence of an objecting sovereign state participant).
55. *Georges*, 834 F.3d at 97.
56. *Id.*

bestow rights that are open to vindication by affected individuals.[57] This exception did not apply here. Neither the Plaintiffs nor the court were able to identify any such express language in the CPIUN, indicating that the rights were not open for vindication by affected individuals, and Plaintiffs lacked standing.[58]

Plaintiffs cited a law review article stating that "a treaty may be enforced defensively even when there is no private right of action" to affirm their standing in this matter. [59] The Plaintiffs failed to recognize that the article limited the only two types of cases in which defensive enforcement may be used: (1) "to defend against a claim by the United States government" or (2) "to defend against a claim by another private party under state or federal law."[60] The case at hand did not classify under either of the two categories, and as such, the Plaintiffs lacked standing to raise the argument.[61]

C. Right of Access to Federal Courts

Plaintiffs' third and final argument was that the District Court erred when it granted Defendants immunity, and thereby violated the U.S. citizen Plaintiffs' constitutional right to access the federal courts.[62] The court rejected this argument.[63]

The court relied on *Brzak v. United Nations* where it rejected an equivalent argument against CPIUN § 2.[64] Like *Brzak*, Plaintiffs' argument did little more than question the general existence of immunities.[65] The court reasoned that immunities rooted in the judicial and legislative systems have existed long before the Constitution.[66] These immunities have evolved over time, and are firmly rooted in American law.[67] If successful, Plaintiffs' argument would undercut not only the UN's immunity, but also overturn the longstanding tenets of judicial immunity, prosecutorial immunity, and legislative immunity.[68] Plaintiffs also failed to show how Section 2 of the CPIUN was applicable to this argument. As such, this argument was unpersuasive.[69]

VI. Conclusion

The United States Court of Appeals, Second Circuit, held that all of Plaintiffs' arguments were without merit, and affirmed the District Court's judgment for dismissing Plaintiffs' action

57. *Id.*
58. *Id.*
59. *Id.* at 98.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. Brzak v. United Nations, 597 F.3d 107, 114 (2d Cir. 2010).
65. *Georges*, 834 F.3d at 98.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

for lack of subject matter jurisdiction pursuant to the CPIUN.[70] Judge Cabranes gave deference to the Obama administration's interpretation of the CPIUN, which stated that Defendants were immune from legal process.[71] Contrary to Plaintiffs' argument, the UN did not forfeit its immunity pursuant to CPIUN § 2.[72] Furthermore, the court found that Plaintiffs lacked standing to raise an issue of material breach pursuant to CPIUN §29, and that Plaintiffs' interpretation of CPIUN § 29 as a condition precedent to § 2 was improper.[73] Plaintiffs' argument stating that the U.S. citizen plaintiff was deprived the constitutional right to access federal courts were also rejected.[74]

This decision was a testament to the critical use of language in ambiguous areas of the law, such as international text. The court's rationale employed principles of statute and contract interpretation, and applied those principles to interpreting international treatises. When interpreting an international treaty, the court must strike a delicate balance between construing its language relative to its context.[75] It is critical that the court engages in an all-encompassing approach in analyzing the treaty's objective, customary state practices, and relationships between state participants.[76]

This decision is likely to have further implications regarding the UN's relationship with its constituents. Since 2010, cholera has infected at least 770,000 Haitians and claimed more than 9,000 lives.[77] In the wake of Hurricane Matthew, Haiti experienced another onslaught of cholera surges, rendering the country vulnerable to an outbreak even more severe than the last.[78] The UN previously faced criticism for its refusal to recognize its role in Haiti's cholera outbreak of 2010, and is now facing criticism for its compensation proposal.[79] Although details of the compensation are still being finalized, the UN has proposed to pay Haiti a $400 million response package to aid ill communities, eradicate cholera, and improve sanitation.[80] The UN expressed concern that issuing a response package will set a precedent and potentially expose the UN to future legal claims.[81]

Divya Acharya

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70. *Id.*
71. *Id*.
72. *Id.*
73. *Id.*
74. *Id.*
75. Richard Gardiner, Treaty Interpretation: Reviewing the Rules, OPINIO JURIS (Mar. 2, 2009), http://opiniojuris.org/2009/03/02/treaty-interpretation-reviewing-the-rules.
76. *Id.*
77. Richard Knox, *U.N. Is Sued Over Haiti's Cholera Epidemic, Which Turns Out To Be Fair Worse Than Previously Thought*, NPR: NATIONAL PUBLIC RADIO (Mar. 21, 2016), http://www.npr.org/sections/goatsandsoda/2016/03/21/471256913/why-the-u-n-is-being-sued-over-haitis-cholera-epidemic.
78. Amanda Holpuch, *Haiti faces fresh cholera outbreak after Hurricane Matthew, aid agencies fear*, THE GUARDIAN, Oct. 14, 2016, www.theguardian.com/world/2016/oct/14/haiti-cholera-hurricane-matthew-aid-agencies.
79. Somini Sengupta & Jonathan M. Katz, *U.N. Plans to Pay Victims of Cholera Outbreak It Caused in Haiti*, THE NEW YORK TIMES, Oct. 24, 2016, www.nytimes.com/2016/10/25/world/americas/haiti-united-nations-cholera.
80. *Id.*
81. *Id.*

In re Hellas Telecommunications (Luxembourg) II SCA

555 B.R. 323 (2016)

The United States Bankruptcy Court for the Southern District of New York: (1) granted the defendants' motion to dismiss on *forum non conveniens* grounds because it found that an adequate alternative forum existed in the U.K. court in which the same avoidance action had been filed by the plaintiffs and were still pending, and that the balancing of public and private factors weighed in favor of granting the motion; and (2) stayed U.S. court proceedings pending the outcome of the U.K. action.

I. Holding

Chapter 15 of the United States Bankruptcy Code allows international cooperation and comity, and provides greater certainty and efficient administration in cross-border insolvency cases.[1] The Chapter applies when a foreign court or foreign representative seeks assistance from the United States in connection with one of its own proceedings.[2] However, a U.S. Bankruptcy court will not replace a foreign court on matters properly pending in that foreign court, particularly when the issues involve unsettled law in the foreign court.[3]

The doctrine of *forum non conveniens* is a discretionary power that permits a federal district court to decline jurisdiction over an action.[4] Even where the court has jurisdiction and venue over a given action, it will dismiss the case under this doctrine where another court, or forum, is better suited to hear the case.[5] To have a case dismissed on *forum non conveniens* grounds, a defendant must prove that an adequate alternative forum exists, and that a balancing of public and private interest factors weighs in favor of dismissal.[6]

In the recent case, *In Re Hellas Telecommunications (Luxembourg) II SCA* (hereinafter "*Hellas*"),[7] the United States Bankruptcy Court for the Southern District of New York held that the defendants met all the requirements favoring dismissal on *forum non conveniens* grounds.[8] The Court found that the U.K. provided an adequate alternative forum, and that the balancing of private and public interest factors weighed in favor of dismissal.[9] Accordingly, it granted defen-

1. 11 U.S.C. § 1501–08 (2005).
2. *Id.* at § 1501.
3. In re Hellas Telecomm. (Lux.) II SCA, 555 B.R. 323, 344 (Bankr. S.D.N.Y. 2016).
4. *Id.* at 345.
5. *Id.*
6. *Id.* at 345–46.
7. *Id.*
8. *Id.* at 354–55.
9. *Id.* at 354.

dants' motion.[10] However, rather than dismissing the action, the Court stayed the proceedings, pending the outcome of the main U.K. action.[11]

II. Background and Procedure

Hellas Telecommunications (Luxembourg) II SCA (hereinafter "Hellas II") is a Greek telecommunications company that had ongoing liquidation proceedings in the U.K.[12] The plaintiffs are the U.K. court-appointed joint compulsory liquidators for Hellas II.[13] The defendants are private-equity companies TPG Capital Management L.P., Apax Partners L.L.P., and various affiliates.[14]

A. The Transfers at Issue

The events and transactions involved in plaintiffs' claims were international in nature and involved executives of British, Italian, German, and American entities.[15]

In 2005, defendants TPG Capital Management L.P. and Apax Partners L.L.P. acquired the equity of TIM Hellas Telecommunications, a Greek telecommunications service provider, in a leveraged buyout transaction.[16] The transaction involved organizing a group of related acquisition entities under Luxembourg law.[17] The group of entities included Hellas II, which had been previously organized in 2003 but remained dormant as a "shelf company" until the TIM Hellas acquisition.[18] The ultimate parent of all these entities was Hellas Telecommunications (hereinafter "Hellas").[19] Hellas was wholly owned by eight investment funds of the defendants.[20]

As part of the leveraged buyout transaction, Hellas issued 490,000 convertible preferred equity certificates (hereinafter "CPECs") having a par value of ?49 million to the defendant.[21] An equivalent number of CPECs were issued to Hellas by one of its direct subsidiaries, the direct parent of Hellas II.[22] This subsidiary was then also issued an equivalent number of CPECs by Hellas II.[23]

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10. *Id.* at 354.
11. *Id.* at 355.
12. *Id.* at 331.
13. *Id.* at 328, 331.
14. *Id.* at 355 n.1.
15. *Id.* at 349.
16. *Id.* at 333.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

In the first half of 2006, the defendants continued to use Hellas and its subsidiaries in various stock purchase deals.[24] These deals involved financing with debt issued by Hellas II's subsidiaries, financial transfers from the defendants to Hellas, and issuance of additional CPECs and subordinate notes from Hellas to the defendants.[25]

The defendants then tried to sell Hellas II, with a planned sale date of no later than June 2006, but were unable to generate an acceptable sale price.[26] In December 2006, defendants developed a multi-step debt-refinancing transaction (hereinafter the "December 2006 transaction") to extract all of Hellas II's returns.[27] The transaction involved: the issuance of new debt; a series of certificate redemption payments;[28] and financial transfers from Hellas II to its parent entity, from the parent entity to its parent, Hellas, and from Hellas to the defendants.[29]

B. Insolvency Proceedings in the U.K.

In 2009, Hellas II began considering a potential restructuring of its capital.[30] To effectuate a restructuring, Hellas II moved its place of incorporation from Luxembourg to the U.K., and moved its headquarters and operating offices to London.[31] In November 2009, the High Court of Justice of England and Wales approved placing Hellas II into administration in England, and joint administrators were appointed.[32] However, in December 2011, the U.K. court discharged the administrators and instead ruled that Hellas II should be liquidated through compulsory liquidation to maximize recoveries for unsecured creditors, who were dissatisfied at the administrators' efforts to restructure the company.[33] Plaintiffs were appointed as joint compulsory liquidators.[34]

C. Adversary Proceedings in the U.S.

In March 2014, the plaintiffs filed an adversary proceeding against the defendants, who were a mixture of U.S.-based and foreign-based entities.[35] Plaintiffs contended that Hellas II was insolvent at the time of the December 2006 transaction, and that defendants received the proceeds of the transaction.[36] Plaintiffs' complaint sought to avoid and recover the initial transfer of approximately $1.57 billion made by Hellas II to its parent entity and subsequent transfers of approximately $973.7 million made by Hellas II to several named defendants and an

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24. *Id.*
25. *Id.* at 334.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 335.
31. In re Hellas Telecomm. (Lux.) II SCA, 524 B.R. 488, 498 (Bankr. S.D.N.Y. 2015) (hereinafter "*Hellas I*").
32. *Hellas*, 555 B.R. at 335.
33. *Id.*; *Hellas I*, 524 B.R. at 499.
34. *Hellas*, 555 B.R. at 335.
35. *Id.* at 331.
36. *Id.* at 335.

unnamed class of transferees.[37] Plaintiffs asserted causes of action based on actual and constructive fraudulent transfers under the New York Debtor and Creditor Law against each of the defendants.[38] Additionally, they filed an unjust enrichment claim, pursuant to New York law, or in the alternative, U.K. or Luxembourgish law, against the defendants affiliated with co-defendants Apax Partners L.L.P. and TPG Capital Management, L.P.[39]

The Court dismissed plaintiffs' avoidance claims against the U.S.-based defendants.[40] It dismissed the entire action against the foreign-based defendants for lack of personal jurisdiction, but allowed plaintiffs to amend the complaint to allege avoidance claims under U.K. law, where the foreign debtor's main insolvency proceeding was pending.[41]

Defendants argued that this proposed amendment would be futile as the case would be subject to dismissal on *forum non conveniens* grounds.[42] No avoidance action had been filed in the U.K. at the time, and only one of the defendants in the U.S. action had consented to jurisdiction the U.K.[43] The Court dismissed the defendants' *forum non conveniens* argument, holding that no adequate alternative forum existed to adjudicate the claims against the remaining defendants to the action.[44]

In August 2015, the plaintiffs filed an amended complaint against the foreign-based defendants whom the Court previously dismissed for lack of personal jurisdiction.[45] Additionally, in November 2015, the plaintiffs filed an avoidance action in the U.K. under sections 213 and 423 of the U.K. Insolvency Act of 1986, asserting the same avoidance claims included in the amended action filed in the U.S.[46]

Subsequently, in January 2016, the defendants in the U.S. action filed a motion to dismiss the action on *forum non conveniens* grounds.[47] Each defendant consented to jurisdiction in the pending U.K. action and agreed that discovery taken in the U.S. action could be used in the U.K. action.[48] The U.K. court, meanwhile, entered a temporary stay, to allow the U.K. court to receive the U.S. Court's decision on the *forum non conveniens* motion.[49]

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37. *Id.*
38. *Id.* at 331, 336.
39. *Id.*
40. *Id.* at 328.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*; Insolvency Act 1986, c.45, §§ 213, 423 (U.K.).
47. *Hellas*, 555 B.R. at 328.
48. *Id.* at 337.
49. *Id.*

III. Holding

Judge Glenn of the United States Bankruptcy Court for the Southern District of New York granted defendants' motion.[50] First, the Court held that the plaintiffs' choice of forum in this action should be given little, if any, deference, because the case involved foreign plaintiffs, and the United States was clearly an inconvenient forum.[51] Second, the U.K. was an adequate alternative forum.[52] And third, the balancing of the public interests at stake and the private interests of the parties to the litigation weighed in favor of dismissal.[53] The U.S. Bankruptcy Court proceeding was therefore stayed pending the outcome of the U.K. action.[54]

IV. Analysis

A. Degree of Deference to the Plaintiffs' Choice of Forum

A plaintiff's choice of forum is generally entitled to great deference.[55] However, when the plaintiff is a foreign plaintiff, such plaintiff's choice-of-forum is entitled to *less* deference because "it 'is much less reasonable' to presume that the choice was made for convenience."[56] The rationale here is to prevent foreign litigants from forum-shopping.[57] Moreover, even if forum-shopping was not the reason for the foreign plaintiff's choice of U.S. forum, there is no reason to presume that this forum is convenient for the plaintiff simply because this is the forum the plaintiff chose.[58]

Judge Glenn considered the factors set forth in *Iragorri v. United Technologies Corporation* to determine whether a plaintiff's choice of forum was motivated by genuine convenience or the desire to forum shop.[59] The factors indicative of a plaintiff's choice of forum motivated by genuine convenience are: (1) the convenience of the plaintiff's residence in relation to the forum; (2) the availability of witnesses or evidence in the forum; (3) the defendant's amenability to suit in the forum; (4) the availability of appropriate legal assistance; and (5) other reasons relating to convenience or expenses.[60]

On the other hand, factors that are suggestive of forum-shopping are: (1) attempts to win a tactical advantage from local laws favorable to the plaintiff; (2) the habitual generosity of

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50. *Id.* at 335.
51. *Id.* at 354.
52. *Id.*
53. *Id.*
54. *Id.* at 355.
55. Allstate Life Ins. Co. v. Linter Grp. Ltd., 994 F.2d 996, 1001 (2d Cir. 1993); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).
56. Iragorri v. United Techs. Corp., 274 F.3d 65, 71 (2d Cir. 2001) (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981)).
57. *Id.*
58. *Id.*
59. *Id.* at 72.
60. *Id.*

juries in the forum district; (3) the plaintiff's popularity or the defendant's unpopularity in the forum district; and (4) the inconvenience and expense to the defendant resulting from litigation in the chosen forum.[61]

Applying these factors, there was little reason for Judge Glenn to find the U.S. a convenient forum for these foreign plaintiffs.[62] First, the plaintiffs resided in the U.K.[63] Additionally, despite the U.K. having the greatest interest in applying its law to the claims alleged in the complaint, the plaintiffs untiringly pursued an action in the U.S.[64] The Court noted that it was conceivable plaintiffs were determined to maintain the case in the U.S. to either have a tactical advantage from local laws or in the hopes that they could end up at an advantage, given the unpredictability of a U.S. court interpreting unsettled U.K. law.[65]

In light of these factors, and the fact that the defendants were amenable to jurisdiction in the U.K., the Court gave little, if any, deference to the plaintiff's chosen forum.[66]

B. Existence of an Adequate Alternative Forum

An alternative forum is ordinarily adequate if the defendants are amenable to service of process there and the forum permits litigation of the subject matter of the dispute.[67] A defendant's agreement to submit to the jurisdiction of the foreign forum generally satisfies the requirement that the defendant be amenable to process there.[68]

Judge Glenn agreed.[69] Because the defendants explicitly agreed to submit to the jurisdiction of the U.K. court,[70] the Court held that they availed themselves of an adequate alternative forum.[71]

Despite the defendants' consent to personal jurisdiction in the U.K., plaintiffs argued that dismissal of the case would prejudice the plaintiffs because approximately 600 U.S. members existed who belonged to the Transferee Class, and who had not consented to U.K. jurisdiction.[72] Following the defendants' filing of their *forum non conveniens* motion, the plaintiffs moved for class certification of these members.[73] The plaintiffs contended that defendants failed to show that any members of the Transferee Class would be subject to U.K. personal

61. *Id.*
62. *Hellas*, 555 B.R. at 346.
63. *Id.*
64. *Id.*
65. *Id.* at 347.
66. *Id.*
67. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981).
68. *See id.*
69. *Hellas*, 555 B.R. at 348–49.
70. *Id.* at 348.
71. *Id.*
72. *Id.* at 338–39.
73. *Id.* at 347.

jurisdiction.[74] Although none of the members of the Transferee Class were named in the complaint, the plaintiffs maintained that the result should not change.[75]

The Court took issue with plaintiffs' argument.[76] It held that the defendants' class here is purely speculative.[77] Moreover, the class certification motion seemed to be intended as a roadblock to defendants' *forum non conveniens* motion.[78] Plaintiffs failed to meet the four requirements under Federal Rule of Civil Procedure 23(a) – numerosity, commonality, typicality, and adequate representation – and at least one subsection of 23(b), which are required for the members to be certified as a class.[79] In any event, the Court found it unnecessary to decide on the class certification motion, as the action before it was stayed pending resolution of the U.K. action.[80]

C. The Balancing of Public and Private Factors

To determine whether the doctrine of *forum non conveniens* should be applied in a given action, a court must consider both the public's interests and the private interests of the litigant.[81] A balancing of the private and public interest factors must tilt heavily in favor of the alternative forum.[82] Here, Judge Glenn held that the balancing of the public and private factors weighed in favor of the alternative forum.[83]

1. The Public Factors

a. Settling Local Disputes in a Local Forum

This case was international in nature.[84] It involved transactions and events that implicated multiple countries across the world.[85] The U.K and the United States were two of those countries, but Italy, Germany, Belgium, and Luxembourg were also involved, along with investors from across the world.[86] Given these circumstances, the Court found no "local dispute" to a single jurisdiction in the case.[87] However, given the U.K's greater interest in having its substantive law govern plaintiffs' claim, as well as the number of transactions at issue that were executed in the U.K. or that involved U.K. entities, the interest in having local disputes settled

74. *Id.* at 338.
75. *Id.*
76. *Id.* at 347–48.
77. *Id.* at 347.
78. *Id.* at 348.
79. *Id.*; Fed. R. Civ. P. 23(a)-(b).
80. *Hellas*, 555 B.R. at 348.
81. *Id.*; Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).
82. *Hellas*, 555 B.R. at 348; Abdullahi v. Pfizer, Inc., 562 F.3d 163, 189 (2d Cir. 2009).
83. *Hellas*, 555 B.R. at 348.
84. *Id.* at 348–49.
85. *Id.* at 349.
86. *Id.*
87. *Id.*

locally weighed in favor of the U.K.[88] An English court would have "an inherent and stronger local interest" in the matter than an American court.[89]

b. Difficulties Applying Foreign Law

The application of foreign law in a case is not in itself sufficient to dismiss an action under the doctrine of *forum non conveniens*.[90] American courts are generally well equipped to interpret foreign law without creating a heavy burden on the judicial process.[91] The means of pleading and proving foreign law are provided in the Federal Rules of Civil Procedure.[92] The ability of U.S. courts to apply foreign law is especially relevant to U.K. law, which is amenable to interpretation by a U.S. court.[93] Application of U.K. law should therefore not create a burden on a U.S. court.[94]

However, when the foreign law at issue remains unsettled in the foreign forum, and proceeding with the action in a U.S. court would cause significant difficulty in interpreting the law, the fact that the law is unsettled should be a powerful factor in favor of dismissal.[95] Taking this into consideration, Judge Glenn held that the factors weighed in favor of dismissal for *forum non conveniens*.[96] When an issue is a matter of first impression, like the one in this case, it is preferable to allow the foreign court with the unsettled law to decide the matter, especially when the U.S. court has very little interest in adjudicating the claim.[97]

c. Avoiding the Burden on Jurors to Decide Cases That Have No Impact on Their Community

Judge Glenn noted that when a court has very little interest in adjudicating a claim due to the application of foreign law and the remoteness of the events from the court's jurisdiction, adjudicating the claim could create an unnecessary burden on the jurors of that court.[98] The parties did not address this public interest factor, but if the claims came to trial in the U.K., the trial would be before a U.K. court without a jury, despite the desire of both parties' wanting a jury trial if the trial was in the U.S.[99]

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88. *Id.*
89. *Id.*
90. *Id.* at 350.
91. *Id.* at 349.
92. Fed. R. Civ. P. 44.1; *Hellas*, 555 B.R. at 349.
93. *Hellas,* 555 B.R. at 350; Gross v. B.B.C., 386 F.3d 224, 233–34 (2d Cir. 2004).
94. *Hellas*, 555 B.R. at 350.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*

2. The Private Factors

a. Extensive U.S. Discovery

The extent of discovery already conducted is a relevant factor that should be considered when assessing a *forum non conveniens* motion.[100] The weight given to this factor varies based upon the facts and circumstances of each case.[101] The presumption against dismissal of a *forum non conveniens* motion is high when the motion has been filed so late in the process that extensive discovery has already been conducted.[102]

The Court found that this was not the case here, and that the extent-of-discovery factor should carry little weight.[103] The defendants did not wait until extensive discovery had been conducted to raise their *forum non conveniens* argument.[104] On the contrary, the defendants previously argued that amending the complaint to assert U.K. claims would be futile because the case would be dismissed on *forum non conveniens* grounds.[105]

b. Delay in Bringing the *Forum Non Conveniens* Motion

There is no time limit on when a motion to dismiss on *forum non conveniens* grounds can be made. [106] But, dismissal based on *forum non conveniens* may be inappropriate, despite a favorable outcome of balancing the private and public interest factors, when the defendant raises the argument at a late stage in the action.[107] This would create an overwhelmingly burdensome shift because voluminous discovery has already been carried out and costly litigation has taken place.[108]

Plaintiffs contended defendants delayed the motion for over 20 months while pursuing discovery in the U.S. Court.[109] However, Judge Glenn found otherwise, ruling that this was not a case where defendants unreasonably delayed bringing their *forum non conveniens* motion to take advantage of discovery.[110] On the contrary, defendants moved to dismiss the action on *forum non conveniens* grounds promptly after the U.K. became a viable alternative option for the action.[111] Accordingly, the factor weighed in favor of dismissal on *forum non conveniens.*[112]

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100. *Id.* at 351.
101. *Id.*
102. *Id.*
103. *Id.* at 352.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 352–53.
112. *Id.* at 353.

c. Location of Documents and Witnesses

The location of documents and witnesses is an important factor when determining whether to dismiss an action for *forum non conveniens*.[113] A comparative approach must be applied to evaluate, on the one hand, the costs the defendant would incur in the present forum, versus the costs the plaintiff would incur in the foreign forum.[114]

The defendants in this case argued that their costs were too high.[115] They argued that the majority of the documents produced were collected in the U.K.; the majority of the depositions were conducted in the U.K.; and the majority of the witnesses to be called at trial resided and/or worked in the U.K.[116] Plaintiffs, in response, argued that defendants failed to establish that the location of documents or witnesses posed a significant obstacle, because defendants were sophisticated private equity institutions for whom producing documents or witnesses posed no special inconvenience.[117] Judge Glenn found this factor to be neutral in his analysis, given the sophistication of the global institutions involved in the case.[118]

d. Judicial Economy

Judge Glenn held that in this case, it would be inefficient and wasteful for two trials involving the same plaintiffs, the same claims, the same transactions, and the same evidence to go forward.[119]

V. Conclusion

Chapter 15 of the U.S. Bankruptcy Code allows for international comity and assures the speedy and economic administration of foreign insolvency proceedings. However, if applied without safeguards, it will "open the door to virulent international forum-shopping to the detriment of . . . stakeholders . . . around the world."[120] The doctrine of *forum non conveniens* is a critical tool that helps mitigate the risk of this type of abuse of the U.S. Bankruptcy court system. *Forum non conveniens* protects both a defendant who is sued by a foreign plaintiff, as well as the courts themselves in their struggle to preserve judicial efficiency.

The Court here properly granted the defendants' *forum non conveniens* motion. The role of this U.S. Court in this case, and the role of a Chapter 15 case generally, is to be an ancillary action to the pending foreign main proceeding, and to provide assistance to the foreign court. Here, the U.K. was clearly the superior forum. The U.S. Court could not have been more con-

113. *Id.*

114. *Id.*; Iragorri v. United Techs. Corp, 274 F.3d 65, 74 (2d Cir. 2001).

115. *Hellas*, 555 B.R. at 353.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 354.

120. Andy Soh, *Chapter 15 of the U.S. Bankruptcy Code: An Invitation to Forum Shopping?*, 16 J. BANKR. L. & PRAC. 873 (2007).

venient than the U.K. itself to these U.K.-based plaintiffs. The U.K. court was an adequate alternative forum. And the balancing of private and public factors weighed in favor of granting the defendants' motion. When a U.K. court is able to interpret and apply U.K. law in a pending U.K. action, the Court should avoid interpreting or applying U.K. law to the same action. U.S. courts should not get into the business of supplanting a foreign court on a matter of unsettled law of that court's jurisdiction when there is a properly pending claim before that foreign court. Doing so would result in a dangerous open-invitation to international forum shopping.[121]

Judith Balasubramaniam

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121. *See id.*

RJR Nabisco Inc. v. European Community

136 S.Ct. 2090 (2016)

The Supreme Court of the United States held that the Racketeer Influenced and Corrupt Organizations Act (RICO) can apply extraterritorially to the extent that predicate offenses alleged in a particular case themselves apply extraterritorially–such as the ones alleged against RJR Nabisco Inc. by the European Community–however, RICO's private right of action requires a civil RICO plaintiff to allege and prove a domestic injury to business or property, and does not allow recovery for foreign injuries.

I. Holding

In the recent case *RJR Nabisco Inc. v. European Community*,[1] the Supreme Court concluded[2] that the Racketeer Influenced and Corrupt Organizations Act (RICO)[3] applies to some foreign racketeering activity, provided that the predicate offenses themselves apply extraterritorially.[4] As such, in looking at the allegations of the European Community against RJR Nabisco, the Court concluded that the European Community did not allege impermissibly extraterritorial violations of RICO.[5] However, with respect to RICO's private right of action created under §1964(c), the Court held that it was clear this provision is much more narrow in its application and that a presumption against extraterritoriality exists with respect to this section.[6] Therefore, the case was reversed and remanded to the United States Court of Appeals for the Second Circuit.[7]

II. Facts and Procedure

RJR is the Supreme Court's most recent take on the issue of extraterritoriality. This case arose from a sixteen-year battle between the European Community and RJR Nabisco (and its numerous related entities, collectively referred to as "RJR").[8] The European Community and twenty-six of its member states first sued RJR Nabisco in the Eastern District of New York in 2000[9] alleging that RJR participated in a global money-laundering scheme in association with

1. RJR Nabisco Inc. v. European Community, 136 S.Ct. 2090 (2016).
2. Justice Alito delivered the opinion of the court. Chief Justice Roberts, Justice Kennedy, and Justice Thomas joined the opinion, while Justice Ginsburg, Justice Breyer and Justice Kagan joined as to parts I, II, and III. Justice Ginsburg filed a dissenting opinion with respect to Part IV of the opinion and from the judgment, which Justice Breyer and Justice Kagan both joined. Justice Breyer filed his own dissenting opinion from Part IV of the Court's opinion and the judgment. Justice Sotomayor took no part in the consideration or decision of the case.
3. 18 U.S.C. § 1961–1968 (2016).
4. *See RJR Nabisco*, 136 S.Ct. at *2103.
5. *See id.* at *2105.
6. *See id.* at *2108.
7. *See id.* at *2111.
8. *See id.* at *2098.
9. *See id.*

various organized crime groups.[10] The European Community alleged that RJR worked with Colombian and Russian drug traffickers to smuggle narcotics into Europe, and then laundered the proceeds from the drug sales to pay for large shipments of RJR cigarettes into Europe.[11] The European Community also alleged that RJR dealt directly with drug traffickers and money launderers in South America and sold cigarettes to Iraq in violation of international sanctions.[12] The European Community also alleged that RJR was engaged in a pattern of racketeering activity consisting of numerous acts of the following: (1) money laundering, (2) material support to foreign terrorist organizations, (3) mail fraud, (4) wire fraud, and (5) violations of the Travel Act.[13,14] The European Community's complaint calls this RICO scheme the "RJR Money-Laundering Enterprise."[15]

RICO is founded on the concept of racketeering activity. The statute defines "racketeering activity" to encompass dozens of state and federal offenses, known as "predicates."[16] A predicate offense implicates RICO when it is part of a "pattern of racketeering activity" or a series of related predicates that together demonstrate the existence of continued criminal activity.[17]In enacting RICO, Congress sought to reach both legitimate and illegitimate enterprises, and drafted RICO broadly enough to encompass a wide range of criminal activity.[18]

Section 1962 specifically targets different ways in which a pattern of racketeering activity may be used to infiltrate, control, or operate "an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."[19] Therefore, §§ 1962(a), (b), (c), and (d) are four substantive prohibitions.[20] A violation of these subsections are subject to criminal penalties.[21]

RICO also creates a private civil cause of action, which allows "any person injured in his business or property by reason of a violation of section 1962" to sue in federal district court and may recover damages, costs and attorney's fees.[22] Putting all of these pieces together, then, the European Community alleged that RJR violated each of RICO's prohibitions in the following four ways.[23]

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10. *See id*.
11. *See id*.
12. *See id*.
13. 18 U.S.C. § 1952 (2014) (making interstate travel in aid of racketeering a federal offense).
14. *RJR Nabisco*, 136 S.Ct. at *2098.
15. *Id.* (citing Petition for Writ of Certiorari at *6, RJR Nabisco v. European Community, 136 S.Ct. 2090 (2016) (No. 15–138), 2015 WL 4572754).
16. *See RJR Nabisco*, 136 S.Ct at *2096. *See* 18 U.S.C. § 1961 (listing examples) (2016).
17. *See RJR Nabisco*, 136 S.Ct. at *2096 (citing H.J. Inc. v. Nw. Bell Telephone Co., 492 U.S. 229, 239 (1989)). *See also* 18 U.S.C. § 1961(5) (2016).
18. G. Robert Blakely, *Time-Bars: RICO-Criminal and Civil-Federal and State*, 88 NOTRE DAME L. REV. 1581, 1595 (2013).
19. *RJR Nabisco*, 136 S.Ct. at *2096. *See* 18 U.S.C. § 1962(a) (2016).
20. 18 U.S.C. § 1962 (2016).
21. *See* 18 U.S.C. § 1963 (2016).
22. 18 U.S.C. § 1964(c) (2016).
23. *See RJR Nabisco*, 136 S.Ct. at *2096.

First, that RJR violated § 1962(a), which makes it unlawful to invest income derived from a pattern of racketeering activity in an enterprise[24] because RJR used the profits from their racketeering to operate their enterprise. Second, that RJR violated § 1962(b), in acquiring and maintaining control of the enterprise through the pattern of racketeering activity.[25] Third, that § 1962(c) makes it unlawful for a person employed by or associated with an enterprise to conduct the enterprise's affairs through a pattern of racketeering activity, therefore, RJR violated this section by operating the enterprise through such a pattern.[26] Finally, that RJR conspired with other participants in this scheme, consequently violating § 1962(d), which makes it unlawful to conspire to violate any of the other three prohibitions in § 1962.[27] These violations allegedly harmed the European Community in many ways, including competitive harm to their state owned cigarette businesses, lost tax revenue from black-market sales, currency instability, harm to European financial institutions and increased law enforcement costs.[28]

RJR moved to dismiss the complaint, arguing that RICO did not apply to racketeering activity occurring outside the US or to foreign enterprises.[29] The District Court agreed with RJR and dismissed the claims as "impermissibly extraterritorial."[30] On appeal by the European Community, the Second Circuit reinstated the RICO claims, and concluded that Congress had clearly communicated an intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of these statutes serve as the basis for RICO liability.[31] Looking at the predicates alleged in the complaint, the Second Circuit found that the money laundering and material support of terrorism statutes expressly apply extraterritorially in the circumstances alleged in the complaint, however, the mail fraud, wire fraud, and Travel Act statutes did not apply extraterritorially.[32] The Second Circuit also concluded that the complaint states domestic violations of those predicates, since it alleged conduct in the US which satisfied every essential element of those offenses.[33]

RJR sought a rehearing with the main contention that RICO's civil cause of action requires a plaintiff to allege a domestic injury, even if a domestic pattern of racketeering or a domestic enterprise is not necessary to make out a violation of RICO's substantive prohibitions.[34] The Second Circuit denied a rehearing and instead issued a supplemental opinion holding that RICO does not require a domestic injury.[35] In their opinion, the Second Circuit concluded that if a foreign injury was caused by the violation of a predicate statute that applies

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24. *See id.* at *2097. *See* 18 U.S.C. § 1962(a) (2016).
25. *See RJR Nabisco*, 136 S.Ct. at *2099. *See* 18 U.S.C. § 1962(b) (2016).
26. *See RJR Nabisco*, 136 S.Ct. at *2099. *See* 18 U.S.C. § 1962(c) (2016).
27. *See RJR Nabisco*, 136 S.Ct. at *2099. *See* 18 U.S.C. § 1962(d) (2016) ("it shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section").
28. *See RJR Nabisco*, 136 S.Ct. at *2098.
29. *See id.* at *2099.
30. *See* European Community v. RJR Nabisco, Inc., No. 02–CV–5771, 2011 WL 943957 at *7 (E.D.N.Y. 2011).
31. *See* European Community v. RJR Nabisco, Inc., 764 F.3d 129, 137 (2d Cir. 2014).
32. *See id.* at 139–40.
33. *See id.* at 142.
34. *See RJR Nabisco*, 136 S.Ct. at *2098.
35. *See* European Community v. RJR Nabisco, Inc., 764 F.3d 149, 151 (2d Cir. 2014) (per curiam).

extraterritorially, then the plaintiff may seek recovery for that injury under RICO.[36] The court later denied a rehearing en banc.[37]

Because the lower courts are divided as to whether RICO applies extraterritorially,[38] and because of the importance of this issue, the Supreme Court granted certiorari on October 1, 2015.[39]

III. Discussion

A. Extraterritoriality

Within the past six years the Supreme Court has addressed the issue of whether certain federal statutes apply extraterritoriality on two separate occasions.[40] In deciding whether or not U.S. law applies beyond our jurisdiction, the Court adheres to a canon of statutory construction known as the presumption against extraterritoriality: absent clearly expressed congressional intent to the contrary,[41] federal laws will be construed to have only domestic application.[42]

In *Morrison v. National Australia Bank Ltd.*[43], the Court addressed whether § 10(b) of the Securities Exchange Act of 1934[44] applies to misrepresentations made in connection with the purchase or sale of securities traded only on foreign exchanges. In *Kiobel v. Royal Dutch Petroleum Co.*[45], the Court considered whether the Alien Tort Statute (ATS)[46] conferred federal jurisdiction over causes of action alleging international law violations committed overseas. From *Morrison* and *Kiobel*, a two-step framework was developed.

For the first step, there must be a determination as to whether the presumption against extraterritoriality has been rebutted; that is, whether the statute gives a clear, affirmative indica-

36. *See id*.

37. *See* European Community v. RJR Nabisco, Inc., 783 F.3d 123, 124 (2d Cir. 2015).

38. *See* European Community v. RJR Nabisco, Inc., 764 F.3d 129 (2d Cir. 2014). *Cf.* U.S. v. Chao Fan Xu, 706 F.3d 965 (9th Cir. 2013) (holding that RICO does not apply extraterritorially).

39. *See* RJR Nabisco Inc. v. European Community, 764 F.3d 129 (2d Cir. 2014), *cert. granted*, 136 S.Ct. 28 (2015) (No. 15–138).

40. *See* RJR Nabisco Inc. v. European Community, 136 S.Ct. 2090, *2100 (2016).

41. "While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential." *Id.* at 2102.

42. Morrison v. National Australia Bank Ltd., 561 U.S. 247, 255 (2010).

43. *See id.* at 255–65 (concluding that because § 10(b) did not give any clear indication of extraterritorial effect and the fact that the statute's focus was on domestic securities transactions and therefore, the statute did not apply to frauds in connection with foreign securities transactions, even if those frauds involve domestic misrepresentations).

44. 15 U.S.C. § 78 (2016).

45. 133 S.Ct. 1659 (2013) (holding that the ATS did not apply extraterritoriality, since the statute lacks any clear indication that it extended to the foreign torts, and because all the relevant conduct regarding those violations took place outside the US).

46. 28 U.S.C. § 1350 (2016) ("the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

tion that it applies extraterritorially.[47] If the statute is not extraterritorial, then the next step is to determine whether the case involves a domestic application of the statute.[48] This step is accomplished by looking to the statute's "focus."[49] If the conduct relevant to the statute's focus occurred in the U.S., then the case involves a permissible domestic application, even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application, regardless of any other conduct that occurred in the U.S.[50]

1. Do RICO's Substantive Prohibitions in § 1962 Apply to Foreign Conduct?

With these guiding principles in mind, the Court determined that the presumption against extraterritoriality had been rebutted in RICO, but only with respect to certain applications of the statute.[51] The Court first looked at the text of RICO, and specifically the definition of "racketeering activity," which includes a number of predicates that apply to at least some foreign conduct.[52] Therefore, the Court concluded Congress has given a clear, affirmative indication that § 1962 applies to foreign racketeering activity.[53]

Nevertheless, the Court agreed with the Second Circuit's conclusion that RICO applies extraterritorially only to the extent that the predicates alleged in a particular case themselves apply extraterritorially; in other words, the Court explained, "a pattern of racketeering activity may include or consist of offenses committed abroad in violation of a predicate statute for which the presumption against extraterritorially has been overcome."[54] The Court emphasized that only some of the RICO predicates have extraterritorial effect, not all of them.

The Court reached this conclusion for two reasons: (1) the presumption against extraterritorially operates to limit the provision of a statute that has some extraterritorial application to its terms[55], and (2) RICO defines racketeering activity only as acts that are "indictable" under § 1961(1).[56] Therefore, if a particular statute does not apply extraterritorially, then conduct committed abroad is not "indictable" under that statute, and so cannot qualify as a predicate under RICO's plain terms.[57] Thus, the Court concluded that RICO applies to only some foreign racketeering activity, and that a violation of § 1962 may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is, itself, extraterritorial.[58]

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47. *See RJR Nabisco*, 136 S.Ct at *2101.
48. *See id.*
49. *See id.*
50. *See id.*
51. *See id.*
52. *See RJR Nabisco*, 136 S.Ct. at *2101.
53. *See id.*
54. *See id.*
55. *Morrison*, 561 U.S. at 265.
56. *See RJR Nabisco*, 136 S.Ct. at *2102. *See* 18 U.S.C. § 1961(1).
57. *See RJR Nabisco*, 136 S.Ct. at *2102.
58. *See id.*

2. Analysis of Specific Prohibitions under § 1962.

Keeping this conclusion in mind, the Court analyzed the specific prohibitions under § 1962. The Court found that the predicates alleged in both §§ 1962(b) and (c) apply extraterritorially because they both prohibit the employment of a pattern of racketeering.[59] Looking more closely at §§ 1962(b) and (c), the Court agreed with the Second Circuit's finding that the relevant portions of the money laundering and material support for terrorism statutes expressly provide for extraterritorial application in certain circumstances, which were alleged in the present case.[60] The Court also agreed with the Second Circuit's conclusion that the fraud statutes and Travel Act do not contain the clear indication needed to overcome the presumption against extraterritoriality.[61] However, the Court noted that the complaint alleged domestic violations of those statutes and because it alleged conduct in the U.S. that satisfies the essential element of the mail fraud, wire fraud, and Travel Act claims.[62] Moreover, the alleged enterprise had sufficient ties to U.S. commerce because its members include U.S. companies and its activities depend on the sale of cigarettes through the U.S. mails and wires.[63] Consequently, the Court concluded, the European Community did not allege impermissible extraterritorial violations of these sections because the alleged pattern of racketeering activity consisted entirely of predicate offenses that were either committed in the U.S., or committed in a foreign country in violation of a predicate statute that applies extraterritorially.[64]

Unlike §§ 1962 (b) and (c), § 1962(a) targets certain uses of income derived from a pattern of racketeering, not the actual pattern itself.[65] Although the Court reasoned that § 1962(a) definitely applies to income derived from foreign patterns of racketeering, the Court concluded that § 1962(a) only extends to domestic uses of income.[66] Therefore, the Court concluded that *RJR* was in violation of § 1962(a), without deciding whether the European Community pleaded a domestic investment of racketeering income.[67] Finally, although the Court did not reach the issue as to § 1962(d), because the parties did not address whether this provision should be treated differently from the provision that a defendant allegedly conspired to violate, the Court did conclude that § 1962(d)'s extraterritoriality tracks that of the provisions underlying the alleged conspiracy.[68]

Because the Court found that RICO applies extraterritorially, the second step, or "focus" analysis, was unnecessary. The Court reiterated that each of RICO's substantive prohibitions requires proof of an enterprise that is "engaged in, or the activities of which affect, interstate or

59. *See id.* at *2103.

60. *See id. See European Community*, 764 F.3d at 139–40.

61. *See RJR Nabisco*, 136 S.Ct. at *2102.

62. *See RJR Nabisco*, 136 S.Ct. at *2105. *See European Community*, 764 F.3d at 142.

63. *See RJR Nabisco*, 136 S.Ct. at *2105.

64. *See id.*

65. *See id.* at *2103.

66. *See id.*

67. *See id.*

68. *See id.*

foreign commerce."[69] Therefore, any enterprises whose activities lack that connection to U.S. commerce cannot sustain a RICO violation. The Court also rejected RJR's contention that RICO does not apply to foreign enterprises because RICO's extraterritorial effect does not depend on the location of the affected enterprise.[70]

B. RICO's Private Right of Action

The Court returned to the same analysis applied to the substantive prohibitions in § 1962 when deciding whether § 1964(c) overcomes the presumption against territoriality.[71] The Court concluded that it did not.[72] The Court recognized early on in its analysis that the creation of a private civil remedy for foreign conduct creates a potential for "international friction" beyond that presented by merely applying U.S. substantive law to that foreign conduct.[73] Therefore, a private RICO plaintiff must allege and prove a domestic injury to its business or property in order to sustain a claim under § 1964(c).[74]

Looking to the text of RICO again, the Court found that, unlike § 1962, there is nothing in § 1964(c) which provides a clear indication that Congress intended to create a private right of action for injuries suffered outside the U.S.[75] The Court also analyzed the placement of § 1964(c) within the larger context of the statute.[76] For instance, the statue's reference to injury to "business or property" does not indicate extraterritorial application, as § 1962 did.[77] Furthermore, the Court stated that the fact that the private cause of action only applies to particular kinds of injury is a signal from Congress that the civil remedy is not coextensive with § 1962's substantive prohibitions.[78] Thus, the Court concluded that it is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries; in order to do that, something more is needed.[79]

Additionally, the Court rejected RJR's argument, as well as that of Justice Ginsburg,[80] that the Court's interpretation of RICO must follow from the analysis applied to § 4 of the Clayton Act,[81] which created a private right of action for injuries suffered abroad as a result of antitrust

69. *See id.* at *2105.

70. *See id.* at *2104.

71. *See id.* at *2106–2111.

72. *See id.* at *2106.

73. *See* Sosa v. Alvarez-Machain, 542 U.S. 629, 727 (2004). *See Morrison*, 561 U.S. at 255 (Although a risk of conflict between the American statute and a foreign law is not a prerequisite for applying the presumption against extraterritoriality, where such a risk is evident, the need to enforce the presumption is at its apex.).

74. *See RJR Nabisco*, 136 S.Ct. at *2106.

75. 18 U.S.C. § 1964(c) (2016).

76. *See RJR Nabisco*, 136 S.Ct. at *2108.

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.* at *2114 (Ginsburg, J., dissenting).

81. 15 U.S.C. § 15 (2016).

violations.[82,83] The Court rejected such a proposition because there is no reason why the two statutes must be viewed interchangeably.[84] Instead, the Court re-emphasized the importance of examining the particular facts of individual cases, especially since both statutes and cases are very different.[85] The Court also noted that Congress has more precisely defined the extraterritorial of antitrust laws, which contributed to its conclusion not to look to the Clayton Act as guidance.[86]

Finally, the Court noted that during the time of the briefing of the case, the European Community waived their damages claims for domestic injuries. Therefore, because the European Community's remaining RICO claims rested entirely on injuries suffered abroad, those claims had to be dismissed.[87]

IV. Conclusion

The Court's reaffirmation of the principles in *Morrison* and *Kiobel*, as well as the presumption against extraterritoriality, not only demonstrates the Court's concern of avoiding international friction, but also seems to provide a balance for the power of US courts against the sovereign interests of foreign nations. On the other hand, the Court has done much to limit RICO's scope, especially under the substantive prohibitions under § 1962 and the private right of action created under § 1964. Furthermore, for subsequent defendants facing RICO claims, the *RJR* decision now provides significant new defenses, including the fact that a plaintiff will now be unable to proceed unless it alleges a domestic injury, and that RICO claims by foreign parties with no ties to the United States will have no recourse under the statute. As such, this case has larger implications, not only for cases arising under RICO, but also for other federal laws, which may involve the same narrow analysis laid out in this case. Only time will tell if future cases will keep in mind the basic premise of our legal system that the Court adhered to in *RJR*, that while U.S. law governs domestically, it does not rule the world.[88]

Cory Morano

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82. *See RJR Nabisco*, 136 S.Ct. at *2109–11.
83. *See* Pfizer Inc. v. Government of India, 434 U.S. 308 (1978).
84. *See RJR Nabisco*, 136 S.Ct. at *2109.
85. *See id.* at *2109.
86. *See id.* at *2110.
87. *See id.* at *2111.
88. *See id.* at 2100 (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).