NEW YORK INTERNATIONAL LAW REVIEW

Summer 2009 **Vol. 22, No. 2**

Articles

The Changing Landscape of Arbitration Agreements in China: Has the SPC-Led Pro-arbitration Move Gone Far Enough?
Weixia Gu 1

Suffer the Little Children: How the United Nations Convention on the Rights of the Child Has Not Supported Children
Lynne Marie Kohm 57

The Cultural Genocide Debate: Should the UN Genocide Convention Include a Provision on Cultural Genocide, or Should the Phenomenon Be Encompassed in a Separate International Treaty?
Daphne Anayiotos 99

International Antitrust Agreement: Premature Proposal and Practical Solutions
Olga Petrovsky 131

Recent Decisions

Morgenthau v. Avion Resources Ltd. 167
The New York Court of Appeals held that service of process on defendants in a foreign country pursuant to CPLR 313 is proper and sufficient to confer personal jurisdiction if no treaties or international agreements supplant New York's service requirements.

Glencore Denrees Paris v. Department of National Store Branch 1 171
The U.S. District Court for the Southern District of New York granted Glencore's motion to compel production of witnesses for deposition, but denied Rule 37 sanctions for Vietnam's failure to comply with discovery mandates. Before deciding Vietnam's claim of sovereign immunity, the court sought to be sure that both parties had the opportunity for full disclosure.

Reino de España v. American Bureau of Shipping, Inc. 177
Pursuant to F.R.C.P. 72(a), the U.S. District Court for the Southern District of New York, after assessing the plaintiff's objections to the granting of the Defendant's motions, overruled such objections and imposed discovery sanctions on the Spanish government for not disclosing electronic documents.

Katz Park Avenue Corp. v. Jagger 181
The New York Court of Appeals held that the holder of a B-2 visa is precluded, as a matter of law, from maintaining a "primary residence" in a rent-stabilized apartment as required under New York City Rent Stabilization Code § 2524.

Sony Music Ent. (Germany) GmbH v. Falcon Neue Medien Vertrieb GmbH ..187
The European Union Court of Justice extended copyright protection to Plaintiff pursuant to a finding that a Directive of the European Parliament and Council permits such protection to a creative work that is protected by the laws of a Member State.

NEW YORK STATE BAR ASSOCIATION
INTERNATIONAL SECTION
Published with the assistance of St. John's University School of Law

NEW YORK INTERNATIONAL LAW REVIEW

Summer 2009
Vol. 22, No. 2

NEW YORK STATE BAR ASSOCIATION
INTERNATIONAL SECTION

ISSN 1050-9453 (print) ISSN 1933-849X (online)

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The Changing Landscape of Arbitration Agreements in China: Has the SPC-Led Pro-arbitration Move Gone Far Enough?

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I. Critique of the Validity Regime under Arbitration Law

A. Overly Rigid Conditions

The crucial statutory provision that governs the validity of arbitration agreements in China is Article 16 of the Arbitration Law (AL),[1] which stipulates, "An arbitration agreement shall include arbitration clauses stipulated in the contract and agreement of submission to arbitration that are in *writing* before or after disputes arise."[2] Further, "[a]n arbitration agreement *shall* contain the following particulars: (1) an expression of intention to arbitrate; (2) matters for arbitration; and (3) a designated arbitration commission."[3]

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1. *See* Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 16, *translated in* 34 I.L.M. 1650, 1654 (1995) (P.R.C.) [hereinafter Arbitration Law] (listing the particulars that arbitration agreements must contain).
2. *See id*. at art. 16 ¶ 1 (legislating that arbitration agreements must indicate an intention to apply for arbitration).
3. *See id*. at art. 16, ¶ 2 (legislating that arbitration agreements must contain the arbitrable matters therein).

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This article is based on a paper that the author presented to the 2008 "China Law Enforcement Symposium" held in Hong Kong (December 6, 2008), which was hosted by the Faculty of Law of the University of Hong Kong.

It is clear from the first paragraph of Article 16 that parties' agreement to arbitrate must be made in writing.[4] The writing requirement tends to clarify the issue of whether parties have actually consented to arbitration.[5] That said, however, the AL fails to define what forms might satisfy the provision's writing requirement.[6] With respect to this issue, an indirect answer may be found by referring to Article 11 of the Contract Law (the CL),[7] which stipulates that "written contracts" refer to "contracts *signed* in written instruments such as letters and electrically or electronically transmitted documents."[8] The jurisprudence on this issue, however, has been restricted to "*signature-based consent*" without taking up the scenario in which the consent to arbitrate is manifested by other means.[9] It is true that consent will be easily established if the

4. *See* MICHAEL CHARLES PRYLES, DISPUTE RESOLUTION IN ASIA 97 (3d ed. 2006) (describing a written agreement as something tangible that is represented in the form of written instruments such as letters, faxes, or e-mails); *see also* JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 34 (2004) [hereinafter JINGZHOU TAO, ARBITRATION] (explaining that although the first paragraph of Article XVI of the Arbitration Law requires arbitration agreement to be written, there is no explicit requirement on the form); *see also* Robert Briner, *Arbitration in China Seen from the Viewpoint of the International Court of Arbitration of the International Chamber of Commerce*, *in* NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 25, 27 (2005) (stating that a written arbitration contract contains an expressed intent to request arbitration, the matters for arbitration, and the designated arbitration commission).

5. *See* ARBITRATION LAWS OF CHINA 55 (The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China ed. 1997) (emphasizing that an arbitration clause is framed before the occurrence of a dispute, which demonstrates the parties' willingness to resort to arbitration in the case of a dispute); *see also* WANG SHENGCHANG, RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA 77 (1997) (affirming that Article XVI holds that an arbitration agreement must be made in written form and that it is binding whether it relates to a present or future dispute); *see also* JINGZHOU TAO, RESOLVING BUSINESS DISPUTES IN CHINA 2802 (2005) [hereinafter JINGZHOU TAO, BUSINESS] (explaining that Chinese economic contract laws provide legislative background to support the idea that arbitration laws should have to meet a writing requirement).

6. *See* WANG SHENGCHANG, *supra* note 5, at 78 (noting that arbitration clauses cannot be made orally but that electronic means such as fax, telex, or cables are sufficient to comply with the written requirement); *see also* JINGZHOU TAO, BUSINESS, *supra* note 5, at 2802 (establishing that art. 11 in the Contract Law gives perspective on the types of written forms, which include letters, fax, electronic data interchange, and e-mail); *see also* Li Hu, *Setting Aside an Arbitral Award in the People's Republic of China*, 12 AM. REV. INT'L ARB. 1, 10 (2001) (defining "written form" as a form that can visibly describe what is being agreed to, which includes written, typed, and electronic forms).

7. *See* Contract Law (promulgated by the Second Session of the Ninth Nat'l People's Cong., March 15, 1999, effective Oct. 1, 1999), art. 11, *available at* http://novexcn.com/contract_law_99.html [hereinafter Contract Law] (holding that China's Contract Law simultaneously repealed and superseded the Economic Contract Law, Foreign Economic Contract Law, and Technology Contract Law).

8. *See id*. (defining a "writing" as memorandum of contract, letter or electronic message).

9. *See* Briner, *supra* note 4, at 27 (noting that an arbitration agreement could exist outside the original contract); *see also* Ian A. Rambarran, *I Accept, But Do They?. . . The Need for Electronic Signature Legislation on Mainland China*, 15 TRANSNAT'L LAW. 405, 426 (2002) (explaining that PRC Contract Law does not expand on the legal effect of electronic signatures); *see also* Minyan Yang, *The Impact of Information Technology Development on the Legal Concept—A Particular Examination on the Legal Concept of "Signatures,"*15 INT'L J.L. & INFO. TECH. 253, 260 (2007) (finding that if Chinese law requires a form for a transaction, most require a written form, not specifying whether a signature is even required).

arbitration agreement is signed by both parties.[10] However, this may not always be the case in modern arbitration practice. According to a premier international arbitrator, Jingzhou Tao, the "written" requirement shall be stipulated dynamically in light of the rapid development of modern means of communications and for the convenience of transactions.[11] Problematic situations often arise as to whether a non-signatory third party can be bound by the arbitration agreement, a situation that is seen frequently with the rising use of arbitration in China;[12] in particular, to what extent the "written form" can be upheld in cases of contract assignment, agency relationship, etc.[13] The AL is silent as to these particular issues and the vague regulation under Article 16(1) could be interpreted to deny the validity of arbitration agreements when the consent is given under a different capacity, until the practice is later resolved by the SPC through a series of judicial replies and opinions.[14]

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10. *See* ARBITRATION LAWS OF CHINA, *supra* note 5, at 56 (informing that arbitration institutions do not accept an application for arbitration without a written agreement); *see also* Jane Volz & Robert Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser,* 21 WM. MITCHELL L. REV. 867, 905 (1996) (explaining that once an arbitral award is set aside by a court, new arbitration cannot begin unless there is consent from both parties); *see also* Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy,* 31 U. DAYTON L. REV. 421, 428 (2006) (explaining that according to the Arbitration Law, parties must agree to arbitrate "of their own accord").

11. *See* JINGZHOU TAO, ARBITRATION (citing that written requirement of arbitration shall be stipulated dynamically in light of other forms of modern communication); *see also* So Cho Yin, *A Comparative Study of Arbitration Law in China and Hong Kong with Respect to Some Selective Areas* (2003), http://online.lgt.polyu.edu.hk/fyp/documents/bsc_03/PO_182_03.pdf (explaining that this requirement can be satisfied by means other than writing); *see also Asian Projects and Construction Update: Dispute Resolution in China* (2003), http://74.125.47.132/search?q=cache:taclIQUUyrcJ:www.mallesons.com/publications/Asian_Projects_and_Construction_Update6939182W.htm+%22China%22+and+%22arbitration+law%22+and+%22writing+requirement%22&cd=3&hl=en&ct=clnk&gl=us (illustrating that an exchange of e-mails, while not written in the usual manner, satisfied the writing requirement of arbitration).

12. *See* Kun Liang, *The Comparative Analysis of the Existing Chinese and English Arbitration Systems from Arbitration Agreement Perspectives*, 13 COLUM. J. ASIAN L. 35 (1999) (noting that there are still unanswered questions concerning the amount of force to be given to an arbitration agreement's effect on a non-signatory); *see also* Nanping Liu, *A Vulnerable Justice: Finality of Civil Judgments in China*, 13 COLUM. J. ASIAN L. 35, 94 (1999) (stating that for a non-signatory, it is important to assess the nature of a Chinese judgment in terms of recognition and enforcement); *see also Attractive Arbitration: Revision of Arbitration Law in China* (2005), http://74.125.47.132/search?q=cache:cD2Nao0fR3UJ:www.liuhule.com/column.asp%3Fid%3D157%26catid%3D5+%22China+Arbitration+Law%22+and+%221994%22+and+%22non-signatory%22&cd=6&hl=en&ct=clnk&gl=us (discussing that the issue of effects of an arbitration agreement on non-signatory parties is being examined).

13. *See* Wang Liming, *An Inquiry into Several Difficult Problems in Enacting China's Uniform Contract Law*, 8 PAC. RIM L. & POL'Y J. 351, 381 (Keith Hand trans., 1999) (describing situations where different interpretations of written form, with respect to contracts, exist); *see also* WEI-QI CHEN, RECENT DEVELOPMENTS IN THE JUDICIAL INTERPRETATION ON ARBITRATION LAW IN CHINA (2007), http://www.jurist.org.cn/doc/uclaw200705/uclaw20070508.pdf (emphasizing that while the statute fails to describe "written forms," the new interpretation offers a more expansive definition); *see also* Wei Li, *A Brief Introduction to Commercial Arbitration in China*, *available at* http://eng.yzlawyer.com/cgi-bin/GInfo.dll?DispInfo&w=yingwen&nid=2356 (stating that arbitrators may draw different conclusions because of the flaws within the statute).

14. *See* Kun Liang, *supra* note 12, at 35 (observing that while strict written requirement exists in the statute, there is no need for the agreement to be signed by the parties).

In addition to the "in writing" requirement for consent, substantive requirements have to be met for an arbitration agreement to be considered valid.[15] As required by the second paragraph of Article 16, an agreement's effectiveness is dependent on the existence of three conditions[16] in an arbitration agreement: (1) an expression of intention to arbitrate; (2) matters for arbitration; and (3) a designated arbitration commission.[17] While there is not much dispute regarding the first two conditions, the third one, a "designated arbitration commission," has raised considerable concern and criticism for being too rigid.[18] Pursuant to Article 18 of the AL: "If an arbitration agreement has failed to set forth the arbitration commission to hear the matter or has failed to define it clearly, the parties may remedy the defect by a supplementary agreement. In the absence of a valid supplementary agreement, the arbitration agreement is invalid."[19] By virtue of this provision, the choice of the arbitration commission must be specified (which excludes the possibility of ad hoc arbitration).[20] Moreover, it must be clearly specified or at least be made clear in a supplementary submission; otherwise the arbitration agreement will be void.[21] As such, the most typical defects in concluding arbitration agreements in China are incorrect or inconclusive references to the choice of arbitral commission, which has been referred to as "defective or pathological arbitration clauses" in Tao's commen-

15. *See* Züblin International GmbH v. Wuxi Woke General Engineering Rubber Co., Ltd (Sup. People's Ct., Jul. 8, 2004), *available at* http://www.prac.org/materials/2006_July_eBulletin.pdf (holding that a valid arbitration clause contains the following elements: an expression of intention to apply for arbitration, matters for arbitration, and a designated arbitral institution); *see also* Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 139 (2006) (describing that Article 16 stipulates that a valid arbitration agreement must express the parties' intention, contain the matters for arbitration, and designate an appropriate institution); *see also* Marianne M. Chao et al., *White Paper: Arbitration in China* (Mar. 2004), *available at* http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=1603 (noting the following elements be required for a valid arbitration: an expression of intention to apply for arbitration, matters that should be referred to arbitration, and a designated arbitration commission).

16. *See* Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 16, *translated in* 34 I.L.M. 1650, 1654 (1995) (P.R.C.) at art. 18 (quoting Article 16, which states an arbitration agreement shall contain an expression of intention to apply for arbitration, matters for arbitration and a designated arbitration commission).

17. *See* QIAO XIN, COMPARATIVE COMMERCIAL ARBITRATION (BIJIAO SHANGSHI ZHONGCAI) 173 (Beijing: China Law Press, 2004); *see also* Steven Smith et al., *International Commercial Dispute Resolution*, 42 INT'L LAW. 363, 366 (2007) (commenting that China Arbitration Law requires arbitration agreements to contain certain requirements); *see also* Shouhua Yu, *Recognition and Enforcement of International Commercial Arbitration Awards—Focusing on Regulations and Practice in China* (2002), http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1055&context=stu_llm (noting that the three particulars must be expressly stated together or present in the arbitration agreement).

18. *See* Arbitration Law, *supra* note 16, at art. 18 (quoting Article 18, which stipulates parties may reach a supplementary agreement in the absence of clear provisions, but should the parties fail to craft a supplementary agreement, it is null and void).

19. *See id*.

20. *See id*.

21. *See* Charles Kenworthey Harer, *Arbitration Fails to Reduce Foreign Investors' Risk in China*, 8 PAC. RIM. L. & POL'Y J. 393, 399 (1999) (commenting that an ambiguous arbitration commission can invalidate the entire arbitration agreement); *see also* Taroh Inoue, *Introduction to International Commercial Arbitration in China*, 36 H.K.L.J. 171, 177 (2006) (explaining that under Article 16 of the Arbitration Law the parties must specify an arbitration commission to resolve their dispute); *see also* Jessica Zoe Renwald, Note, *Foreign Investment Law in the People's Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution*, 16 IND. INT'L & COMP. L. REV. 453, 472 (2006) (stating that the arbitration commission must be indicated with specificity, for an arbitration agreement to be valid under the Arbitration Law of China).

tary on the Chinese arbitration practice.[22] The following case may provide an illustration on how the stringent requirement of "specificity of an arbitration commission" has worked in real life.

The claimant and respondent signed a cooperation contract in 1996. Article 39 of the contract read that "any dispute under the contract should be arbitrated under the Shanghai International Trade Promotion Commission Foreign-Related Arbitration Commission." After the dispute arose, the parties resorted to the CIETAC Shanghai sub-commission, but the commission ruled that "since the arbitration commission agreed does not exist, and no subsequent supplementary submissions are available, the arbitration clause has to be voided under Articles 16 and 18 of the Arbitration Law, and thus the jurisdiction cannot be entertained."[23]

Indeed, there have been many reports that not only CIETAC, but also LACs suffered greatly from the "killing provisions" (Articles 16 and 18)[24] and that the parties' arbitral desires can be defeated if the arbitration agreements failed to clearly provide the institutional identity.[25] These defects and inconsistencies may include: selecting two arbitration commissions in one contract, providing merely the place of arbitration or institutional rules without nominating the arbitration commission, quoting incorrectly the name of the arbitration commission, and other similar mistakes.[26] As a result of the over-rigid substantive mandates, parties are not only excluded the opportunity of using ad hoc arbitration in China,[27] but their intention to arbitrate could be easily denied under the Chinese distinctive "defective-led-void" mechanism

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22. *See* JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 34, 51 (2004) (finding that arbitration agreements that do not specify an arbitral commission are defective); *see also* Xue Hong, *Online Dispute Resolution for E-Commerce in China: Present Practices and Future Developments*, 34 H.K.L.J. 377, 384 (2004) (noting that under the Arbitration Law of China the parties in an arbitration agreement must specify the arbitration commission); *see also* Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 48 (2005) (recognizing that Article 18 of the Arbitration Law specifies that arbitration agreements that do not select an arbitration commission are void).

23. *See* CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, SELECTED JURISDICTIONAL DECISIONS OF THE CIETAC 318–19 (2004); *see also* Taroh Inoue, *supra* note 21, at 182 (positing that the Arbitration Law is unique in that an arbitration agreement will be held invalid if the parties fail to specify an arbitration commission); *see also* Joseph T. McLaughlin et al., *Planning for Commercial Dispute Resolution in Mainland China*, 16 AM. REV. INT'L ARB. 133, 144 (2005) (illustrating the rigorous standard applied to the requirement of indicating an arbitration commission).

24. *See* Song Lianbin, *From Ideology to Legislation: Several Issues to Pay Attention to for Reforming the Arbitration Law,* ARBITRATION IN BEIJING 52 (2005); *see also* Eu Jin Chua, *supra* note 15, at 141–42 (discussing Article 18 and its application to CIETAC as well as other local arbitration commissions in China); *see also* Reinstein, *supra* note 22, at 44–48 (analyzing Article 18 in relation to CEITAC and other local arbitration commissions such as the Beijing Arbitration Commission).

25. *See* Zhao Jian, *Looking Back and Looking Ahead: China's International Commercial Arbitration Crossing Centuries,* ARBITRATION AND LAW 51 (2001) (unverified source); *see also* Eu Jin Chua, *supra* note 15, at 139 (explaining that if parties to an arbitration agreement do not designate an arbitration commission in the agreement it will be deemed void); *see also* Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 130 (1996) (finding that an arbitral tribunal will not have jurisdiction under the Arbitration Law unless the parties have reached a qualified arbitration agreement).

26. *See* discussion *infra* Part II.A.1. a–c (outlining the judicial efforts made to relieve the Arbitration Law of some of its exacting provisions).

27. *See* discussion *infra* Part III.A. 1–2 (discussing China's aversion to ad hoc arbitration and the problems associated with its limited use).

in regulating arbitration agreements.[28] The AL fails to resolve the problems, bringing about much difficulty in arbitral practice and leaving wide room for judicial interpretations.[29]

B. Significant Gap with International Arbitration Norms

1. Form of Consent

In examining international arbitration norms, the prevalent approach is, rather than stick to a strict signature-based form of consent, to find that the "written" requirement be satisfied as long as the communication provides sufficient proof of the written agreement.[30] Further, courts generally uphold the effect of the arbitration agreement as to its non-signatory parties.[31]

The ML provides the form requirement of arbitration agreements to ensure that parties have agreed to go to arbitration, but in attempts to ensure that the parties will not be dissuaded

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28. *See* Song Lianbin et al., *Approaches to the Revision of the 1994 Arbitration Act of the PRC*, 20 J. INT'L ARB. 169, 174 (2003) (demonstrating the difficulties encountered by the inflexible provisions of the 1994 Arbitration Act); *see also* Li Hu, *Setting Aside an Arbitral Award in the People's Republic of China*, 12 AM. REV. INT'L ARB. 1, 9 (2001) (noting that the stringent requirements needed to form a valid arbitration agreement are an undue limitation on the development of arbitration in China); *see also* Li Jing, *Preservation of Evidence in China's International Commercial Arbitration: Several Considerations*, 10 VJ 145, 145 (2006) (expressing disapproval over the rigidity of the Arbitration Law).

29. *See* Mauricio J. Claver-Carone, *Post-Handover Recognition and Enforcement of Arbitral Awards Between Mainland China and Hong Kong SAR: 1999 Agreement vs. New York Convention*, 33 LAW & POL'Y INT'L BUS. 369, 391 (2002) (illustrating the ambiguity surrounding the Arbitration Law's treatment of ad hoc awards made outside of Mainland China); *see also* Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL'Y J. 403, 411–12 (2006) (revealing the disparity between the Arbitration Law and judicial interpretations of local commissions' jurisdiction); *see also* Mark S. Hamilton, Note, *Sailing in a Sea of Obscurity: The Growing Importance of China's Maritime Arbitration Commission*, 3 ASIAN-PAC. L. & POL'Y J. 10, ¶ 23 (2002) (noting that China's Arbitration Law does not provide effective rules or procedures for enforcement of awards).

30. *See* Peter Kucherepa, *Reviewing Trends and Proposals to Recognize Oral Agreements to Arbitrate in International Arbitration Law*, 16 AM. REV. INT'L ARB. 409, 414 (2005) (recognizing under the New York Convention there simply needs to be evidence of a consent of an agreement to arbitrate); *see also* Charles H. Martin, *The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law*, 16 TUL. J. INT'L & COMP. L. 467, 494 (2008) (finding that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards allows for electronic contracts); *see also* Olagoke O. Olatawura, *The "Privity to Arbitration" Doctrine: The Withering of the Common-Law Privity of Contract Doctrine in Arbitration Law*, 16 AM. R. INT'L ARB. 429, 465 (2005) (noting that under Nigerian laws as long as the contract references a document containing an arbitration clause, it will be enforceable).

31. *See* Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 237 (2006) (asserting that the Fifth Circuit Court has held that tacit agreements are sufficient to satisfy the writing requirement); *see also* James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J. 469, 472 (2004) (showing that a non-signatory party may be bound to an arbitration agreement); *see also* Michael P. Daly, Note, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. MIAMI L. REV. 95, 103 (2007) (explaining that many international tribunals ignore the written requirement so long as there is evidence of an arbitration agreement).

from arbitration simply due to stringency of the form.[32] Article 7(2) has thus been designed to encompass a broad range of circumstances.[33] Under this provision, much jurisprudence has been developed by jurisdictions that have adopted the ML, and the general theme of this jurisprudence is that the "written" requirement can be flexibly established either as a mere formality or as a rule of evidence.[34] This can be proved by evidence of either an arbitration agreement through conduct or by an exchange of correspondence, incorporation by reference, or through

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32. *See* U.N. Comm'n on Int'l Trade Law, *Report of the Working Group on Arbitration on the Work of its Thirty-second Session*, ¶ 88, U.N Doc. A/CN.9/468 (Mar. 20–31, 2000) (emphasizing that a narrow interpretation of the model law is not beneficial); *see also* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS ¶ 2-014 (London Sweet & Maxwell 2000) (stating that the writing requirement has been one of the most controversial parts of the model law); *see also* Kucherepa, *supra* note 30, at 410 (providing that the UNCITRAL writing requirement can be optional and oral agreements to arbitrate can be binding).

33. *See* UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION ch. II, art. 7(2) (1994) (stating that

> [t]he arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another);

see also Kucherepa, *supra* note 30, at 413 (reiterating that Article 7(2) defines the writing requirement broadly); *see also* William K. Slate et al., *UNCITRAL (United Nations Commission on International Trade Law), Its Workings in International Arbitration and a New Model Conciliation Law*, 6 CARDOZO J. CONFLICT RESOL. 73, 85 (2004) (declaring that the writing requirement has been broadened and adapted to conform to modern commercial practices).

34. *See* HENRI ALVAREZ ET AL., MODEL LAW DECISIONS: CASES APPLYING THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985–2001) 37 (2003) (positing that the writing requirement is flexibly applied, allowing for many forms of communication to constitute a writing); *see also* PIETER SANDERS, THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION 68 (2d ed. 2004) (claiming that Article 7 is flexible in its requirements to accommodate for new forms of communication); *see also* Christoph Liebscher, *Interpretation of the Written Form Requirement Art. 7(2) UNCITRAL Model Law*, 8 INT'L ARB. L. REV. 2005, 164–69, 164 (2005) (claiming that the requirement can be established as a rule of evidence or a condition for validity); *see also* Jing Wang, *International Judicial Practice and the Written Form Requirement for International Arbitration Agreements*, 10 PAC. RIM. L. & POL'Y J. 375, 381 (2001) (discussing that the written requirement is beginning to waver and oral or tacit agreements will be acceptable in the future); *see also* Christopher Coakley, Note, *The Growing Role of Customized Consent in International Commercial Arbitration*, 29 GA. J. INT'L & COMP. L. 127, 148–49 (2000) (illustrating that the writing requirement can be flexibly established by referring to the arbitration agreement in the contract in question).

statements of claim and defense.[35] In this scenario, a Canadian court[36] has held that Article 7(2) of the ML does not require correspondence regarding the arbitration agreement to be signed by the parties.[37] In a similar vein, the Supreme Court of Bermuda[38] held that an arbitration agreement is valid if "the applicant's written contract constituted an offer which was accepted by the respondent's conduct. . . . 'the acceptance need not be in writing but may be inferred by conduct.'. . . "[39] Influenced by the UKAA in its domestic regime and ML in its international regime,[40] Hong Kong has construed Article 7(2) even more liberally by its legislation. Section 2AC of the Hong Kong Arbitration Ordinance[41] makes it clear that "arbitration

35. *See* ALVAREZ ET AL., *supra* note 34, at 37 (citing that courts overwhelmingly interpret Article 7 definitions broadly); *see also* SANDERS, *supra* note 34, at 68 (recognizing the exchange of briefs and incorporation by reference referring to the arbitration clause sufficient to satisfy the writing requirement); *see also* Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 24 GEO. WASH. INT'L L. REV. 17, 75 (2002) (recognizing that an arbitration agreement can be concluded by incorporation by reference); *see also* Liebscher, *supra* note 34, at 164 (showing that an arbitration agreement can be proven by an exchange of letters); *see also* Coakley, *supra* note 34, at 143–44 (remarking that Article 7 requires only that the questioned contract make reference to the arbitration clause).

36. Canada adopted the ML in 1988, which was among those first ML jurisdictions in the world. *See* Proctor v. Schellenberg, [2002] 164 Man. R. 2d 188, ¶ 12 (Can.) (revealing that the court considers a writing necessary to prove an arbitration clause); *see also* Xerox Canada Ltd. v. MPI Technologies Inc., [2006] 2006 CarswellOnt 7850, ¶ 37 (admitting the writing requirement to be necessary, but concluded that the intention of the parties was to include an arbitration clause); *see also* Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A., [1999] 45 O.R. 3d 183, ¶ 78 (holding that parties can enter into a valid arbitration agreement by incorporating to it by reference).

37. *See* Schiff Food Products Inc. v. Naber Seed & Grain Co., [1996] 149 Sask. R. 54 (Can.) (suggesting that parties may be contractually bound without ever signing documents); *see also Xerox Canada Ltd.*, 2006 CarswellOnt 7850, at ¶ 37 (positing that the parties' intentions to include an arbitration clause is valid, even absent a signed document); *see also Corporacion Transnacional de Inversiones S.A. de C.V.*, 45 O.R. 3d 183, at ¶ 78 (finding that a signed document is not necessary if the arbitration clause is incorporated by reference).

38. Bermuda adopted the ML in 1992. *See* ACE Bermuda Insurance Ltd. v. Continental Casualty Company [2007] SC Bda 12, ¶ 10 (holding that the plaintiffs are entitled to the benefit of the arbitration clause in its agreement); *see also* James H. Carter, *The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?*, 15 MICH. J. INT'L L. 785, 789 (1994) (citing that Bermuda adopted the arbitration statutes); *see also* Louis F. Del Duca, *Developing Global Transnational Harmonization Procedures for the Twenty-first Century: The Accelerating Pace of Common and Civil Law Convergence*, 42 TEX. INT'L L.J. 625, 631 (2007) (proclaiming that Bermuda has enacted legislation based on UNCITRAL).

39. *See* Skandia International Insurance Company and Mercantile & General Reinsurance Company, Case Law on UNCITRAL Texts, Case 127, The Supreme Court of Bermuda (Jan. 21, 1994) (displaying that there was no signed document indicating the existence of an arbitration clause, but rather it was inferred by the parties' conduct); *see also* ALVAREZ ET AL., *supra* note 34, at 38–39 (citing that the arbitration provision was incorporated by reference).

40. Hong Kong adopted the ML in 1996 to govern its international regime by its revision to the Hong Kong Arbitration Ordinance. Domestic arbitrations taking place in Hong Kong still follow pretty much the UKAA. *See* Arbitration Ordinance (1996) Cap. 341, § 2AC(2) (H.K.) (codifying the model law into Hong Kong's arbitration ordinance); *see also* Peter S. Caldwell, *Maritime Arbitration in Hong Kong*, 22 TUL. MAR. L.J. 155, 159–60 (1997) (providing Hong Kong's new definition of what constitutes an arbitration agreement, based on the model law); *see also* Chuncheng Lian, *Commercial Arbitration in Hong Kong and China: A Comparative Analysis*, 18 U. PA. J. INT'L ECON. L. 297, 316 (1997) (informing that Hong Kong recognizes that an arbitration clause is separable from the contract in question).

41. *See* Hong Kong Arbitration Ordinance, § 2AC(4) (explaining that a writing includes "any means by which information can be recorded").

agreement in writing" includes any means by which information can be recorded[42] with a wide array of illustrative examples.[43] In particular, Section 2AC clarifies the portion of Article 7(2) of the ML that deals with "incorporation of arbitration agreements by reference."[44] Modeled after Section 5(6) of the UKAA, the section provides that "[t]he reference in an agreement written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement."[45] Indeed, courts in Hong Kong have interpreted this provision very liberally by stating that "what the tribunal or court must determine, as a matter of construction, is whether parties intended to incorporate an arbitration agreement and there is no need for words specifically incorporating it."[46] Likewise, the writing requirement has been construed liberally under the case law in the UK.[47] In a pair of recent cases, the English Court of Appeals concluded that an arbitration clause that was a standard condition of contract was properly incorporated by reference through an "incorporation clause" into the final contract and binding, although no specific reference was made to the arbitration clause in the incorporation provision.[48]

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42. *See id*. at § 2AC(2) (stating "[t]he agreement is in writing if it is made by an exchange of written communication; or although not itself in writing, it is evidenced in writing; or although made otherwise than in writing, it is recorded in writing; or there is an exchange of written submission in arbitral or legal proceedings in which the existence of an agreement otherwise in writing is alleged by one party and not denied by the other party (waiver of objection)").

43. *See id*. at § 2AC(3) (defining a reference in an agreement).

44. *See id*. (explaining what constitutes a reference within an agreement); *see also* Arbitration Act, 1996, c. 23, § 5(6) (U.K.) (stating that references apply to writings recorded by "any means").

45. *See* Astel-Peiniger Joint Venture v. Argos Eng'g & Heavy Indus. Co. Ltd., [1995] 1 H.K.L.R. 300, 306–7 (H.C.) (explaining that the intention of the parties is determinative of the arbitration's enforceability); *see also* Lucky-Goldstar Int'l (H.K.) Ltd. v. NG Moo Kee Eng'g Ltd. [1993] 2 H.K.L.R. 73, 73–75 (H.C.) (holding that the arbitration clause was valid because the parties intended it to be part of the contract); *see also* Gu Weixia, Essay and Note, *Recourse Against Arbitral Awards: How Far Can a Court Go? Supporting and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration*, 4 CHINESE J. INT'L L. 481, 490–91 (2005) (stating that courts will examine "other relevant considerations" in addition to the words of the arbitration agreement).

46. *See* XL Ins. Ltd. v. Owens Corning (1999) 1999 WL 33114351 (H.C.) (implying that courts can examine the intention of the parties when determining whether a particular agreement existed); *see also* Susan L. Karamanian, *supra* note 30, at 75 (commenting that the UK Arbitration Act liberally interprets arbitration agreement requirements); *see also* Adam Sulkowski, *Polish Arbitration Law Analyzed and Applied to the Procedural Scenarios of Chromalloy*, 10 AM. REV. INT'L ARB. 247, 257–58 (1999) (noting that the UK liberally interprets the written requirement of arbitration agreements).

47. *See* Welex AG v. Rosa Mar. Ltd. (2003) 2 LLOYD'S REP. 509 (A.C.) (holding that the parties intended to include an arbitration clause); *see also* Sea Trade Mar. Corp. v. Hellenic Mut. War Risks Ass'n (Bermuda) Ltd. (2006) 1 LLOYD'S REP. 280 (Q.B.) (holding that the arbitration agreement was binding against the parties).

48. *See* J. Douglas Uloth & J. Hamilton Rial III, *Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—a Bridge Too Far?*, 21 REV. LITIG. 593, 599–602 (2002) (listing several ways that would compel a court to extend the terms of an arbitration agreement to a non-signatory); *see also* Dwayne E. Williams, *Binding Non-signatories to Arbitration Agreements*, 25-SPG FRANCHISE L.J. 175, 176 (2006) (implying that courts are willing to side in favor of enforcing arbitration agreements against non-signatories); *see also* Keisha I. Patrick, Note, *The Tie That Doesn't Bind: Fifth Circuit Rules That Non-signatory Agents Can't Compel Arbitration as Individuals*, 2003 J. DISP. RESOL. 583, 587–88 (2003) (citing several courts that have held that non-signatories can be bound to arbitration agreements).

Moreover, the practice of extending the arbitration agreement to non-signatory third parties has been generally accepted.[49] Although the ML does not deal with the issue directly, national courts in jurisdictions that have adopted it have successfully developed the jurisprudence in favor of this extension.[50] In terms of contract assignment, the prevailing notion is that if a party has agreed to an arbitration agreement, its assignee is bound by it.[51]

This view of arbitration clauses and contract assignees has been endorsed by a series of cases in Germany.[52] In one such case, the Federal Court held that the buyer of real estate is bound by the arbitration clause in a tenancy agreement covering the same property entered into by its old owner (the seller).[53] Likewise, Singapore[54] has supported the effect of the arbitration agreement on legal successors in a case in which the High Court decided that the receiver in an insolvency proceeding was bound by an arbitration agreement entered into by the insolvent

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49. *See* Denney v. BDO Seidman, L.L.P., 412 F.3d 58, 70 (2d Cir. 2005) (commenting that courts have previously held that an arbitration agreement can be extended to non-signatories); *see also* Int'l Paper Co. v. Schwabedissen Maschienen & Anlagen GMBH, 206 F.3d 411, 416–17 (4th Cir. 2000) (stating that it is well-established law that a non-signatory can be forced to arbitrate); *see also* James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J. 469, 499 (2004) (noting that the Model Law does not "specifically deal" with arbitration regarding third party non-signatories).

50. *See* Thomson-CSF, S.A. v. Am. Arb. Ass'n, 64 F.3d 773, 776–77 (2d Cir. 1995) (relying on the traditional principles of agency laws that "may bind a non-signatory to an arbitration agreement"); *see also* Hosking, *supra* note 49, at 496–500 (emphasizing that while there is no specific rule on point, the courts generally hold that arbitration agreements are prima facie assigned with the rest of the contract); *see also* Michael P. Daly, Note, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. MIAMI L. REV. 95, 102 (2007) (commenting that an assignee to a contract that includes an arbitration agreement may be bound by the terms of the arbitration agreement).

51. *See* Andrea Vincze, *Arbitration Clause—Is It Transferred to the Assignee?*, NORDIC J. COM. L., 1, 3 (2008), *available at* www.njcl.fi/1_2003/article4.pdf (discussing the transferability of arbitration obligations in various ML jurisdictions). *But see* Lachmar v. Trunkline LNG Co., 753 F.2d 8, 9–10 (1985) (holding that an assignee is not bound by an assignor's duty to arbitrate unless he expressly agrees to be so bound). *See generally* ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 151 (4th ed. 2004) (noting that the effect of the assignment of an arbitration clause will depend on the laws under which the contract was made).

52. *See* REDFERN ET AL., *supra* note 51, at 151 (noting that German courts presume arbitration agreements are automatically transferred to an assignee); *see also* FRANZ SCHWARZ & HANNO WEHLAND, THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: INTERNATIONAL ARBITRATION 2007 175 (2007) (asserting that under German law assignees are bound to arbitration agreements contained in the assigned contract); *see also* Vincze, *supra* note 51, at 3 (discussing the decision by the German Federal Constitutional Court which held that arbitration clauses are automatically transferred).

53. *See* Daniel Busse, *Privity to an Arbitration Agreement*, 8(3) INT'L ARB. L. REV. 95, 97 (2005) (noting the effect of arbitration clauses on third parties in Germany); *see also* Norbert Horn, *The Arbitration Agreement in Light of Case Law of the UNCITRAL Model Law*, 8(5) INT'L ARB. L. REV. 146, 148 (2005) (discussing two cases handed down by the German Federal Court which held that legal successors to a contract are bound by arbitration agreements contained therein); *see also* Stefan Kroll, *German Court Enforces Domestic Award Against a Third-Party Non-signatory to the Arbitration Agreement*, Case Comment, 10(2) INT'L ARB. L. REV. N18, N18–19 (2007) (positing that the application of arbitration clauses on non-signatory third parties is a matter of contract interpretation).

54. *See* International Arbitration Act § 3(1) (Jan. 27, 1995) (Singapore), *available at* http://statutes.agc.gov.sg (adopting the Model Law in Singapore); *see also* Gordon Smith et al., *The UNICITRAL Model Law and the Parties' Chosen Arbitration Rules*, 6 VINDOBONA J. INT'L COM. L. & ARB. 194, 195–96 (2002) (discussing Singapore as a Model Law country); *see also* Jack Lee & Tsen-Ta, *Separability, Competence—Competence and the Arbitrator's Jurisdiction in Singapore*, 7 SINGAPORE ACAD. L.J. 421, 435 (1995) (noting the enactment of the International Arbitration Act that codifies the Model Law).

debtor.[55] Moreover, a court in Canada confirms that an agent of a party giving consent to arbitration can bind its principal if the main contract where the arbitration clause appears binds the principal as well.[56] The validity of arbitration agreement in the circumstances of agency relationship is also recognized in Hong Kong[57] and Austria.[58] Additionally, the "long-arm" effect of arbitration agreements on the non-signatory third party is confirmed under cases interpreting the UKAA.[59] A couple of recent cases in the English Court of Appeals held that the validity of an arbitration agreement will be presumed in contract assignment and in subrogation unless there is a clear restriction in the arbitration agreement stating that the arbitration clause cannot be transferred.[60]

2. Specificity as to Arbitral Institution

With respect to the substantive content provisions for an arbitration agreement to be valid, under the prevailing practice in the international arbitration community, an agreement is valid if the parties provide the scope of arbitrable disputes (arbitrability) and show their inten-

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55. *See* Rajesh Muttah & Michael Hwang, Case Comment, *Singapore: Incorporation of Arbitration Clause Requires Clear and Specific Reference*, 3(3) INT'L ARB. L. REV. N42, N42–43 (2000) (examining the holding of Concordia Agritrade Pte Ltd v. Cornelder Hoogewerff Pte Ltd).

56. *See* Automatic Systems v. E.S. Fox [1994] 12 B.C.L.R.2d 148 (Can.) (remitting the decision as to the validity of the arbitration agreement to the Ontario Court of Justice). *See generally* Automatic Systems v. Bracknell, [1994] 113 D.L.R. 449 (Can.) (holding that the strong legislative preference for arbitration should be overcome only by strong language in a contract to preclude it); *see generally* Benner & Assoc. v. Northern Lights Distrib. [1995] 22 B.C.L.R.2d 79 (Can.) (explaining that a court will look to the intent of the parties to determine the proper construction of an arbitration clause).

57. *See* Chung Siu Hong v. Primequine Corp. [1999] H.K.C.U. 1211, (C.F.I.) (holding that parties will be held to arbitration where the express provisions of the contract require it).

58. *See* Christian Koller & Natascha Tunkel, *An Outline of the New Austrian Arbitration Act Based on UNCITRAL Model Law*, 10 VINDOBONA J. OF INT'L COMM. L. & ARB. 27, 44 (2006) (indicating that the UNCITRAL Model Law has full force and effect in Austria as of July 1, 2006); *see also* Vera van Houtte et al., *What's New in European Arbitration?*, 61 DISP. RESOL. J. 8, 9 (2006) (indicating that the Austrian arbitration act adopted the Model Law and applies to cases commencing on or after July 1, 2006); *see also The New Austrian Arbitration Act* (Graf, Maxl & Pitkowitz, Vienna, Austria) Feb. 2006, at 1 (discussing the scope of the application of the model law in the Austrian Arbitration Act).

59. *See* WENDY MILES & KATE DAVIS, THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: INTERNATIONAL ARBITRATION 2007 110 (2007) (acknowledging that although England is hesitant to compel non-signatories to arbitration, certain legal theories such as agency and alter ego principles may be successfully advanced). *But see* Peterson Farms v. C & M Farming [2004] N.P.C. 13 (Eng.) (rejecting the group of countries' doctrine to compel a non-signatory party to arbitration); *but see* London v. Sancheti [2008] EWCA (Civ) 1283 (Eng.) (holding that a subsidiary claiming the benefit of an arbitration agreement to which it was not a party was entitled to a stay of court proceedings in favor of arbitration).

60. *See* Wealands v. CLC Contractors [1999] 2 Lloyd's Rep. 739 (A.C.) (ruling in favor of arbitration in third party proceedings where the third parties were covered by the arbitration clause); *see also* X Ltd v. Y Ltd [2005] BUILDING LAW REP. 342, *reprinted in* ARBITRATION LAW: FROM 1996 UK ARBITRATION ACT TO INTERNATIONAL COMMERCIAL ARBITRATION (China Law Press, 2006); *see also Update: Legal Notes on Construction Matters* (Manches LLP, London, UK), Winter 2005, at 32 (examining whether contribution, misrepresentation and negligent misstatement fell within the ambit of the arbitration clause).

tion to arbitrate.[61] Beyond these core ingredients, there are some other considerations that may be included, such as the institution chosen, place of arbitration, method of appointment and qualification of the arbitrators, and the applicable law, among others.[62]

These provisions guiding an arbitration agreement's substantive content are clearly shown in Articles 7(1) and 8(1) of the ML. Article 7(1) stipulates that parties should put into their arbitration agreement all or certain disputes they want to subject to arbitration.[63] In addition, pursuant to Article 8(1), the court shall refer parties to arbitration unless it finds the agreement is null and void, inoperative, or incapable of being performed.[64] Thus, under the ML framework, an "arbitration institution" has been suggested for inclusion as one of the relevant considerations rather than an indispensable element for valid construction.[65] The Working Group of the ML thought they should not set out separate grounds for the validity of the arbitral agreement apart from the "intention to arbitrate" and "scope of arbitration," mainly because the for-

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61. The prevailing notion is that there are two essentials which should be contained in every effective arbitration agreement: (1) the agreement to arbitrate (intent to arbitrate) and (2) the scope of the agreement (arbitrability). *See* REDFERN ET AL., *supra* note 51, at 3-4 (outlining the historical development of the arbitration process as one of willing parties); *see also* LIU XIAOHONG, JURISPRUDENCE AND EMPIRICAL RESEARCH OF INTERNATIONAL COMMERCIAL ARBITRATION (Guoji Shangshi Zhongcai Xieyi de Fali yu Shizheng Yanjiu) 51–2, 57–9 (2005); *see also* Julian D.M. Lew, *Arbitration Agreement: Form and Character*, *in* ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION 55 (Sarcevic ed., 1989) (noting that the intention to arbitrate is an essential element of an arbitration); *see also* Robert F. Windfohr & Anne Burnet Windfohr, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287, 354–55 (1999) (referencing the importance of the intent of the parties to enter into the arbitration process).

62. *See* Lew, *supra* note 61, at 55 (establishing that arbitration agreements typically take into account procedural elements such as jurisdiction, applicable law, and selection of arbitrators); *see also* Thomas S. Breckenridge, *International Arbitration: A Historical Perspective and Practice Guide Connecting Four Emerging World Cultures: China, Mexico, Nigeria, and Saudi Arabia*, 17 AM. REV. INT'L ARB. 183, 227–28 (2006) (noting that the method of selecting arbitrators is typically included in the arbitration agreement); *see also* Kenneth R. Davis, *A Proposed Framework for Reviewing Punitive Damages Awards of Commercial Arbitrators*, 58 ALB. L. REV. 55, 69 n.117 (1994) (commenting that the arbitrator is usually bound by the choice of law in the arbitration agreement).

63. *See* U.N. Comm'n on Int'l Commercial Arb., *UNCITRAL Model Law on International Commercial Arbitration*, art. 7, U.N. Doc. A/40/17, annex I and A/61/17, annex I (July 7, 2006) *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (defining an arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in respect of a legal relationship, whether contractual or not).

64. *See id*. at art. 8 (stating that a court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds the agreement is null and void, inoperative or incapable of being performed); *see also* Richard W. Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent Is Not "Clear and Unmistakable,"* 17 AM. REV. INT'L ARB. 545, 568 (2006) (citing instances where British Courts have found arbitration agreements null and void); *see also* Richard H. Kreindler, *"Arbitral Forum Shopping": Observations on Recent Developments in International Commercial and Investment Arbitration,* 16 AM. REV. INT'L ARB. 157, 164 (2005) (establishing that courts can proceed with their own actions if they find an arbitration agreement null and void).

65. *See* Paul A. Gelinas, *"Arbitration Clauses: Achieving Effectiveness," in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENT AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION: ICCA CONGRESS SERIES NO.9 47 (Albert van den Berg, ed., 1998) (offering support for the inclusion of the expertise of arbitrators in constructing arbitration agreements); *see also* Toby Landau, *Composition and Establishment of the Tribunal: Articles 14 to 36*, 9 AM. REV. INT'L ARB. 45, 46 (1998) (noting that clauses in the arbitration agreement dealing with arbitrators are often carefully constructed); *see also* Tom Stilwell, *Correcting Errors: Imperfect Awards in Texas Arbitration,* 58 BAYLOR L. REV. 467, 521 (2006) (establishing that arbitration agreements often adopt the standards of conduct of the arbitrating body).

mulation of an exhaustive list would cause many defective arbitration agreements and lead to lengthy litigation challenging jurisdiction both at the outset and during award enforcement.[66] The ML prefers the "intent over defect" rule of interpretation, which does not follow the strict textual interpretation and upholds the parties' drafting autonomy as much as possible.[67]

Under the ML jurisprudence, the adopting jurisdictions have generally made considerable efforts to give effect to the parties' agreement to arbitrate and intentions rather than stick to the seemingly uncertain language on arbitration institution.[68] And the national courts have always attempted to uphold an arbitration clause, unless the uncertainty is such that it is difficult to make any sense of it under Article 8(1).[69] The Court of Appeal in Hamburg gave effect to an arbitration clause that simply used the language, "Arbitration-Hamburg Institution."[70] The German Federal Court subsequently pointed out that an arbitration agreement can validly refer to two different courts of arbitration and the claimant will be given the choice between the two options.[71] An extreme case showing the tendency of courts to interpret an agreement in favor of finding a technically defective arbitration agreement valid in the ML jurisdictions is in *Lucky-Goldstar v. Ng Moo Kee Engineering,* where the High Court of Hong Kong held the arbitration clause was valid even though it said "arbitration in a third country and in accordance

66. *See* U.N. Comm'n on Int'l Trade Law, *Report of the Working Group on International Contract Practices on the Work of Its Third Session*, ¶ 25, U.N. Doc. A/CN.9/216 (Feb. 16–26, 1982) (establishing that the question of validity of an arbitration agreement will be left up to applicable law rather than an international standard); *see also* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS ¶ 2-014 (London Sweet & Maxwell 2000) at 53; *see also* Stephen R. Bond, "*How to Draft an Arbitration Clause,*" 6 J. OF INT'L ARB., 65 (1989); *see also* Lew, *supra* note 61, at 55 (noting that the intention to arbitrate is an essential element of an arbitration).

67. *See* JULIAN D.M. LEW ET AL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 138 (2003) (emphasizing intent over defect in assessing the validity of an arbitration agreement); *see also* Davis, *supra* note 62, at 74 (commenting that the arbitrator is usually bound by the choice of law in the arbitration agreement); *see also* Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L. J. 105, 121–22 (1997) (noting that courts are reluctant to adopt form arbitration clauses contrary to party intent).

68. *See* Martin Davies*, Court Ordered Interim Measures in Aid of International Commercial Arbitration,* 17 AM. REV. INT'L ARB. 299, 323–24 (2006) (citing disagreement in German courts as to whether parties' intent controlled jurisdiction); *see also* Peter Kucherepa, *Reviewing Trends and Proposals to Recognize Oral Agreements to Arbitrate in International Arbitration Law*, 16 AM. REV. INT'L ARB. 409, 415–16 (2005) (noting that the High Court of Hong Kong has held that parties' intent must be evinced in writing and correspondence); *see also* Elizabeth Shackelford, Note, *Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration*, 67 U. PITT. L. REV. 897, 900 (2006) (commenting that considerations of original parties' intent are paramount in establishing the jurisdiction of an arbitration tribunal).

69. *See* ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 3–69 (4th ed. 2004) (noting that courts try to uphold arbitration clauses unless they make no sense); *see also* Alan S. Kaplinsky & Mark Levin, *Consumer Financial Services Arbitration: Last Year's Trend Has Become This Year's Mainstay*, 54 BUS. LAW. 1405, 1405 n.15 (1999) (emphasizing that courts are often eager to uphold arbitration clauses); *see also* Amy J. Schmitz, *Mobile-Home Mania? Protecting Procedurally Fair Arbitration in a Consumer Microcosm*, 20 OHIO ST. J. ON DISP. RESOL. 291, 314–15 (2005) (noting the courts' preference for upholding arbitration clauses whenever possible).

70. *See* Hanseatisches Oberlandesgericht Hamburg [OLGZ] [Trial Court for Select Civil Matters], January 24, 2003, Germany.

71. *See* Norbert Horn, *The Arbitration Agreement in Light of Case Law of the UNCITRAL Model Law*, 8(5) INT'L ARB. L. REV. 146, 150 (expressing that courts have a tendency to carry out a favorable interpretation of defective causes and the German Federal Court found a valid agreement where it referred to two different courts of arbitration).

with the rules of International Arbitration Association."[72] The High Court found that the arbitration clause sufficiently indicated the parties' intention to arbitrate.[73] In the words of Justice Kaplan, "The arbitration agreement was not inoperative or incapable of being performed since arbitration could be held in any country other than the countries where the parties had their places of business."[74]

The UK has taken a similar approach, and English courts tend to give the widest interpretation of defective arbitration agreements and to grant the tribunal full jurisdiction except in cases of hopeless confusion.[75] Section 3 of the 1996 UKAA requires the parties only to subject their disputes to an arbitration panel in a particular place ("arbitral seat") or under specific rules ("procedural law").[76] Under the English law, the choice of the procedural law of arbitration would imply the country in which the arbitration has its seat,[77] and the selection of either will be sufficient to show the parties' intention to arbitrate.[78] If neither the seat nor the procedural law has been agreed to, the effect of the arbitration agreement will be determined after looking

72. *See Lucky-Goldstar*, 2 H.K.L.R. at 74 (articulating that the court found in favor of a valid arbitration agreement and that the plaintiffs were fortunate to have a forum to arbitrate in).

73. *See id*. at 76 (holding that it was perfectly clear that the parties intended to arbitrate any disputes that might arise under the contract).

74. *See id*. at 74 (reasoning that the arbitration clause cannot be said to be inoperative or incapable of being performed).

75. *See* George Burn & Elizabeth Grubb, *Insolvency and Arbitration in English Law*, INT. A.L.R. 8(4), 124, 128 (2005) (providing that English courts have broad and wide discretion to do what is right and fair in the circumstances to determine validity in the claim); *see also* Horn, *supra* note 71, at 150 (arguing that the English courts had a wide interpretation of arbitration agreements in favor of validity because courts would look to the intention of the parties to determine validity even though two different courts were writing the agreement); *see also* Domenico Di Pietro, *The Influence of the New Law on Arbitration Agreements and Arbitrato Irrituale*, INT. A.L.R. 10(1), 18, 18 (2007) (suggesting that other countries have adopted liberal arbitration provisions such as England which has displaced traditional venues such as France and Switzerland since the adoption of the English Arbitration Act of 1996).

76. *See* U.K. Arbitration Act, 1996 (providing that the arbitral seat is designated (a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or person vested by the parties with powers to fix the seat, or (c) by the arbitral tribunal if so authorized by the parties, or determined, in absence of any such designation, having regard to the parties' agreement and all the relevant circumstances).

77. *See* ABB Lummums Global LTD v. Keppel Fels Ltd (1999), 2 LLOYD'S REP. 24 (Q.B.D.) (maintaining that if the parties do make an express choice of procedural law to govern their arbitration, the court looks to the place for arbitration which governs the procedural law); *see also* Union of India v. McDonnell Douglas Corp. (1993) 2 Lloyd's Rep. 48 (Q.B.D.) (concluding that choosing London as the "seat" is not just the place of arbitration, it also means the choice of law to govern the arbitration proceedings); *see also* Gu Weixia & Joshua A. Lindenbaum, *The NYPE 93 Arbitration Clause: Where Ends the Open-End?*, 37 J. MAR. L. & COM. 245, 249 (2006) (rationalizing that England regards it as essential for an arbitration to have a geographical location to which arbitration is tried and in the absence of agreement, it prescribes the procedural law of the arbitration).

78. *See* Derek P. Auchi, *The Liberal Interpretation of Defective Arbitration Clauses in International Commercial Contracts: A Sensible Approach*, A.L.R. 2007, 10(6), 206, 211 (2007) (arguing that once the parties have made their intention to arbitrate perfectly plain it is sufficient to find arbitration); *see also* Horn, *supra* note 71, at 150 (arguing that the English courts had a wide interpretation of arbitration agreements in favor of validity because courts would look to the intention of the parties to determine validity, even though two different courts were writing the agreement); *see also* William Tetley, *Good Faith in Contract: Particularly in the Contracts of Arbitration*, 35 J. MAR. L. & COM. 561, 614 (2004) (asserting that arbitration agreements usually refer to arbitration in London or New York, where the disputes are governed by the procedural law of the place of arbitration).

at the parties' agreement and all the relevant circumstances.[79] In a pair of recent cases, the arbitration clauses contained in the charter were extremely abbreviated such that they consisted of only the words "Arbitration-London."[80] Nevertheless, the courts were unwilling to deny the effect due to uncertainty; rather, they "expanded" the clause in accordance with the parties' "presumed" intentions.[81]

The "specificity to arbitral institution" has never been required as a cardinal factor for a determination of validity in international arbitration practice.[82] However, difficulties might arise in an institutional arbitration jurisdiction such as China, where a stringent restriction on the party's drafting autonomy has been imposed by the creation of a requirement to designate clearly and unequivocally the name of the arbitral institution, which is rare practice among modern arbitration regimes.[83] On the one hand, the Chinese provision puts too heavy a bur-

79. *See* U.K. Arbitration Act (providing that the arbitral seat is designated (a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or person vested by the parties with powers to fix the seat, or (c) by the arbitral tribunal if so authorized by the parties, or determined, in absence of any such designation, having regard to the parties' agreement and all the relevant circumstances); *see also* Auchi, *supra* note 78, at 213 (asserting that a prerequisite to the arbitration clauses incorporation is where all the circumstances are clear that the parties intended to embrace such a clause); *see also* Shivani Singhai, *Independence and Impartiality of Arbitrators*, INT. A.L.R. 2008, 11(3), 124, 127 (2008) (maintaining that the court should consider the relevant circumstances and apply the real danger test to determine whether there was a valid arbitration clause).

80. *See* Tritonia Shipping Inc v. South Nelson Forest Prod. Corp. (1996), 1 Lloyd's Rep. 114, 114 (C.A.) (holding that the arbitration clause was not too vague and short to be intelligible when it states arbitration shall be held in London); *see also* Dubai Islamic Bank PJSC v. Paymentech Merchant Serv., Inc. (2001), 1 Lloyd's Rep 65, 67 (Q.B.D.) (asserting that the factors pointing to England as the seat was that the appeal took place in London and all the administrative work was done there).

81. *See* CLARE AMBROSE & KAREN MAXWELL, LONDON MARITIME ARBITRATION 30 (2d ed. 2002); *see also Tritonia Shipping Inc*., 1 Lloyd's Rep. at 116 (discussing the interpretive powers of the court); *see also Dubai Islamic Bank PJSC*, Lloyd's Rep. at 70 (establishing that court is allowed wide interpretation to determine the seat of arbitration); *see also* Gu Weixia & Lindenbaum, *supra* note 77, at 249 (informing that courts will expand brief arbitration clauses according to the parties' intent).

82. This approach has been concluded through research on the most authoritative textbooks on international commercial arbitration. *See* W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 81–83 (2d ed. 1990) (using examples to show that it is helpful for parties to choose the laws for their arbitration); *see also* PHILIPPE FOUCHARD ET AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 262–63 (2d ed. 1999) (displaying the flexibility allowed toward arbitration agreements); *see also* JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 138, 165–72 (2003) (outlining the elements of the arbitration agreement); *see also* ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 151, 165–68 (4th ed. 2004), (explaining unless there is uncertainty to the degree the arbitration agreement is difficult to understand, courts will still uphold the agreement).

83. *See* Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 16, 18 *translated in* 34 I.L.M. 1650, 1654 (1995) (P.R.C.) (outlining the specifics of China's Arbitration Law); *see also* Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 139 (2006) (summarizing the restrictions embodied in articles 16 and 18 in the Arbitration Law). *See generally* Ashby Jones & Andrew Batson, *Concerns About China Arbitration Rise*, WALL ST. J., May 9, 2008, at B.1 (reporting problems with the Chinese system of arbitration that are considered riskier than Western arbitration).

den on the validity of all arbitration agreements; on the other hand, it fails to provide solutions to fixing arbitration agreements that are defective in this regard.[84]

II. Judicial Efforts to Relax the Legislative Rigidity

Because of the over-rigidity and inherent deficiency of the AL in recognizing the validity of arbitration agreements, the judiciary has stepped in to address the practical problems stemming from the stringent requirement. Since the promulgation of the AL, approximately 30 interpretative documents have been released by the SPC regarding the handling of arbitration cases,[85] which constitutes an important source of the legal framework of Chinese arbitration. With respect to the "defective" arbitration agreements, judicial replies (*pifu*) and opinions (*yijian*) have centered upon how to broaden the scope of the formal "written requirement" and liberalize the "institutional ambiguity" in substance.[86] In the meantime, although the official judicial interpretative power is vested only in the SPC, some LHPCs in more economically well-developed areas have also made their contributions to regulatory development in this regard.[87] Given the remarkable numbers of the replies and opinions issued by both the central and local judiciary, this section details the developments in chronological order from 2006, which is considered the turning point, when the SPC promulgated the very impressive "unified judicial interpretation on arbitration law" based on its accumulated experience over more than a decade.[88]

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84. *See* Eu Jin Chua, *supra* note 83, at 139 (explaining the burden of proof and reasons for voiding agreements under Articles 16 and 18 in the Arbitration Law); *see also* Eu Jin Chua et al., *Arbitration in the PRC*, CHINA L. & PRAC. (London), May 2005, at 1 (noting that if Article 16 of the Arbitration Law is not fully complied with, arbitration can be frustrating). *See generally* Jerome A. Cohen, *Time to Fix China's Arbitration*, 168 FAR E. ECON. REV. 31, 32 (2005) (discussing structural problems in China's arbitration system that lead to unfairness).

85. See Appendix in SELECTED JURISDICTIONAL DECISIONS BY THE CIETAC 601–33 (CIETAC ed., 2004); see also Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL'Y J. 403, 413 (2006) (establishing that the Supreme People's Court has issued over a dozen interpretations of the Arbitration Law); *see also* Andrew Aglionby, *An Arbitration Clause Safety Net*, FINANCIAL TIMES (London), Apr. 12, 2006, at 10 (describing how the Supreme People's Court is interpreting the Arbitration Law). *See generally* John Choong, *Clarifying the PRC Arbitration Law: Questions and Answers*, CHINA L. & PRAC. (London), Nov. 2006, at 1 (announcing the release of the Supreme People's Court's interpretation of the Arbitration Law).

86. *See* Li Hu, *Setting Aside an Arbitral Award in the People's Republic of China*, 12 AM. REV. INT'L ARB. 1, 9–10 (2001) (discussing the limitations of the writing requirement and how it may be expanded in the future); *see also* Andrew Aglionby, *supra* note 85, at 10 (reporting that the Supreme People's Court is making efforts to broaden the Arbitration Law). *See generally* Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 BERKELEY J. INT'L L. 329, 346 (1997) (describing the limitations and criticisms of Article 16 of the Arbitration Law).

87. *See* Jian Zhou, *supra* note 85, at 408 (informing that the lower courts in China are deciding cases that traditionally would be decided by the Supreme People's Court); *see also* Haung Jin & Du Huanfang, *Chinese Judicial Practice in Private International Law: 2003*, 7 CHINESE J. INT'L L. 227, ¶ 31–32 (2008) (exemplifying the trend of lower Chinese courts interpreting arbitration law and the higher courts rejection of the trend). *See generally* David T. Wang, Comment, *Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System*, 48 SANTA CLARA L. REV. 649, 650–52 (2008) (clarifying the levels of the court system in China).

88. *See* discussion *infra* in part III.B. of this Article.

A. The First Decade: From 1995 to 2005

This part of the discussion concerns the judicial interpretations on defective arbitration agreements by both the SPC and LHPCs in the period from 1995 to 2005. Moreover, it reads between the lines of these interpretative documents to explore the difference in approach of the central and local judiciaries toward the drafting autonomy of arbitration and underlying reasons for the difference.

1. Interpretative Documents by the SPC

On "Non-Signatory Third Party"

a. Incorporation by reference

For contracts where arbitration agreements are not directly included, incorporation by referring to an existing document that contains an arbitral clause has been recognized as satisfying the "written" requirement under Article 16 of the AL.[89] This was explicitly affirmed by the 1996 SPC reply in the *Sino-Mongolian* case,[90] where the contract provided that "matters not covered in the contract shall be governed by the Joint Conditions of the Delivery Protocol between China and Mongolia"[91] in which arbitration was provided as the means of dispute resolution.[92]

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89. As Wang Shengchang put it,

> In complex transactions involving numerous contracts based on standard terms and conditions, it is sometimes found that a standard or *borrowed* arbitration agreement has been used. This means that the parties, familiar with a provision for arbitration agreement contained in another document, *simply introduce that provision into their contract by reference to it*, as it stands.

See WANG SHENGCHANG, RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA 77, 78 (1997) (*emphasis added*) (defining the term "incorporation by reference"). *See generally* Li Hu, *supra* note 86, at 9–10 (mentioning how the written requirement could be expanded); *see generally* Gu Weixia, Essay and Note, *Recourse Against Arbitral Awards: How Far Can a Court Go? Supporting and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration*, 4 CHINESE J. INT'L L. 481, 489 (2005) (discussing how limiting a strict writing requirement is to arbitrations).

90. *See* SPC Reply on the Manner of Determining Jurisdiction in a Sino-Mongolian Contract That Fails to Provide for Arbitration Directly (issued by the Sup. People's Ct., Dec. 14, 1996) 1996 Fa Han No. 177 (P.R.C.) (affirming the 1996 Supreme People's Court reply in the Sino-Mongolian case).

91. *See* The Protocol on Mutual Joint Conditions for the Delivery of Goods Between Trade Entities of the Two Countries Agreed by MOFTEC of the People's Republic of China and the Department of International Economy and Supply of the People's Republic of Mongolia (Nov. 8, 1988) (P.R.C.) (stating that matters not covered in the contract shall be governed by the Joint Conditions of the Delivery Protocol between China and Mongolia).

92. *See* TANG DEHUA & SUN XIUJIN, ZHONGCAIFA JI PEITAO GUIDING XINSHI XINJIE [or ARBITRATION LAW AND NEW JUDICIAL INTERPRETATIONS] 152–53 (Beijing, People's Court Publ'g 2003) (P.R.C.) (stating that arbitration is provided as the means of dispute resolution).

b. Contract Assignment

Prior to the promulgation of the CL,[93] the judiciary and arbitration commissions were divided on how to give effect to arbitration agreements in cases of contract assignment.[94] The People's courts held that, notwithstanding the assignment, the arbitration agreement included would be binding only on the assignor and could not automatically extend to the assignee.[95] However, CIETAC generally preferred the more liberal approach of finding that once a contract had been assigned, any arbitration agreement therein contained was assigned as well.[96] Given the conflicting views and practices, the SPC issued its judicial opinions via a reply to the Hubei Higher People's Court in 1999 (the SPC Hubei Reply).[97] The SPC pointed to Article 80 of the newly promulgated CL, which provides that the assignee will acquire all accessory rights related to the main contractual rights following the assignment.[98] Therefore, any arbitration agreement contained in the original contract would be binding on the assignee as part of

93. *See* Contract Law (promulgated by the Second Session of the Ninth Nat'l People's Cong., March 15, 1999, effective Oct. 1, 1999), art. 11, *available at* http://novexcn.com/contract_law_99.html.

94. *See* JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 34, 40 (2004) (explaining that the Arbitration Law fails to address the ramifications when a contracting party assigns its rights to a third party); *see also* JINGZHOU TAO, RESOLVING BUSINESS DISPUTES IN CHINA 2802, 3004 (2005) (stating that the Arbitration Law fails to address the binding force of an arbitration agreement in the circumstance of contract assignment). *See generally* Brown & Rogers, *supra* note 86, at 329 (elaborating that arbitration in China's emerging marketplace is still subject to many of the limitations that plague China's court system).

95. *See* S.P.C. Case Comments on the *S.P.C. Reply to the Zhejiang Higher People's Court* (Mar. 19, 1997), ARBITRATION LAW AND NEW INTERPRETATIONS ON RELEVANT REGULATIONS 202 (compiled in Tang & Sun 2003) (asserting that the assigned arbitration agreement would be binding only on the assignor and not extend automatically to the assignee); *see also* JINGZHOU TAO, BUSINESS, *supra* note 94, at 3004 (explaining that the Contract Law allows for binding a binding assignment of an arbitration agreement). *See generally* The Basics of Arbitration in China, CHINA BRIEFING, http://www.china-briefing.com/news/2008/09/03/arbitration-in-china-the-basics.html (establishing the fundamentals of arbitration in China).

96. *See* CIETAC Case Comments on *Validity of the Arbitration Agreement Following the Contract Assignment*, SELECTED JURISDICTIONAL DECISIONS BY THE CIETAC 116–22 (CIETAC 2004) (expressing the CIETAC generally preferred a more liberal approach with respect to contract assignments of arbitration agreements); *see also* JINGZHOU TAO, ARBITRATION, *supra* note 94, at 40 (stating that Chinese arbitration institutions generally preferred the view that once a contract had been assigned, any arbitration provision therein contained was similarly assigned). *See generally* Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 424 (2006) (explaining that CIETAC represented China's first step in providing international commercial arbitration services).

97. *See* Case Report by Wang Shengchang, *Zhongcai Xieyi ji qi Youxiaoxing Queding* [*Arbitration Agreement and the Confirmation of Its Validity*], HAIXIA LIANG'AN JINGMAO ZHONGCAI YANTAOHUI WENJI 18–20 [SYMPOSIUM ESSAYS ON ECONOMIC TRADE ARBITRATION ACROSS THE TAIWAN STRAITS 18–20] (2001) (stating that the Supreme People's Court issued an opinion to resolve the conflicting views and practices regarding arbitration assignment). *See generally* ANNE WAGNER & SOPHIE CACCIAGUIDI-FAHY, OBSCURITY AND CLARITY IN THE LAW 121 (2008) (explaining that judicial interpretation in China takes many forms, including replies); *see generally* The Supreme People's Court, THE PEOPLE'S DAILY ONLINE, http://english.people.com.cn/data/organs/court.html (asserting that the Supreme People's Court is the highest judicial organ in China).

98. *See* Contract Law, *supra* note 93, at art. 80 (stating that the assignor should notify the other contracting parties of the assignment for assignment of the rights). *But see id.* at art. 84 (declaring that the assignor needs to obtain the consent of the other contracting party in addition to notifying them). *See generally* A.J. VAN DEN BERG, NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 30 (2005) (asserting that the Supreme People's Court has suggested that it may take a more liberal view in construing the validity of arbitration agreements).

the accessory rights transferred.[99] Eventually, it was held that the arbitration clause was equally binding on the third-party assignee, despite the lack of a separate written arbitration agreement signed by the assignee.[100] The Reply has received warm welcome by those who study international arbitration and practitioners as a significant development of the SPC in enhancing arbitral parties' wishes.[101]

c. Bill of Lading (B/L)

In the maritime industry, arbitration is invariably triggered where the bill of lading incorporates an arbitration clause in the charter under which it is issued.[102] However, when a ship owner issues the bill, the holder is not required to sign on it, leaving the effect of the arbitral

99. *See* JINGZHOU TAO, ARBITRATION, *supra* note 94, at 40 (indicating that this view was also shared by CIETAC and had been endorsed at the workshop on the determination of validity of arbitration agreement jointly sponsored by the SPC, the Beijing Higher People's Court, the Beijing Intermediate People's Court and CIETAC, which was held in December 1997); *see also* Haung Jin & Du Huanfang, *Chinese Judicial Practice in Private International Law: 2003*, 7 CHINESE J. INT'L L. 255 (2008) (referencing Wuhan Zhongyuan kejiao Ltd. v. Hong Kong Longhai (Group) Ltd., the SPC reversed the Henan Higher People's Court, stating that a third party was bound by the arbitration clause of the original contract). *See generally* William Krause, *Do You Want to Step Outside? An Overview of Outline Alternative Dispute Resolution*, 19 J. MARSHALL J. COMPUTER & INFO. L. 457, 477–79 (2001) (describing the problems of the binding effects of arbitration law).

100. *See* Wang Shengchang, *supra* note 97, at 15–18 (detailing a similar case found in the SPC reply to the Henan Higher People's Court where it held that the Xinquan Company (the XC) assigned its rights to the Liaoning Company (the "LC") and had informed the Henan Company (the HC)); *see also* "The Supreme People's Court Reply Letter Concerning the Question over the Effect of an Arbitration Clause in the Bill of Lading in the Case of an International Shipping Dispute Between Fujian Province Production Data Consolidated Corporation and Golden Pigeon Shipping Company Limited" (P.R.C.), *translated in* 2 ARBITRATION IN CHINA: A PRACTICAL GUIDE 463 (Kenneth C.K. Chow trans., Jerome A. Cohen, Neil Kaplan, and Peter Malanczuk eds., 2004) [hereinafter S.P.C. Reply Letter] (holding that the arbitration clause is binding on both parties).

101. *See* Gu Weixia, *Thinking about the Application of Subrogation in China's Commercial Arbitration (Guanyu Daiwei Qinggiuquan zai Zhongguo Shangshi Zhongcai zhong Yingyong de Sikao), in* ARBITRATION AND LAW (ZHONGCAI YU FALV) 88 (2004); *see also* Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 155 (2006) (indicating that the Supreme People's Court is hosting discussions with academics and practitioners); *see also* Jason Pien, Note, *Creditor Rights and Enforcement of International Commercial Arbitral Awards in China,* 45 COLUM J. TRANSNAT'L L. 586, 587 (2007) (enumerating the benefits of the arbitral enforcement process, including the fact that it has been a topic of interest to Chinese and non-Chinese academics).

102. *See* H. Edwin Anderson III, *Applicable Arbitration Rules for Maritime Disputes In Australia and Hong Kong*, 6 U.S.F. MAR. L.J. 387, 387–88 (1994) (noting that arbitration is the method most often used to resolve charter party disputes); *see also* Simon G. Zinger, *Navigating the Russian Shipping Industry: Making the Most of International and Russian Law for Successful Arbitration Against Russian Parties*, 8 U.S.F. MAR. L.J. 141, 142 (1995) (indicating that bills of lading require arbitration in the home country of the ship owner). *See generally* PHILIP YANG, SHIPPING PRACTICE 570–71 (Y.M. Lin ed., Dalian Maritime University Press, 1995) (presenting general information of the arbitration clause in the charter parties and bills of lading); *see generally* Adewale A. Olawoyin, *Safeguarding Arbitral Integrity in Nigeria: Potential Conflict Between Legislative Policies and Foreign Arbitration Clauses in Bills of Lading*, 17 AM. REV. INT'L ARB. 239, 245 (2006) (outlining the difference between a foreign jurisdiction clause and a foreign arbitration clause).

clause contained within it in doubt.[103] Moreover, the bills are transferable documents.[104] This raises questions with regard to the binding effect of the original arbitral clause on any subsequent holders.[105] The SPC, in its reply to the Guangdong Higher People's Court, recognized the effect of the arbitration clause to an eventual B/L holder.[106] It pointed out that, "[a]lthough the appealing party did not sign the bill, it had expressly agreed to the arbitration clause contained therein. Hence the arbitration agreement should be valid and binding upon both the carrier and the B/L holder."[107] The affirmation engendered more confidence in the Chinese system of arbitration by maritime practitioners.[108] However, since its effect must be conditioned upon the "holder's express consent," parties are still very much wary that their intention to arbitrate could be denied absent such requirement.[109]

On "Unclear Arbitration Commission"

a. Selecting Two Arbitration Commissions

In its reply to the Shandong Higher People's Court, the SPC declared that arbitration agreements were valid where the parties provided for submission of their dispute to "either the

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103. *See* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS 76 (London Sweet & Maxwell 2000) (indentifying unsigned arbitration clauses in bills of lading as a prominent situation); *see also* Caslav Pejovic, *The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law*, 31 J. MAR. L. & COM. 379, 380 (2000) (noting that bills of lading are sometimes signed by the charterer or agent without the shipmaster's authority); *see also* Georgios I. Zekos, *The Contractual Role of Documents Issued Under the CMI Draft Instrument on Transport Law 2001*, 35 J. MAR. L. & COM. 99, 104 (2004) (elucidating the inconsistency in terminology).

104. *See* GEORGE W. EDWARDS, FOREIGN COMMERCIAL CREDITS: A STUDY IN THE FINANCING OF FOREIGN TRADE 233 (1922) (referencing Lickbarrow v. Mason, which decided that bills of lading were transferable); *see also* EMMANUEL T. LARYEA, PAPERLESS TRADE: OPPORTUNITIES, CHALLENGES AND SOLUTIONS 69 (2002) (explaining that a bill of lading is transferable); *see also* Stasia M. Williams, *Something Old, Something New: The Bill of Lading in the Days of EDI*, 1 TRANSNAT'L L. & CONTEMP. PROBS. 555, 562 (1991) (defining "negotiability" of the bill of lading as "transferability").

105. *See* LARYEA, supra note 104, at 69 (transferring a bill of lading transfers the right of possession but not necessarily the ownership of the goods); *see also* Felix H. Chan, Analysis, *A Plea for Certainty: Legal and Practice Problems in the Presentation of Non-Negotiable Bills of Lading*, 29 HONG KONG L.J. 44, 45 (1999) (delineating the difference between a straight bill of lading and a negotiable bill of lading and the confusion the differences create); *see also* George F. Chandler, *Maritime Electronic Commerce for the Twenty-First Century*, 22 TUL. MAR. L.J. 463, 469–470 (1998) (describing the difference in rights given to subsequent holders of negotiable bills of lading and straight bills of lading).

106. *See* S.P.C. Reply Letter, supra note 100, at 463 (holding that the court should no longer accept any prosecution by the parties).

107. *See id.* (indicating that the nation's court should "recognize the effect of such ad hoc arbitration clause").

108. *See id.*

109. *See* Li Hai, *Guanya Tidan Zhongcai Tiakuan Xiaoli Ruogan Wenti de Sikao* [*Thinking About the Several Questions Regarding the Validity of the Arbitration Clause in the Bill of Lading*], *in* ZHONGCAI YU FALV [ARBITRATION AND LAW] (2005) (P.R.C.).

CIETAC or the Qingdao Arbitration Commission."[110] The SPC confirmed that such an arbitration clause was certain and operative, entitling the party to initiate arbitral proceedings before either of the two agreed arbitration institutions.[111]

b. Selecting Both Arbitration and Litigation

The SPC, in its reply to the Guangdong Higher People's Court, held that the parties' intention to arbitrate was unclear under such arbitration agreement, and the arbitration clause shall be void under the Chinese law unless parties subsequently reached a separate agreement to submit their disputes to a specific arbitration institution.[112]

c. Referring to a Non-existent Arbitration Commission

The SPC, in a pair of cases, replied to the Zhejiang and Sichuan Higher People's Courts that agreements that referred to non-existent arbitration commissions shall be invalid unless the parties reached a supplementary agreement specifying clearly the relevant arbitration institution where the disputes were to be submitted.[113]

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110. *See* S.P.C. Reply to Questions Concerning the Validity of an Arbitration Clause in Which Two Arbitrations Inst. Are Simultaneously Selected (Sup. People's Ct., Dec. 12, 1996) (P.R.C.) [hereinafter S.P.C. Reply to Questions]; *see also* S.P.C. Reply Letter, *supra* note 100, at 463 (summarizing the decision in the case, holding that an arbitration agreement specifying two commissions is not invalid, provided that the parties agree on the commission ultimately used); *see also* Steamship Mutual, *China—Validity of Arbitration Agreements*, http://www.simsl.com/ChinaArbitration0107.asp (last visited Mar. 23, 2009) (showing how prominent shipping and carrier companies have become aware of and have recognized Chinese arbitration practices).

111. *See* SHAOYING CHEN ET AL., 1 SERIES ON CONTEMPORARY CHINESE LAW §9:7 (affirming that Chinese arbitration practices permit parties to specify more than one commission for dispute resolution, but require consensus in selection when a dispute arises); *see also Interpretation on Several Issues Concerning the Application of the <PRC Arbitration Law> 4500/06.08.23*, CHINA L. & PRAC., Oct. 1, 2006, at 91 [hereinafter *Application of P.R.C. Arb. L.*] (reporting that, as of 2006, the most commonly used arbitral commissions in China were the Beijing Arbitration Commission [BAC] and the China International Economic and Trade Arbitration Commission [CIETAC]); *see also* Jessica Zoe Renwald, Note, *Foreign Investment Law in the People's Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution*, 16 IND. INT'L & COMP. L. REV. 453, 473 (2006) (providing segments of the SPC Interpretation of the Arbitration Law, including the consensus requirement for selecting an arbitration commission from those specified in arbitral agreements).

112. *See* S.P.C. Reply to the Validity of the Arbitration Agreement Which Agrees to Both Arbitration and Litig. (Sup. People's Ct., Apr. 18, 1996) (P.R.C.); *see also* Charles Kenworthey Harer, *Arbitration Fails to Reduce Foreign Investors' Risk in China*, 8 PAC. RIM. L. & POL'Y J. 393, 399–400 (1999) (1999) (specifying that the requirements for a valid arbitration agreement are: a clear intent to arbitrate, statement of the issues subject to arbitration, and clear selection of an arbitration commission); *see also Arbitration in the PRC: New Revisions Have Been Made to CIETAC's Arbitration Rules. How Have the New Revisions Further Facilitated the Recourse to PRC Arbitration?*, CHINA L. & PRAC., May 1, 2005, at 19 (restating the three requirements for a valid arbitration agreement under Chinese Arbitration Law).

113. *See* S.P.C. Reply to the Judicial Dispute of a Sin-Foreign Contract between a Yiwu Hotel and a Hong Kong Co (Zhejiang Higher People's Ct., Sept. 9, 1996) (P.R.C); *see also* S.P.C. Reply to the Validity of the Arbitration Agreement Agreeing on an Unclear Arbitration Commission (Sichuan Higher People's Ct., Oct. 10, 1996) (P.R.C.).

d. Incorrect Name of Arbitration Commission

The SPC held that if the name of the selected arbitration commission was erroneously recorded in the arbitration agreement, the agreement may still be valid, provided that the correct name of the commission could be readily ascertained.[114] This holding was applied to a CIETAC case to give effect to an agreement that incorrectly referred to CIETAC as "China International Trade Arbitration Commission" (missing the word "Economic").[115]

e. Specifying the Place of Arbitration Only

The validity of such an agreement was first considered by CIETAC in 1995.[116] Since then, three relevant interpretative documents have been issued by the SPC.[117] The judicial opinions, however, have changed drastically. In 1997, the SPC opined that where the parties fail to include a specific arbitration commission but have provided the place of arbitration, such arbi-

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114. *See* SHAOYING CHEN ET AL., *supra* note 111 (enumerating instances in which Chinese courts will recognize a valid arbitral agreement despite errors or ambiguities in the specification of an arbitration commission); *see also Application of P.R.C. Arb. L.*, *supra* note 111, at 91 (stating that Article 4 of the SPC Interpretation expressly permits a court to recognize selection of an arbitral commission, despite ambiguity, provided that the commission's name is readily ascertainable); *see also* Steamship Mutual, *supra* note 110 (explaining that the contingencies granted by the SPC are based on a policy of upholding the parties' intentions where the agreement is "sufficiently clear and enforceable").

115. *See* S.P.C. Reply Regarding a Case in Which the Validity of the Arbitration Clause Remained Unaffected by the Omission of Words from the Name of the Arbitration Inst. Therein (Sup. People's Ct., Apr. 2, 1998) (P.R.C.) [hereinafter S.P.C. Omission of Words].

116. *See* The Supreme People's Court Reply Letter Concerning the Question over the Effect of an Arbitration Clause in the Bill of Lading in the Case of an International Shipping Dispute Between Fujian Province Production Data Consolidated Corporation and Golden Pigeon Shipping Company Limited (P.R.C.), translated in 2 ARBITRATION IN CHINA: A PRACTICAL GUIDE 463, 469 (Kenneth C.K. Chow trans., Jerome A. Cohen, Neil Kaplan, and Peter Malanczuk eds., 2004) (highlighting the decision in the Chu Kwok Fai case, where the court rejected an arbitral agreement which specified the city for arbitration, but failed to select an actual commission); *see also* Li Hu, *Setting Aside an Arbitral Award in the People's Republic of China*, 12 AM. REV. INT'L ARB. 1, 10 (2001) (positing that the strict requirement for selecting an arbitral commission has been interpreted as a bar on ad hoc arbitration proceedings under Chinese Arbitration Law); *see also* Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 438 (2006) (recalling an analogous case, in which the agreement specified London as the location for arbitration, but failed to specify an actual commission for hearing).

117. *See* Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 BERKELEY J. INT'L L. 329, 387 (1997) (displaying that terms that were ambiguous were interpreted to provide clarity); *see also* Benjamine P. Fishburne III & Chuncheng Lian, *Commercial Arbitration in Hong Kong and China: A Comparative Analysis*, 18 U. PA. J. INT'L ECON. L. 297, 310–11 (1997) (showing that the Supreme People's Court issued interpretations to clarify meaning of certain key terms); *see also* Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL'Y J. 403, 413 (2006) (indicating that the Supreme People's Court has issued many judicial interpretations relating to arbitration criteria).

tration clause will be void.[118] As such, the expression that "any dispute between the parties shall be resolved by the arbitration institution in Beijing" will be regarded as a void clause.[119] Later, a similar scenario arose before the Hebei Higher People's Court, where the arbitration clause provided that "any dispute arising out of the contract shall be submitted to the arbitration institution in Shijiazhuang."[120] The SPC, in this case, relaxed their stance a bit by stating that "although the name of the arbitral institution is not specified, since there is only one arbitration commission in the given city, i.e., the Shijiazhuang Arbitration Commission, the arbitration clause is certain in this context and therefore should be enforceable and valid."[121] It shall be noted that notwithstanding the similar wording in the two cases, the circumstances were different. In the former case, there were more than two arbitration commissions in Beijing while there was only one such commission at the time in Shijiazhuang.[122] Therefore, the underlying policy remains that even if the institution is not clearly spelled out, the arbitration agreement would be valid as long as the arbitral institution is ascertainable or can be inferred with some degree of certainty from the surrounding circumstances.[123] Unfortunately, the SPC stepped back from the approach of ascertainable inference and returned to the blanket denial approach. In its later reply to the Shandong Higher People's Court,[124] it opined that by "[s]pecifying the place of arbitration without nominating the arbitral commission, then unless the parties can reach a supplementary agreement on the choice of the commission, their arbitration agreement shall be held void, so that the court will have jurisdiction over the disputed matter."[125]

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118. *See* Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 139 (2006) (stating that an agreement must designate a specific institution for arbitration in order for the agreement to be valid); *see also* Joseph T. McLaughlin et al., *Planning for Commercial Dispute Resolution in Mainland China*, 16 AM. REV. INT'L ARB. 133, 144–45 (2005) (posting the notion that if an arbitration commission is not specified in the clause, then the Chinese court will not enforce it); *see also* Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 48 (2005) (indicating that a necessary component for a valid agreement is the place of arbitration).

119. S.P.C. Reply on the Validity of an Arbitration Clause with Selected Arbitration Venue but No Arbitration Institution, Fa Han [1997] No. 36, issued by the SPC on 19 March 1997.

120. *See id.*

121. *See* S.P.C. Reply to the Hebei Higher People's Court on the Validity of an Arbitration Agreement, Fa Jing [1998] No. 287, issued by the SPC on July 6, 1998. [hereinafter S.P.C. Reply to Hebei] (unverified source); s*ee also* Harer, *supra* note 112, at 399 (showing that if the commission tribunal is not listed in the agreement, it can be determined at a later time). *See generally* Jane Volz & Robert Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser,* 21 WM. MITCHELL L. REV. 867, 902 (1996) (enumerating some of the arbitration commissions that exist in China).

122. *See* Harer, *supra* note 112 at 399.

123. *See* S.P.C. Case Comments on the *S.P.C. Reply to the Zhejiang Higher People's Court* (Mar. 19, 1997), ARBITRATION LAW AND NEW INTERPRETATIONS ON RELEVANT REGULATIONS 202 (compiled in Tang & Sun 2003); *see also* TANG DEHUA & SUN XIUJUN, ZHONGCAIFA JI PEITAO GUIDING XINSHI XINJIE [ARBITRATION LAW AND NEW JUDICIAL INTERPRETATIONS (OR ARBITRATION LAW AND NEW INTERPRETATIONS ON RELEVANT REGULATIONS)] 202 (Beijing, People's Court Publ'g 2003) (P.R.C.); *see also* Charles Kenworthey Harer, *Arbitration Fails to Reduce Foreign Investors' Risk in China*, 8 PAC. RIM. L. & POL'Y J. 393, 399 (1999) (explaining mentioning the specific commission in the agreement is not a necessary component in determining if the agreement is valid); *see also* Milo Molfa, *Pathological Arbitration Clauses and the Conflict of Laws*, 37 HONG KONG L. J. 161, 164 (2007) (displaying that the circumstances of the situation are considered to determine which arbitration commission shall preside over the matter).

124. *See* S.P.C. Reply on Several Issues of Ascertaining the Validity of the Arbitration Agreement, Fa Shi [1998] No. 27, issued by the SPC on October 21, 1998.

125. *See id.*

Given the above illustrations, it is evident that during the period from 1995 to 2005, the SPC, through its issuance of over 20 pieces of interpretative documents, has resolved a lot of practical obstacles to determining the validity of defective arbitration agreements in light of both the formal and substantial defects that were unresolved by the AL. But concerns still exist as to the SPC's shortcomings in terms of providing clarification on the means of "written form" other than "signing" in the arbitral practice, particularly written forms such as waiver of objection, and in agency relationships.[126] There are further concerns with respect to SPC's swinging attitude on the designation of "unclear arbitration commission." Significant gaps remain in international practice with respect to an arbitration agreement that provides for institutional arbitration without unequivocally quoting the name of the institution.[127] Lastly, there has been inconsistency among the judicial opinions where the agreements "specify the place of arbitration only," with the foregoing being one such example. In facing the challenges unsettled by the SPC, some LHPCs have developed more liberal approaches with their own local judicial opinions.[128]

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126. *See* McLaughlin et al., *supra* note 118, at 142 (providing examples as to how there is a shortage of certain explanations by the SPC); *see also* Xian Chu Zhang, *Chinese Law: The Agreement Between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects*, 29 HONG KONG L.J. 463, 469–70 (1999) (illustrating a way where there has been vagueness with explanations). *See generally* Eu Jin Chua, *Legal Implications of a Rising China: The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 134 (2006) [hereinafter Eu Jin Chua, *Legal Implications*] (explaining how the SPC is responsible for providing explanations on certain terms in arbitral practice).

127. *See* Eu Jin Chua, *Legal Implications*, *supra* note 126, at 139 (stating that an arbitration institution, although no named, should be designated); *see also* Katherine L. Lynch, *Chinese Law: The New Arbitration Law*, 26 HONG KONG L.J. 104, 106 (1996) (purporting that where there is a need, an institution shall be established); *see also* Mauricio J. Claver-Carone, *Post-Handover Recognition and Enforcement of Arbitral Awards Between Mainland China and Hong Kong SAR: 1999 Agreement vs. New York Convention*, 33 LAW & POL'Y INT'L BUS. 369, 379 (2002) (providing insight to the fact that there is an unclear arbitration commission on the part of the SPC).

128. *See* Apple & Eve, LLC v. Yantai N. Andre Juice Co., 499 F. Supp. 2d 245, 250 (E.D.N.Y. June 20, 2007) (providing an example regarding the place of arbitration within the ambit of the arbitration laws of China); *see also* WANG SHENGCHANG, RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA 77, 126–27 (demonstrating a flexible approach with issues such as location); *see also* Joseph T. McLaughlin et al., *supra* note 118, at 140 (showing how arbitration is more flexible, and thereby more liberal approached with judicial opinions issued).

2. Judicial Opinions by the LHPCs

a. The "Beijing Opinion," 1999

In 1999, the Economic Trial Division of the Beijing Higher People's Court (the BHC) issued its opinions regarding the determination of a petition to ascertain the validity of an arbitration agreement (the Beijing Opinion).[129] The Beijing Opinion was designed to provide guidance to the intermediate and district people's courts in Beijing on handling such petitions, and comprised a series of questions and answers frequently faced by these courts.[130] Among all the opinions issued, Articles 1 and 2 specifically addressed the effect of an arbitration agreement on a non-signatory third party in the agency context.[131]

Article 1 of the Opinion stipulates that where an arbitral agreement is concluded by an agent with no authority or an agent that is exceeding its authority, the agreement will not be binding on the principal.[132] If, in any of the foregoing circumstances, a third party submits an application for arbitration on the basis of such an arbitration agreement, the agreement shall be voided between the principal and the third party and the arbitration commission will have no

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129. *See* Opinion on Some Issues Regarding the Determination of an Application for Ascertaining the Validity of an Arbitration Agreement, and Motions to Revoke an Arbitration Award (issued by the Beijing Higher People's Ct., Dec. 3, 1999) [hereinafter Ascertaining Arbitration Validity] (providing the doctrines within the "Beijing Opinion" that concern the determination of a petition for obtaining the validity of an arbitration agreement).

130. *See* Charles Zhen Qu, *The Representative Power of the Shareholders' General Meeting Under Chinese Law*, 17 PAC. RIM L. & POL'Y 295, 304 (2008) (demonstrating that the Beijing Higher People's Court provides guidelines to the lower courts); *see also* Gu Weixia, *Judicial Review over Arbitration in China: Assessing the Extent of Latest Pro-Arbitration Move by the Supreme People's Court in the People's Republic of China*, 23–24 (University of Hong Kong, Working Paper), *available at* http://works.bepress.com/context/weixia_gu/article/1000/type/native/viewcontent/ [hereinafter Gu Weixia, Working Paper] (positing that the Beijing Opinion provided guidance and authority in determining certain questions regarding arbitration). *See generally* Eu Jin Chua, *Legal Implications*, *supra* note 126, at 134 (explaining how the SPC is responsible for providing for explanations on certain terms in arbitral practice).

131. *See* Ascertaining Arbitration Validity, *supra* note 129 (enumerating the explanations to the following issues: (1) validity of arbitration agreement in the agency relationship; (2) the effect of arbitration agreement upon investor and investee in the JV contract; (3) the validity of arbitration agreement when both arbitration and litigation are provided; (4) the validity of arbitration agreement when two arbitration commissions are provided; (5) independence of arbitral clause when the main contract is non-existent; (6) independence of arbitration agreement made under duress or undue influence; (7) invalidity of ad hoc arbitration agreement; (8) the scope of arbitration agreement; (9) the procedure of jurisdictional challenge handled by the court; (10) the validity of arbitration agreement in cases of "incorporation by reference."); *see also* Gu Weixia, Working Paper, *supra* note 130 (displaying how the Opinions provide guidance to the lower courts in Beijing). *See generally* Dr. John Mo, *Legality of the Presumed Waiver in Arbitration Proceedings under Chinese Law*, 29 INT'L BUS. LAW 21, 25 (2001) (addressing how the Opinions issued provide answers to questions frequently faced by courts in Beijing).

132. *See* Jerome A. Cohen & John E. Lange, *The Chinese Legal System: A Primer for Investors*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 345, 354 (1997) (defining the roles of principals and agents); *see also* Gu Weixia, Working Paper, *supra* note 130 (addressing some binding obligations on signatories). *See generally* Kate O'Hanlon, *Enforcement of Foreign Arbitration Award*, THE INDEPENDENT (LONDON), Feb. 2, 1999, at 7 (providing information with regard to how awards should be enforced in arbitration).

jurisdiction unless a supplementary agreement is reached.[133] Article 2 goes on to provide that in an arbitration agreement signed by a foreign agent, the agreement will not be binding upon the domestic principal and the third party.[134]

The BHC guidance, however, fails to take into account whether a third party has actual knowledge of the existence of an agency relationship as the newly promulgated CL notes.[135] In accordance with Articles 402 and 403 of the CL, the validity of the contract signed by the agent shall be binding on the principal depending on whether the third party reasonably knows about the agency relationship between the agent and principal at the conclusion of the contract.[136] If the third party has such knowledge, the arbitration agreement shall be binding upon the principal;[137] while in cases of an undisclosed principal, the third party could invoke the arbitration agreement against either the principal or the agent.[138] In both cases, the arbitration agreement should extend to bind the principal.

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133. *See* Ascertaining Arbitration Validity, *supra* note 129, at art. 1 (stating that an arbitration agreement will be deemed void between a principal and a third party and that an arbitration commission will have no jurisdiction unless a supplementary agreement is reached); *see also* Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969, 973 (2001) (illustrating the third party's role within the ambit of arbitration in China); *see also* Bryant Yuan Fu Yang & Diane Chen Dai, *Tipping the Scale to Bring a Balanced Approach: Evidence Disclosure in Chinese International Arbitration*, 17 PAC. RIM L. & POL'Y 41, 60 (2008) (presenting a situation where a third party would be involved).

134. *See* Ascertaining Arbitration Validity, *supra* note 129, at art. 2 (providing that the arbitration agreement signed by the foreign agent will not be binding upon the domestic principal and the third party); *see also* JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 34, 58–59 (2004) (indicating the effect of a signed arbitration agreement on a third party); *see also* Wang Shengchang, *Enforcement of Foreign Arbitral Awards in the People's Republic of China*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS & AWARDS 461, 477–78 (Albert Jan van den Berg ed., 1999) (providing that the arbitration agreement signed by a foreign party will not bind a third party).

135. *See* Contract Law (promulgated by the Second Session of the Ninth Nat'l People's Cong., March 15, 1999, effective Oct. 1, 1999), art. 11, *available at* http://novexcn.com/contract_law_99.html (listing the date of issue of the law as March 15, 1999 and the implementation date as October 1, 1999); s*ee also* Feng Chen, *The New Era of Chinese Contract Law: History, Development, and a Comparative Analysis,* 27 BROOK. J. INT'L L. 153, 154 (2001) (explaining how the Chinese legislature intended the new Contract Law to bring uniformity and certainty to the previous contract system); *see also* Wang Liming & Xu Chuanxi, *Fundamental Principles of China's Contract Law,* 13 COLUM. J. ASIAN L. 1, 1 (1999) (noting the promulgation of the Contract Law as both a major development in contractual law and a major step toward the enactment of the Chinese Civil Code); *see also* John H. Matheson, *Convergence, Culture and Contract Law in China,* 15 MINN. J. INT'L L. 329, 334 (2006) (positing that the main reason for China's recent promulgation of the Contract Law in 1999 was in an effort to join the WTO).

136. *See* Contract Law, *supra* note 135 (detailing the law regarding an agent's act binding on the principal); s*ee also* Lutz-Christian Wolff & Bing Ling, *The Risk of Mixed Laws: The Example of Indirect Agency Under Chinese Contract Law,* 15 COLUM. J. ASIAN L. 173, 181 (2002) (indicating how Articles 402 and 403 dictate the contract rules on indirect agency).

137. *See* Contract Law, *supra* note 135 (regulating the agency of an unnamed principal); s*ee also* Guodong Xu, *Structures of the Three Major Civil Code Projects in Today's China,* 19 TUL. EUR. & CIV. L.F. 37, 52 (2004) (noting that Article 402's concept of indirect agency is shared by Western nations like the United States and the United Kingdom); *see also* Zhang Yuqing, *Agency Under the New Contract Law of the People's Republic of China,* 5 UNIFORM L. REV. 441, 447–48 (2000) (explaining that the main issue in Article 402 is determining the third party's knowledge of an agency relationship when the contract was formed).

138. *See* Contract Law, *supra* note 135 (regulating the agency relationship of an undisclosed principal).

In conclusion, despite its attempt to remedy the practical problems in arbitral practice, the Beijing Opinion fails to address the newly promulgated CL with respect to the rights and obligations surrounding the agency relationship when regulating the effect of arbitration agreements. Thus, the Beijing Opinion may not be satisfactory in filling in the practical gap on the relevant arbitral issues despite the fact that it parallels the positions of the local judiciary in developing the arbitration jurisprudence and practice.[139]

b. The "Shanghai Opinion" 2001

Two years later, the Shanghai Higher People's Court (the SHC), in light of the developments brought by the new CL, promulgated its own opinions to further explore the issues unresolved in the SPC interpretations (the Shanghai Opinion).[140] The Shanghai Opinion covers a number of important issues in arbitral practice, and Articles 2 and 5 specifically address the practical difficulties arising from defective arbitration agreements.[141]

Article 2 of the Shanghai Opinion clarifies the proper judicial approach with respect to the determination of the validity of an arbitration agreement if it makes inaccurate reference to the arbitration commission.[142] The SHC opines that because parties usually have limited understanding of the arbitration system and arbitral institutions, it is not uncommon that they refer

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139. *See* Carlos de Vera, *Arbitrating Harmony: "Med-Arb" and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 193 (2004) (explaining that the slow development of arbitration jurisprudence in China can be tied to deeply rooted cultural traditions that favor mediation over arbitration); *see also* Eu Jin Chua & Kathryn Sanger, *Arbitration in the PRC*, P.R.C. L. & PRACTICE, May 2005, at 1 (stating that as foreign investment continues to grow in China, so will the need for China to develop its arbitration system); *see also* Ashby Jones & Andrew Batson, *Concerns About China Arbitration Rise*, WALL ST. J., May 9, 2008, at B.1 (reporting that many Western attorneys are still wary of China's inexperienced arbitration mechanisms).

140. *See* Shanghai Shi gaoji renmin fayuan guanyu zhixing "Zhonghua Renmin Gongheguo zhongcai fa" ruogan wenti de chuli yijian [Opinion of the Shanghai High People's Court on the Handling of Certain Issues Relating to Implementation of the "Arbitration Law of the People's Republic of China"] (adopted Jan. 3, 2001) (P.R.C.)) *translated in* ARBITRATION IN CHINA: A PRACTICAL GUIDE, VOLUME 2, at 523–31 (Daniel R. Fung et al. eds., 2004) [hereinafter S.H.P.C. Implementation of Arbitration Law] (addressing numerous issues regarding the arbitration law of China).

141. *See* ARBITRATION IN CHINA: A PRACTICAL GUIDE, VOLUME 1, at 39 (Daniel R. Fung, et al. eds., 2004) (promulgating 13 different issues regarding the implementation of the arbitration law in China); s*ee also* JINGZHOU TAO, ARBITRATION, *supra* note 134, at 54 (showing that the Shanghai Opinion adopted a relatively moderate approach to treating possibly defective arbitration agreements.); *see also* Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL'Y J. 403, 411–12 (2006) (reporting that the legal opinions on arbitration by the Shanghai and Bejing Higher People's Courts were recently adopted by the Supreme People's Court); *see also* Jason Pien, Note, *Creditor Rights and Enforcement of International Commercial Arbitral Awards in China*, 45 COLUM J. TRANSNAT'L L. 586, 608 (2007) (stating that the Shanghai Opinion, while not binding, has not been disputed by other legislative and judicial institutions).

142. *See* S.H.P.C. Implementation of Arbitration Law, *supra* note 140, at art. 2 (allowing an arbitration agreement clause to be valid to the extent that the wording and logic are not ambiguous); s*ee also* JINGZHOU TAO, ARBITRATION, *supra* note 134, at 54 (explaining that the Shanghai Opinion allows a technically defective arbitration agreement to be valid if the identity of the specific arbitration institution could be deduced or inferred from the document); *see also* Taroh Inoue, *Introduction to International Commercial Arbitration in China*, 36 H.K.L.J. 171, 182 (2006) (stating that the Chinese arbitration law is unique in that the parties must choose a specific arbitration commission in their arbitration agreement or it is considered invalid)
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to an arbitration commission inaccurately in their arbitral agreements.[143] In such cases, as long as the identity of the commission is ascertainable from the surrounding facts, the court should uphold the effect of the arbitration agreement.[144] For better understanding, the Shanghai Opinion then gives some examples of defective draftsmanship referring to arbitral institutions in Shanghai in which its validity can be saved by the context.[145] This may include agreements using the language such as "Shanghai Arbitration Institution," "Shanghai Arbitration Organization," "arbitration by the relevant department in Shanghai," and "arbitration in Shanghai," to name a few.[146] Because there are two arbitral institutions in Shanghai, the party will be deemed to have selected both the Shanghai Arbitration Commission (the SAC) and the CIETAC Shanghai sub-commission under the Shanghai Opinion.[147] Hence, according to a previous SPC reply, the arbitration agreement is certain and enforceable if parties would agree to submit their disputes to either institution.[148]

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143. *See* Sonia Chan, *The End of Trial and Error,* ASIALAW, Oct. 2008, at 1 (recalling the reluctance of foreign parties to arbitrate in China due to its high probability of unreliability and unfairness); s*ee also* Evelyn Iritani, *A Local Firm's Baffling Trip Through China's Arbitration System; Origon Group Finds That the Country's Method of Resolving Disputes Still Lack Openness,* L.A. TIMES, Dec. 26, 2003, at C1 (detailing one company's difficulties and unfamiliarity with the problematic Chinese arbitration system); *see also* Joseph Kahn, *Dispute Leaves U.S. Executive in Chinese Legal Netherworld,* N.Y. TIMES, Nov. 1, 2005, at A1 (reporting that the Chinese courts and arbitration panels are still plagued with uncertainties, corruption, and a lack of transparency).

144. *See* S.H.P.C., Implementation of Arbitration Law, *supra* note 140 (establishing that arbitration agreements can still be valid, even if they don't disclose the location); *see also* Interpretation of the S.P.C. Concerning Some Issues on Application of The Arbitration Law of The People's Republic of China (promulgated by the Judicial Committee of the S.P.C., Dec. 26, 2005, effective Sept. 8, 2006) art. 3 (P.R.C.) [hereinafter Interpretation of the Arbitration Law] (noting that even when the arbitration site is not clearly stated, if it is discernable from the surrounding circumstances, then agreement is still valid); *see also* JINGZHOU TAO, ARBITRATION, *supra* note 134, at 54 (stating that the Shanghai Higher People's Court used a more moderate approach upholding arbitration agreements that did not clearly identify a specific institution).

145. *See Interpretation on Several Issues Concerning the Application of the <PRC Arbitration Law> 4500/06.08.23*, CHINA L. & PRAC., Oct. 1, 2006, at art. 3–8, at (describing the different situations in which an arbitration agreement will still be valid); *see also* S.P.C. Reply to Questions Concerning the Validity of an Arbitration Clause in Which Two Arbitrations Inst. Are Simultaneously Selected (Sup. People's Ct., Dec. 12, 1996) (P.R.C.) (explaining that an arbitration clause will still be valid even when two institutions are selected if they can be verified by the circumstances); *see also* S.P.C. Reply Regarding a Case in Which the Validity of the Arbitration Clause Remained Unaffected by the Omission of Words from the Name of the Arbitration Inst. Therein (Sup. People's Ct., Apr. 2, 1998) (P.R.C.) (stating that an arbitration clause is still valid even when it is not entirely clear what institution is being named).

146. *See* Wang and Qu, *Several Comments on the Shanghai Opinion 2001*, in CIETAC, ARBITRATION AND LAW YEARBOOK OF 2001 407–8 (ZHONGCAI YU FALV 2001 NIANKAN) (2002); *see also* Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 142 (2006) (commenting on the differences in the domestic and foreign arbitration institutions); *see also* David T. Wang, Comment, *Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System*, 48 SANTA CLARA L. REV. 649, 664–65 (2008) (articulating the two different types of institution branches used in arbitration).

147. *See* Wang and Qu, *supra* note 146, at 407–8; *see also China International Economic and Trade Arbitration Commission*, 1 CONTEMP. CHINESE LAW: CHINESE INT'L ECON. LAW § 9:13, (2008) (describing how the Beijing and Shanghai headquarters became integrated into the South China Subcommission); *see also* Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOY. L.A. L. REV. 1337, 1356–7 (2007) (discussing the two branches of the CIETAC institution, located in Shanghai and Shenzhen).

148. *See* S.P.C. Reply to Questions, *supra* note 145.

Article 5 of the Shanghai Opinion addresses whether an arbitration agreement binds its legal successor when the original party signing the agreement has been merged, divided, or terminated.[149] The Shanghai Opinion based its legal authority on the newly promulgated CL and its provisions on legal transfer and assignment.[150] Pursuant to Article 90 of the CL, the transferee shall be bound by the original contractual rights and obligations following the transfer unless otherwise agreed.[151] The SHC thus explains that where there is a valid arbitration agreement, any reorganization of the original contracting party that leads to an assignment of the rights and obligations (including merger, division, or termination) will bind the original contracting party's legal successor unless parties agreed otherwise.[152]

The Shanghai Opinion has been given a lot of commendations for its timely interacting with the development of the CL.[153] Moreover, the pragmatic approach taken by the SHC prioritizes the parties' intention to arbitrate by referring to the surrounding circumstances of the arbitration agreement. Dr. Wang Shengchang concludes that the Shanghai Opinion pioneers the efforts of local judiciaries in giving judicial preference to parties' drafting autonomy.[154]

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149. *See* Wang and Qu, *supra* note 146, at 402; *see also* Interpretation of the Arbitration Law, *supra* note 144, at art. 5 (concluding that when a party is merged the successor is still bound by the agreement); *see also* JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 39 (2004) (stating that in mergers, the newly formed party or company will still be bound by the old arbitration agreement).

150. *See* Contract Law (promulgated by the Second Session of the Ninth Nat'l People's Cong., March 15, 1999, effective Oct. 1, 1999), art. 11, *available at* http://novexcn.com/contract_law_99.html (citing that the law gives the power for parties to agree to terms through consultation such as arbitration); *see also* Wang Liming & Xu Chuanxi, *Fundamental Principles of China's Contract Law,* 13 COLUM. J. ASIAN L. 1, 12 (1999) (discussing that in China's contract law parties have a right to consultation as a part of the principles of equality and freedom to contract); *see also* Feng Xu, *The Emergence of Temporary Staffing Agencies in China*, 30 COMP. LAB. L. & POL'Y J. 431, 450 (2009) (acknowledging that the China contract and labor law allows there to be a consultation between parties in order to make agreements).

151. *See* Contract Law, *supra* note 150 (determining that where a party is merged after the contact's formation that the merged party will hold the same rights and obligations of the former parties under the contract); *see also* JINGZHOU TAO, RESOLVING BUSINESS DISPUTES IN CHINA 2802, 3003 (2005) (describing the process of merging companies adopting the old companies' rights and abilities in contracts); *see also* Stephen Hsu, *Contract Law of the People's Republic of China*, 16 MINN. J. INT'L L. 115, 150 (2007) (clarifying that when a merger takes place the newly formed party assumes the rights and duties of the former parties).

152. *See* Wang and Qu, *supra* note 146, at 402; *see also* Interpretation of the Arbitration Law, *supra* note 144, at art. 5 (citing that the law states a new agreement must be formed if new parties are involved); *see also* Steven Smith et al., *International Commercial Dispute Resolution*, 42 INT'L LAW. 363, 366 (2007) (explaining that if new parties are formed, the law provides for a remedy and therefore the original clause is not enforceable).

153. *See* Wang & Qu, *supra* note 146, at 407, 407–08; *see also* Xianwu Zeng, *Can a Foreign Company Contract Out of a Chinese Court? A Comparison of the American and Chinese Legal Systems Regarding the Enforceability of the Arbitration Clause in a Commercial Contract*, 8 CHINA L. REP. 85, 85 (1994) (discussing the development of Chinese contract law); *see also* Mark C. Lewis, Note, *Contract Law in the People's Republic of China—Rule or Tool? Can the PRC's Foreign Economic Contract Law Be Administered According to the Rule of Law?*, 30 VAND. J. TRANSNAT'L L. 495, 503–10 (1997) (detailing China's shift from an instrumentalist view of law that served the government's interest to a decentralized market and the theory of choice of law for contracting parties).

154. *See* WANG SHENGCHANG, RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA 78–79 (explaining that parties to an arbitration agreement must express their intention to apply for arbitration in order for such an agreement to be valid); *see also* Wang Shengchang, *Zhongcai Xieyi ji qi Youxiaoxing Queding* [*Arbitration Agreement and the Confirmation of Its Validity*], HAIXIA LIANG'AN JINGMAO ZHONGCAI YANTAOHUI WENJI 18–20 [SYMPOSIUM ESSAYS ON ECONOMIC TRADE ARBITRATION ACROSS THE TAIWAN STRAITS 11] (2001),

3. Reading Between the Lines

As discussed previously, the provisions of the AL fail to resolve the rigidity of the validity requirements for effective arbitration agreements.[155] Consequently, in tackling the legislative rigidity and to fill in the practical gap, the work has been left to the courts, with the most major improvements contributed by the SPC, augmented by the LHPCs.[156]

In interpreting the requirement on form, remarkable improvements have been made to expand the "signature-based written" requirement."[157] Besides endorsing the form of consent by "incorporation by reference," the SPC has also recognized the effect of arbitration agreement in some situations involving contract assignment and some maritime bills.[158] By doing so, the SPC has been seen as a swinging pendulum of strict textual adherence under the AL to a

155. *See* WANG SHENGHANG, *supra* note 154, at 11; *see also* JINGZHOU TAO, BUSINESS, *supra* note 151, at 4003 (highlighting the CIETAC provision allowing for supplementary submission agreements to remedy defective existing agreements). *See generally* Jingzhou Tao, *The Role of Local Courts In Chinese Arbitration Procedures: Judicial Intervention—Friend, Enemy, or Just Alien?*, *in* DOING BUSINESS IN CHINA: RESOLVING THE CHALLENGES IN TODAY'S ENVIRONMENT 291 (PLI Corp. L. & Practice, Course Handbook Series No. 13438, 2007) (noting the nature of court intervention in Chinese arbitration proceedings and their determination by the Arbitration Laws of China and the nature, domestic or foreign, of the proceedings).

156. *See* Philippe Fouchard, *Suggestions to Improve the International Efficacy of Arbitral Awards*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 601, 612 (Int'l Council for Com. Arb. Congress, Series No. 9, 1999) (discussing the important role courts play, both nationally and locally, in assisting arbitrations); *see also* JOHN SHIJIAN MO, ARBITRATION LAW IN CHINA, 66–67 (2001) (proclaiming the Supreme People's Court's power to supervise, and its limited power to determine the validity of an arbitral agreement); *see also* JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 31 (2004) (describing the relationship between arbitration and the courts of China and noting the Supreme People's Court's issuance of important judicial interpretations of Arbitration Law).

157. *See* MO, *supra* note 156, at 88–89 (detailing the written requirements of arbitration agreements as contracts, which may be in the form of a letter or electronic message, and indicating that a signature is probably not mandated); *see also* JINGZHOU TAO, ARBITRATION *supra* note 156, at 33–34 (discussing written form requirements of arbitration agreements but noting that a signature is not statutorily required in China as it is under the New York Convention); *see also* ARBITRATION LAWS OF CHINA 55–56 (The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China ed. 1997) (outlining the types, forms, and requirements of arbitration agreements but failing to mention a signature requirement).

158. *See* Zhu Jianlin, *CIETAC: Validity of Arbitration Agreements in China*, INT. A.L.R. 1998, 1(4), N66 (1998) (quoting a discussion in which CIETAC and the Supreme People's Court clarified that arbitration agreements would remain valid in the event of legal contract assignment); *see also* Haung Jin & Du Huanfang, *Chinese Judicial Practice in Private International Law: 2003*, 7 CHINESE J. INT'L L. 255 (discussing several contract assignment cases where the higher courts held assignees bound to written arbitration agreements where the original clause was not expressly excluded or modified); *see also* Liu Yuwu, *China: Assignment of Arbitration Clause*, INT. A.L.R. 2001, 4(2), n11-12 (2001) (summarizing a Supreme People's Court's finding that assignees bound by an original arbitration clause are thereby subject to dispute resolution under the Foreign Trade Arbitration Commission of China).

more intentions-based interpretation.[159] The LHPCs go even further; they give effect to arbitration agreements where contractual parties have undergone reorganizations.[160]

When it comes to the substantive requirement, an even longer list of judicial documents has been recorded to clarify the uncertainty of "designated arbitration commission."[161] In this respect, the SPC seems to allow an arbitration agreement to be deemed valid even if concurrent arbitral institutions have been nominated.[162] However, the bottom line is that the institution must be clearly ascertainable from the parties' drafting, and moreover, a supplementary agreement must be reached to appoint one institution.[163] By comparison, the judicial approach taken by the LHPCs seems more pro-arbitration in that it not only acknowledges the validity of agreements that incorrectly refer to arbitral commissions, but also lays down the solutions should there be any jurisdictional conflict due to the choice of two commissions.[164] That said,

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159. *See* José Alejandro Carballo Leyda, *A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Tawain?*, 6 CHINESE J. INTL L. 345, 351 (2007) (observing Chinese courts' focus on "substance, justice, fairness and equity"); *see also* Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL'Y J. 403, 411–12 (2006) (demonstrating China's progressive attitude towards international arbitration). *See generally* Huang Jin & Du Huan Fang, *supra* note 158, at 647 (charting Supreme People's Court's choice of law decisions and exercise of jurisdiction, and noting that they decided almost half of the cases by party autonomy).

160. *See* ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 152 (4th ed. 2004) (referencing the general rule that arbitration agreements are still effective for contract successors); *see also* Karl-Heinz Böckstiegel, *Summary of Discussion in the Third Working Group*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 433, 435 (Int'l Council for Com. Arb. Congress, Series No. 9, 1999) (quoting Professor Wang Sheng Chang's report illustrating China's preference for enforcement of arbitration agreements); *see also* Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People's Republic of China*, 1 ASIAN-PAC. L. & POL'Y J. 12, 59–61 (2000) (commenting on China's lack of a unified fraudulent transfer or conveyance statute which would allow for enforcement of arbitration agreements under such circumstances).

161. *See* ARBITRATION LAWS OF CHINA, *supra* note 157, at 56–57 (explaining that a designated arbitration commission is a mandatory element under Chinese Arbitration Law); *see also* Roger Best, *The Resolution of China Disputes*, 3 INT. A.L.R. 2000 1, 4 (2000) (observing that CIETAC has a monopoly due to China's mandated designation of an arbitration commission); *see also* Mauricio J. Claver-Carone, *Post-Handover Recognition and Enforcement of Arbitral Awards Between Mainland China and Hong Kong SAR: 1999 Agreement vs. New York Convention*, 33 LAW & POL'Y INT'L BUS. 369, 390–91 (2002) (quoting Article 16 of China's Arbitration Law, which requires arbitration agreements to contain a designated arbitration commission).

162. *See* Katherine L. Lynch, *Chinese Law: The New Arbitration Law*, 26 HONG KONG L.J. 104, 106 (1996) (explaining the creation of arbitration commissions by the SPC where necessary); *see also* Patricia Pattison & Daniel Herron, *The Mountains Are High and the Emperor Is Far Away: Sanctity of Contract in China*, 40 AM. BUS. L.J. 459, 503 (2003) (outlining the establishment of the China Arbitration Association and its purpose to supervise arbitration commissions); *see also* Peerenboom, *supra* note 160, at 9 (noting how the courts are answerable to the local government and are viewed as government administrators).

163. *See* Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes: Drafting An Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941, 947 (1996) (declaring that there has been a growth in the availability of arbitration institutions in China); *see also* Joseph T. McLaughlin et al., *Planning for Commercial Dispute Resolution in Mainland China*, 16 AM. REV. INT'L ARB. 133, 141 (2005) (recognizing the difficulty in drafting clauses under the Arbitration Law to identify an arbitration commission); *see also* Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 428 (2006) (addressing the principle that arbitration institutions are independent from each other).

164. *See* Li Xuebing, *The Recognition and Enforcement of Foreign Arbitral Awards or Foreign Judgments in China*, *available at* http://www.vmaa.org/docs/Li%20Xuebing_Nov1605_Seminar.doc (analyzing the impact of the Shanghai Opinion on the implementation of the Arbitration Law of the People's Republic of China).

Article 2 of the Shanghai Opinion has been widely regarded as a bold stride of the local judiciary to show greater respect to the parties' arbitral intention.[165]

In reading between the lines of these judicial documents, we find that despite the fact that there is no clear legal basis for the LHPCs to exercise judicial interpretative power, they do issue judicial opinions, and these opinions tend to influence arbitral jurisprudence and practice.[166] This is because decentralization in the course of pursuing economic reforms has fueled local judicial efforts to develop their own practice in implementing the national rules according to their own needs.[167] As such, the lack of national guidance in certain aspects creates some room for local organizations to expand their own role. It deserve to be noted that although judicial guidelines at both the central and local levels have shown significant progress in liberalizing parties' drafting autonomy, the local judiciary has been generally more liberal and "benevolent" in allowing the honoring of the defective agreements. They strive to save the defectively drafted agreements as much as possible by referring to extraneous evidence and by reading in a selection of arbitration commission for the parties even when only the place of arbitration is mentioned.[168] This may be explained by the fact that more pressure to liberalize has been put on the judicial front lines, i.e., the local judiciary, particularly those in economically well-developed areas where the practice of commercial arbitration has developed into a more advantageous practice. The two judicial opinions issued by the BHC and SHC therefore have resulted

165. *See* Wang and Qu, *"Several Comments on the Shanghai Opinion 2001,"* in CIETAC, ARBITRATION AND LAW YEARBOOK OF 2001 407–8 (ZHONGCAI YU FALV 2001 NIANKAN) (2002); *see also* Katherine L. Lynch, *Chinese Law: The New Arbitration Law*, 26 H.K.L.J. 104, 108 (1996) (describing that the purpose of Article 2 is to discuss how the rights of contract disputes between parties are arbitrable); *see also* Zhao Xiuwen & Kloppenberg, *supra* note 163, at 428 (revealing that China's Arbitration Law promotes party autonomy in choosing an arbitration commission).

166. *See* Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 BERKELEY J. INT'L L. 329, 345–46 (1997) (commenting on the disturbing exercise of jurisdiction by the People's Court in an arbitration dispute); *see also* Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV. 539, 560 (1995) (indicating the roles of the judiciary in the People's Republic of China Arbitration Courts); *see also* Carlos de Vera, *Arbitrating Harmony: "Med-Arb" and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China,* 18 COLUM. J. ASIAN L. 149, 161–62 (2004) (detailing the process by which some jurisdictions provide for enforcement of a settlement agreement apart from mediation).

167. *See* Hu Kangsheng, *Speech at the Seminar "Resolving Differences in China," in* ZHONGCAI YU FALY 2001 NIANKAN [ARBITRATION AND LAW YEARBOOK OF 2001] at 7 (CIETAC ed., 2002); *see also* Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China from a U.S. Judgment Creditor's Perspective*, 36 GEO. WASH. INT'L L. REV. 757, 782 (2004) (remarking how China is moving to improve the efficacy of judgment enforcement in China's judicial system); *see also* William Heye, Note, *Forum Selection for International Dispute Resolution in China—Chinese Courts vs. CIETAC*, 27 HASTINGS INT'L COMP. L. REV. 535, 535–36 (2004) (discussing the jurisdiction of Chinese courts for litigation purposes).

168. *See* Li Xuebing, *supra* note 164 (analyzing the impact of the Shanghai Opinion on the implementation of the Arbitration Law of the People's Republic of China).

in resounding compliments from both the judiciary and arbitration community.[169] The Shanghai Opinion in 2001 was particularly well received for having cleared up quite a few practical uncertainties.[170] In CIETAC's words, "The Shanghai Opinion has made crucial contributions to the development of arbitration in China by the local judiciary and these guidelines impact the arbitral practice not only in Shanghai but also the entire country."[171]

However, gaps remain after comparing international arbitration norms. For example, judicial documents at both the central and provincial levels fail to satisfactorily reflect the relevant changes taking place in other important Chinese legislatures such as the CL.[172] The inconsistencies include, for example, the effects of arbitration agreements on non-signatory third parties in the context of an agency relationship.[173] Moreover, from time to time, all those judicial opinions appear to be sporadic pieces of documents before the public.[174] They may not be consistent with each other in a number of instances and perhaps conflict with each other, which

169. *See* Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 38 (2005) (reviewing the Chinese legislature's attempt to address the longstanding problems with foreign parties in the court system); *see also* Jane Volz & Robert Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser,* 21 WM. MITCHELL L. REV. 867, 904 (1996) (addressing arbitration within China's People's Court); *see also* Li Hu, *Setting Aside an Arbitral Award in the People's Republic of China*, 12 AM. REV. INT'L ARB. 1, 16 (2001) (stating the difficulties of the former arbitration system in China).

170. *See* McLaughlin et al., *supra* note 163, at 140 (emphasizing the reputation of China's arbitration commission by the American Chamber of Commerce after 2001); *see also* George O. White III, *Foreigners at the Gate: Sweeping Revolutionary Changes on the Central Kingdom's Landscape—Foreign Direct Investment Regulations & Dispute Resolution Mechanisms in the People's Republic of China*, 3 RICH. J. GLOBAL L. & BUS. 95, 136 (2003) (detailing the progress of China's arbitration courts since 1990); *see also* Jessica Zoe Renwald, Note, *Foreign Investment Law in the People's Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution*, 16 IND. INT'L & COMP. L. REV. 453, 474 (2006) (describing the advantages to arbitrating in an international arbitration commission in China).

171. *See* Wang & Qu, *supra* note 165, at 407–8. *See generally* David T. Wang, Comment, *Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System*, 48 SANTA CLARA L. REV. 649, 650–52 (2008) (discussing how the new federal court system in China seeks to improve the enforcement of arbitral awards).

172. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, CHINA IN THE WORLD ECONOMY: THE DOMESTIC POLICY CHANGES 365 (2002) (stating that China's current regulation reform focuses on improving the implementation of its lawmaking); *see also* JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK 54 (2005) (informing that the National People's Republic of China has recognized a delay between the promulgation and implementation of their laws); *see also* Shirley S. Cho, Note, *Continuing Economic Reform in the People's Republic of China: Bankruptcy Legislation Leads the Way,* 19 HASTINGS INT'L & COMP. L. REV. 739, 749–50 (1996) (describing China's cautious approach to implementing its laws and regulations, characterized by trial periods in select localities that create inconsistent judicial documents).

173. *See* The Beijing Opinion on Some Issues Regarding the Determination of an Application for Ascertaining the Validity of an Arbitration Agreement, and Motions to Revoke an Arbitration Award (promulgated by the Beijing High Court Dec. 3, 1999) (P.R.C.); *see also* Cosmoteck Mumessillik Ve Ticaret Ltd. Sirkketi v. Cosmoteck U.S.A., 942 F. Supp. 757, 760 (D. Conn. 1996) (applying the idea that non-signatory parties can be bound by arbitration agreements to international arbitrations).

174. *See* ZIMMERMAN, *supra* note 172, at 36 (postulating that the modern Chinese legal system is influenced by Legalism, which does not emphasize the importance of accurately recording crimes or punishments); *see also* Nanping Liu, *Trick or Treat: Legal Reasoning in the Shadow of Corruption in the People's Republic of China*, 34 N.C. J. INT'L L. & COM. REG. 179, 225 (2008) (accusing Chinese judges of issuing unclear and irrational opinions because they omit certain facts from their decisions); *see also* Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 68 (2001) (claiming that no formal or official system for reporting cases or judicial opinions exists in China).

makes them very difficult to reference in arbitral practice.[175] As such, a unified judicial interpretative document compiling all these opinions from various levels would better serve the practical needs of various arbitral organizations.

B. Critical Turning Since 2006: Unified SPC Interpretation on Arbitration

In its latest attempt, a decade later, the SPC spearheaded the reform by issuing its unified interpretation on Chinese arbitration, the "Interpretation on Certain Issues Relating to the Application of the PRC Arbitration Law" (the SPC Interpretation), as effective in September 2006.[176] The SPC Interpretation has been based significantly on the two Draft Provisions previously issued by itself in 2003 and 2004 respectively, namely, "Several Regulations on How the People's Courts Handle Foreign-Related Arbitration and Foreign Arbitration Cases" (the "Foreign-Related Draft")[177] and "Interpretations to Several Issues on the Application of the Arbitration Law" (the "Domestic Draft").[178]

As far as the regulation of arbitration agreements is concerned,[179] the newly issued SPC Interpretation appears to be a good summary of the relevant provisions contained in the CL and various SPC and LHPC judicial opinions on the topic.[180] It codifies the existing arbitra-

175. *See* ICCA INTERNATIONAL ARBITRATION CONGRESS, NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 67–68 (Albert Jan van den Berg ed., 2005) (positing that China's inconsistent laws and judicial decisions are the cause of its difficulties in applying arbitration decisions); *see also* Thuy Le Tran, Comment, *Vietnam: Can an Effective Arbitration System Exist?*, 20 LOY. L.A. INT'L & COMP. L. J. 361, 383 (1998) (commenting that China's Arbitration Law allows Chinese courts to refuse to enforce arbitration awards); *see also* Wang, *supra* note 171, at 660 (opining that Chinese arbitration law is plagued by institutional differences and extra-judicial influences, which result in the non-enforcement of arbitration awards).

176. *See* Interpretation on Certain Issues Relating to the Application of the PRC Arbitration Law (promulgated by the Supreme People's Court, Aug. 23, 2006, effective Aug. 23, 2006), *translated in* ISINOLAW (last visited Mar. 21, 2009) (P.R.C.) (answering questions about China's Arbitration Law and its domestic application).

177. *See Interpretation on Several Issues Concerning the Application of the <PRC Arbitration Law> 4500/06.08.23*, CHINA L. & PRAC., Oct. 1, 2006, at 91; *see also* Letter from Zhang Jinxian, Judge of the Supreme People's Court, to Ellen S. Reinstein (Nov. 12, 2004) (on file with www.chinaiprlaw.com), *available at* http://www.chinaiprlaw.com/english/answers/answer27.htm (acknowledging that in February 2002, the SPC released an interpretation on its Arbitration Law as applied to foreign arbitral awards).

178. *See Application of P.R.C. Arb. L.*, *supra* note 177; *see also* WEI-QI CHEN, RECENT DEVELOPMENTS IN THE JUDICIAL INTERPRETATION ON ARBITRATION LAW IN CHINA (2007), at 58, http://www.jurist.org.cn/doc/uclaw200705/uclaw20070508.pdf a58, (affirming that the Interpretation on Arbitration Law, released in 2006 was based on a Draft Provision which was published on the Court's website on July 22, 2004).

179. *See Certain Issues*, *supra* note 176; *see also* John Choong, *Clarifying the PRC Arbitration Law: Questions and Answers*, CHINA L.& PRAC., Nov. 2006, *available at* http://www.chinalawandpractice.com/Article/1691932/Channel/9930/Clarifying-the-PRC-Arbitration-Law-Questions-and-Answers.html (revealing that arbitration agreement and arbitral awards are the two aspects of this interpretation.)

180. *See China: Interpreting the PRC Arbitration Law*, ANGELA WANG & CO., Jan. 24, 2007, http://www.mondaq.com/article.asp?articleid=45778 (providing that the Interpretation clarified past ambiguities associated with arbitration agreements). *See generally* Chen Jian, *Latest Developments in Commercial Arbitration*, BUSINESS FORUM CHINA, http://www.bfchina.de/index.php?Itemid=27&contentid =318&id= 209&option=com_content&task=view (explaining that the Interpretation is pro-arbitration and provides clarification on how the arbitration law should be interpreted); *see generally* Graeme Johnston & Steve Kou, *The Latest Incremental Reform of Chinese Arbitration Law*, ASIAN DISP. REV. 13 (Jan. 2007) (asserting that some portions of the SPC Interpretation took into account prior SPC interpretations).

tion rules and practices and provides further clarification to certain issues that, in the past, have led to technical challenges to arbitration agreements.[181] At the same time, however, it steps backward from the pro-validity initiatives in some cases cited to in the two Drafts and leaves other important issues unanswered.

1. Two Previous SPC Draft Provisions

For the purpose of the present review of the 2006 SPC Interpretation, its previous two Draft Provisions are of particular relevance and will be referred to throughout this section as a comparative base in outlining both the improvements and problems of the latest SPC approach toward arbitration.

a. Broad Meaning of "Written Agreement"

Both the Foreign-Related and Domestic Drafts comprehensively cover the increased flexibility of the traditionally strict writing requirement for arbitration agreements.

First, the provisions are consistent with the CL in that the determination of whether an agreement is in writing is determined in accordance with Article 11 of the CL,[182] which states that "any signed form capable of tangibly representing its contents, such as written instruments, letters and electrically or electronically transmitted documents," qualifies as a writing that makes the agreement valid.[183] Article 16 of the Foreign-Related Draft contains an exceptional deviation from the traditional "signature-based writing" rule by providing that a valid arbitration agreement will be deemed to have been made where one party commences arbitral proceedings and the other party joins in the proceeding without jurisdictional objection and files a substantive defense. This creation of the "waiver of objection" standard is similar to the practice of "exchange of statements of claim and defense"[184] under the ML.

To resolve the practical uncertainty raised by the BHC, the Foreign-Related Draft addressed the effect of arbitration agreements on agency relations, and provides, in Article 21, that the agreement will not bind the principal if it is concluded by an agent without authorized

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181. *See China: Interpreting the PRC Arbitration Law*, *supra* note 180 (asserting that the SPC's Interpretation helped clarify Chinese arbitration law); *see also* Andrew Jeffries & Peter Thorp, *A New Interpretation on the Application of Arbitration Law in China*, ALLEN & OVERY, Sept. 20, 2006, http://www.allenovery.com/AOWEB/AreasOfExpertise/Editorial.aspx?contentTypeID=1&contentSubTypeID=7944&itemID=46114&countryID=18856&prefLangID=18531 (explaining that the Interpretation should result in consistent rulings from the courts on arbitration matters). *See generally* Johnston & Kou, *supra* note 180 (expressing that the SPC's Interpretation was useful).

182. *See Application of P.R.C. Arb. L.*, *supra* note 177, at art. 25 (proclaiming that an arbitration agreement is valid when the disputing parties agree to submit their dispute to arbitration under Articles 34 and 256 of the Civil Procedure Law).

183. *See* Contract Law (promulgated by the Second Session of the Ninth Nat'l People's Cong., March 15, 1999, effective Oct. 1, 1999), art. 11, *available at* http://novexcn.com/contract_law_99.html (providing the definition of a writing under the Contract Law).

184. *See* UNCITRAL Model Law on International Commercial Arbitration ch. II, art. 7(2) (1994) (asserting that the arbitration agreement must be in writing in order to be valid); *see also* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS at 59 (London Sweet & Maxwell 2000) (explaining that an arbitration agreement is valid so long as it is in writing).

power, ultra vires or after the power expires.[185] However, in accordance with CL provisions, the arbitration agreement signed by the agent will be established between the principal and the third party as long as the substantive contract per se binds the principal; this will be based on whether the third party has actual knowledge of the agency relationship at the conclusion of the arbitration agreement with the agent.[186]

Both drafts further articulate that the succession or transfer of the legal rights and obligations of a party in a contract that contains an arbitration clause leads to the transfer of the arbitration agreement. This expansive view on "written form of consent" has been endorsed by the SPC before[187] and has been codified in Articles 28 (succession), 29 (assignment), and 31 (subrogation) of the Foreign-Related Draft as well as Articles 1 (succession) and 2 (assignment) of the Domestic Draft[188] unless the third party assignee or successor disagrees with or proves that he was unaware of the arbitration clause at the time of assignment or succession.[189]

Finally, Article 30 of the Foreign-Related Draft deals with the transfer of arbitration agreements in the context of charter parties and Bs/L. It states that an arbitral clause contained in a charterparty shall be deemed to be incorporated and therefore binding on the B/L holder, provided the incorporation is expressly stated on the face of the bill and the arbitral clause is valid.[190] It is notable that over a decade, the SPC seemed to soften its tone a bit as the express consent by the bill holder is no longer required. However, it might still be arguable that an express statement on the "face" of the bill appears restrictive in that it could deny maritime arbitration cases where the statement of incorporation may not be made "express" enough or made within the lines of the bill.[191]

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185. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, art. 21 (promulgated by the Supreme People's Court, Dec. 31, 2003, effective Dec. 31, 2003) (P.R.C.) (stating a principal is not bound by the arbitration agreement unless he authorizes an agent to act on his behalf).

186. *See* Contract Law, *supra* note 183, at art. 402–3 (detailing the roles of the agent, principle, and third party in a contract situation).

187. *See* Case Report by Wang Shengchang, *Zhongcai Xieyi ji qi Youxiaoxing Queding* [*Arbitration Agreement and the Confirmation of Its Validity*], HAIXIA LIANG'AN JINGMAO ZHONGCAI YANTAOHUI WENJI 18–20 [SYMPOSIUM ESSAYS ON ECONOMIC TRADE ARBITRATION ACROSS THE TAIWAN STRAITS 18–20] (2001) 15–20; *see also* Wang and Qu, *"Several Comments on the Shanghai Opinion 2001,"* in CIETAC, ARBITRATION AND LAW YEARBOOK OF 2001 407–8 (ZHONGCAI YU FALV 2001 NIANKAN) (2002).

188. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, *supra* note 185, at arts. 28-29, 31; *see also* Interpretations to Several Issues on the Application of the Arbitration Law, arts. 1–2 (issued by the Supreme People's Court, July 22, 2004) (P.R.C.).

189. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, *supra* note 185, at art. 29(2).

190. *See id*. at art. 30; *see also* Jessica Zoe Renwald, Note, *Foreign Investment Law in the People's Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution*, 16 IND. INT'L & COMP. L. REV. 453, 472 (2006).

191. *See* Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 141 (2006) (discussing that arbitration agreements in China must have clear guidelines or they are considered void); *see also* Li Hai, *Guanya Tidan Zhongcai Tiakuan Xiaoli Ruogan Wenti de Sikao* [*Thinking About the Several Questions Regarding the Validity of the Arbitration Clause in the Bill of Lading*] (ZHONGCAI YU FALV [ARBITRATION AND LAW] (2005) (P.R.C.) at 92.

b. Curable Instances of "Ambiguous Arbitration Institution"

In the beginning, both of the two draft provisions replace the use of the term "arbitration commission" (*zhongcaiweiyuanhui*) in the AL with "arbitration institution (*zhongcaijigou*)."[192] It is interesting to note that except for the use of the word "commission" in China, most arbitral institutions abroad adopt different titles which imply that they are institutional arbitration service providers.[193] Pursuant to the CL, parties to a contract with foreign parties[194] are allowed to agree to submit their disputes to arbitration either within or outside China.[195] They are thus allowed to choose institutional arbitration abroad even if the governing law of their arbitration agreement is AL.[196] As such, it is absurd to reject the validity of arbitration agreements when often strict adherence to the term "commissions" is actually impossible. It may also be said that the SPC hopes to address other concerns such as the rigid adherence to the term "arbitration commission" and hence to move Chinese arbitral regulations more parallel to international arbitration terms and uses. Beyond the wording change, three main aspects of reforms are brought by the two drafts with respect to liberalizing the rigidity of the "designated arbitration commission" standard under the AL.[197]

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192. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, *supra* note 185, at arts. 22–26; *see also* Interpretations to Several Issues on the Application of the Arbitration Law, *supra* note 188, at art. 2.

193. *See* Hong Kong International Arbitration Center, http://www.hkiac.org/HKIAC/HKIAC_English/main.html (last visited Mar. 20, 2009) (referencing the arbitration institution in Hong Kong); *see also* London Court of International Arbitration (LCIA), http://www.lcia-arbitration.com/ (last visited Mar. 20, 2009) (referencing the arbitration institution in England); *see also* American Arbitration Association, http://www.adr.org/ (last visited Mar. 20, 2009) (referencing the arbitration institution in America).

194. *See* Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL'Y J. 403, 444 (2006) (reiterating the judicial criteria for a foreign related dispute). *See generally* General Principles of Civil Law (promulgated by President of the People's Republic of China on Apr. 12, 1986, effective Jan. 1, 1987) (P.R.C.), *available at* http://www.lawbridge.net/english/LAW/20065/1322572053247.html (discussing the civil laws of the People's Republic of China and specifically how they deal with foreigners).

195. *See* Contract Law (promulgated by the Second Session of the Ninth Nat'l People's Cong., March 15, 1999, effective Oct. 1, 1999), art. 128, *available at* http://novexcn.com/contract_law_99.html (stating that the parties may go to either the Chinese arbitration or outside arbitration for their disputes); *see also* JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 8 (2004) (asserting that the reform in Chinese law has allowed for arbitration both inside and outside of China); *see also* Gary J. Dernelle, *Direct Foreign Investment and Contractual Relations in the Peoples Republic of China*, 6 DEPAUL BUS. L.J. 331, 359 (1994) (contending that the Chinese Foreign Economic Contract Law allows for arbitration dispute resolution in other forums outside China).

196. *See* JINGZHOU TAO, ARBITRATION, *supra* note 195, at 56 (postulating that ad hoc arbitration agreements between nations that allow for arbitration outside of China are valid); *see also* Mark Sidel, *The Acceptance of Emerging American Law Abroad: Could "Maritime RICO" Work in the People's Republic of China*, 12 TUL. MAR. L.J. 99, 107 (1987) (arguing that under the New York Convention, China agreed to recognize foreign arbitrational decisions).

197. *See* Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 132 (1996) (claiming that there have been significant breakthroughs in international arbitration in China); *see also* Zhao Xiuwen & Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 449–50 (2006) (identifying the three major reforms that should take place in arbitration law in China). *See generally* Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 48 (2005) (stressing the reforms in Chinese law regarding arbitration).

First, Articles 22 through 26 of the Foreign-Related Draft and Articles 5 through 7 of the Domestic Draft detail the circumstances under which arbitration agreements should be voided under Articles 16 and 18 of the AL, yet would be curable in arbitral practice. This may include cases such as an agreement providing for arbitration "by two or more arbitral institutions."[198] Further, both Drafts articulate that if an arbitration agreement provides for arbitration at a certain place but fails to designate a specific arbitral institution, the agreement is not invalidated by the fact that more than one institution exists at the place of arbitration.[199] Although it fails to clarify which institution in the arbitral place is the proper one, the reasonable assumption is that without any supplementary agreement specifying the exact institution, the principle of "first come, first served" will be applied so that the arbitral institution that first receives an application for arbitration seizes jurisdiction over that arbitration agreement.[200] In addition, where the parties make incorrect reference to an arbitral institution but its proper identity can still be ascertained by reference to the surrounding context, the courts should find the agreement valid and decline its jurisdiction over the dispute.[201] Similarly, where an arbitration clause makes reference only to the rules of a specific arbitral institution, the court may refer the matter to arbitration under that institution whose rules are referred to.[202]

The second aspect concerns the scenario where the parties opt for both arbitration and litigation. Following a previous SPC opinion, Article 20(4) of the Foreign-Related Draft provided

198. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, at art. 22 (promulgated by the Supreme People's Court, Dec. 31, 2003, effective Dec. 31, 2003) (P.R.C.) (providing an example of a type of an agreement that would be curable and not voidable under the new measures); *see also Application of the P.R.C. Arb. L.*, *supra* note 111, at art. 5 (citing how providing for arbitration by two or multiple arbitral institutions would not be voidable).

199. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, *supra* note 199, at art. 23 (discussing how arbitration agreements are not rendered invalid due to leaving out certain details); *see also Application of the P.R.C. Arb. L.*, *supra* note 111, at art. 5 (discussing how an arbitration agreement is valid even if more than one institution exists at the place of arbitration).

200. *See* Shanghai Shi gaoji renmin fayuan guanyu zhixing "Zhonghua Renmin Gongheguo zhongcai fa" ruogan wenti de chuli yijian [Opinion of the Shanghai High People's Court on the Handling of Certain Issues Relating to Implementation of the "Arbitration Law of the People's Republic of China"] (adopted Jan. 3, 2001) (P.R.C.)) translated in ARBITRATION IN CHINA: A PRACTICAL GUIDE, VOLUME 2, at at art. 5 (Daniel R. Fung et al. eds., 2004) (discussing how if a particular jurisdiction is not designated, the arbitral institution which first receives an application for arbitration will be the one to seize jurisdiction); *see also* Wang and Qu, *"Several Comments on the Shanghai Opinion 2001,"* in CIETAC, ARBITRATION AND LAW YEARBOOK OF 2001 407–8 (ZHONGCAI YU FALV 2001 NIANKAN) (2002) (describing the "first come, first served" principle that is used to determine a specific jurisdiction).

201. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, *supra* note 198, at art. 24 (describing a circumstance where the courts should decide the jurisdiction in a dispute rather than the parties); *see also Interpretation on Several Issues Concerning the Application of the <PRC Arbitration Law> 4500/06.08.23*, CHINA L. & PRAC., Oct. 1, 2006, art. 6 (stating that courts should decline jurisdiction where parties make incorrect reference to an arbitral institution).

202. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, *supra* note 198, at art. 26 (discussing what a court may do when an arbitration clause refers only to the rules of a specific arbitral institution); *see also* Jessica Zoe Renwald, Note, *Foreign Investment Law in the People's Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution*, 16 IND. INT'L & COMP. L. REV. 453, 472 (2006) (describing how a "chosen arbitration commission" must be indicated specifically).

that such arbitration agreements were invalid.[203] The approach in the Foreign-Related Draft, however, conflicts with that of the Domestic Draft, which provides, under Article 7, that such agreements will not be voided and that the case will be adjudicated in whichever, the arbitral institution or the court, adjudicatory body files the application first.[204] The liberal approach in the Domestic Draft is welcomed by the practitioners as the more realistic interpretative technique and more pro-arbitration stance of the SPC.[205]

Lastly, Article 20(6) of the Foreign-Related Draft deals with the controversial issue of ad hoc arbitration agreements in China. It seems that the SPC now relaxes its traditional stance by providing an exception under Article 27 of the Foreign-Related Draft to allow the ad hoc agreement in some cases.[206] The Article 27 exception consists of two parts: first, both parties to the arbitration agreement must be nationals of member states to the 1958 New York Convention (NYC); second, the laws of both countries must not prohibit ad hoc arbitrations.[207] Since the SPC has held that ad hoc arbitrations are not permitted in China,[208] then pursuant to the second limb of the Article 27 exceptions, an ad hoc arbitration agreement between a Chinese party and a foreign party may nevertheless be voided. As such, on its face, the rule dramatically reduces the ability of the parties to a Sino-foreign contract to conduct ad hoc arbitrations. Additionally, the SPC seems to lean toward arbitration agreements that provide for ad hoc arbitrations outside China.[209] The potential impact of Article 27 is nonetheless far-reaching as it is the future goal for ad hoc arbitral practice in China. The Draft Provisions were expected to be formally recognized with this partial recognition of ad hoc arbitration agreements. However, that formal recognition did not occur, leaving the status of ad hoc arbitration agreements still an open-ended question in the Chinese arbitration system, as the following sections will discuss.

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203. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-related Arbitrations and Foreign Arbitrations, *supra* note 198, at art. 20(4) (explaining agreements are invalid where the parties opt for both arbitration and litigation).

204. *See Application of the P.R.C. Arb. L.*, *supra* note 201, at art. 7 (citing the Domestic Draft, which provides that agreements where parties opt for both arbitration and litigation will not be voided, as opposed to the Foreign-Related Draft).

205. *See* Alex Burkett, *China's Two-Dimensional Skies: The "Chineseness" of Aviation Law in China and How It Helps Us Understand Chinese Law,* 16 J. TRANSNAT'L L. & POL'Y 251, 261 (2007) (providing examples of the liberal thinking and legal philosophy used in trade agreements); *see also* Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL'Y J. 403, 454 (2006) (describing how a liberal approach would be more beneficial to foreign practitioners).

206. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, *supra* note 198, at art. 27 (discussing how the ad hoc agreement is allowed in some cases under the Foreign-Related Draft).

207. *See id.* (discussing the exception for ad hoc arbitrations).

208. *See* People's Insurance Company of China, Guangzhou Branch v. Guangdong Guanghe Power Company Ltd. (Ming Si Zhong Zi No. 29, 2003); *see also* Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 18, *translated in* 34 I.L.M. 1650, 1654 (1995) (P.R.C.) (outlining grounds when an arbitration agreement will be invalid).

209. *See* SUN NANSHEN, JURISDICTIONAL CONFLICTS IN THE JUDICIAL REVIEW OF FOREIGN-RELATED ARBITRATIONS (2004); *see also* Xiaowen Qiu, Note & Comment, *Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China*, 11 AM. REV. INT'L ARB. 607, 608 (2000) (enumerating ways in which foreign and domestic awards are treated differently).

2. Unified Judicial Interpretation on Arbitration

The unified SPC Interpretation of 2006, on the basis of the two Drafts previously issued, is the latest attempt by the SPC to clarify its positions on a number of contentiously defective arbitration agreements. Compared with the two Drafts, both encouraging a general preference toward confirming arbitration agreement and discouraging moving away from liberalization are reflected in this latest SPC codification.

a. Confirming the Broad Meaning of "Written Agreement"

The 2006 Interpretation generally confirms the liberal approach of the two Drafts on the writing formality. Consistent with Article 15 of the Foreign-Related Draft, Article 1 of the Interpretation aligns the definition of written form with Article 11 of the CL.[210] Article 11 then confirms acceptance of consent to arbitration by way of incorporation by reference. It provides that where a contract specifically stipulates that an arbitration clause in another contract or document shall be applied to resolve disputes under the contract at issue, the parties shall refer the dispute to arbitration in accordance with such clause.[211] Although the wording is not entirely clear, it appears that a general reference to such contract or document will be sufficient, which is in accordance with an earlier SPC reply.[212]

With respect to the effect of arbitration agreements upon non-signatory third parties in contractual transfer (succession, assignment, and subrogation), the interpretation is generally in line with the approach taken in its Draft Provisions that the arbitration agreement shall be binding on the party to whom contractual rights are assigned, transferred, or subrogated.[213] However, it goes on to provide a significant exception, other than those already mentioned in the drafts—the arbitration agreement will not be binding if the transferee is unaware of the existence of a separate arbitration agreement at the time of transfer or assignment.[214] It thus introduces a presumptive rule that the arbitration agreement will be binding on the transferee or assignee, but can be rebutted by showing a lack of knowledge, although the exact scope of "lack of awareness" is unclear. For example, to what extent is the transferee or assignee's implied or constructive knowledge of the existence of arbitration agreement relevant? The SPC fails to provide any further guidelines, leaving the practice vague on that point. Additionally, some other controversial non-signatory third party cases, in the agency and bill of lading contexts,

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210. *See* Interpretation on Certain Issues Relating to the Application of the PRC Arbitration Law (promulgated by the Supreme People's Court, Aug. 23, 2006, effective Aug. 23, 2006), *translated in* ISINOLAW (last visited Mar. 21, 2009) (P.R.C.), at art. 1 (describing what constitutes a writing for an arbitration agreement).

211. *See id.* art. 11 (outlining how incorporation by reference is handled in arbitration).

212. *See* SPC Reply on the Manner of Determining Jurisdiction in a Sino-Mongolian Contract That Fails to Provide for Arbitration Directly (issued by the Sup. People's Ct., Dec. 14, 1996) 1996 Fa Han No. 177 (P.R.C.) (affirming the 1996 Supreme People's Court reply in the Sino-Mongolian case*; see also* John Choong, *Clarifying the PRC Arbitration Law: Questions and Answers*, CHINA L. & PRAC. (London), Nov. 2006 at 22 (arguing that it is common practice to refer to and incorporate standard terms set out in another document).

213. *See* Certain Issues, *supra* note 210, at arts. 8, 9 (detailing how third parties are to be treated in an arbitration).

214. *See id.* at art. 9 (shifting the burden to object to an arbitration agreement to the transferee if he does not want it to be binding).

have been omitted that had previously been addressed in the Foreign-Related Draft.[215] The provisional omission leads to greater uncertainty of the regulatory regime and causes the arbitral practice to be inconsistent on these issues.

b. Stepping Backward on "Curable Arbitration Institution"

The unified SPC Interpretation confirms the two drafts' usage of the term "arbitration institution." With respect to guidelines for substantive validity, Articles 3 through 7 of the Interpretation deal specifically with curable instances of a vague yet ascertainable arbitral institution as required under Articles 16 and 18 of the AL.[216] Most notably, Article 4 of the Interpretation provides under its second part that "if the arbitration institution can be ascertained pursuant to the arbitration rules which have been agreed by the parties to be applicable, the arbitration agreement is valid."[217] It is clear from most institutional arbitration rules which institution the rules refer to. It thus appears sufficient that if parties in China agree on institutional arbitration rules such as those of the ICC and HKIAC, then that is sufficient to uphold arbitration under that institution.[218] Such an approach is consistent with Article 26 of the previously issued Foreign-Related Draft[219] and Article 4(3) of the recently revised CIETAC Rules.[220]

The Interpretation, in response to Article 5 of the Domestic Draft and Article 22 of the Foreign-Related Draft, clarifies the scenario where two or more arbitration institutions have been concurrently identified. To the disappointment of arbitration scholars and practitioners, it

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215. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, art. 21, 30 (promulgated by the Supreme People's Court, Dec. 31, 2003, effective Dec. 31, 2003) (P.R.C.).

216. *See* David T. Wang, Comment, *Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System*, 48 SANTA CLARA L. REV. 649, 665 (2008) (stating that the SPC Interpretation conformed to the usage of the arbitration institution in the Draft). *See generally* Jingzhou Tao, *The Role of Local Courts In Chinese Arbitration Procedures: Judicial Intervention—Friend, Enemy, or Just Alien?*, *in* DOING BUSINESS IN CHINA: RESOLVING THE CHALLENGES IN TODAY'S ENVIRONMENT 297 (PLI Corp. L. & Practice, Course Handbook Series No. 13438, 2007) (acknowledging the use of an arbitration institution by the Chinese courts).

217. *See* Certain Issues, *supra* note 210, at art. 4 (explaining that the arbitration agreement must specify the arbitration rules that are to apply, not just in the event of a dispute).

218. *See* China International Economic and Trade Commission, *supra* note 23; *see also* Jingzhou Tao, *supra* note 216, at 297 (acknowledging that Chinese courts may only intervene in the third stage, if an enforcement procedure is initiated concerning a foreign arbitral award). *See generally* Ren Qiujuan et al., *Review of Chinese Reviews: Selected Articles Recently Published in Chinese (Part 6)*, 5 CHINESE J. INT'L L. 787 (2006) (asserting that the ICC plays a huge role in the Chinese arbitration process).

219. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, at art. 26 (promulgated by the Supreme People's Court, Dec. 31, 2003, effective Dec. 31, 2003) (P.R.C.). *See generally* Gu Weixia, Essay and Note, *Recourse Against Arbitral Awards: How Far Can a Court Go? Supporting and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration*, 4 CHINESE J. INT'L L. 481, at 490 (2005) (examining how the Foreign Related Draft provides for institutional arbitration).

220. *See* China International Economic and Trade Arbitration Commission Arbitration Rules, art. 4.3 (adopted by the China Council for the Promotion of Int'l Trade/China Chamber of Int'l Com., Jan. 11, 2005, effective May 1, 2005) (P.R.C.), *available at* http://www.cietac.org.cn/english/rules/rules.htm (stating that under these Rules, where parties agree to refer disputes to arbitration without providing the name of an arbitration institution, they are deemed to have agreed to refer the dispute to arbitration by the CIETAC).

pronounces under Article 5 that such agreements will be deemed invalid.[221] The SPC steps backward from the liberal attempt previously taken under both Drafts which provided that such agreements would nonetheless be considered effective and enforceable.[222] The backward step is further reflected by Article 6, which, in a similar vein to Article 5, denies the effect of arbitration agreements with concurrent arbitral jurisdictions resulting out of the parties' stipulation to the place of arbitration only. This negates the aforementioned pro-validity approaches under both Drafts in which all possible arbitration institutions in the specifically named place may assume jurisdiction.[223]

What is also worth noting is the provision for validity arising from those "split arbitration agreements," which refer disputes either to arbitration institution or to a court.[224] Article 7 of the Interpretation, contrary to the liberal approach previously taken under Article 7 of the Domestic Draft,[225] announces the invalidity of such agreements, unless one party commences arbitration and the other party does not object prior to the tribunal's first hearing.[226] In so providing, the SPC suggests that the so-called split agreements or clauses—often favored by foeign financial institutions—will not be enforced in China, at least to the extent that they are governed by the Chinese law.[227]

As noted above, Article 4 of the Interpretation helps, to some extent, alleviate the requirement that an arbitration institution such as the ICC International Court of Arbitration has to be specifically designated in an arbitral agreement.[228] However, to the great dismay of interna-

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221. *See* Cao Jianming, *Comprehensive Strengthening of Intellectual Property Adjudication Will Provide Powerful Judicial Guarantees for Constructing an Innovation-Based Country and Harmonious Society*, 18 PAC. RIM L. & POL'Y J. 97, 98 (2009) (explaining that the SPC has substantive, far-reaching effects on arbitration agreements).

222. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, *supra* note 219, at art. 22; *see also* Interpretations to Several Issues on the Application of the Arbitration Law, *supra* note 219, at art. 5. *See generally* Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT'L J. CONST. L. 215, 220 (2009) (stating that the SPC has tightened up Chinese courts' interpretation of laws).

223. *See* Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, *supra* note 219, at art. 23; *see also* Interpretations to Several Issues on the Application of the Arbitration Law, *supra* note 222, at art. 5. *See generally* Ying Chen, Article, *China's One-Child Policy and Its Violations of Women's and Children's Rights*, 22 N.Y. INT'L L. REV. 1, n.127 (2009) (discussing the status of arbitration institutions and their jurisdictions).

224. *See* Ying Chen, *supra* note 223 (setting forth the procedure in the event of an arbitration disagreement).

225. *See* Interpretations to Several Issues on the Application of the Arbitration Law, *supra* note 222, at art. 7.

226. *See* Interpretations to Several Issues on the Application of the Arbitration Law, *supra* note 222, at art. 7; *see also* Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 16, *translated in* 34 I.L.M. 1650, 1654 (1995) (P.R.C.) (verifying that objections are valid if made only prior to first hearing).

227. *See* Louise Barrington, *Arbitration in China*, 756 PRACTISING L. INST. CORP. 385, 394 (2007) (noting the Supreme People's Court's decision invalidating "split clauses"); *see also* Michael J. Moser, *Arbitrating Business Disputes in Today's China*, 1626 PRACTISING L. INST. CORP. 249, 254 (2007) (noting the importance of careful drafting of arbitration clauses).

228. *See* Fiona D'Souza, *The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China*, 30 FORDHAM INT'L L.J. 1318, 1322 (2007) (noting the limits to the ICC's power in China); *see also* Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 48 (2005) (reporting that the Chinese arbitration clauses under the ICC are valid and enforceable).

tional arbitration practitioners, the new judicial explanation does no more to confirm the validity of ad hoc arbitration agreements, than Article 27 of the Foreign-Related Draft did;[229] nor has it clarified the status of foreign arbitral institutions sitting in China, as the previous interpretations failed to do.[230] Pursuant to Article 31, the Interpretation will supersede all regulations, notices, replies, and opinions issued by the SPC to the extent that there are any inconsistencies between provisions contained therein and in the Interpretation.[231] It is thus unlikely that arbiters can still refer to Article 27 of the Foreign-Related Draft specifically with reference to ad hoc arbitration. In particular, it remains questionable whether an ad hoc arbitration agreement in China may still be admissible where both of the Article 27 exceptions under the Foreign-Related Draft are satisfied.

3. Comments on the Latest SPC Approach

After more than a decade of experience in interpreting defective arbitration agreements, the 2006 SPC Interpretation may be considered a systematic summary of the past sporadic judicial replies, notices, opinions, and guidelines. More importantly, due to its de facto rule-making power in China, the SPC Interpretation has dual significance. First, it serves as quasi-legislative attempt to bridge the gap between the AL and international arbitration norms on the topic. Second, it shows the evolving degree of judicial preference of people's courts to respect the parties' drafting autonomy in arbitration.

To sum up, the Interpretation attempts to unify the overlapping and even conflicting provisions in both Drafts so as to merge the two tracks.[232] Disappointingly, it moves away from the pro-validity approach taken in the two Drafts on the substantive validity requirement, although it generally conforms to the expansive understanding of "written" formality previously adopted. As illustrated before, before the unified Interpretation is officially adopted, it should consider the more liberal interpretative technique endorsed in the Draft Provisions where surrounding circumstances are taken into account in ascertaining the parties' intent to arbitrate. As such, the two Drafts have indicated a significant preference by judiciary for arbitration and they appear to respect the principle of party autonomy generally. However, it appears that under some provisions of the current approach, the practice of "designated arbitration institution" still adheres to the rigid textual interpretation without taking into consideration further facts to preserve the parties' arbitral wishes. In particular, Articles 5, 6, and 7 of the unified Interpretation can be unduly restrictive in some cases. Compared with international

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229. *See* Several Regulations on How the People's Courts Handle Foreign-Related Arbitration and Foreign Arbitration Cases, art. 27.

230. *See* Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. at 133, n. 26 (2006), (clarifying that article 27 affects ad hoc arbitrations by making them ineffective within China); *see also* Michael J. Moser, *The New CIETAC Arbitration Rules—Two Steps Forward, Still More to Go*, 1626 PRACTISING L. INST. CORP. 235, 245 (2007) (illuminating that foreign entities in China are considered domestic for arbitration purposes).

231. *See* Interpretation on Certain Issues Relating to the Application of the PRC Arbitration Law (promulgated by the Supreme People's Court, Aug. 23, 2006, effective Aug. 23, 2006), *translated in* ISINOLAW (last visited Mar. 21, 2009) (P.R.C.), art. 31.

232. *See* Several Regulations on How the People's Courts Handle Foreign-Related Arbitration and Foreign Arbitration Cases, *supra* note 229, at art. 22–25, 28–29; *see also* Interpretations to Several Issues on the Application of the Arbitration Law, *supra* note 222, at art. 1, 2, 5, 6, 14.

arbitration norms, the general rule should give effect to the parties' arbitral intention as much as possible. As such, even if two arbitral institutions or both arbitration and court litigation have been referenced in the arbitration agreement, that should not render the agreement *ipso facto* invalid. Instead, as some leading international arbitrators suggest, the latest approach by the SPC is too stringent and fails to adopt more liberal interpretation techniques:

> It is strange that the SPC now steps backward from its Foreign-related Draft where a principle of effective interpretation used to be adopted. However, if there is a clear desire to submit the dispute to arbitration, such a desire should, as far as possible, be given effect to, by seeking to construe the clause in such a way as to render it effective.[233]

The unexpected answer to some of the most controversial issues on the specificity of arbitral institutions may suggest a restrictive approach on the part of the SPC in accommodating the parties' drafting autonomy. However, in a recent symposium focusing on the provisional gap between the Interpretation and its previous two Drafts, an SPC official stated that "[t]here are many different views on the two Drafts after their opening to the public for comments and the current text is the just result for balancing these views."[234] It might be arguable that the SPC is worried about liberalizing this traditional legislative rigidity too quickly and going too far beyond the AL text. Hence, a compromise has been put forward by the judiciary in treating arbitration the way it has after carefully balancing the inflexibility of the current regime and full-scale liberalization.

There are also a few other contentious issues that the latest unified Interpretation fails to address. Among them is whether to recognize the validity of arbitration agreements providing for ad hoc arbitration and foreign arbitration in China. As outlined in previous discussions, for the first time in the history of arbitration in China, ad hoc arbitration is provided under Article 27 of the Foreign-Related Draft. The provision has been seen as a revolutionary progress and was widely expected to be formally adopted as part of the SPC's agenda, so as to create a more arbitration-friendly environment for foreign business. This, however, did not occur, which leaves the practice of ad hoc arbitration standing at the crossroads of the SPC-led reform of Chinese arbitration. It could be argued either that the SPC has finally decided to give up recognizing agreements providing for ad hoc arbitration in China entirely, even when the demanding exceptions under Article 27 of the Foreign-Related Draft have been satisfied, or that the Article 27 exceptions still cannot be fit into the Chinese model of arbitration.[235] Moreover, the SPC's failure to address the effect of arbitration agreements that select the ICC arbitration in China could arguably be because the ICC Court does not fit properly within the meaning of

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233. *See* http://www.jonesday.com/search/search.aspx?qu=arbitration&limit=pubpdfs.

234. *See* Dongchuan Luo, Vice-Head of the Research Inst. of the Supreme Peoples' Court, Speech at the Joint Conference Co-organized by the Civil Division and Research Institute of the Supreme Peoples' Court, CIETAC and CMAC: SPC Interpretation on the Application of the Arbitration Law (Dec. 15, 2006). *See generally* Choong, *Clarifying the PRC Arbitration Law: Questions and Answers*, CHINA L. & PRAC. 22 (London), Nov. 2006 (emphasizing that the recent interpretations of the PRC arbitration law indicate the large strides PRC judges have made toward more generally accepted international practices).

235. *See* Arbitration Law, *supra* note 226, at art. 27.

"arbitration commission" under the AL—nor is there any clear legal mechanism for enforcing the resulting ICC (or other foreign institutional) award in China.[236] Although the SPC may not be able to solve all these problems, Dr. Moser, a lawyer at an widely known international law firm, suggests that its omission on these highly contentious issues in the latest Interpretation reflects judicial concerns about the current institutional monopoly in Chinese arbitration, which will be the focus of the section below.[237]

III. Problems of Ad Hoc Arbitration in China

In light of the Chinese government's continued reluctance to recognize ad hoc arbitration, the following discussion will first analyze the fundamental reason for rejecting this liberalization of the process. The second part examines the success of an ad hoc arbitration case against the current regulatory framework before this section ends with proposals for legislative recognition and the possible political challenges entailed.

A. Institutional Monopoly in Chinese Arbitration

Although almost all countries permit ad hoc arbitration in their national arbitration legislation, in the history of commercial arbitration in China, ad hoc arbitration has never been ratified by the legislation or protected in practice.[238] The regulatory obstacles have most recently involved the omission of the issue in the 2006 unified SPC Interpretation on arbitration and a case in 2003 in which the SPC struck down an arbitration clause providing for ad hoc arbitration in China.[239] This section attempts to explain the institutional monopoly from the perspective of the state's overwhelming desire to control arbitration in China. The actual impact of such a monopoly in China (both theoretically and practically) will also be addressed in this part.

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236. *See* An Chen, Symposium, *Is Enforcement of Arbitral Awards an Issue for Consideration and Improvement?—The Case of China* (Dec. 12, 2005) (noting in the UN sponsored conference that there are no provisions with which to recognize or enforce arbitration awards); *see also* José Alejandro Carballo Leyda, *A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Tawain?*, 6 CHINESE J. INTL L. 345, 347 (2007) (stating that China's 1994 Arbitration Law does not have any tool by which to compel payment of arbitral awards); *see also* Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People's Republic of China*, 1 ASIAN-PAC. L. & POL'Y J. 12, 20 (2000) (explaining that China's relatively new legal system lacks mechanisms with which to legally enforce an arbitral award).

237. *See* Michael J. Moser, Speech at the Symposium Co-organized by the Hong Kong International Arbitration Center and the German Institution of Arbitration: Developments in the Settlement of International Commercial and Investment Disputes—Chinese and German Perspectives (Dec. 8, 2006). *See generally* Moser, *supra* note 227, at 254 (elaborating on the guiding rules promulgated by the Supreme People's Court alongside recent changes to CIETAC's arbitration rules).

238. *See* Reinstein, *supra* note 228, at 48–49 (commenting that China has never officially recognized or sanctioned arbitral awards issued by an unrecognized arbitral institution); *see also* Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 139 (2006), (finding that the Arbitration Law contains no provision as to establish the legality of ad hoc arbitration).

239. *See* People's Insurance Company of China, Guangzhou Branch v. Guangdong Guanghe Power Company Ltd. (Ming Si Zhong Zi No. 29, 2003); *see also* Michael J. Moser, *Commentary on Arbitration and Conciliation Concerning China*, *in* NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 89, 91 (A. J. van den Berg ed., 2005) (citing *People's Insurance* as an importance case in which the Supreme People's Court struck down an arbitration clause assigning ad hoc arbitration in China).

1. Problems of State Control

Determined to achieve a breakthrough in the economic reform, China started to practice a "socialist market economy" since 1992.[240] The socialist market economy has been described both as a major improvement to the previous planned economy and an "inherent dichotomy" by the legal scholars.[241] On the one hand, the reform brings the prospect of greater managerial autonomy in market transactions and increases the diversity of economic factors.[242] Hence, unlike the planned economy where the driving force was government production orders, in a market economy, the market players have the freedom to make decisions for themselves.[243] On the other hand, in order to ensure that China's market develops according to the Party ideology and policy, the establishment of a socialist market economy in China has been the declared objective and the focus of the Party State's efforts to boost socioeconomic development.[244] State intervention and control is therefore decisive in the regulation of the market and to maintain the Party policy of centralized censorship despite rising recognition that reform requires more freedom for economic actors and their transactions.[245] The legal implication of the transition from a planned to a socialist market economy has been understood as the conception of

240. *See* XIAN FA amend. 2, § 7 (1993) (P.R.C.) (proclaiming that China will begin instituting a socialist market economy); *see also* Yingyi Qian & Jinglian Wu, *China's Transition to a Market Economy: How Far Across the River?*, *in* HOW FAR ACROSS THE RIVER? CHINESE POLICY REFORM AT THE MILLENNIUM 31, 36 (Nicholas C. Hope, Dennis Tao Yang & Mu Yang Li eds., 2003) (opining that the Fourteenth Party Congress's big ideological breakthrough was adopting the socialist market economy as the goal of reform); *see also* Charles Harvie, *Economic Transition: What Can Be Learned from China's Experience?*, 26 INT'L J SOC. ECON. 1091, 1108 (1999) (finding that Deng Xiaoping's goal of creating a socialist market economy was formally endorsed by its incorporation into China's constitution).

241. *See* BECKY CHIU & MERVYN LEWIS, REFORMING CHINA'S STATE-OWNED ENTERPRISES AND BANKS 41 (2006) (asserting that while China's reform under the socialist market economy has been successful, the theory itself is a paradox); *see also* Jianfu Chen, *Market Economy and the Internationalisation of Civil and Commercial Law in the People's Republic of China*, *in* LAW, CAPITALISM AND POWER IN ASIA 58, 61–62 (Kanishka Jayasuriya ed., 1999) (expressing the view that the theory is somewhat symbolic yet it will open the doors for legal development).

242. *See* Fan Gang, *Is the Transition Under Control? Gradualism and Macroeconomic Policy*, *in* THE CHINESE ECONOMY 73, 75 (Michel Fouquin & Francoise Lemoine eds., 1998) (detailing the accelerated decentralization and deregulation of the socialist market economy reform movement); *see also* William H. Simon, *The Legal Structure of the Chinese "Socialist Market" Enterprise*, 21 IOWA J. CORP. L. 267, 298 (1996) (reporting that the socialist market economy is shifting toward corporatization and capitalist models). *See generally* He Guanghui, *Reform of the Chinese Economic Structure (Zhongguo Jingji Tizhi Gaige)*, FBIS DAILY REPORT CHINA, Mar. 23, 1990, at 21.

243. *See* Zhang Wenxian, *Shichang Jingji yu Xiandai Fazhi Jingshen* [*Market Economy and the Spirit of Modern Law*], 6 ZHONGGUO FAXUE [CHINESE LEGAL SCIENCE] (1994); *see also* Wang Zhengbang, *Shichang Jingji Nai Fazhi Jingji* [*The Modern Market Economy as a Rule of Law Economy*], 25 STUDIES IN LAW [FAXUE YANJIU] (1994); *see also Expand Investment System to Suit Changes*, FIN. TIMES, Jan. 13, 2009 (describing the difference between a planned economy and a market economy).

244. *See* Zhang Wenxian, *Guanyu Hongguanjingji Tiaokong jiqi Falv yu Zhengce de Sikao* [*Reflections on Macro-economic Control and Its Law and Policy*], 1 ZHONGWAI FAXUE [PEKING UNIVERSITY LAW JOURNAL] 3 (1994); *see also* Jianfu Chen, *The Transformation of Chinese Law—from Formal to Substantial*, 37 HONG KONG L.J. 689, 692 (2007) (describing the changes which took place with the establishment of a socialist market economy); *see also The Right Direction*, FIN. TIMES, Dec. 19, 2008 (discussing the replacement of the planned economy with that of a market economy).

245. *See* Wang Baoshu, *Shehuizhuyi Shichangjingji yu Minshangfa Yanjiu* [*The Socialist Market Economy and Research in Economic Law*], 3 ZHONGGUO FAXUE [CHINESE LEGAL SCIENCE] 20 (1993); *see also* John O. Haley, *Competition Policy for East Asia*, 3 WASH. U. GLOBAL STUD. L. REV. 277, 282 (2004) (describing the impact of state control of the market in maintaining centralized censorship).

a relationship between an economic base and a social superstructure within the Party State, which is called the "high-level institutionalized commodity economy" under Party ideology.[246] As such, during the market transition, state agencies still wish to exercise considerable control over market activities for the sake of predictability and stability to preserve socialism, which includes controlling the State's means of dispute resolution.

State control of arbitration has been achieved by controlling the *outcome* of arbitration during the transitional period. By adopting an institutional arbitration system in China, these arbitration institutions are made state agencies subject to control by the Party leadership. For example, prior to the AL becoming effective in 1995, arbitration cases involving domestic business disputes were handled by the Economic Contract Arbitration Commissions (the ECACs) within the Administrations of the Industry and Commerce around China, through a system of mandatory jurisdiction.[247] Technology disputes were heard by the Technology Contract Arbitration Commissions (the TCACs) attached to the Bureau of Science and Technology of the local people's government.[248] The ECACs and TCACs were subordinate to the governmental departments at various levels, so they were subject to governmental scrutiny of their dispute resolutions.[249] This historical preference for using arbitration in China, such as the ECACs, is because these are administrative adjudication systems that are easy to control under Chinese style top-down administrative governance. Foreign-related arbitrations were then handled by the foreign-related arbitration institutions, namely CIETAC and CMAC, which, although technically called independent social organizations of foreign trade, received subsidies from the State Council for their businesses, and the way they handled disputes with foreign parties was inspected by the Central Government.[250] In the realm of pre-AL arbitration, only specific insti-

246. *See* Albert H.Y Chen, *The Developing Theory of Law and Market Economy in Contemporary China, in* LEGAL DEVELOPMENTS IN CHINA: MARKET ECONOMY AND LAW 5–6 (Wang Guiguo & Wei Zhenyin eds., 1996); *see also* Jianfu Chen, *supra* note 244, at 709–12 (explaining the legal implications of the economic change).

247. *See* Regulations of the People's Republic of China on the Arbitration of Disputes over Economic Contracts, Art. 2 (effective Aug. 22, 1983) *available at* http://www.asianlii.org/cn/legis/cen/laws/rotaodoec656/ (last visited Mar. 24, 2009) (listing the parties responsible for arbitrating economic contracts).

248. *See* Provisional Regulations Concerning the Administration of Organization for Technology Contract Arbitration Institutions, Article 2; *see also* Yuan Cheng, *Legal Protection of Trade Secrets in the People's Republic of China*, 5 PAC. RIM. L. & POL'Y J. 261, 292–93 (1996) (discussing the scope of the Technology Contract Arbitration Commission).

249. *See* Pat Chew-LaFitte, *The Resolution of Transnational Commercial Disputes in the People's Republic of China: A Guide for U.S. Practitioners*, 8 YALE J. WORLD PUB. ORD. 236, 269 (1982) (describing China's dispute resolution preferences); *see also* Chun Gu, *The Applicable Law and Dispute Settlement in East-West Trade*, 46 U. TORONTO FAC. L. REV. 96, 125 (1988) (explaining dispute resolution practices in China); *see also* James A.R. Nafziger & Ruan Jiafang, *Chinese Methods of Resolving International Trade, Investment, and Maritime Disputes*, 23 WILLAMETTE L. REV. 619, 623–4 (1987) (discussing the Chinese preference for less formal varieties of dispute resolution).

250. *See* JIANG XIANMING & LI GANGGUI, ZHONGGUO ZHONGCAIFA YANJIU [STUDY OF CHINESE ARBITRATION LAW] 28 (1996); *see also* Jason Pien, Note, *Creditor Rights and Enforcement of International Commercial Arbitral Awards in China*, 45 COLUM J. TRANSNAT'L L. 586, 588–89 (2007) (describing the function of CIETAC and CMAC in China).

tutions could conduct arbitration in China and thus, it is clear how China was able to control the outcome of the arbitration.[251]

The institutional monopoly has been affirmed in the AL, which is most obviously reflected in Articles 16 and 18 relating to the rigid specificity to the arbitration commission in arbitration agreements. For the purpose of regulating these Chinese arbitration commissions, Chapter II of the AL makes special provisions for their establishment[252] and structure.[253] The re-organized Local Arbitration Commissions (the LACs) have thus replaced the previous ECACs and TCACs and they have been set up at the prefecture level across the country in accordance with the AL. CIETAC and CMAC retained their status as foreign-related arbitration institutions in China as separately addressed in Chapter VII of the AL[254] despite the subsequent merging of jurisdictions between the two types of arbitration commissions.[255]

State control has however been extended to the post-AL stage where, through a "1995 State Council Notice,"[256] the newly established LACs are required to be registered with the local Department of Justice (the DOJ) and attached to the Legislative Affairs Office (the LAO) of the local people's government. Hence, LAC's dispute resolution work is made part of the

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251. *See* China International Economic and Trade Arbitration Commission Arbitration Rules, art. 4.3 (adopted by the China Council for the Promotion of Int'l Trade/China Chamber of Int'l Com., Jan. 11, 2005, effective May 1, 2005) (P.R.C.), at art. 1, *available at* http://www.cietac.org.cn/english/rules/rules.htm (detailing the rules of the CIETAC); *see also* Gillian Triggs, *Confucius and Consensus: International Law in the Asian Pacific*, 21 MELB. U. L. REV. 650, 660–1 (1997) (discussing the control over the outcome of arbitrations by certain institutions).

252. *See* Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), at art. 10, 11, *translated in* 34 I.L.M. 1650, 1654 (1995) (P.R.C.) (requiring arbitration commissions to be registered with the administrative department of justice of the applicable province, region, or municipality directly under the Central Government and listing the qualifications required for an arbitration commission).

253. *See id.* at art. 12 (calling for an arbitration commission to have one chairman, two to four vice chairmen and between seven and eleven commission members).

254. *See id.* at art. 66 (providing that foreign-related arbitration commissions may be created in the China International Chamber of Commerce and will be composed of one chairman, several deputy chairmen, and several members).

255. *See* Circular of the General Office of the State Council Regarding Some Problems Which Need to be Clarified for the Implementation of the Arbitration Law of the People's Republic of China at ¶ 3 (issued by the St. Council, June 8, 1996), *available at* http://www.asianlii.org/cn/legis/cen/laws/cotgootscrspwntbcftiotal1194 (permitting local arbitration commissions to accept foreign-related cases at the concerned parties' discretion); *see also* China International Economic and Trade Arbitration Commission, *Introduction: Works in 1998* at ¶ 2, *available at* http://www.cietac.org.cn/english/introduction/intro_2.htm (last visited Mar. 23, 2009) (allowing disputes arising between foreign investment enterprises operating in China to be heard by the arbitration commissions); *see also* Joseph T. McLaughlin et al., *Planning for Commercial Dispute Resolution in Mainland China*, 16 AM. REV. INT'L ARB. 133, 143 (2005) (asserting that legal reforms in 1996 enabled local Chinese arbitration commissions to hear international arbitrations).

256. *See* Circular of the General Office of the State Council Regarding Further Strengthening the Reorganization of Arbitration Institutions, *supra* note 255, at ¶ 1 (requiring local governments to assist in the reorganization of arbitration institutions); *see also* McLaughlin et al., *supra* note 255, 142 (expressing the differences in both the governing law and standard of judicial review between domestic and international arbitrations); *see also* Xian Chu Zhang, *Chinese Law: The Agreement Between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects*, 29 H.K. L.J. 463, 478 (1999) (claiming that local arbitration commissions are becoming increasingly independent from the government).

legal administration under the locality.[257] Moreover, the re-organization of personnel and finance of these LACs is led by many governmental departments of the locality.[258] Finally, it is emphasized in the Notice that the LACs are to "help the government resolve business disputes and thus to achieve socioeconomic stability in the locality for the construction of a socialist market economy for the entire country."[259] As such, the outcome of arbitration by the LACs shall be accountable to the local political and administrative interests, given the basis of their establishment and their stated function to help with local administration and economic stability. This connection is buoyed by the local government's use of its LACs to resolve disputes to play upon a localization sentiment in matching the outcome to the local economic interests. On the other hand, CIETAC and CMAC remain accountable to the State Council in dealing with foreign-related disputes, particularly when the disputes involved assets of SOEs,[260] although in general they have more foreign arbitrators and are subject to less interference by the government in their decision-making processes.[261]

According to this logic, it is easy to see how any arbitration conducted by a non-Chinese arbitral institution may invite the possibility of unexpected outcomes for the government. It will thus be considered as outside the realm of state control and hence a deviation from the overall means toward achieving socioeconomic stability. Furthermore, traditional Chinese respect for the power of the government emphasizes the role of institutions rather than individuals and hence pushes the government to adhere to an institutional style of arbitration.[262]

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257. *See* Circular of the General Office of the State Council Regarding Further Strengthening the Reorganization of Arbitration Institutions, *supra* note 255, at ¶ 1 (stating that existing arbitration commissions would be subject to an administrative department and established in communities directly under the central government); *see also* Ignazio Castellucci, *Rule of Law with Chinese Characteristics*, 13 ANN. SURV. INT'L & COMP. L. 35, 60 (2007) (recognizing that China's politically oriented legal systems influence arbitration and court proceedings and whether judgments are enforced).

258. *See* Circular of the General Office of the State Council Regarding Further Strengthening the Reorganization of Arbitration Institutions, *supra* note 255, at ¶ 1 (acknowledging that government leaders must be in charge of reorganization and responsible for implementing the reorganization process); *see also* Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 BERKELEY J. INT'L L. 329, 342 (1997) (commenting on the influence of local governments on the arbitration process and the enforcement of awards); *see also* Xian Chu Zhang, *supra* note 256, at 481 (noting the influence or control of local government over arbitration proceedings).

259. *See* Ignazio Castellucci, *supra* note 257, at 60 (noting the increased enforcement of international arbitration awards due to the needs of international business activities); *see also* Vai Io Lo, *Resolution of Civil Disputes in China*, 18 UCLA PAC. BASIN L.J. 117, 129 (2001) (asserting that the Arbitration Law established the China Arbitration Association to supervise arbitration commissions and create uniform rules for arbitration commissions to apply).

260. *See* Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV. 539, 549 (1995) (stating that the 1994 arbitration laws gave parties the right to decide who would arbitrate their case and where it would be heard); *see also* Jason Pien, Note, *Creditor Rights and Enforcement of International Commercial Arbitral Awards in China*, 45 COLUM J. TRANSNAT'L L. 586, 602 (2007) (claiming that local governments pressure courts not to enforce arbitration judgments against state-owned enterprises that provide employment and other benefits to the local economy).

261. *See* MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE 76 (2001) (indicating that CIETAC's Panel of Arbitrators consists of more then 400 arbitrators from 24 countries); *see also* William K. Slate II, *International Arbitration: Do Institutions Make a Difference?*, 31 WAKE FOREST L. REV. 41, 63 (1996) (positing that one of the key goals of arbitration is to minimize judicial involvement).

262. *See* Kang Ming, *Ad Hoc Arbitration in China*, INT. A.L.R. 2003, 6(6), 200 (2003) (listing reasons why ad hoc arbitration is not incorporated into the Act).

2. Non-recognition of Ad Hoc Arbitration

The AL endorses institutional arbitration and does not expressly forbid the practice of ad hoc arbitration in China. Notwithstanding the foregoing, this article argues that this legal effect is prohibited by the State.[263] First, an arbitration agreement containing an ad hoc arbitration provision is not valid with respect to the "designation of an arbitral institution," one of the required components of a valid arbitration agreement under Chinese law.[264] Second, an award made by ad hoc arbitration process in China will be set aside or denied enforcement following an invalid arbitration agreement under Articles 58, 63, 70, and 71 of the AL.[265] Indeed, in the recent case of *People's Insurance Company of China, Guangzhou v. Guanghope Power* in 2003, the SPC struck down an arbitration clause providing for ad hoc arbitration in China.[266]

The absence of ad hoc arbitration in the AL gives rise to both theoretical and practical problems. First, Article I, Section 2 of the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards (the NY Convention) provides that arbitral awards shall include not only institutional awards but also ad hoc awards. As a member state to the NY Convention, Chinese courts are obliged to recognize and enforce all arbitral awards rendered in other contracting states, including those obtained through ad hoc arbitration.[267] By contrast, ad hoc awards rendered in China cannot be recognized or enforced either in China or another member state. Chinese courts have declared ad hoc arbitration agreements void if the applicable law is the AL. Furthermore, the courts of other contracting states to the NY Convention may refuse to enforce an ad hoc arbitral award that is issued in China because it constitutes an

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263. *See* JOHN SHIJIAN MO, ARBITRATION LAW IN CHINA, 56 (2001) (2001) (outlining the status of ad hoc arbitration in China based on whether the arbitration occurred in or outside of China); *see also* JINGZHOU TAO, RESOLVING BUSINESS DISPUTES IN CHINA at 2003 (2005) (concluding that the legislature fully considered ad hoc arbitration when drafting the AL but ultimately chose institutional arbitration).

264. *See* ICCA INTERNATIONAL ARBITRATION CONGRESS, NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 105 (Albert Jan van den Berg ed., 2005) (emphasizing that an ad hoc arbitration agreement between a foreign party and a party from China would be invalid regardless of whether the agreement is proper under its governing law); *see also* Eu Jin Chau, *The Laws of the People's Republic of China: An Introduction for International Investors*, *supra* note 15, at 141 (confirming that an ad hoc arbitration agreement will be invalid in China if it fails to specify an arbitration commission).

265. *See* Mauricio J. Claver-Carone, *Post-Handover Recognition and Enforcement of Arbitral Awards Between Mainland China and Hong Kong SAR: 1999 Agreement vs. New York Convention*, 33 LAW & POL'Y INT'L BUS. 369, 391 (explaining that if parties to an ad hoc arbitration agreement agree that Chinese law will govern their dispute, the agreement will not be enforced since Chinese Law does not allow ad hoc arbitration); *see also* Li Hu, *Setting Aside an Arbitral Award in the People's Republic of China*, 12 AM. REV. INT'L ARB. 1, 11 (2001) (stressing that Article 58(2) of the AL will set aside an arbitration agreement if the arbitration institution exceeds it authority).

266. People's Insurance Company of China, Guangzhou v. Guanghope Power et al. (Min Si Zhang Zi No. 29 of 2003).

267. *See* INVESTMENT IN GREATER CHINA: OPPORTUNITIES & CHALLENGES FOR INVESTORS (2005) 278 (reiterating that China ratified the NYC and became a member in 1986); *see also* JINGZHOU TAO, RESOLVING BUSINESS DISPUTES IN CHINA, *supra* note 263, at 5604 (explaining that under the reciprocity reservation, China will only enforce foreign awards made in member states of the convention); *see also* JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK 864 (2005) (noting that China imposed a commercial reservation before ratifying the NYC, and, as a direct result does not enforce noncommercial arbitration awards).

invalid arbitral agreement under Article V, Section 1(a) of the NY Convention.[268] In Hong Kong, ad hoc arbitration is very popular and ad hoc arbitral awards rendered in Hong Kong can be enforced in Mainland China, but the reverse is not true.[269] The current system gives rise to inconsistencies in arbitration practice in the people's courts with regard to the enforcement of both arbitration agreements and arbitral awards.

Also, despite the advantages of institutional arbitration,[270] arbitrating disputes solely through institutions limits the freedom of parties to determine the boundaries of their dispute resolution and thus violates the principle of party autonomy.[271] Under Chinese arbitral regulations, since the 1996 State Council Notice (and subsequent CIETAC Rules revision in 1998), parties may choose to either submit their disputes to a local commission or a non-local commission, i.e., CIETAC or CMAC. In practice, however, parties usually submit their disputes to the arbitration commission where they are located.[272] Apart from the geographic convenience, more often than not, the influence from the local government on the drafting of standardized arbitration agreements contributes to the localization of arbitral choices, which severely restricts the parties' autonomy and interest.[273]

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268. *See* United Nations Conference on International Commercial Arbitration, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 U.N.T.S. 38, art. B, Sec. 1(a) (June 10, 1985) (declaring that recognition and enforcement of the award may be refused where the agreement is invalid).

269. *See* RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG 84 n.215 (1997) (noting that China has also entered into agreements on mutual recognition with five other countries); *see also* Claver-Carone, *supra* note 265, at 388 (discussing the 1999 Agreement on the Mutual Recognition and Enforcement of Arbitral Awards and noting the primary effect of the agreement is that the NYC no longer applies to the arbitral awards between Hong Kong and China); *see also* José Alejandro Carballo Leyda, *A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Tawain?*, 6 CHINESE J. INTL L. 345, 345, ¶51 (2007) (explaining that although China does not enforce ad hoc arbitration awards made domestically, they must, in accordance with the convention, accept ad hoc awards made in Hong Kong).

270. *See* Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 47 (2005) (stating that CIETAC or BAC, pre-set arbitration rules and expertise in arbitration under Chinese law greatly benefit parties who arbitrate with them).

271. *See* WANG SHENGCHANG, RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA 17 (1997) (stating that the principle of party autonomy is violated when institutions solely arbitrate disputes).

272. *See* Hua Chen, *China and Its Arbitration System in Foreign Trade,* 68 U. DET. L. REV. 457, 469 (1991) (stating that parties that agree to arbitrate may choose to arbitrate their claims at the local Chinese commission where the defendant is located); *see also* Taroh Inoue, *Introduction to International Commercial Arbitration in China*, 36 H.K.L.J. 171, 173 (2006) (stipulating that Chinese law expressly provides that a party to arbitration may choose between an arbitration by a local Chinese commission or by an international Chinese arbitration institution such as the CIETAC).

273. *See* Wang Wenying, *Distinct Features of Arbitration in China: A Historical Perspective*, J. INT'L. ARB. 67, 123 (2006) (stating that some local governments frequently use so-called "red-headed documents" to request that local enterprises and companies modify their standard contracts which contain an arbitration clause solely designating the local arbitration commissions).

And there remains uncertainty with respect to the legal status of ad hoc arbitration agreements completed outside China that the latest SPC Interpretation fails to address in its previous Foreign-Related Draft. As previously mentioned, ad hoc awards may run the risk of being denied recognition and enforcement by the people's court if the Chinese law serves as governing law between the disputing parties.

3. Non-recognition of Foreign Arbitration in China

With respect to the arbitration conducted by foreign arbitral institutions, the AL neither explicitly permits nor prohibits this practice from taking place in China.[274] The issue has been addressed frequently, with particular focus on whether an arbitration following the rules of the International Chamber of Commerce (the ICC) Court of Arbitration can be lawfully conducted within China and produces an enforceable award.[275] Notwithstanding the international consensus that the ICC Court of Arbitration is a lawful arbitration institution,[276] it does not seem to comport with the provisions on "arbitration institution" under the AL.

Chapter II of the AL deals specifically with local arbitration commissions, sets out the requirements for the establishment of such commissions, and makes quite clear that they are to be organized by the local people's governments, registered with the local department of justice,[277] conform to a number of constitutional requirements,[278] and be subject to supervision by the local legal administration.[279] Chapter VII further provides for the establishment of the foreign-related arbitration commissions by the China Chamber of International Commerce. The organization of such commission must also conform to the requirements set out in Chap-

274. *See* Eu Jin Chua, *supra* note 264, at 140–5 (stating that under Article 128 of Chinese Contract Law, parties to a contract may choose between a local Chinese arbitral institution or a foreign arbitral institution).

275. *See* ICCA INTERNATIONAL ARBITRATION CONGRESS, NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND (Albert Jan van den Berg ed., 2005) (discussing whether China can lawfully conduct arbitrations which follow the rules of the International Chamber of Commerce); *see also* Benjamin P. Fishburne & Chuncheng Lian, *Commercial Arbitration in Hong Kong and China: A Comparative Analysis*, 18 U. PA. J. INT'L ECON. L. 287, 331 (1997) (stipulating that because China has agreed to the ICC, a party involved in an arbitration in a foreign country may seek enforcement of the arbitral award in China).

276. *See* Robert Briner, *Arbitration in China Seen from the Viewpoint of the International Court of Arbitration of the International Chamber of Commerce*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 12 (2005) (stating that while the international community agrees that the ICC Court of Arbitration is a valid arbitration institution, Chinese Arbitration Law does not recognize this court as a means for settlement dispute in China).

277. *See* Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 10, *translated in* 34 I.L.M. 1650, 1654 (1995) (P.R.C.) (noting that chapter 2 of the arbitration law provides the requirements for the creation of a local arbitration commission).

278. *See id.* at arts. 10, 12 (noting that chapter 2 of the arbitration law mandates that after a local arbitration commissions has been established, it must register with the Chinese Department of Justice).

279. *See id.* at art. 15 (providing that the standard of operation for the China Arbitration Association is self-regulation of the arbitration commissions).

ter II, referenced above.[280] Accordingly, as a foreign arbitration institution, it is difficult to see how the ICC can be conformed to these provisions. The current system seems to close the door to not only ad hoc arbitration, but also institutional arbitration conducted by foreign arbitral bodies.

In the words of Professor Song Lianbin of the Wuhan University, arbitration in China is monopolized by Chinese arbitral institutions.[281] Such institutional monopoly, however, entails inherent risks. The existence of only one form of arbitration in China tends to make the Chinese arbitral commissions excessively bureaucratic. The fact that most arbitrations in China are conducted by government-supported commissions gives rise to the risk of administrative influence and insufficient transparency.[282] Chinese arbitration commissions and the lack of competitive pressures from external arbitral bodies are likely to lead to complacency about current practices. Ultimately, arbitral institutions will lose their competitive edge against the potential liberalized Chinese arbitration market as China moves toward providing greater market access for legal services in connection with the ongoing WTO negotiations.[283]

B. Formal Mediation, Actual Arbitration

Despite the questionable basis in law, the following case is one in which ad hoc arbitration was accomplished without changing the current legal framework. Sinotrans Dalian Company (Sinotrans) a charterer, entered into a time charter with the ship owner Hainan Dongda Shipping Company (Dongda) on October 20, 1998. The arbitration clause in the contract provided that "[a]ll disputes arising out of the contract shall be arbitrated in Beijing." Both companies were located in Dalian. A dispute arose and Dongda asked Hu Zhengliang, a law professor at the Dalian Maritime University and a Beijing CMAC panel-arbitrator, to assist in resolving the dispute. Subsequently, Sinotrans also requested that Mr. Hu arbitrate the dispute. On May 18, 1999, the parties agreed to allow the dispute to be arbitrated by Mr. Hu. Mr. Hu asked for both parties' submissions. He then requested Wang Jianping, a professor at the Dalian Maritime University with a specialty in navigation technology, to give an expert report

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280. *See id.* at art. 65 (stating that all provisions of this article will control the steps taken in arbitrating disputes arising from foreign economic interactions).

281. *See* Song Lianbin, *From Ideology to Legislation: Several Issues to Pay Attention to for Reforming the Arbitration Law,* ARBITRATION IN BEIJING 6–7 (2005); *see also* PHILIPPE FOUCHARD ET AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 161 (2d ed. 1999) (commenting that although many countries are receptive to international norms and have relinquished some control in the arbitration process, China continues to maintain a de facto monopoly).

282. *See* Gu Weixia, *The China-Styled Closed Panel System in Arbitral Tribunal Formation: Analysis of Chinese Adaptation into Globalization*, 25(1) J. INT'L ARB. 121, 121–49 (2008). *See generally* GARY BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS 53 (2006) (commenting on China's realization of a greater need in transparency in arbitration proceedings has led them to periodically change their procedures).

283. *See* LANCE TAYLOR, EXTERNAL LIBERALIZATION IN ASIA, POST-SOCIALIST EUROPE, AND BRAZIL 385 (2006) (describing the ongoing efforts of China and other ASEAN countries in liberalizing trade); *see also* John Mo, *Reform of Chinese Arbitration System after the WTO*, *in* 41 CHINA LAW (2003) (noting that as part of the commitments to the market access under Annex 9, the arbitration market may need to be liberalized); *see also* Wang Shengchang, *The Arbitration Law after China's Accession to the WTO*, *in* 37 CHINA LAW (2002); *see also* Paul Gellert, *Regionalization and the Foray on Primary Goods: From Managed Free(r) Markets: Transnational and Regional Governance of Asian Timber*, 610 ANNALS 246, 251 (2007) (commenting that China's attempts at trade liberalization are an attempt to compete with NAFTA's strong economic presence).

of the navigation database provided by the parties. On July 10, 1999, Mr. Hu drafted and delivered to the parties his decision by way of a document entitled "An Opinion on Mediation." Both parties honored the decision.[284] Although it was formally titled "An Opinion on Mediation" in essence, the document was an ad hoc arbitral award.

First, there was an intention to arbitrate rather than mediate. Apart from the original arbitration clause enclosed in the charterparty, after the dispute arose, both parties chose ad hoc arbitration in Dalian rather than the institutional arbitration at the CMAC in Beijing.[285] It was reasonably foreseeable that the ad hoc arbitration in Dalian offered the following advantages: (1) both parties were located in Dalian; it was convenient and cost-effective to conduct the arbitration in Dalian rather than in CMAC in Beijing; and (2) Mr. Hu was familiar with maritime arbitration and was known to both parties.[286]

More importantly, neither party considered the resolution as "mediation" at any stage. It is notable that the word "arbitration" rather than "mediation" was utilized by both parties in their correspondences. More importantly, Mr. Hu is an arbitrator under the CMAC. In the process, Mr. Hu made no attempt to mediate in the traditional sense that would imply that he persuaded the parties to reach a mutually agreeable compromise. Rather, he relied on his professional knowledge of maritime law, an expert's opinion and relevant legal provisions and shipping customs to deal with the dispute by following the arbitral procedure. The "Opinion" was independent of both parties' desires and contained orders rather than suggestions.[287]

We must wonder then, why the title "Opinion on Mediation" was used. According to Kang Ming, Vice Secretary-General of the CIETAC, although it was expected that the parties would honor Mr. Hu's decisions, a risk still remained that the losing party might not do so due

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284. *See* Kang Ming, *Ad Hoc Arbitration in China*, INT. A.L.R. 2003, 6(6), 168 (2003).

285. *See* Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 51–4 (2005) (positing that due to corruption, arbitral awards are difficult to enforce). *See generally* China Maritime Arbitration Commission Arbitration Rules, *Chapter 2 Arbitration Proceedings*, http://www.cmac-sh.org/en/rules.asp (last visited Mar. 30, 2009) (outlining the rights accorded to foreign nationals during arbitration of maritime disputes).

286. *See* KANG MING, A STUDY ON COMMERCIAL ARBITRATION SERVICE 210–12 (China Law Press, 2004); *see also* Thomas S. Breckenridge, *International Arbitration: A Historical Perspective and Practice Guide Connecting Four Emerging World Cultures: China, Mexico, Nigeria, and Saudi Arabia*, 17 AM. REV. INT'L ARB. 183, 195 (2006) (commenting that disputes in China would find a more satisfactory resolution if disputing parties negotiate without third-party arbitrators).

287. *See* Wang Shengchang, *The Relation between Arbitration and Mediation*, *in* CHINA LAW 49 (2004) (commenting that the major difference between arbitration and mediation is that the procedure of the former is independent from both parties; however, it still requires a measure of cooperation from both parties); *see also* Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 132–33 (1996) (noting that the changes in China's arbitration rules reflects a move towards greater international cooperation); *see also* Xiaowen Qiu, Note & Comment, *Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China*, 11 AM. REV. INT'L ARB. 607, 627–29 (2000) (demonstrating the difficulties in enforcing arbitral agreements in China despite the changes in the law).

to the lack of enforcement mechanism for ad hoc arbitration in China.[288] As such, if this had happened, the winning party would not have been able to enforce the award since it was the outcome of ad hoc arbitration. The word "mediation" was therefore used as a strategy to avoid the risk of non-enforcement of ad hoc arbitral award.

C. Proposal for Legislative Recognition and Its Political Challenges

Despite the successful result of the case reported above, it is worth noting that attempting a successful ad hoc arbitration—under the "pretense" of mediation—is technical maneuvering in order to circumvent legal requirements, or, more accurately, a kind of "fashioning of practical remedies without violating the current legal framework."[289] Given the fact that ad hoc arbitration has not yet been widely accepted in China, the practice of "formal mediation, actual arbitration" might be arguably acceptable while waiting for the AL to be amended.[290] However, in the long run, in order to align the Chinese arbitration system with international norms, legislative recognition will be required to codify support for the practice of ad hoc arbitration in China. Likewise, foreign arbitration should be allowed in China and be written into the amendment of the AL. The merits for legalizing the ad hoc arbitration and foreign arbitration in China are evident. Parties can enjoy more choices of arbitration providers if they can choose either institutional or ad hoc arbitration, and arbitration could be conducted by both Chinese and foreign arbitral bodies. Moreover, given the current bureaucratic practice of local arbitration commissions, the introduction of ad hoc arbitration seems particularly necessary to provide an alternative to the administratively tainted institutional arbitration in China (providing the parties a way to avoid administrative interference) or pressure the local commissions to be better qualified and more transparent in catering to market demand rather than administrative needs.[291]

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288. *See* BEN BEAUMONT ET AL., CHINESE INTERNATIONAL COMMERCIAL ARBITRATION 121–2 (1994) (explaining that while China will recognize an arbitral award rendered under the New York Convention, enforcement of any other arbitral award will occur only if there is reciprocity or precedent); *see also* Eu Jin Chua, *Legal Implications of a Rising China: The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 141 (2006) (emphasizing that the Arbitration Law contains no reference or provision for *ad hoc* arbitration, thus, although it is not forbidden, there are no clear rules for it in China).

289. *See* LIU XIAOHONG, JURISPRUDENCE AND EMPIRICAL RESEARCH OF INTERNATIONAL COMMERCIAL ARBITRATION (Guoji Shangshi Zhongcai Xieyi de Fali yu Shizheng Yanjiu) 51–52, 88 (2005); *see also* Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration,* 93 NW. U. L. REV. 453, 511 (1999) (stressing that cultural traditions compel attempts to mediate before resorting to the formal adjudicatory process of arbitration).

290. See WANG SHENGCHANG, RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA 29 (1997) (stating that the Arbitration Law does not outright prohibit the use of ad hoc arbitration, although its use is discouraged).

291. *See* ARBITRATION LAWS OF CHINA 87 (The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China ed. 1997) (noting that while foreign cases receive unbiased and efficient arbitration proceedings, discrimination plagues domestic arbitration); *see also* Eu Jin Chua, *supra* note 288, at 142 (maintaining that CIETAC has been criticized for failing to implement a transparent arbitral regime); *see also* William Heye, Note, *Forum Selection for International Dispute Resolution in China—Chinese Courts vs. CIETAC*, 27 HASTINGS INT'L COMP. L. REV. 535, 549 (2004) (recognizing that although strict impartiality and transparency are important in the West, China is struggling to find a balance between attaining a harmonious and a predictable and proper outcome).

However, even after we tout the benefits of legalizing the practice of ad hoc arbitration, one has to realize the political problem of state control remains a much more serious challenge to its inclusion in the revised AL. Politicians tend to avoid ad hoc arbitrations inclusion in the AL by blaming Chinese economic conditions. Ad hoc arbitration also requires the highest degree of good faith[292] in its execution because the burden is placed on the parties to organize and administer the arbitration and if problems arise, such as intentional delays by the parties or arbitrators, the assistance of an arbitration institution or an independent appointing authority are not available.[293]

As such, the argument has been made that the fledging level of fiduciary duties in the socialist market transition is still unable to maintain the high degree of good faith required for ad hoc arbitration. Likewise, the argument has been made that the predictability of ad hoc dispute resolution will be hard to guarantee so it will thus be detrimental to socioeconomic stability and therefore be detrimental to China's immature market system.[294] These arguments have been put forth by one Chinese top legislative official responsible for AL legislation. Liu Maoliang, Vice Chief of the Legislative Affairs Office of the State Council, expressed recently that "ad hoc arbitration should go slow in China until we have a more developed and mature market economy."[295] This argument makes the development of ad hoc arbitration in China a nullity, as the Chinese leadership has made it clear very recently that China will remain a developing country for the long term.[296] In conclusion, it is clear that there is much more political resistance than economic restraint when it comes to allowing ad hoc arbitration and foreign arbitration in China and any future implementation of these international arbitral norms will depend on liberalization of not only the market economy but also the political atmosphere.

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292. *See* William Tetley, *Good Faith in Contract: Particularly in the Contracts of Arbitration*, 35 J. MAR. L. & COM. 561, 594 (2004) (observing that in an ad hoc arbitration, good faith is imperative for the its success).

293. *See* Wang Liming & Xu Chuanxi, *Fundamental Principles of China's Contract Law,* 13 COLUM. J. ASIAN L. 1, 16 (1999) (clarifying that the principle of good faith is extremely important in Chinese culture).

294. *See* Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 436 (2006) (expressing the belief that the incompatibility between the Arbitral Law of China and international standards for ad hoc arbitration could undercut the conclusiveness of arbitral awards).

295. *See* Liu Maoliang, *Ad Hoc Arbitration Should Be Slow for Implementation in China*, 54 ARB. BEIJING Q. 8, 8–12 (2005); *see also* Ellen Reinstein, *supra* note 285, at 64 (commenting that unless the Chinese government is willing to submit itself to the legal system and lose some cases, it will face insurmountable odds in its attempt to establish a trustworthy market economy).

296. *See* Wen Jiabao, Chinese Premier, 2007 *Lunar New Year Address: Several Issues on the Historic Tasks and Foreign Policies that China Face in the Initial Period of Socialism* (Feb 26 2007), *in* XINHUA NEWS NET, http://news.xinhuanet.com/politics/2007-02/26/content_5775212.htm (last visited Mar. 19, 2009); *see also* Patrick H. Hu, Note, *The China 301 on Market Access: A Preclude to GATT Membership?*, 3 MINN. J. GLOBAL TRADE 131, 155 (1994) (opining that trade with China will continue to present problems beyond commercial expectations).

Suffer the Little Children: How the United Nations Convention on the Rights of the Child Has Not Supported Children

Lynne Marie Kohm*

On July 11, 2007, the European Committee on Crime Problems (CDPC) met regarding the Draft Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse and to examine the problem of sexual exploitation and abuse of children in Europe.[1] Their report states: "Compliance with the CRC and its Protocols is monitored by the Committee on the Rights of the Child, which has come to the conclusion that children in Europe are not sufficiently protected against sexual exploitation and abuse."[2] Despite the fact that the United Nations Convention of the Rights of the Child (CRC)[3] has been heralded as the most effective human rights document in history,[4] the European Committee clearly recognized upon

1. *See* Ministers' Deputies, *European Committee on Crime Problems: Draft Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse*, 1002 meeting (Jul. 11, 2007) [hereinafter Minister's Deputies, Protection of Children], *available at* https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2007)112&Language=lanEnglish&Ver=add&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75 (declaring that sexual abuse and exploitation are among the worst forms of violence against children).

2. *See id*. at ¶ 7 (naming trafficking of children, child pornography, the lack of a minimum age of consent, and an inadequacy of protection against child abuse on the Internet as the most pressing problems in the member states).

3. *See* Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (*entered into force* Sept. 2, 1990) (recognizing in the Preamble that all people, including children, are entitled to fundamental human rights and dignity).

4. *See* Rochelle D. Jackson, *The War Over Children's Rights: And Justice for All? Equalizing the Rights of Children*, 5 BUFF. HUM. RTS. L. REV. 223, 225 (1999) (basing the effectiveness and success of the Convention on the Rights of the Child on the fact that only one nation has not signed or ratified the convention); *see also* Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law,* 30 COLUM. HUM. RTS. L. REV. 159, 166 (1998) (citing the Convention on the Rights of the Child as a treaty that recognizes and protects the civic, political, economic, social, and cultural rights of the world's children); *see also* Crystal J. Gates, Note, *Working Toward a Global Discourse on Children's Rights: The Problem of Unaccompanied Children and the International Response to Their Plight*, 7 IND. J. GLOBAL LEGAL STUD. 299, 304 (1999) (describing the Convention on the Rights of the Child as the most thorough and all-inclusive of all human rights treaties).

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review of the evidence that the Convention on the Rights of Children has been ineffective in protecting European children.[5]

The United Nations Convention on the Rights of the Child is "the most widely ratified human rights treaty in history, with 191 participatory nations,"[6] and is thus the most successful document in UN history.[7] It is designed to set "out the rights that must be realized for children to develop their full potential."[8] Indeed, the "near-universal ratification of the Convention reflects a global commitment to the principles of children's rights."[9] The CRC was designed to protect children, with specific virtues set out in the document text: Articles 1, 11, 21 and 32–37 are formulated in general and broad terms to protect children from all forms of sexual exploitation and abuse, from abduction, sale and trafficking, from any other form of exploitation, and from cruel and inhuman treatment;[10] Article 6 was formulated to protect a child's

5. *See* Ministers' Deputies, Protection of Children, *supra* note 1, at ¶ 7 (noting that compliance with the Convention on the Rights of the Child is monitored by the Committee on the Rights of the Child, which concluded that the treaty has been insufficient in protecting children against sexual exploitation and abuse); *see also* EUGEEN VERHELLEN, CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND, MOTIVATION, STRATEGIES, MAIN THEMES 143 (3d ed. 2000) (admitting that passing additional treaties in the European Union to supplement the Convention on the Rights of the Child is necessary, but has yet to be realized); *see also* Bozena Maria Celek, Note, *The International Response to Child Labor in the Developing World: Why Are We Ineffective?*, 11 GEO. J. ON POVERTY L. & POL'Y 87, 103–4 (2004) (asserting that the ineffectiveness of the Convention on the Rights of the Child in protecting children from exploitation and abuse lies in weak and inadequate enforcement mechanisms).

6. *See* Jill Marie Gerschutz & Margaret P. Karns, *Transforming Visions into Reality: The Convention on the Rights of the Child*, *in* CHILDREN'S HUMAN RIGHTS 31 (Mark Ensalaco et al. eds., 2005) (indicating that the endorsement and ratification of the Convention on the Rights of the Child was rapid and near universal); *see also* Jisha S. Vachachira, Note, *Report 2002: Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 18 N.Y.L. SCH. J. HUM. RTS. 543, 544 (2002) (noting that only Somalia and the United States have failed to ratify the treaty). *See generally* John Quigley, *U.S. Ratification of the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 401, 402 (2003) (asserting that the Convention on the Rights of the Child was a result of a widely shared belief that children were especially vulnerable and in need of special attention and treatment from the international community).

7. *See* Laine Rutkow & Joshua T. Lozman, *Suffer the Children? A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 162 (2006) (describing the Convention on the Rights of the Child as the most successful treaty because of its effect on the plight of children and near-universal ratification); *see also* Todres, *supra* note 4, at 169–70 (opining that the Convention on the Rights of the Child has had effects beyond that of a normal treaty because it has increased support worldwide for the concept of human rights). *See generally* JANE FONTIN, CHILDREN'S RIGHTS AND THE DEVELOPING LAW 36–37 (2d ed. 2003) (asserting that if countries fully complied with the Convention on the Rights of the Child, the aim of protecting children's rights would be achieved).

8. *See* UNICEF, Convention on the Rights of the Child, http://www.unicef.org/crc/index_protecting.html (last visited Jan. 28, 2009) (stating that the rights set forth in the convention are intended to allow children to reach their full potential).

9. *See id.* (observing that the near-unanimous ratification of the Convention indicates a worldwide commitment to children's rights).

10. *See* HARRI ENGLUND, PRISONERS OF FREEDOM: HUMAN RIGHTS AND THE AFRICAN POOR 61 (2006) (observing that the government of Malawi used the Convention as the basis for enacting progressive laws to ensure children's rights and freedoms); *see also* Kurtis A. Kemper, *Construction and Application of the United Nations Convention on the Rights of the Child, 28 I.L.M. 1448 (1989)—Global Cases and Administrative Decisions*, 20 A.L.R. FED. 2d 95 (2007) (stating that the goal of the Convention was to protect children's civil and political rights, as well as economic, social, and humanitarian rights). *See generally* Mark Dowie, *Pupils Get Insight into Democratic Process*, ABERDEEN PRESS & JOURNAL, Jan. 24, 2009, available at 2009 WLNR 1397687 (describing an English school where students receive instruction about children's rights guaranteed by the Convention).

right to life;[11] Article 19 protects against offenses of child prostitution;[12] Article 34 protects children from sexual abuse and sexual exploitation.[13] No treaty or convention can be a cure-all for all of the concerns it targets, yet some effectiveness is minimally expected.[14] According to the CDPC, however, the CRC is ineffective.[15]

The welfare of children is the moral basis and legal foundation for the CRC.[16] "The four core principles of the Convention are non-discrimination; devotion to the 'best interests of the child'; the right to life, survival and development; and respect for the views of the child."[17] This

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11. *See* SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 125 (1999) (describing how Convention Article 6 delineates the child's right to life); *see also* Malcolm Nathan Shaw, International Law 307 (5th ed. 2003) (stating that the inherent right to life for children is contained in Article 6); *see also* Julia Velasco Parisaca & Wendy Medina, *Bolivia: Mothers Teaching Mothers to Combat Malnutrition*, IPSNEWS, Jan. 9, 2009, http://www.ipsnews.net/news.asp?idnews=45348 (reporting that the basis of Bolivia's Zero Malnutrition Policy rests upon the Article 6 right to life for children).

12. *See* United Nations Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M.1456 *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm (providing the text of the entire Convention, including Article 19 protections against child prostitution); *see also* UNICEF, Convention on the Rights of the Child, *supra* note 8 (setting forth Article 19's protective measures against child prostitution); *see also* Susan P. Limber & Målfrid Grude Flekkøy, *The U.N. Convention on the Rights of the Child: Its Relevance for Social Scientists*, IX SOCIAL POLICY REPORT 1, 5 (1995) (detailing Article 19 benefits, such as the protection of children from physical, sexual, and psychological abuse and neglect).

13. *See* UNICEF, Convention on the Rights of the Child, *supra* note 8 (citing Article 34 as containing provisions that protect children from sexual abuse and exploitation); *see also* KAREN L. KINNEAR, CHILDHOOD SEXUAL ABUSE (2d ed. 2007) (stating that the purpose of Article 34 is to protect children against sexual exploitation); *see also* THE PROTECTION PROJECT AT JOHNS HOPKINS UNIVERSITY SCHOOL OF ADVANCED INTERNATIONAL STUDIES, TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN IN THE COUNTRIES OF THE AMERICAS (2002), *available at* www.childtrafficking.com/Docs/the_protection_project_2002.pdf (noting that ratifying nations must comply with Article 34 by protecting the child from sexual exploitation and sexual abuse).

14. *See* Georg Kell, et al., *Silent Reform Through Global Compact*, 44 U.N. CHRONICLE (2007), *available at* 2007 WLNR 18558608 (noting that UN treaties have become central in member nations formulating effective policies); *see also* Michael Fakhri, *Sausage Making and U.N. Treaties—How They Are Really Made*, HARV. L. REC., Dec. 8, 2005, *available at* http://media.www.hlrecord.org/media/storage/paper609/news/2005/12/08/News/Sausage.Making.And.Un.Treaties.How.They.Are.Really.Made-1126336.shtml (commenting on the process by which U.N. treaties are made in order to determine their effectiveness). *See generally* General Assembly Session 59 Meeting 8, UNDEMOCRACY.COM, http://www.undemocracy.com/generalassembly_59/meeting_38/pg001-bk02 (last visited January 28, 2009) (describing the U.N. treaty on nuclear nonproliferation as effective in containing the threat).

15. See E. KAY M. TISDALL ET AL., CHILDREN, YOUNG PEOPLE AND SOCIAL INCLUSION 217 (2006) (declaring that the CRC has been ineffective in providing children with rights by making it seem that children are participating when they are not); *see also* Jennifer R. Silva, Note, *Child Soldiers: A Call to the International Community to Protect Children from War*, 31 SUFFOLK TRANSNAT'L L. REV. 681, 702 (2008) (stating that the CRC's inability to prevent the use of children in warfare is one example of the its ineffectiveness); *see also* Kelly M. Whittner, Comment, *Curbing Child-Trafficking in Intercountry Adoptions: Will International Treaties and Adoption Moratoriums Accomplish the Job in Cambodia?*, 12 PAC. RIM L. & POL'Y J. 595, 613 (2003) (postulating that the CRC is not entirely effective because it does not have a means for enforcing its provisions).

16. *See* ELISABETH REICHERT, SOCIAL WORK AND HUMAN RIGHTS 163 (2003) (recognizing that the UN drafted the Convention on the Rights of the Child to provide special protection for children); *see also* Molly S. Marx, Comment, *Whose Best Interests Does It Really Serve? A Critical Examination of Romania's Recent Self-Serving International Adoption Policies*, 21 EMORY INT'L L. REV. 373, 397 (2007) (explaining that the CRC was the next step in child welfare reform and emphasizing the best interests of the child standard); *see also* Silva, *supra* note 15, at 702 (asserting that the CRC was the first legally binding international instrument pertaining to children's rights).

17. *See* Convention on the Rights of the Child, UNICEF, *supra* note 8 (listing the four core principles of the Convention on the Rights of the Child).

devotion to the best interests of the child is a long and strong Western tradition of concern for children that originated in common law and was developed in American jurisprudence,[18] and the CRC was hoped to be sort of the crowning jewel of that standard, offering the salvation and liberation of children around the world.[19] Indeed, it was wonderful that this best interest of the child model was universally the basis of the CRC,[20] a triumph of a child-focused concept adopted by a global community of persons concerned for children's welfare.

> By agreeing to undertake the obligations of the Convention (by ratifying or acceding to it), national governments have committed themselves to protecting and ensuring children's rights and they have agreed to hold themselves accountable for this commitment before the international community. *States parties to the Convention are obliged to develop and undertake all actions and policies in the light of the best interests of the child*.[21]

This eminent legal standard of best interest of the child, however, was somehow twisted to establish a rights framework for children, from other United Nations foundational documents, promulgating the idea that children are best protected by having rights conferred upon them.[22]

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18. *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence,* 10 J. L. & FAM. STUD. 337, 376 (2008) (maintaining that the best interest of the child doctrine is uniquely established in American law and has set the trend for the treatment of children throughout the rest of the world).

19. *See* NICOLA ANSELL, CHILDREN, YOUTH AND DEVELOPMENT 229 (2005) (discussing that through the CRC, children have been given liberation through greater participation rights, but they still need help that is left to adults). *See generally* Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 451 (1996) (explaining that the CRC has a new approach that gives children rights that are more equal to those of adults, as opposed to previous children's rights associations); *see generally* Convention on the Rights of the Child, *Protecting and Realizing Children's Rights*, UNICEF, http://www.unicef.org/crc/index_protecting.html [hereinafter UNICEF Convention, *Children's Rights*] (mentioning that the CRC was the major proponent of the best interests standard).

20. *See* MARJORIE AGOSIN, WOMEN, GENDER, AND HUMAN RIGHTS 156 (2001) (emphasizing that the primary consideration for the CRC is the best interests of the child standard); *see also* T. Jeremy Gunn, *The Religious Right and the Opposition to U.S. Ratification of the Convention on the Rights of the Child,* 20 EMORY INT'L. L. REV. 111, 128 (2006) (noting that the CRC was "expressly designed to promote the best interests of the child"); *see also* Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 170 (1998) (noting that the best interest standard was the "primary aspiration" of the CRC).

21. *See* Convention on the Rights of the Child, UNICEF, http://www.unicef.org/crc/index_protecting.html (last visited Jan. 28, 2009) (quoting the Convention on the Rights of the Child).

22. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI) (Dec. 16, 1966) (laying the historical foundation for children's rights leading up to the CRC); *see also Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV) (Nov. 20, 1959) (serving as the central historical document of children's rights which led up to the CRC); *see also Geneva Declaration of the Rights of the Child, Sept. 26, 1924*, 21 L.N.T.S. 43 (existing as a foundation document of the child's rights which culminated in the CRC). *See generally The Universal Declaration of Human Rights*, G.A. Res. 217A, art. 25, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (establishing the first rights declaration as a standard for international law).

This twist effectively works to treat children like capacitated individuals.[23] This article proffers that what began as a best interests standard evolved into a rights framework, and that twist has affected the actual result that the CRC fosters neither the legal rights of children nor what is best for any child.

Because the CRC is premised on a rights framework, it is ineffective. This lack of effectiveness for the rights framework with children is admitted by the international community.[24] "Despite the existence of rights, children suffer from poverty, homelessness, abuse, neglect, preventable diseases, unequal access to education and justice systems that do not recognize their special needs."[25] And although this virtuous document has been agreed to by myriad signatory nations,[26] conditions for children around the world are *not* improving. In fact, the horrors faced by many children around the world are almost unfathomable.[27] This article will vividly illustrate that children are used as never before in warfare, as laborers, as forced spouses, and as sexual objects—and all in CRC signatory countries. The CRC is not protecting children.[28]

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23. See Hafen, *supra* note 19, at 458–59 (revealing that the CRC aimed to create individual autonomy and that it provides children with civil liberties previously only available to adults); *see also* UNICEF Convention, *Children's Rights* (providing that the CRC sets out the rights that must be realized in order for a child to achieve their full human potential). *See generally* JAMES DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 11 (2006) (focusing on individual autonomy and declaring that the same moral rights applicable to adults are also applicable to children).

24. *See* Marc D. Seitles, *Effect of the Convention on the Rights of the Child Upon Street Children in Latin America: A Study of Brazil, Colombia, and Guatemala*, 16 INT'L PUB. INT. 159, 159–60 (1997) (critiquing the Convention on the rights of the Child); see also U.N. Special Session on Children Draft Provisional Outcome Document, "A World Fit for Children," HUM. RTS. WATCH, Sept. 3, 2001, http://www.hrw.org/en/news/2001/09/03/un-special-session-children-draft-provisional-outcome-document-world-fit-children (stating that governments have to adopt appropriate goals to protect children's rights); *see also* Roy W. Brown, Representative, World Population Foundation, *Address Before the Human Rights Council, The Horror of Child Marriage* (Apr. 16, 2007), *available at* http://www.iheu.org/node/2553 (illustrating how the Convention on the Rights of the Child has many weaknesses).

25. See UNICEF Convention, *Children's Rights*, *supra* note 19 (illustrating that even though children have rights within this framework, several obstacles prevent the application of such rights).

26. *See Convention on the Rights of the Child*, G.A. Res. 25, at 171, art. 37, U.N.Doc A/44/736 (Nov. 20, 1989) (enumerating various rights provided to children); *see also* David Weissbrodt, *Prospects for Ratification of the Convention on the Rights of the Child*, 20 EMORY INT'L. L. REV. 209, 209 (2006) (noting the CRC is the "most widely ratified of all human rights treaties, with 192 Parties").

27. *See* Timothy John Fitzgibbon, Note, *The United Nations Convention on the Rights of the Child: Are Children Really Protected? A Case Study of China's Implementation*, 20 LOY. L.A. INT'L & COMP L. REV. 325, 326–27 (1998) (portraying how children are forced into child labor, poverty, and sexual exploitation); *see also* Karen A. McSweeney, Note, *The Potential for Enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base*, 16 B.C. INT'L & COMP L. REV. 467, 467–68 (1993) (revealing the hurdles that over 50 million children around the world must clear in order to survive to adulthood); *see also* Brown, *supra* note 24 (revealing that young girls are being forced into child marriage and often die as a result of forced pregnancies).

28. *See* Crystal J. Gates, Note, *Working Toward a Global Discourse on Children's Rights: The Problem of Unaccompanied Children and the International Response to Their Plight*, 7 IND. J. GLOBAL LEGAL STUD. 299, 300 (1999) (emphasizing that the Convention does not fully protect the rights of unaccompanied minors); *see also* Amnesty International, *Thailand: Thai Government Must Not Fail Lao Hmong Refugees and Asylum Seekers*, AI Index No: ASA 39/002/2009, Jan. 20, 2009, *available at* http://www.amnestyusa.org/document.php?id=ENGASA390022009 (stressing that the Convention is not protecting unlawfully detained child refugees in Thailand, which is a signatory country of the Convention); *see also* Child Rights Glossary, CRIDOC, available at http://www.cridoc.net/glossary_c.php (defining child labor and informing that there are around 250 million child laborers around the world).

This article demonstrates this theory with the use of five examples of problems that plague children around the globe. These five areas of concern will clearly demonstrate the duplicity of the CRC and its signatories, despite the rights extended to children, and are set forth in the sections of this article.

Section I discusses the growing child sex tourism industry and its prominence in many CRC signatory nations. It reveals that children are brutally sexually exploited in the face of their enumerated rights.[29] Section II discusses child marriage as the norm in many signatory nations, and demonstrates how a child's right to self-determination is subordinate to her culture and a marriage arranged for her. Section III reviews the well-known practice of female genital mutilation (FGM) of young girls as the norm in many signatory nations, clarifying the brutal reality that these children have no rights to challenge and object to the practice, even though it leaves them mutilated for life. Section IV then discusses child soldiering, warfare training, and combatant activity as an active and growing concern in many signatory nations. Its horrors reveal the desperate exploitation of children by state actors and opposing rebel fighters to recruit personnel for their armies. Finally, Section V explains the severe problem of forced labor and servitude of children around the world, revealing the utter inability of children to enforce their own rights against adults who insist on child bondage and exploitation for their own benefit.

These five examples represent the collapse and failure of the CRC. It simply has not worked to the benefit of children anywhere—not in Europe, as the CDPC has concluded,[30] and nowhere in the world, as this article will reveal. The CRC fosters neither the legal rights of children nor what is best for any child, and has in no way improved conditions for children

29. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 28 (2007), *available at* http://www.state.gov/documents/organization/82902.pdf (commenting on the fact that children are continually exploited despite numerous international covenants and protocols); *see also* Jonathan Todres, *The Importance of Realizing "Other Rights" to Prevent Sex Trafficking*, 12 CARDOZO J.L. & GENDER 885, 888 (2006) (recognizing that most of the sexually exploited victims are children, and suggesting rights that are necessary to prevent such exploitation); *see also* Laurie Nicole Robinson, Note, *The Globalization of Female Child Prostitution: A Call for Reintegration and Recovery Measures via Article 39 of the United Nations Convention on the Rights of the Child*, 5 IND. J. GLOBAL LEGAL STUD. 239, 242–43 (1997) (noting that sex tourism is a billion dollar industry and directly linked to the sexual exploitation of children).

30. *See* Ministers' Deputies, European Committee on Crime Problems: Draft Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, 1002 meeting (Jul. 11, 2007) *available at* https://wcd.coe.intViewDoc.jsp?Ref=CM(2007)112&Language=lanEnglish&Ver=add&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75 7, (explaining that the sexual exploitation of children is not adequately protected by the CRC); *see also* Christina Okereke, Note, *The Abuse of Girls in U.S. Juvenile Detention Facilities: Why the United States Should Ratify the Convention on the Rights of the Child and Establish a National Ombudsman for Children's Rights*, 30 FORDHAM INT'L L.J. 1709, 1730 (2007) (noting that the opposing sentiment to the CRC is that it gives children power and rights which undermine the parent's role and may ultimately harm rather than benefit the children). *See generally* Richard G. Wilkens et al., *Why the United States Should Not Ratify the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 411, 412 (2003) (detailing how the CRC harms children by giving them expansive autonomy rights which they are not wise enough to exercise properly).

around the world.[31] In the conclusion, this article offers a discussion of why this has happened and of what can be done in response to the failure of the CRC.

This article argues with painful clarity that the CRC is ineffective at best in fostering the welfare of children. That fact is demonstrated in some of the most dangerous circumstances that children have ever faced in world history.

Section I: Child Sex Trafficking and Tourism

Despite the relevant prohibitions in Articles 19 and 34 of the CRC,[32] "[t]rafficking in persons is the fastest growing form of organized crime."[33] It guarantees billions of dollars (in euros) of profit each year with minimal risk of retribution,[34] possibly because its victims are (physically powerless) women and children.[35]

> The female child usually finds her way into prostitution by being bought, kidnapped, tricked, sold by her parents, or traded. Figures estimate that the child prostitution business employs approximately 1 million children in Asia, 1.5 to 2 million children in India, 100,000 children in the United States, and 500,000 children in Latin America.[36]

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31. *See* Gunn, *supra* note 20, at 119–20 (explaining how some think that the CRC focuses on the wrong rights, thus negatively impacting children); *see also* Wilkens et al., *supra* note 30, at 412 (maintaining that the rights given to children by the CRC are not beneficial); *see also* Okereke, *supra* note 30, at 1730 (noting that one view of the CRC is that it is "anti-parent" in that it gives children rights that are not in the child's best interest and also infringe upon the parents' raising of the child).

32. *See* Convention on the Rights of the Child, G.A. Res. 25, at 171, art. 37, U.N.Doc A/44/736 (Nov. 20, 1989) (providing that Article 19 protects against offenses of child prostitution and Article 24 protects children from sexual abuse and sexual exploitation).

33. *See* Silvia Scarpa, *Child Trafficking: International Instruments to Protect the Most Vulnerable Victims*, 44 FAM. CT. REVIEW 429, 429 (2006) (discussing some of the reasons why trafficking in persons is the fastest growing form of organized crime).

34. *See* Europol, *2004 European Union Organized Crime Report* 12 (Dec. 2004), *available at* http://www.europol.europa.eu/publications/Organised_Crime_Reports-in_2006_replaced_by_OCTA/EUOrganisedCrimeSitRep2004.pdf (stating that trafficking in persons generates billions of euros per year); *see* also Melvyn Levitsky, *Transnational Criminal Networks and International Security*, 30 SYRACUSE J. INT'L L. & COM. 227, 229–30 (2003) (commenting that human trafficking can be conducted easily and can generate tens of billions of dollars annually); *see also* Vicki Trapalis, Comment, *Extraterritorial Jurisdiction: A Step Towards Eradicating the Trafficking of Women into Greece for Forced Prostitution*, 32 GOLDEN GATE U. L. REV. 207, 211 (2002) (explaining that profits from the trafficking of women alone can reach $9 billion per year).

35. *See* Sara Dillon, *What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children*, 17 UCLA WOMEN'S L.J. 121, 137–38 (2008) (noting that the vulnerability of children leads to their widespread exploitation); *see also* Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap Between U.S. Immigration Laws and Human Trafficking Laws*, 12 U.C. DAVIS J. JUV. L. & POL'Y 309, 374–75 (2008) (explaining how children are the "quintessential reflection of vulnerability" because they lack power); *see also* Michelle R. Adelman, Note, *International Sex Trafficking: Dismantling the Demand*, 13 S. CAL. REV. L. & WOMEN'S STUD. 387, 390–91 (2004) (alleging that the increased trafficking of women thrives on their powerlessness).

36. *See* Robinson, *supra* note 29, at 239 (quoting figures regarding the number of children employed in the child prostitution business).

Since these year 2000 figures, more current estimates reveal that there are about 600,000 to 800,000 people, mostly women and children, who are trafficked annually across national borders.[37] These numbers do not include the millions who are trafficked within their own countries; at least 80 percent of the victims are female, 75 percent of all victims are trafficked into commercial sexual exploitation, and roughly two-thirds of the global victims are trafficked intraregionally within East Asia and the Pacific (260,000–280,000) and Europe and Eurasia (170,000–210,000).[38] In Japan, buying sex is a factor in trafficking in persons, and many of those persons are children.[39]

Because it was clear quite early on that the CRC was not protecting child victims of trafficking, the UN Committee on the Rights of the Child issued an optional protocol on the CRC which signatory nations could also ratify—The Optional Protocol on the sale of children, child prostitution and child pornography was dated January 18, 2002.[40] In the face of these international efforts, children are being caught up in sexual prostitution like never before in history.[41]

In June 2007 the U.S. Department of State issued its annual *Report on Trafficking in Persons*, which details slave labor, sexual slavery and labor trafficking.[42] Guided by the Trafficking Victims Protection Act (TVPA) of 2000,[43] the *Report* addresses the status quo globally, for the

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37. *See* Central Intelligence Agency, *Field Listing—Trafficking in Persons*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/fields/2196.html [hereinafter CIA, *Trafficking in Persons*] (documenting the current situation of human trafficking around the globe).

38. *See id.* (providing statistics on the gender and ultimate destination of victims of human trafficking).

39. See DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2008), *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100522.htm (characterizing Japan as a "destination country" for trafficked women and children for the purpose of sexual exploitation); *see also* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 124, *supra* note 29 (reporting on the "booming" sex trade industry, including child sex tourism, in Japan); *see also* Susan Song, Youth Advocate Program Int'l, *Global Child Sex Tourism: Children as Tourist Attractions* 2, http://www.yapi.org/rpchildsextourism.pdf (noting the increasing incidence of sex slavery for women and children in Japan).

40. *See* Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, U.N. Doc. A/RES/54/263/ (May 25, 2000) (proposing additional measures to combat sex tourism, child pornography and prostitution).

41. *See* Dillon, *supra* note 35, at 122 (noting the immensity of the problem of child trafficking for sexual purposes); *see also* Jacqueline Bhabha, *Trafficking, Smuggling, and Human Rights*, MIGRATION POL'Y INST., March 1, 2005, *available at* http://www.migrationinformation.org/Feature/print.cfm?ID=294 (discussing the increase of human smuggling in recent years); *see also* CIA, *Trafficking in Persons*, *supra* note 36 (defining the scope of modern day human trafficking).

42. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 3–7 (2007), *available at* http://www.state.gov/documents/organization/82902.pdf (providing a comprehensive worldwide report on the efforts of governments to combat severe forms of trafficking in persons).

43. It is interesting to note that the United States acted on the concern of child trafficking prior to the international community, which did not adopt the Optional Protocol until 2002. *See* Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 103(9), 114 Stat. 1464, 1470 (2000) (responding to the reality of modern day slavery); *see also* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 20, *supra* note 42 (noting passage of the Trafficking Victims Protection Act by the United States in 2000).

purpose of combating such trafficking,[44] and for the particular purpose of protecting children.[45] There are many causes and methods of trafficking, some even legal,[46] but here the *Report* is used to identify CRC signatories who are in violation of the TVPA and are actually harming children.[47]

Nations are categorized by tiers delineating compliance with the TVPA[48] and assessed for significant number of victims and how the nation combats trafficking.[49] Tier 3 nations are most significantly violating standards of combating trafficking, and therefore are actually harming, or knowingly allowing harm to, children. These nations categorized include Algeria, Bahrain, Burma, Cuba, Equatorial Guinea, Iran, Kuwait, Malaysia, North Korea, Oman, Qatar,

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44. *See* Trafficking Victims Protection Act of 2000, *supra* note 43, § 108 (A) (articulating that the objective of this statute is to punish and eliminate large-scale human trafficking); *see also* Calvin C. Cheung, *Protecting Sex Trafficking Victims: Establishing the Persecution Element*, 14 ASIAN AM. L.J. 31, 34–35 (2007) (noting that the TVPA was meant to address the lack of international and state enforcement in the area of human trafficking); *see also* Kathleen K. Hogan, Comment, *Slavery in the 21st Century and in New York: What Has the State's Legislature Done?* 71 ALB. L. REV. 647, 653 (2008) (commenting that the TVPA provides for enhanced criminal enforcement against traffickers as well as additional protection for their victims).

45. *See* Trafficking Victims Protection Act of 2000, *supra* note 43, at § 108 (A)(2), (emphasizing the victimization of children in human trafficking); *see also* Robyn Emerton, *Translating International and Regional Trafficking Norms into Domestic Reality: A Hong Kong Case Study*, 10 BUFF. HUM. RTS. L. REV. 215, 215 n.2 (2004) (noting that the majority of people trafficked internationally are women and children); *see also* April Rieger, Note, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 233 (2007) (clarifying that the TVPA Act is targeted at the principal victims of human trafficking —women and children).

46. Some scholars argue that global adoption systems could even be contributing to trafficking. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 16, *supra* note 42 (commenting that past reports have noted that human traffickers often position themselves as employment agents to induce parents to part with their children); *see also* David Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113, 115 (2005) (describing how global adoption systems are sometimes used to "launder" children so that they can be trafficked legally).

47. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 12, *supra* note 42 (outlining the purpose of the TIP report and categorizing countries depending on their treatment of human trafficking); *see also* Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 476–477 (2006) (criticizing the TIP's tier ranking system as being somewhat ambiguous in regards to the standards used when comparing the trafficking in different countries); *see also* Susan W. Tiefenbrun, *The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 2 LOY. INT'L L. REV. 193, 213–215 (2005) (noting that the TIP report identifies the efforts of various countries to combat human trafficking).

48. Tier 1 countries fully comply with the Act's minimum standards; Tier 2 nations do not fully comply but are making significant efforts to do so; Tier 2 "Watch List" nations have very significant numbers of victims or fail to provide evidence of their efforts to combat trafficking, or made commitments to comply but do not. Tier 3 nations are not in compliance with the Act and "are not making significant efforts to do so." *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 12, *supra* note 41 (categorizing countries into three tiers with escalating levels of human trafficking violations in each category).

49. *See id*. at 46–52 (identifying human trafficking statistics by country and region and illustrating how countries in each region combat trafficking); *see also* Joyce Koo Dalrymple, Book Review, *Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act (*reviewing CRAIG MCGILL, HUMAN TRAFFIC: SEX, SLAVES & IMMIGRATION) 25 B.C. THIRD WORLD L.J. 451, 463 n.80 (2005) (noting that the TVPA allows for non-humanitarian and non-trade punitive measures against those countries that do not improve their efforts against human traffickers); *see also* Edi C.M. Kinney, Recent Development, *Appropriations for the Abolitionists: Undermining Effects of the U.S. Mandatory Anti-Prostitution Pledge in the Fight Against Human Trafficking and HIV/AIDS*, 21 BERKELEY J. GENDER L. & JUST. 158, 170 (2006) (enumerating the diplomatic and political repercussions for countries that do not rank well under the TIP tier system).

Saudi Arabia, Sudan, Syria, Uzbekistan and Venezuela.[50] Excepting Burma and North Korea, each one of these countries is a CRC signatory.[51]

In Syria, "[c]hild victims of commercial sexual exploitation are housed in juvenile detention facilities."[52] Cuba is also a major destination for child sex tourism, "involv[ing] large numbers of Cuban girls and boys, some as young as 12," with evidence of commercial and governmental complicity in the sexual exploitation of children.[53] Likewise, Venezuela is a source, transit, and destination country for children trafficked for the purposes of sexual exploitation, and children are trafficked internally for such purposes as well.[54]

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50. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 46, *supra* note 42 (listing the countries categorized as Tier 3 under the TIP); *see also* Mohamed Y. Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 FORDHAM INT'L L.J. 721, 745–46 (2003) [hereinafter Mattar, *Middle East*] (explaining that several Middle Eastern countries are ranked in Tier 3 as having severe forms of human trafficking); *see also* Susan W. Tiefenbrun, *International Justice and Shifting Paradigms, Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT'L L. 249, 275 (2007) (noting that Tier 3 countries are the worst offenders either for lack of laws or efforts to address human trafficking).

51. *See* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, CONVENTION ON THE RIGHTS OF THE CHILD (last updated Dec. 5, 2008), *available at* http://www2.ohchr.org/english/bodies/ratification/11.htm (listing each of the participating countries, dates of ratification, acceptance, accession or succession).

52. See DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 28 (2007), *available at* http://www.state.gov/documents/organization/82902.pdf (stressing that the Syrian government made no progress in protecting trafficking victims and facilitated such unlawful acts by lacking necessary safeguards, such as proper investigations, to prevent the trafficking of children); *see also* Mohamed Y. Mattar, *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, 41 VAND. J. TRANSNAT'L L. 1355, 1382 (2008) [hereinafter Mattar, *Human Beings*] (indicating that a significant number of men and women are being trafficked to Syria, among other countries, and that the overall effort in combating human trafficking has stalled due to the lack of prosecutions); *see also* Mohamed Y. Mattar, *State Responsibilities in Combating Trafficking in Persons in Central Asia*, 27 LOY. L.A. INT'L & COMP. L. REV. 145, 151–52, 168 (2005) [hereinafter Mattar, *Central Asia*] (positing that Syria is a main transit point for trafficking women and has not accepted the United Nations Protocol to Prevent, Suppress, and Punish Trafficking persons).

53. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2008—CUBA (June 4, 2008), *available at* http://www.unhcr.org/refworld/docid/484f9a0f2d.html (concluding that the Cuban government does not fully comply with the minimum standards for the elimination of human trafficking and has not taken important steps in fighting the sexual exploitation of women and children); see also DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 86, *supra* note 52 (announcing that state-run hotel workers, travel employees, cab drivers, hospitality staff, and police officers often steer tourists to prostituted women and children and facilitate their commercial exploitation); *see also* Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT'L L. 249, 269 (2007) (asserting that Cuba, a Tier 3 nation, has been involved in buying and selling women in addition to running brothels with the help of corrupt police and government officials).

54. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 209, *supra* note 52 (clarifying that the government of Venezuela has not made any antitrafficking law enforcement efforts, and that the country is a source, transit point, and destination for women and children trafficked for sexual exploitation); *see also* Angela D. Giampolo, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon in the Fight Against Human Trafficking*, 16 TEMP. POL. & CIV. RTS. L. REV. 195, 218–19 (2005) (articulating that Venezuela and Cuba were singled out in 2006 TRAFFICKING IN PERSONS REPORT as being nonexistent in the fight against human trafficking, possibly due to deteriorating relations with the United States); *see also* Luz E. Nagle, *Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude*, 26 WIS. INT'L L.J. 131, 146 (2008) (establishing that women from many rural groups were trafficked for sexual exploitation through Venezuela to Cuba to supply the sex tourism industry).

Trafficking occurs throughout Europe and across Asia also. Burmese children are trafficked to Thailand, China (P.R.C.), Bangladesh, Malaysia, South Korea, and Macau for sexual exploitation, and a significant number of children from Burma are economic migrants who wind up in forced prostitution.[55] A considerable number of Laotian children are economic migrants who are subject to commercial sexual exploitation in Thailand.[56] Iran serves as a source and transit country for girls trafficked into forced marriages and sexual exploitation, but also traffics children internally for purposes of sexual exploitation.[57]

The African continent is not exempt from trafficking, either. In Niger, "[c]hildren are trafficked . . . for forced begging, domestic servitude, mine labor, sexual exploitation, and possibly for agricultural labor."[58] Widespread reports of child labor abuses connected to the trafficking of children on farms in West Africa, where 70 percent of the world's cocoa is produced, led to pressure for the U.S. to ban chocolate imports, which instigated a voluntary protocol, signed by the two largest cocoa industry groups, pledging to combat labor exploitation in the country.[59] Moreover, the 2007 *TIP Report* states that "[i]ncreased attention" recently has been paid in

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55. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORt 71, *supra* note 52 (providing that many Burmese women and children who sought better economic opportunities abroad found themselves forced into bonded labor and sexual exploitation in Thailand); *see also* Sean C. Clark, *Never in a Vacuum: Learning from the Thai Fight Against HIV*, 13 WM. & MARY J. WOMEN & L. 593, 600–1 (2007) (reiterating the fear in Burmese children who have been smuggled to Thailand by policemen and border guards for the purpose of human trafficking); *see also* Bryant Yuan Fu Yang, *Life and Death Away from the Golden Land: The Plight of Burmese Migrant Workers in Thailand*, 8 ASIAN-PAC. L. & POL'Y J. 485, 522–23 (2007) (discussing that there is a growing population of migrant Burmese children in Thailand that are vulnerable to sexual labor and harsh working conditions due to their lack of citizenship in either Thailand or Burma).

56. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 197–98, *supra* note 52 (reporting that immigrant Laotian women and children are trafficked to Thailand for the purposes of exploitative labor and are more susceptible to human trafficking to other countries because they lack citizenship); *see also* Christa Foster Crawford, *Cultural, Economic and Legal Factors Underlying Trafficking in Thailand and Their Impact on Women and Girls from Burma*, 12 CARDOZO J.L. & GENDER 821, 824 (2006) (emphasizing that if there were no demand for the sex industry in Thailand, there would be less sexual exploitation of individuals from countries such as Laos, Burma, and Cambodia); see also Symposium, *Women and War: A Critical Discourse*, 20 BERKELEY J. GENDER L. & JUST. 321, 360–61 (2005) (showing that the U.N. Development Fund has found that sexual exploitation of women and children from Laos was inextricably linked to conflict between nations).

57. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 120–21, *supra* note 52 (informing that some media sources report that 54 Iranian females between the ages of 16 and 25 are sold into the illegal sex industry in Pakistan every day); *see also* Tracy Agyemang, *Reconceptualizing Child Sexual Exploitation as a Bias Crime Under the Protect Act*, 12 CARDOZO J.L. & GENDER 937, 944 (2006) (demonstrating that in Iran, short-term marriage contracts facilitate opportunities of sexual exploitation of young children, and are basically another form of child prostitution). *See generally* Mohamed Y. Mattar, *Human Security or State Security? The Overriding Threat in Trafficking in Persons*, 1 INTERCULTURAL HUM. RTS. L. REV. 249, 255 (2006) [hereinafter Mattar, *Human Security*] (rationalizing that in many Muslim cultures there are harmful cultural practices, such as temporary marriages, that equate to human trafficking, thus making it difficult for those women to reintegrate into their cultures).

58. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 159, *supra* note 52 (describing the reasons why children are trafficked into Niger).

59. Of the estimated 284,000 children working in these West African cocoa farms, most were in Cote D'Ivoire, "the world's largest cocoa producer"; "[t]he remaining children labored on farms in Ghana, the world's second-largest producer, and in Cameroon, and Nigeria." *See id.* at 31 (summarizing the child labor abuses on cocoa farms that led to a United States ban on cocoa imports linked to abuse and identifying the worst cocoa farm offenders in regard to child labor); see also Nagle, *supra* note 53, at 140–42 (highlighting the United States' effort to condemn child labor abuse in the cocoa industry). See generally Marc Ellenbogen, *Can the Tariff Act Combat Endemic Child Labor Abuses? The Case of Cote D'Ivoire*, 82 TEX. L. REV. 1315, 1315–16 (2004) (chronicling actions taken against Cote D'Ivoire for labor abuses).

West Africa to trafficking of children in relation to so-called "blood diamonds" mined by child soldiers.[60]

The list of nations included in the Tier 2 Watch List includes 32 countries, all of which have signed, ratified, or otherwise approved of the CRC's provisions, excepting only Macau.[61] They include Argentina, Armenia, Belarus, Burundi, Cambodia, Central African Republic, Chad, China (P.R.C.), Cyprus, Djibouti, Dominican Republic, Egypt, Fiji, Gambia, Guatemala, Guyana, Honduras, India, Kazakhstan, Kenya, Libya, Macau, Mauritania, Mexico, Moldova, Mozambique, Papua New Guinea, Russia, South Africa, Sri Lanka, Ukraine and the United Arab Emirates.[62]

The UN General Assembly targeted child sex trafficking problems in specific countries in 2002 and 2003.[63] In 2002 the Committee on the Economic, Social and Cultural Rights expressed concern about child trafficking in Benin, Slovakia, and the Czech Republic.[64] In 2003 the Human Rights Committee made observations to Mali, Sri Lanka, and the Philippines to underline the need to eradicate child trafficking as part of their obligations under Article 8 of

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60. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 32, *supra* note 52 (emphasizing that more attention is being paid to child exploitation in the mining of blood diamonds); *see also* Bill Zlatos, *Pitt Professor Briefs U.N. on Child Soldiers*, KNIGHT RIDDER TRIB. BUS. NEWS (Washington), Jan. 6, 2007, at 1 (calling the United Nation's attention to the urgency of the child soldier issue). *See generally* Christopher Wyrod, *Sierra Leone: A Vote for Better Governance*, 19 J. OF DEMOCRACY 70, 70–73 (2008) (giving a general history of how attention came to the child soldier and blood diamond issue).

61. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 27, *supra* note 51 (distinguishing the Tier 2 Watch List from the other tiers defined by the report); *see also* Matthew Lee, *U.S. Adds to Human Trafficking Blacklist Seven Nations, Including Some Allies, Make List*, ST. LOUIS POST-DISPATCH, June 13, 2007, at A3 (defining the various tiers from the TRAFFICKING IN PERSONS REPORT). *See generally* Robin Kwong, *Washington Presses Macao to Act Against People Trafficking*, FIN. TIMES (London), July 2, 2007, at 3 (singling out Macao from the group as a human trafficking offender).

62. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 42 (2007), *available at* http://www.state.gov/documents/organization/82902.pdf (listing the countries on the Tier 2 Watch List); *see also* U.S. Fed. News Service, *Trafficking in Persons Interim Assessment*, January 19, 2007 (reporting the list of Tier 2 Watch List countries). *See generally* Lee, *supra* note 61, at A3 (tracking the movements of a few countries from one tier to another).

63. *See* LeRoy G. Potts Jr., *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT'L L. REV. 227, 227–28 (2003) (outlining early UN efforts against sex trafficking); *see also* Michael B. Farrell, *Global Campaign to Police Child Sex Tourism*, CHRISTIAN SCI. MONITOR (Boston), Apr. 22, 2004, at 11 (describing UN efforts in Cambodia, Thailand, and Costa Rica to eradicate sex trafficking). *See generally* Linda Smith & Mohamed Mattar, *Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN, and Global Responses and Challenges*, 28 FLETCHER F. OF WORLD AFF. 155, 157 (2004) (recalling the UN's long-standing goal of ending sexual slavery).

64. *See* Silvia Scarpa, *Child Trafficking: International Instruments to Protect the Most Vulnerable Victims*, 44 FAM. CT. REVIEW 429, 438–39 (2006) (specifying the Committee's concern about child trafficking in Benin, Slovakia and the Czeck Republic); *see also U.N.: Committee on Economic, Social, Cultural Rights Concludes Fifty-Eighth Session*, M2 PRESSWIRE (Coventry), May 20, 2002, at 1 (reporting the Committee's determinations on Benin, Slovakia, and the Czech Republic); *see also Committee on Economic, Social and Cultural Rights to Hold Twenty-Eighth Session from 29 April to 17 May*, UNIS.org, Apr. 26, 2002, http://www.unis.unvienna.org/unis/pressrels/2002/hr4585.html (announcing that the Committee will be addressing issues with Benin, Slovakia, and the Czech Republic).

ICCPR.[65] Committees made these inquiries under documents other than the CRC.[66] Other national organizations were at work as well. The Central Intelligence Agency (CIA) documents a list of countries where trafficking in persons is a major criminal problem.[67] Its fieldbook details the problems in 34 countries including Algeria, Argentina, Armenia, Bahrain, Burma, Cambodia, Central African Republic, China, Cuba, Cyprus, Djibouti, Egypt, Equatorial Guinea, India, Iran, Kenya, North Korea, Kuwait, Libya, Macau, Malaysia, Mauritania, Mexico, Oman, Qatar, Russia, Saudi Arabia, South Africa, Sudan, Syria, United Arab Emirates, Uzbekistan, and Venezuela.[68] All are CRC signatories, yet all are accused of trafficking in persons, and many of those persons are children.[69]

Despite the fact that the CRC is the main reference regarding prohibitions on trafficking in children, particularly under Article 11 (promoting international agreements to fight the illicit transfer of children), and Articles 32, 34, and 36 (emphasizing the protection of children from exploitation), this evidence of further needed instruments implicitly acknowledges the

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65. *See* Scarpa, *supra* note 64, at 438–39 (stressing that states have an obligation under Article 8 to eliminate the trafficking of children and women in addition to previous obligations to ban slavery and involuntary prostitution and optional CRC protocols); *see also* Aderanto Adepoju, *Review of Research and Data on Human Trafficking in Sub-Saharan Africa*, INT'L MIGRATION, Jan. 2005, at 87 (analyzing how trafficked children were identified in Mali); *see also "Chairman" Reveals Seedy World of Trafficking*, BBC NEWS, Apr. 1, 2007, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/6507495.stm (estimating that there are 100,000 Philippine children involved in the local sex trade).

66. *See* Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Mali*, ¶ 68, U.N. Doc. CRC/C/MLI/CO/2 (May 3, 2007) (welcoming Mali's cooperative agreements with neighboring countries to combat cross-border human trafficking); *see also* U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Sri Lanka*, ¶ 14, U.N. Doc. CCPR/CO/79/LKA (Jan. 12, 2003) (calling for effective implementation of the National Plan of Action to combat child trafficking in Sri Lanka); *see also* U.N. Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: The Philippines*, ¶ 13, U.N. Doc. CCPR/CO/79/PHL (Dec. 1, 2003) (expressing concern for the effective enforcement of relevant legislation to combat child trafficking in the Philippines).

67. *See generally* Central Intelligence Agency, *Field Listing—Trafficking in Persons*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/fields/2196.html (listing the countries with serious human trafficking issues that are in the second or third of a three-tier classification system).

68. *See id*. (assessing each country listed primarily in terms of a source, destination, or transit country for those involved in human trafficking).

69. *See* U.N. Convention on the Rights of the Child, Nov. 7, 1995, 3 U.N.T.S. 1577 (listing all the signatory nations of the CRC from which the United States and Somalia are absent); *see also* Martti Lehti & Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 CRIME & JUST. 133, 133 (2006) (stating that between 70 and 90 percent of contemporary traffic in women and children in Europe and Asia is related to sexual exploitation). *See generally* CIA, *Trafficking in Persons*, *supra* note 66 (explaining the criteria by which countries involved in human trafficking are classified into tiers).

CRC's limited effectiveness.[70] The UN has attempted to buttress the CRC in light of its inability to arrest child sex trafficking offenders under the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, supplementing the UN Convention Against Transnational Organized Crime.[71] "Child trafficking victims are guaranteed specific protection on the basis of the provisions contained in the CRC and in its two Protocols and in the ILO Convention 182."[72] Yet this section has detailed a reality unaffected by these international laws. None of these UN documents, treaties, or actions have been even remotely effective in ceasing or even diminishing child sex trafficking and tourism.[73] Instead, the abuse of children globally is growing, extending from forced prostitution and sexual slavery to coerced child marriage.[74]

Section II: Child Marriage

An advertisement in a Taiwan publication is selling Vietnamese brides for 180,000 New Taiwan (NT) dollars, or about $6,000 U.S., or for 20,000 NTs, a prospective "groom" can purchase a package tour to Vietnam for purposes of shopping for a bride.[75] Bride-selling and prostitution are problems of special significance in light of the dearth of girls in Far Eastern

70. *See* CHILDREN'S HUMAN RIGHTS: PROGRESS AND CHALLENGES FOR CHILDREN WORLDWIDE 32 (Mark Ensalco & Linda C. Majka eds., 2005) (declaring that a human rights system based in the UN provides only limited means to submit complaints against governments for rights violations or for failure to implement the treaties); *see also* Malfrid Grude Flekkoy, *Implementation of the United Nations Convention on the Rights of the Child: The Children's Ombudsman as an Implementor of Children's Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 353, 369–70 (1996) (explaining that although the establishment of a children's ombudsman at a national level may be very useful in monitoring CRC implementation, it generally cannot enforce it); *see also* Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 179–80 (1998) (stressing that a CRC loophole exists by which countries can claim that they do not have adequate resources to enforce CRC provisions).

71. *See* U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol. I) (2001) (requiring ratifying states to prevent and combat trafficking in persons, protect and assist victims of trafficking and promote cooperation among states in order to meet those objectives); *see also* Scarpa, *supra* note 63, at 429 (asserting that even if the protection of trafficked children is enhanced by some specific international conventions, much still needs to be done to enforce a bill of rights for child trafficking victims to grant effective protection).

72. *See* Scarpa, *supra* note 63, at 442 (presenting the adoption of measures designed to help prevent child engagement in the worst forms of child labor).

73. *See* Karen D. Breckenridge, *Justice Beyond Borders: A Comparison of Australian and U.S. Child-Sex Tourism Laws*, 13 PAC. RIM L. & POL'Y J. 405, 425 (2004) (arguing that child-sex tourism laws are not the most powerful deterrents because they are not supported by the statistical evidence); *see also* Abigail Schwartz, *Sex Trafficking in Cambodia*, 17 COLUM. J. ASIAN L. 371, 408 (2004) (stating that despite the passage of Anti-Trafficking Laws and intermittent brothel raids, Cambodia is unable to address the trafficking problem).

74. See Patricia D. Levan, *Curtailing Thailand's Child Prostitution Through an International Conscience*, 9 AM. U. J. INT'L L. & POL'Y 869, 870 (1994) (expressing that child prostitution is increasing throughout the world); *see also* John Y. Luluaki, *Sexual Crimes Against and Exploitation of Children and the Law in Papua New Guinea*, 17 INT'L J.L. & POL'Y & FAM. 275, 276 (2003) (explaining that while the number of sexual crimes generally is expected to increase, the increase has been unprecedented in the last half-decade); *see also* Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT'L L. 605, 606 (2004) (discussing how 700,000 people, mostly women and girls, are trafficked into sexual exploitation and forced labor every year).

75. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 275 (2007), *available at* http://www.state.gov/documents/organization/82902.pdf (referring to a Taiwanese publication advertising prospective brides).

nations.[76] Many of these brides are children. "Millions of young girls in the developing world are married when they are still children, and as a result are denied the ordinary experiences that young people elsewhere take for granted: schooling, good health, economic opportunities, and friendship with peers."[77]

Countries with very high rates of early marriage (before the child reaches 18) include Niger (77 percent), Chad (71 percent), and Mozambique (57 percent).[78] The rate of early marriage among young girls is also very high in Bangladesh (65 percent) and moderately high in India (48 percent);[79] all these countries are CRC signatories. Forty-eight percent of girls in Yemen marry before age 18, and 54 percent in Nicaragua.[80]

Child marriage of very young girls is a widespread practice that continues despite the CRC and other international laws that prohibit such unions.[81] For example, in the Indian state of Rajasthan, 17 percent of girls marry before they reach 10 years of age, and in Nepal 40 percent of girls marry before they turn 15.[82] In Mali, 25 percent of girls were married by the age of 15,

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76. See P. Jayaram, *Desperate Bachelors—India's Skewed Sex Ratio Is Forcing Men to Scour Faraway Places and Even Orphanages for Brides*, STRAITS TIMES, Dec. 16, 2007 (noting that "across India there would be close to 32 million to 48 million 'missing women'—the victims of female foeticide").

77. *See* Sanyukta Mathur et al., *Too Young to Wed: The Lives, Rights and Health of Young Married Girls,* INT'L CENTER FOR RESEARCH ON WOMEN 1 (2003) (commenting that these children, defined as wives and mothers, have responsibilities they are often not prepared for, disrupting their ability to pursue employment and education).

78. *See id.* at 2–3 (illustrating how regional patterns hide considerable intraregional variation between countries).

79. *See id.* at 2–3 (reporting that Third World areas like southern Africa and India have drastically higher child marriage rates than many other regions).

80. *See id.* at 4 (alleging that official numbers sometimes fail to reflect accurately the number of child marriages and marriage-like situations; and that the actual rates are likely to be higher).

81. *See* Ladan Askari, *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages*, 5 ILSA J. INT'L & COMP. L. 123, 123–33 (1998) (decrying the CRC for its failure to ban child marriage specifically and its reliance on several indirect provisions which have been globally unsuccessful in eliminating the practice); *see also* Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 AM. U. J. GENDER SOC. POL'Y & L. 233, 252–53 (2004) (suggesting that the CRC's failure to ban child marriage has actually encouraged the practice by allowing parents to marry off their children in accordance with their cultural, religious, and economic traditions); *see also* UNICEF, EARLY MARRIAGE: CHILD SPOUSES 4–5 (2001), *available at* http://www.unicef-icdc.org/publications/pdf/digest7e.pdf (providing a statistical comparison of more than 30 First and Third World nations in which child marriage is still a significantly common practice).

82. *See* Laura Davids, Note, *Female Subordination Starts at Home: Consequences of Young Marriage and Proposed Solutions*, 5 REGENT J. INT'L L. 299, 319 (2007) (lamenting that nations, like India, have enacted their own anti-child marriage legislation but have failed to strongly enforce them due to governmental apathy and ignorance of the issue's severity); *see also* UNICEF, EARLY MARRIAGE: CHILD SPOUSES 4, *supra* note 80 (highlighting some areas in which women are being married off at particularly early ages, before they even reach puberty).

and one in 10 married girls aged 15 to 19 gave birth before age 15,[83] although the health risks of early marriage are tremendous.[84]

The risks of early marriage include the high likelihood of death in pregnancy or childbirth due to reproductive complications, increased risk of sexually transmitted diseases,[85] domestic violence and sexual abuse,[86] denial of education, social isolation, and mental health concerns.[87] The concern for this practice is strong. "This custom is not marriage, but rather sanctioned sexual abuse and a human rights violation that destroys girls' lives."[88] Yet, the practice of child marriage is rooted in two deeply entrenched historical reasons: the concern for maximum fertil-

83. *See Mali: Child Marriage a Neglected Problem*, NIRIN HUMANITARIAN NEWS AND ANALYSIS, Aug. 30, 2007, *available at* http://irinnews.org/printreport.aspx?reportid=74027 (pointing out that some nations have advocated and legalized child marriage as a legitimate form of marriage despite external pressures to outlaw the practice).

84. *See* Aliya Haider, *Adolescents Under International Law: Autonomy as the Key to Reproductive Health*, 14 WM. & MARY J. WOMEN & L. 605, 619–22 (2008) (asserting that early marriage severely disrupts a young woman's formative education and social experience, and forces her to take on physical and mental responsibilities which she is not developmentally able to handle); *see also* Warner, *supra* note 81, at 240 (explaining that a young woman's inexperience and age make her susceptible to domination, rape, and abuse from her husband, and life-threatening complications from early pregnancy); *see also* Meredith Marshall, Note, *United Nations Conference on Population and Development: The Road to a New Reality for Reproductive Health*, 10 EMORY INT'L L. REV. 441, 453 (1996) (positing that early marriage places women in an economic position that deprives them of the opportunity to pursue meaningful personal goals or achieve significant financial status).

85. *See* James Gathii, *Symposium: Family Planning and AIDS Policy in the International Community*, 13 U.C. J. INT'L L. & POL'Y 67, 84 (2006) (claiming that young wives are particularly susceptible to sexually transmitted diseases because they often are dominated by husbands who have had multiple sexual partners, or because they themselves have been passed among multiple men); *see also* Davids, *supra* note 82, at 319 (explaining that pressure to conceive a child and general ignorance of health risks leads to frequent unprotected sex between couples, and equally frequent HIV/AIDS and STD infection); *see also Child Marriage: A Neglected Problem*, *supra* note 83 (reporting that married girls between the ages of 10 and 19 are up to five times more likely to die during pregnancy or contract HIV/AIDS than girls who wait until they are fully matured to get married).

86. *See* Tamar Ezer et al, *Child Marriage and Guardianship in Tanzania: Robbing Girls of Their Childhood and Infantilizing Women*, 7 GEO. J. GENDER & L. 357, 377 (2006) (positing that when children get married, it causes grave problems their sexual and reproductive health); *see also* Warner, *supra* note 81, at 235 (showing that children that are forced to marry young are often physically abused by their husbands). *See generally* Kelly C. Connerton, *The Resurgence of the Marital Rape Exception: The Victimization of Teens by Their Statutory Rapist*, 61 ALB. L. REV. 237, 260 (1997) (describing that the health and safety of the child is not considered when children are married off at a young age).

87. *See* L. Elizabeth Chamblee, *Rhetoric or Rights?: When Culture and Religion Bar Girls' Right to Education*, 44 VA. J. INT'L L. 1073, 1118, (2004) (identifying that a barrier to girls' education is the fact they get married at a young age); *see also* Davids, *supra* note 81, at 309 (acknowledging that because of a child's isolation when they get married young, he or she lacks the education to protect him or herself); *see also* U.N. Children's Fund, *Early Marriage: Child Spouses*, INNOCENTI DIGEST No. 7, 8–9 (March 2001) (describing that a problem with getting married young is the lack of education the children receive); *see also Child Marriage Fact Sheet, UNFPA State of World Population 2005, available at* http://www.unfpa.org /swp/2005 /presslot/factsheets/facts_child_marriage.htm (listing negative effects that arise when adolescents are married).

88. *See* Barbara Slavin, *Child Marriages Rife in Nations Getting U.S. Aid,* USA TODAY, July 16, 2007, *available at* http://www.usatoday.com/news/washington/2007-07016-child-marriages-aid_N.htm (asserting the fact that when girls get married young, it destroys their lives).

ity in socially sanctioned unions[89] (even though, ironically, these unions result in extremely high maternal and infant mortality rates)[90] and "an important means for securing critical social, economic, and political alliances for the family, clan or lineage."[91]

The UN created the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages in 1962 to promote consensual marriage between adults.[92] It would seem that this ought to eliminate child marriage, but that is not the case because the document does not prescribe a minimum age for marriage.[93] The Convention on the Elimination of All Forms of Discrimination Against Women of 1979 also addresses marriage and includes a prohibition against child marriage that gives such marriages no effect.[94] It also does not prescribe a minimum age for marriage.[95] The CRC provisions of 1989 appear to rescue young girls from the potential tragedies of child marriage. Those provisions of the CRC that

89. *See* Sanyukta Mathur et al., *Too Young to Wed: The Lives, Rights and Health of Young Married Girls,* INT'L CENTER FOR RESEARCH ON WOMEN 4 (2003) (putting forward the idea that one of the major goals in pushing a woman to get married early is to maximize her fertility); *see also* Haider, *supra* note 84, at 620 (describing the fact that when girls get married young, their husband takes over all the decision making in their reproduction); *see also* Warner, *supra* note 81, at 235 (showing that girls get married once they reach puberty, as a way to ensure maximum fertility).

90. *See* Mathur et. al, *supra* note 89, at 11 (describing the health risks that exist when woman under the age of 20 give birth).

91. *See id*. at 4 (listing that another reason families promote their children getting married young is to increase their economic situation).

92. *See* Convention on Consent to Marriage, *Minimum Age for Marriage and Registration of Marriages* art. 2, 521 U.N.T.S. 231, 231 (1962), *available at* http://www.unhchr.ch/html/me nu3/b/63.htm (last visited Jan. 28, 2009) (establishing the principle that denounces child marriage and promotes consensual marriage); *see also* Ladan Askari, *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages*, 5 ILSA J. INT'L & COMP. L. 123, at 136 (stating that the consent of both parties is needed before a marriage is entered into); *see also* Yuval Merin, *The Right to Family Life and Civil Marriage Under International Law and Its Implementation in the State of Israel*, 28 B.C. INT'L & COMP. L. REV. 79, 126 (2005) (describing the reasoning behind the establishment of the provision of free consent to marriage).

93. *See* Convention on Consent to Marriage, *supra* note 92, at 231 (establishing the doctrine that promotes consensual marriage yet does not specifically stipulate a minimum age for marriage); *See also* Ladan Askari, *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages*, 5 ILSA J. INT'L & COMP. L. 123, 136 (1998) (describing the Convention's prescription of a minimum age as a "sham"); *see also* Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 AM. U. J. GENDER SOC. POL'Y & L. 233, 250 (2004) (asserting that the Convention does not specify a minimum age for marriage).

94. *See* Convention on the Elimination of All Forms of Discrimination Against Women, Art. 16, 19 I.L.M. 33, 42 (1980) (indicating that child marriage has no legal effect); *see also* Laura Davids, Note, *Female Subordination Starts at Home: Consequences of Young Marriage and Proposed Solutions*, 5 REGENT J. INT'L L. 299, 316 (2007) (declaring that the Convention includes a prohibition against child marriage that gives such marriage no legal effect). *See generally* Mohamed Y. Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 FORDHAM INT'L L.J. 721, 731 (2003) (providing that although the Convention does not prescribe a minimum age for marriage, legal systems of other countries have restrictions on child marriages that give such marriages no effect).

95. *See* Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 94, at 42 (affirming that the Convention does not denote a minimum age for marriage); *see also* Karine Belair, *Unearthing the Customary Law Foundations of "Forced Marriages" During Sierra Leone's Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women's Rights in Post-Conflict Sierra Leone*, 15 COLUM. J. GENDER & L. 551, 559 (2006) (demonstrating that since the Convention does not provide for a minimum age for marriage, that a country's legislation should establish the minimum age of eighteen for marriage); *see also* Davids, *supra* note 94, at 314 (addressing how the Convention does not specify a minimum age for marriage).

could apply to prohibiting child marriage, however, do not specifically and explicitly identify child marriage in those provisions.[96]

Some provisions of the CRC, however, indirectly apply to protecting girls against early marriage.[97] These provisions do not fully and expressly shield girls from this harmful practice, but allow cultural rules to dominate international law, leaving the CRC weak in combating the child marriage issue.[98] As a result, many countries do not construe general provisions to apply to the issue.[99] Some countries and lawmakers, in effect, have denied that the provisions actually prohibit the traditional practice of child marriage, and in fact, some have construed CRC provisions to actually sanctify the practice of child marriage.[100] Article 14.2 of the CRC allows parents the right to control their children's religious, educational, and cultural heritage.[101] Essentially, this would give parents the right to choose spouses and decide when their children will marry, based on cultural and/or religious practices.[102] Thus, even though the CRC sets

96. *See Convention on the Rights of the Child*, G.A. Res. 25, at 3, art. 37, U.N.Doc A/44/736 (establishing the protections of the child which do not include the prohibition of child marriage); *see also* Ladan Askari, *Girls' Rights Under International Law: An Argument for Establishing Gender Equality as a Jus Cogens*, 8 S. CAL. REV. L. & WOMEN'S STUD. 3, 10 (1998) (affirming that the CRC provisions do not even address the matter of child marriage); *see also* Jonathan Todres, *Women's Rights and Children's Rights: A Partnership with Benefits for Both*, 10 CARDOZO WOMEN'S L.J. 603, 610 (2004) (maintaining that the CRC does not identify child marriage in its provisions).

97. *See Convention on the Rights of the Child*, *supra* note 96, at 3 (providing implicit protection of girls against early marriage).

98. *See* L. Elizabeth Chamblee, *Rhetoric or Rights?: When Culture and Religion Bar Girls' Right to Education*, 44 VA. J. INT'L L. 1073, 1084, (2004) (showing an instance where cultural rules dominate international law and thereby weakening CRC's influence); *see also* Davids, *supra* note 94, at 314–15 (stating that since the provisions do not explicitly protect girls from child marriage, the CRC is weak in combating the issue); see also RANGITA DE SILVA-DE-ALWIS, CHILD MARRIAGE AND THE LAW THE UNITED NATIONS CHILDREN FUND DIVISION OF POLICY AND PLANNING, LEGISLATIVE REFORM INITIATIVE 18–19 (2008), *available at* http://www.unicef.org/policyanalysis/files/Child_Marriage_and_the_Law.pdf (lending evidence to the fact that so many countries have their respective law with regards to child marriage making CRC weak in combating the child marriage issue).

99. *See* Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483, 499 (2002) (demonstrating how many countries do not take the provision into account when dealing with child marriage); *see also* Aliya Haider, *Adolescents Under International Law: Autonomy as the Key to Reproductive Health*, 14 WM. & MARY J. WOMEN & L. 605, 621–22 (2008) (suggesting that since many countries do not construe the provisions to apply to the issue, these countries should adopt laws to combat child marriage); *see also* Rebecca M. Stahl, *"Don't Forget About Me": Implementing Article 12 of the United Nations Convention on the Rights of the Child*, 24 ARIZ. J. INT'L & COMP. LAW 803, 809–10 (2007) (implying that since parents are free to choose the means in which to protect their children, the provisions of the Convention might not be applied).

100. *See* Laura Adams, *Privileging the Privileged? Child Well-Being as a Justification for State Support of Marriage*, 42 SAN DIEGO L. REV. 881, 884 (2005) (referring to child marriage where it is sometimes accepted); *see also* Ladan Askari, *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages*, 5 ILSA J. INT'L & COMP. L. 123, 127 (1998) (illustrating that not all countries forbid child marriages); *see also* Monte N. Steward, *Law and Morality*, 31 HARV. J.L. & PUB. POL'Y 313, 319 (2008) (indicating that some cultures allow child marriage).

101. *See Convention on the Rights of the Child*, *supra* note 96, at Art. 1(3) (referring to parent's attempt to control their children's marriage decisions).

102. *See* Adams, *supra* note 100, at 884 (referring to a parent's ability to control their child's decisions); *see also* Askari, supra note 100, at 127 (illustrating that parents know best for their children); see also Steward, *supra* note 100, at 319 (indicating that it is sometimes smarter for parents to make decisions for their children).

forth a solid definition of "child," specifying any human under 18 years old,[103] the CRC is basically unsuccessful in protecting children against the dangers and harms of child marriage.

Traditional practices of child marriage continue in countries granting such individual discretion to parents and communities without international accountability.[104] For example, Nigeria, a CEDAW signatory, signed the international conventions amid reluctance of its National Assembly to domesticate the treaties "amidst cultural and religious misgivings about the prohibition of early marriages of girls."[105] Although Nigeria is also a CRC signatory, the strength of both documents together has not protected girls in that nation from child marriage.[106]

Furthermore, the UN and the CRC lack the ability to execute its declarations.[107] The CRC leaves implementation and enforcement to each individual state.[108] International and domestic laws either do not offer any penalties at all for violations of child marriage or offer very lenient penalties, which do not reflect the severe nature of the actual act.[109] Even if laws do

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103. *See Convention on the Rights of the Child*, *supra* note 96 at Art. 1; *see also* Erwin Chemerinsky, *Same Sex Marriage*, 34 SW. U. L. REV. 579, 583 (2005) (indicating that the CRC sets a bright line on who is considered a child); *see also* Katherine S. Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 67 (1998) (referring to the CRC's strict definition of what constitutes a child).

104. *See* Chemerinsky, *supra* note 103, at 583 (indicating that some countries give too much choice to their children's marriage decision); *see also* Maggie Gallagher, *The Case for the Future of Marriage*, 17 REGENT U. L. REV. 185, 191 (1998) (illustrating that some nations do not forbid child marriages); *see also* Spaht, *supra* note 102, at 67 (referring to those countries that allow child marriage as those who give too much discretion).

105. *See CEDAW—Completing Gains of Democracy for Nigerian Women?* AFRICA NEWS, July 9, 2007 (referring to Nigeria's way in which they show their disagreement with child marriages).

106. *See* Steven W. Fitschen, *Marriage Matters: A Case For A Get-The-Job-Done-Right Federal Marriage Amendment*, 83 N.D. L. REV. 1301, 1309 (2007) (referring to Nigerian girls' struggles, which have not gotten any better); *see also* Gallagher, *supra* note 104, at 191 (illustrating that even with all the effort, Nigerian girls have not received much help in their marriages); *see also id.* (noting that Article 16(2) of the CEDAW compels the official registration of marriages).

107. *See* SANA LOUE, SEXUAL PARTNERING, SEXUAL PRACTICE, AND HEALTH 72 (2006) (explaining that international conventions prohibiting child marriages are ineffective because they are not self-executing); see also Ladan Askari, *supra* note 99, at 127–28 (noting that provisions within the CRC only indirectly prohibit early marriage and are unsatisfactory); *see also* Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 AM. U. J. GENDER SOC. POL'Y & L. 233, 251 (2004) (explaining how the CRC's deference to local law in defining its critical terms leads to exceptions that render it powerless in many aspects).

108. *See Convention on the Rights of the Child*, *supra* note 102, at Art. 4 (declaring that states' parties shall implement the rights stated in the CDC by their own "appropriate" measures); *see also* Kirsten M. Backstrom, Note, *The International Human Rights of the Child: Do They Protect the Female Child?,* 30 GEO. WASH. J. INT'L L. & ECON. 541, 565 (1996) (stating that the CRC's reliance on domestic efforts to enforce its rights offers relatively little in terms of enforcement protection of the child); *see also* Lauren M. Spitz, Note, *Implementing the U.N. Convention on the Rights of the Child: Children's Rights Under the 1996 South African Constitution,* 38 VAND. J. TRANSNAT'L L. 853, 868–69 (2005) (noting that signatories of the CRC are merely presumed to have signed it in good faith and with the intention of implementing it fully).

109. *See* JAYA SAGADE, CHILD MARRIAGE IN INDIA: SOCIO-LEGAL AND HUMAN RIGHTS DIMENSIONS 49 (2005) (listing India's relatively lenient punishments for violating child marriage laws from 1929 to 1949); *see also* Vijayayashri Sripati, *India's National Human Rights Commission: A Shackled Commission?,* 18 B.U. INT'L L.J. 1, 39–40 (2000) (stressing that the prevalence of child marriages in India is not due to lack of legislation, but lack of enforcement and political effort); *see also* Laura Davids, Note, *Female Subordination Starts at Home: Consequences of Young Marriage and Proposed Solutions*, 5 REGENT J. INT'L L. 299, 319 (2007) (stating how many countries allow local customs and traditions to override domestic laws, thus bypassing international regulations).

prohibit child marriage and provide punishments for the practice, law enforcement officials and other citizens who can initiate a complaint do not enforce such laws because of their deeply rooted traditional acceptance of the marriage.[110]

The CRC revolves around the best interest of the child,[111] prohibiting all forms of discrimination,[112] protecting children's right to life,[113] abolishing "traditional practices prejudicial to the health of children,"[114] and promoting children's right to education.[115] The ongoing practice of child marriage violates all of these CRC general provisions.

> The number and scope of international and national statements on early marriage and the laws that regulate the practice in most countries are exten-

110. *See* SAGADE, *supra* note 109, at 49 (detailing how India's traditional acceptance of child marriage is reflected in the lack of strong statutory punishments for child marriage); *see also* Aliya Haider, *Adolescents Under International Law: Autonomy as the Key to Reproductive Health*, 14 WM. & MARY J. WOMEN & L. 605, 621–22 (2008) (citing economic incentives and traditional local customs as two strong forces that drive child marriage, especially in poor rural areas); *see also* Jill Sheffield, *Child Marriage: A Dangerous Tradition,* SEATTLE POST INTELLIGENCER, Jul. 8, 2004, at B7 (promoting policies directed at educating cultures on reproductive health as a means to end the traditional practice of child marriage).

111. *See Convention on the Rights of the Child*, G.A. Res. 25, at 171, art. 3(1), U.N.Doc A/44/736 (Nov. 20, 1989) (stating the "best interests of the child" as the primary consideration in all state actions concerning children); *see also* Jelani Jefferson & John W. Head, *In Whose "Best Interests"?—An International and Comparative Assessment of US Rules on Sentencing of Juveniles,* 1 HUM. RTS. & GLOBALIZATION L. REV. 89, 110 (2008) (recognizing the fundamental basis of the CRC is to hold the state to work "in the best interests" of the child); *see also* M. Beth Morales Singh, Note, *To Rescue, Not Return: An International Human Rights Approach to Protecting Child Economic Migrants Seeking Refuge in the United States,* 41 COLUM. J.L. & SOC. PROBS. 511, 538–39 (2008) (explaining that the "best interests" standard applies to both legislation and government administration of signatory states).

112. *See Convention on the Rights of the Child*, *supra* note 111, at Art. 2(2) (stating the states' parties should take all appropriate means to protect the child against all forms of discrimination or punishment); *see also* Jonathan Todres, *The Importance of Realizing "Other Rights" to Prevent Sex Trafficking*, 12 CARDOZO J.L. & GENDER 885, 897 (2006) (explaining that the CDC's prohibition on discrimination is merely illustrative and not a finite list of types of discrimination); *see also* Rachel Bien, Note, *Nothing to Declare but Their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children*, 12 J.L. & POL'Y 797, 810–11 (2004) (detailing that the application of the CRC's prohibition on discrimination applies to every child within a state, irrespective of birth status).

113. *See Convention on the Rights of the Child*, *supra* note 111, at Art. 6 (stating the states' parties must recognize the inherent right of life of every child); *see also* G. Diane Lee, Comment, *Ireland's Constitutional Protection of the Unborn: Is It in Danger?,* 7 TULSA J. COMP. & INT'L L. 413, 442–43 (2000) (explaining that the CRC views children as human beings with a right to life rather than as objects of the law); *see also* Ann M. Simmons, *Court Gives a Key Victory to South African AIDS Activists; Health: Government Must Offer Drug That Helps Prevent HIV Transmission at Birth,* L.A. TIMES, Dec. 15, 2001, at A17 (reporting that the South African government's obligation to the child's right to life includes providing drugs that help prevent HIV transmission at birth).

114. *See Convention on the Rights of the Child*, *supra* note 111, at Art. 24(3) (stating that the government agencies will take all effective and appropriate measures to make sure that there are no traditional practices that hurt children's health).

115. *See id.* at Art. 28 (reviewing the measures being implemented to ensure that all children have the right to get an education); *see also* John D. Bessler, *In the Spirit of Ubuntu: Enforcing the Rights of Orphans and Vulnerable Children Affected by HIV/AIDS in South Africa*, 31 HASTINGS INT'L & COMP. L. REV. 33, 56–7 (2008) (describing how the CRC and the African Children's Charter are very similar, as they both recognize the child's right to an education); *see also* Vanessa T. Hernandez, Comment, *Making Good on the Promise of International Law: The Convention on the Rights of Persons with Disabilities and Inclusive Education in China And India*, 17 PAC. RIM L. & POL'Y J. 497, 501 (2008) (noting that the Convention on the Rights of the Child explicitly states that all children have the right to education).

> sive, making the degree to which they are disregarded even more startling. Significant proportions of girls marry before age 18 in countries, such as Mali, Bangladesh, Uganda, and Nicaragua, which have established 18 as the legal minimum age at marriage. The case of Cameroon provides an even more staggering example: although the legal minimum age at marriage for women is 21, 62 percent of women in their early 20s are already married before age 18 according to Demographic and Health Survey (DHS) data.[116]

Young girls' health, welfare, and even their lives are in grave danger. The strong possibility of severe, life-threatening health effects of early sexual activity which happens through the occurrence of child marriage violates a child's right to life.[117] Fathers turn over control of their daughters to older spouses, and children are bound to a life they did not choose.[118] Young married girls do not have educational rights in the vast majority of circumstances, and in fact, the marriage of a young girl all but ensures an end to a girl's education except in rare circumstances.[119] Thus, child marriage violates a child's right to education, depriving her of self-determination and potential independence as well as violating the CRC provision—and the CRC is helpless to provide for, protect, or allow the child to participate in her own fate.[120]

The concerns detailed here have severe detrimental generational outcomes on children as well. "In addition to having a negative impact on girls themselves, the practice of early marriage

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116. *See* Sanyukta Mathur et al., *Too Young to Wed: The Lives, Rights and Health of Young Married Girls,* INT'L CENTER FOR RESEARCH ON WOMEN 1 (2003) (suggesting that educational, employment, societal, familial, and child bearing factors should be considered in setting the legal age for marriage).

117. *See id.* (citing disease, physical harm from intercourse, and problems with early pregnancy and child birth as reasons to set a higher legal age for marriage); *see also* Fitnat Naa-Adjeley Adjetey, *Reclaiming the African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture*, 44 AM. U. L. REV. 1351, 1361 (1995) (detailing how pregnancy at young ages makes girls more susceptible to complications from childbirth); *see also* Davids, *supra* note 109, at 300–1 (discussing the adverse effects of marrying young and how it can cause serious health effects to the young women).

118. *See* SAGADE, *supra* note 109, at 11 (declaring that women usually forfeit their right to an education upon entering into marriage); *see also* Mathur et al, *supra* note 115, at 1 (opining that child marriage gives the women responsibilities that they are not able to mentally or physically handle and usually ends any chance of an education).

119. *See* Convention on Consent to Marriage, *Minimum Age for Marriage and Registration of Marriages* art. 2, 521 U.N.T.S. 231, 231 (1962), *available at* http://www.unhchr.ch/html/me nu3/b/63.htm (last visited Jan. 28, 2009) (stating that international law does not state a minimum marrying age and that each state must decide that on their own); *see also* Laura Davids, Note, *Female Subordination Starts at Home: Consequences of Young Marriage and Proposed Solutions*, 5 REGENT J. INT'L L. 299, 311–12 (2007) (discussing how child marriages lead to the female being subordinate and dependant on the husband, thus not being able to establish her own personal identity); *see also* U.N. Children's Fund, *Early Marriage: Child Spouses*, INNOCENTI DIGEST No. 7, 4–5, 7 (March 2001) (explaining that females fare much worse in child marriages as the exploitation and subordination of child marriages is generally directed towards females more than males).

120. *See* Convention on Consent to Marriage, *Minimum Age for Marriage and Registration of Marriages* art. 2, 521 U.N.T.S. 231, 231 (1962), *available at* http://www.unhchr.ch/html/me nu3/b/63.htm (last visited Jan. 28, 2009) (stating that international law does not state a minimum marrying age and that each state must decide that on their own); *see also* Davids, *supra* note 119, at 311–12 (2007) (discussing how child marriages lead to the female being subordinate and dependant on the husband, thus not being able to establish her own personal identity); *see also* U.N. Children's Fund, *Early Marriage: Child Spouses*, INNOCENTI DIGEST No. 7, 4–5, 7 (March 2001) (explaining that females fare much worse in child marriages as the exploitation and subordination of child marriages is generally directed towards females more than males).

also has negative consequences for children, families, and society as a whole."[121] This concern should cause all the more astonishment at the ineffectiveness of the CRC. "The consequences of early marriage reach beyond the lives of young married girls themselves to the next generation."[122]

Child marriage shows the way to another related problem girls face in many CRC signatory nations which emotionally and physically mutilates their bodies for life.

Section III: Female Genital Mutilation

The traditional practice of female genital mutilation (FGM) still reigns supreme in myriad CRC signatory nations, despite the clarity of the horrors of the practice.[123] Added to the physical mutilation endured by girls, FGM victims also experience the continued agony and repression that accompanies the practice.[124]

As recently as June 1, 2001, the United States Department of State released reports on individual countries and their employment of FGM[125] and how such practices drive women and children to seek asylum here in the U.S.[126] Individual country reports on FGM or FGC are used as factual background material by INS asylum adjudicators and were developed and released by the Office of the Senior Coordinator for International Women's Issues, U.S. Department of State, on June 1, 2001.[127] Approximately 30 countries in the Middle East and

121. See Mathur et al, *supra* note 116, at 1 (rationalizing that child marriage can have a severe effect on society and families because children's lack of education, and economic options will restrict them from being able to contribute to society or their family).

122. *See id.* at 12 (observing the negative effects of early marriage on two generations: young mothers and their children).

123. *See* UNICEF, *Child Protection from Violence, Exploitation and Abuse: Female Genital Mutilation/Cutting*, http://www.unicef.org/protection/index_genitalmutilation. html [hereinafter UNICEF, *Female Mutilation*] (defining female genital mutilation (FGM), estimating that over 70 million girls and women are living with its devastating effects, and noting the continued prevalence of its use).

124. *See* Alexi N. Wood, *A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective*, 12 HASTINGS WOMEN'S L.J. 347, 362–67 (2001) (discussing the plethora of negative long-term physical, psychological, and psychosocial effects of female genital mutilation); *see also* UNICEF, *Female Mutilation*, *supra* note 123 (enumerating the horrific consequences of female genital mutilation).

125. *See generally* OFFICE OF INT'L WOMEN'S ISSUES, U.S. DEP'T OF STATE, Female Genital Mutilation (FGM) or Female Genital Cutting (FGC): Individual Country Reports (2001), *available at* http://state.gov/documents/organizations/ 10222.pdf (documenting the use of female genital mutilation (FGM) throughout the world). *Cf.* Dep't of State, 2004 Country Reports on Human Rights Practices (2004), http://www.state.gov/g/drl/rls/hrrpt/2004/ (reporting on worldwide human rights abuses).

126. *See* Molly Stark, Comment, *Derivative Asylum Claims in the FGM Context: Protecting Family Unity and Women's Rights in the New Millennium*, 83 U. DET. MERCY L. REV. 543, 565 (2006) (illuminating the difficult situation for refugees in the U.S. who seek asylum based on claims of suffering from, and subsequent opposition to, female genital mutilation).

127. *See generally* OFFICE OF INT'L WOMEN'S ISSUES, *supra* note 125 (archiving important U.S. government publications which support refugees' claims of past persecution in the form of female genital mutilation).

Africa widely practice FGM.[128] CRC signatory nations that employ avid use of the practice of FGM on girls include Benin, Burkina Faso, Chad, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Indonesia, Kenya, Liberia, Mali, Nigeria, Senegal, Sierra Leone, Somalia (unratified signatory), Sudan, Togo, and Yemen.[129]

The literature on FGM is abundant, emphasizing that adults outside FGM cultures understand the magnitude of this problem facing children around the world.[130] The most common assertion in the protection of FGM is that the practice is a cultural rite of passage.[131] Analyzing FGM as a violation of international law, especially in light of the United Nations ban on torture, is a common theme throughout the literature. Scholars have explored the various types of FGM that are performed, their historical background, the reality of FGM and the various attempts that have been made to help reduce the numbers of procedures performed.[132]

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128. *See* 140 Cong. Rec. S14, 242 (daily ed. Oct. 5, 1994) (statement of Sen. Reid) (introducing the Federal Prohibition of Female Genital Mutilation Act of 1994 and decrying the widespread practice of FGM); *see also* ANIKA RAHMAN & NAHID TOUBIA, FEMALE GENITAL MUTILATION: A GUIDE TO LAWS AND POLICIES WORLDWIDE 6–7, 101 (2d ed. 2001) (reporting the practice of FGM in 28 African countries and listing the rates of its prevalence); *see also* UNICEF, *Female Mutilation*, *supra* note 121 (estimating the mutilation of over 70 million girls in Africa and Yemen).

129. *See* OFFICE OF INT'L WOMEN'S ISSUES, *supra* note 125 (detailing the type, frequency, legal status, and attitudes for each country practicing female genital mutilation); *see also* Aliya Haider, *Adolescents Under International Law: Autonomy as the Key to Reproductive Health*, 14 WM. & MARY J. WOMEN & L. 628–29 (presenting information covered by the Children's Rights Convention on the countries that practice female genital mutilation); see also Jennifer J. Rasmussen, Note, *Innocence Lost: The Evolution of a Successful Anti-Female Genital Mutilation Program*, 41 VAL. U. L. REV. 919, 922 (2006) (denouncing the common belief that female genital mutilation occurs only in Africa).

130. *See* World Health Organization [WHO], *Female Genital Mutilation*, Fact Sheet No. 241 (2008) *available at* http://www.who.int/mediacentre/factsheets/fs241/en (explaining general information about the procedures, consequences, and international response to female genital mutilation); see also Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 525–26 (1993) (illustrating the effects of abusive tribal practices on African women); *see also* Patricia Dysart Rudloff, In re Oluloro: *Risk of Female Genital Mutilation as "Extreme Hardship" in Immigration Proceedings*, 26 ST. MARY'S L.J. 877, 880 (1995) (describing the implications of an immigration case on female genital mutilation); *see also* Ellen Goodman, Op-Ed., *Another Step Toward Redefining Abuse of Women*, BOSTON GLOBE, Mar. 27, 1994, at 75 (commenting on the international court decision releasing two young Nigerian girls from genital mutilation).

131. *See* Wood, *supra* note 122, at 361– 62 (discussing the beginnings of female genital mutilation in Europe and the United States as a way to cure sexual "deviancy"); *see also* Patricia Broussard, *Female Genital Mutilation: Exploring Strategies for Ending Ritualized Torture; Shaming, Blaming, and Utilizing the Convention Against Torture*, 15 DUKE J. GENDER L. & POL'Y 19, 39 (2008) (criticizing the rite of passage as the reason for female genital mutilation); *see also* Susan McKay, *Living in Limbo*, THE IRISH TIMES, Jan. 17, 2009, at 12 (reporting that in the Nigerian context, female genital mutilation is a rite of passage).

132. *See* Wood, *supra* note 124, at 383 (outlining multiple remedies and proposals for change for women who have been subjected to genital mutilation); *see also* Tiffany Ballenger, *Female Genital Mutilation: Legal and Non-Legal Approaches to Eradication*, 9 J.L. & SOC. CHALLENGES 84, 91 (2008) (presenting both legal and non-legal remedies to reduce female genital mutilation); *see also* Susan A. Dillon, *Healing the Sacred Yoni in the Land of Isis: Female Genital Mutilation Is Banned (Again) in Egypt*, 22 HOUS. J. INT'L L. 289, 298 (2000) (recognizing the international focus on the eradication of female genital mutilation).

Indeed, scholarship has analyzed how international law, covenants and treaties can be used to help protect women from FGM, yet proposals for change seem to fall on deaf ears.[133]

In fact, scholars have called on nations to adopt extraordinary measures in the fight against female circumcision, and to fully involve African and Middle Eastern women in this effort.[134] In the midst of understanding the meaning and practice of female circumcision, justifications for its continuance are offered despite its enormous health implications.[135] The international response to female circumcision, the role of the UN and its specialized agencies, as well as country-specific measures so far adopted to combat it have not succeeded in arresting the practice.[136] Organizations and countries are entreated to mobilize toward the complete eradication of female circumcision, calling for the empowerment of women, who are much more qualified to deal with female circumcision, and for the UN to lead the fight by working out an international document specifically making female circumcision a health and human rights issue.[137]

The conflict between the recognition of international human rights and the principle of cultural sovereignty with social and political implications surrounding FGM is most instructive in analyzing why the CRC has made no difference in protecting children against the practice.[138] The torturous practice of FGM, including the reasons given to justify it, as well as the resulting complications and effects, can easily be addressed and evaluated using existing international legal instruments that protest FGM.[139] Arguments of both FGM proponents and opponents still abound, and enforcement mechanisms of international law concerning FGM go unused.[140] Proposals to rectify these issues have been made in the literature.[141] Yet, in an age when it should be commonplace for society to respect women of all cultures and for all women to have the opportunity to make meaningful choices in their lives, the conflicting issues raised

133. *See* Wood, *supra* note 124, at 375 (attributing multiple United Nations covenants and treaties to the protection of women from genital mutilation); *see also* Kathy M. Salamat, In Re Fauziya Kasinga: *Expanding the Judicial Interpretation of "Persecution," "Well-Founded Fear," and "Social Group" to Include Anyone Fleeing "General Civil Violence"*?, 40 HOW. L.J. 255, 256–57 (1996) (advocating for a change in the protections offered to women by the United Nations); *see also* Rasmussen, *supra* note 129, at 922 (detailing the lack of legislation and protection by a majority of African and Middle Eastern countries).

134. *See* John T. Okwubanego, *Female Circumcision and the Girl Child in Africa and the Middle East: The Eyes of the World Are Blind to the Conquered*, 33 . 159, 159– 60 (1999) (calling on nations to adopt measures against female circumcision); see also Natalie J. Friedenthal, *It's Not All Mutilation: Distinguishing Between Female Genital Mutilation and Female Circumcision*, 19 N.Y. INT'L L. REV. 111, 141–42 (2006) (describing various solutions that can be adopted by countries to stop the practice of genital mutilation); *see also* Leigh A. Trueblood, Comment, *Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory*, 28 DENV. J. INT'L L. & POL'Y 437, 464–65 (2000) (commenting on the collaboration of governmental agencies and international organizations to eliminate female genital mutilation).

135. *See* Okwubanego, *supra* note 132, at 159–60.

136. *See id.*

137. *See id.*

138. *See* Trueblood, *supra* note 132, at 441.

139. *See id.* at § II.

140. *See id.* at § III.

141. *See id.* at § IV.

in the practice of FGM reveal the difficulties, horrors, and lack of freedom girls and women face daily.[142]

The United Nations Children's Emergency Fund (UNICEF) has attempted to promote a plan to combat FGM,[143] but the practice continues despite such programs. Scholars conclude that a blueprint of essential factors should be considered by international organizations, governments, and NGOs in the development and implementation process of successful anti-FGM programs.[144]

The current regime of asylum and withholding of removal leaves alien parents in removal proceedings with an impossible choice: either bring their LPR or citizen child with them to face persecution in the form of FGM or abandon the child to alternate care in the United States, thereby separating the family.[145] LPR or citizen children need protection, rather than a choice between two alternative hardships,[146] and the CRC has not altered that.

The magnitude of this problem facing girls around the world is indeed appalling, and all regardless of the fact that these FGM-practicing nations have pledged to protect children by signing and ratifying the CRC. Clearly the CRC has not protected children in these countries, and girls are still mutilated on a continual and daily basis. FGM clearly still haunts girls globally, despite all the attention its horrors have received and despite rights set out for protection

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142. *See id.* In fact, girls face new horrors in nations that seek to control its children and women by practices like FGM:

> "Introcision" is another rare form of female genital mutilation reported[ly] practiced by the Pitta-Patta aborigines of Australia. . . . [The procedure involves] enlarge[ment of] the vaginal orifice by tearing it downward with three fingers bound with opossum string. This is usually followed by compulsory sexual intercourse with a number of men. It is [further] reported that "introcision" is . . . practi[c]ed in eastern Mexico, Brazil, and Peru. In North-Eastern Peru, among a division of the Pano Indians, the operation is performed . . . using a bamboo knife [to cut] around the hymen from the vaginal entrance and sever[ ] the hymen from the labia, at the same time exposing the clitoris. Medical herbs are applied, followed by the insertion into the vagina of a penis-shaped object made of clay.

See id. at 441 n.23.

143. *See* Jennifer J. Rasmussen, Note, *Innocence Lost: The Evolution of a Successful Anti-Female Genital Mutilation Program*, 41 VAL. U. L. REV. 919, 973 (2006). This article presents the necessary elements for a successful anti-FGM program by first considering some of the reasons for the failure of regulations and implementation programs working toward the abolition of FGM, and then analyzing those programs and government entities that have demonstrated some success in curbing the practice. It does suggest some elements necessary for a successful anti-FGM program by identifying the factors of effective legal programs and pairing them with six essential requirements of an implementation program as identified in the INNOCENTI DIGEST, published by the United Nations Children's Emergency Fund (UNICEF). *See id*.

144. *See id.*

145. *See* Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 523 (1993).

146. *See id*. Cipriani provides an overview of the existing law of cancellation of removal, as well as asylum and withholding of removal, focusing on how courts currently handle FGM cases, examines the impacts of the existing law and analyzes its deficiencies, discusses possible remedies and their implications, and concludes that the "hardship factor" of cancellation of removal claims should be legislatively incorporated into the asylum and withholding of removal regime to offer LPR or citizen children protection from the devastating choices their parents currently face. *See id*. at 511.

of children. The horrors that face boys are almost as intimidating and certainly as much, if not more, physically threatening.

Section IV: Child Soldiering

Warfare training and combatant activity is a strong and growing concern in many CRC signatory nations.[147] Over 300,000 children are taking part in hostilities in over 30 countries; some are as young as seven years old, boys as well as girls.[148] This is the case despite passage and implementation of the CRC and UN efforts to the contrary for nearly two decades.

> In Liberia and Sierra Leone, the devastating civil wars of the 1990s, whose effects continue to reverberate through West Africa, were perhaps most infamous for the "small-boy units" of children under 12 who committed unspeakable crimes. In northern Uganda, until a recent tenuous truce, the Lord's Resistance army did more than put guns into the hands of preteens: By sexually enslaving young girls and "marrying" them to his fighters, rebel leader Joseph Kony saw to it that children were literally born into the conflict. A recent study by the United Nations Children's Fund puts the average age of recruitment for child soldiers in six Asian countries at 13 years; more than a third of all child soldiers are under 12.[149]

Reportedly the Lord's Resistance Army (LRA), a terrorist rebel organization, continues to abduct and forcibly conscript small numbers of children in Southern Sudan for use as cooks, porters, and combatants in its ongoing war against the government of Uganda.[150] Although there has been some child advocacy progress, the concerns remain.[151] These young soldiers can face war crimes as well.[152]

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147. See Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT'L L. 249, 440 (2007) (positing that the CRC changed the protocol for the minimum age of soldiers to 18 because of a widespread problem in voluntary enlisting by minors between 15 and 18).

148. See Olara A. Otunnu, Special Representative of the Secretary-Gen. for Children and Armed Conflict, Introductory Statement at the U.N. General Assembly Third Committee on the Promotion and Protection of the Rights of Children (Oct. 27, 1999), *available at* www.iansa.org/issues/GA99_statement.pdf; *see also* J. Peter Pham, *Michael Wessells' Child Soldiers: from Violence to Protection*, WILSON QUARTERLY 20070601 (2007).

149. *See* Pham, *supra* note 148.

150. *See* DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 230 (2007), *available at* http://www.state.gov/documents/organization/82902.pdf.

151. *See id.* at 232.

152. *See*, *e.g.*, William Glaberson, *A Legal Debate in Guantanamo on Boy Fighters*, N.Y. TIMES, Jun. 3, 2007 at Section 1 (discussing the dilemma of holding an Al Qaeda operative, spy. and killer responsible before a war crimes tribunal when the perpetrator was just 15 at the time of the crime.)

> Legal concepts that are still evolving, the lawyers say, require that countries treat child fighters as victims of warfare, rather than war criminals. The military prosecutors say such notions may be 'well-meaning and worthy,' but are irrelevant to the American military commissions at Guantanamo . . . [and that] international law . . . does not prohibit and individual under 18 from being prosecuted for war crimes.

Id.

One victim of child soldiering in Sierra Leone very recently chronicled his own experience of being separated from his parents and his village at age 12 and ending up in a warfare training camp.[153] Though raised in an intact family where education was promoted and memorizing Shakespeare was routine, his story details how a village from where he and other boys had escaped death from rebel forces was placed under martial law to provide protection from the rebels.[154] Yet that martial law enlisted each of the village's residents into its ranks regardless of objection, or age,[155] and the harrowing depictions of cruelty and depravity reveal how compelling a problem is child soldiering.[156] "War and its memories stay with these young soldiers long after they have gone off drugs and survived the resulting physical sickness."[157]

Child soldiers can be found in Myanmar, Sri Lanka, various nations of the Middle East, Kosovo, Turkey, Chechnya, Colombia, and in many African countries including Uganda, Sudan, Rwanda, and Angola, according to scholar and policy analyst Peter Singer, author of *Children at War*.[158] "In Asia, the average age of recruitment is 13, with 34 percent under the

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153. *See* ISHMAEL BEAH, A LONG WAY GONE: MEMOIRS OF A BOY SOLDIER 1 (2007). Ishmael's tentmates, whom he had not previously known, clung to him like an older brother, making it quite likely those two boys were age ten and younger. *See id.* at 110.

154. *See id*. at 23–108.

155. *See* BEAH, *supra* note 153, at 108 (2007). Here is Beah's eyewitness account:

> . . . All women and girls were asked to report to the kitchen; men and boys to the ammunition depot, where the soldiers watched their movies and smoked marijuana.
>
> As we walked toward the building, a soldier who carried a G3 weapon came out and stood at the doorway. He smiled at us, lifted his gun, and fired several rounds toward the sky. We dropped to the ground, and he laughed at us as he went back inside. We walked through the door and came upon the tents inside the building. The building was roofless except for the tarpaulin that covered the boxes of ammunition and guns stacked against the wall; and in the only common space, a huge television screen sat on top of a dilapidated drum. A few meters away from the television stood a generator, along with gallons of gasoline. The soldiers came out of their tents as the staff sergeant led us to the back of the house, where none of us had been before. There were more than thirty boys there, two of whom, Sheku and Josiah, were seven and eleven years old. The rest of us were between the ages of thirteen and sixteen, except Kanei, who was no seventeen [*sic*].
>
> A soldier wearing civilian clothes, with a whistle around his neck, stepped up to a rack of AK-47s and handed one to each of us. When the soldier stood in front of me, I avoided eye contact, so he straightened my head until my eyes met his. He gave me the gun I held it in my trembling hand. He then added the magazine, and I shook even more.

A good result that has come about from this boy's account is the Special Court for Sierra Leone, which is designed particularly to criminalize the recruiting of children. *See generally* Timothy Webster, *Babes with Arms: International Law and Child Soldiers,* 39 GEO. WASH. INT'L L. REV. 227 (2007) (examining the advances in preventing children from participation in armed conflict since the CRC was entered into force). Using treaty force to attach criminal responsibility may prove helpful, but still has limits regarding children who wish to enlist despite their tender years. *See id*. at 245–47.

156. *See* John Marshall, *"Long Way Gone" Recalls the Haunting, Barbaric Experiences of a Child Soldier*, SEATTLE POST-INTELLIGENCER, Mar. 30, 2007, at What's Happening.

157. *See id.* (adding "[e]very time Beah turns on a water faucet, he sees only blood.").

158. *See generally* PETER SINGER, CHILDREN AT WAR (U.Cal. Press 2006). Through a careful and thorough study, Singer discusses recruitment and experiences of child soldiers on the battlefield, and the governments and rebel groups that condone and promote their use, how this illuminates the problems and choices that face the international community, and how that community responds. *See id*. at 37–94.

age of 12. And in Africa, 60 percent are recruited at the age of 14 and under."[159] This is a severe problem on both continents.

Child soldiering practices in specific nations are detailed and well-documented in *Innocents Lost: When Child Soldiers Go to War.*[160] A chapter is dedicated to each of five troubled nations: Rwanda, Colombia, Sri Lanka, Uganda, and Afghanistan.[161] Several personal stories provide a history of the conflict. In Rwanda, for example, a Hutu 16-year-old was given the choice either to kill his four young Tutsi nephews or be killed himself.[162] In Colombia the conflict is not solely about drugs, but it is also about class, power, and economics,[163] continually drawing children into the conflict, and all the more now that there are rivaling factions in these conflicts.[164] "Over generations, children have merely been the main casualties, both as the victims of violence and as the perpetrators of it."[165] In Sri Lanka "battles rage between Hindu Tamils seeking a separate, independent state and the ruling Buddhist Sinhala Government."[166]

One of the most severe offenders of child soldiering has been the Sudan:

> Sudanese children are utilized in rebel groups in Sudan's ongoing conflict in Darfur; the Sudanese Armed Forces and associated militias reportedly continue to utilize children in this region. Vulnerable boys often perceive that voluntarily attaching themselves to an armed group, whether a rebel militia or the Sudanese Armed Forces (SAF), is their best option for survival.[167]

Political conflicts within a nation appear to be the strongest reasons/means for the "need" to recruit soldiers from among children. For example, the intranational fighting in Sri Lanka between government forces, the Tamil Tigers and a (rebel) group called Karuna has led to

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159. *See* Kim K. Sawyer, *Tragedy of Child Soldiers is Poignant in 2 Books*, ST. LOUIS POST-DISPATCH, Aug. 31, 2005 at Everyday (reviewing PETER SINGER, CHILDREN AT WAR (2006) and JIMMIE BRIGGS, INNOCENCE LOST: WHEN CHILD SOLDIERS GO TO WAR (2005)).

160. *See* JIMMIE BRIGGS, INNOCENCE LOST: WHEN CHILD SOLDIERS GO TO WAR (2005), at 2.

161. *See id.*

162. *See id.* (recounting the horrifying recollection of a 16-year-old-boy who was forced to crush his nephews' skulls with a garden tool in order to save his own life).

163. *See id.* at 41(2005) (claiming that the drug wars and cocaine distribution are not the sole contributors to the child soldiering problems in Colombia); *see also* RACHEL BRETT & IRMA SPECHT, YOUNG SOLDIERS: WHY THEY CHOOSE TO FIGHT 14–15 & 62 (2004) (explaining how poverty, lack of education and a community's acceptance of child recruitment can greatly increase the instances of child soldiering); *see also* Susan Tiefenbrun, *Child Soldiers, Slavery and the Trafficking of Children*, 31 FORDHAM INT'L L.J. 415, 426–35 (2008) (concluding that there are numerous factors that actuate child soldiering such as poverty, illiteracy, family background, abductions and economics).

164. *See* BRIGGS, *supra* note 160, at 41 & 44 (discussing the correlation between longer conflicts, the increase in the number of militant groups and the percentage of casualties among child soldiers).

165. *See id.* at 41 (recognizing that children are both victims and casualties of war); *see also id.* at 45–46 (commenting on the increased visibility and awareness of child soldiers because of the larger, more destructive weapons they are given in combat).

166. *See id.* at 83 (acknowledging that there is a power struggle between the current Sri Lankan government and the Hindu Tamils, a militant group).

167. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 230 (2006), *available at* http://www.state.gov/g/tip/rls/tiprpt/2006 (indicating that many Sudanese boys join local rebel militant groups in order to live).

abducting children to fight as soldiers.[168] "UN staff and other monitors in the country say they have documented as least 146 causes of child abduction by the Karuna group. The same staff has documented at least 1,600 child solider [*sic*] cases on the Tamil Tiger side."[169] Many Tamil children have been recruited or conscripted into the Liberation Tigers of Tamil Eelam (LTTE) cadres and drawn into combat.[170] UN attempts at holding these factions to the CRC have been worthless.[171]

Many of these armies would be immobilized without child soldiers. "An account of the prominent role children play in modern warfare reveals the urgent need for efforts to address the most unrecognized form of child abuse."[172] These CRC signatories do not feel obligated or in any other way bound to cease the soldiering of children.

Because the CRC was not adequate to deal with concerns over child soldiering, several additional declarations were needed.[173] The concerns for children recruited into armed combat culminated in the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which banned coerced participation in hostilities by children under 18.[174] Yet despite all the protocol's apparent successes,[175] child soldiering remains the norm in many signatory countries.

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168. *See id.* (indicating that many Sudanese boys join local rebel militant groups in order to persevere).

169. *See* Steven Edwards, *Rock Accused of Link to Tigers: UN Advisor Alleges Sri Lanka Using Child Soldiers*, NAT'L POST, Jan. 26, 2007, at A10 (finding that government forces are helping a group called Karuna abduct children to have them fight as soldiers).

170. *See id.* at A10 (proclaiming that the finding that the Sri Lankan government has been using child soldiers has been particularly embarrassing because of its criticism of the Tamil Tigers for also using child soldiers).

171. *See* JIMMIE BRIGGS, INNOCENCE LOST: WHEN CHILD SOLDIERS GO TO WAR (2005), at 86 (explaining that the training of child soldiers by the LTTE includes a combination of weapons training, propaganda literature, and combat videos); *see also* P.W. Singer, *Talk Is Cheap: Getting Serious About Preventing Child Soldiers*, 37 CORNELL INT'L L.J. 561, 573 (2004) (detailing that the LTTE uses sophisticated strategies to recruit child soldiers which include the use of computer databases and training camps).

172. *See* BRIGGS, *supra* note 171, at 86 (explaining that the training of child soldiers by the LTTE includes a combination of weapons training, propaganda literature and combat videos); *see also* Singer, *supra* note 171 (detailing that the LTTE uses sophisticated strategies to recruit child soldiers which include the use of computer databases and training camps).

173. *See* Jisha S. Vachachira, Note, *Report 2002: Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 18 N.Y.L. SCH. J. HUM. RTS. 543, 544–45 (2002) (recognizing that new resolutions and conventions were needed to be passed to address the inability of the Convention on the Rights of the Child to protect children).

174. *See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, G.A. Res. 54-263, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/263 (Mar. 16, 2001) (articulating that signatories must not compel children under age 18 to participate in hostilities but may permit children age 16 and over to voluntarily participate).

175. *See* Vachachira, *supra* note 173, at, 545 (stressing that by January 2002, 93 countries signed the Protocol); *see also* Nsongurua J. Udombana, *War Is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts*, 20 TEMP. INT'L & COMP. L.J. 57, 58 (2006) (asserting that the Protocol is a universally accepted human rights instrument); *see also* Uta Oberdörster, Note, *Why Ratify? Lessons from Treaty Ratification Campaigns*, 61 VAND. L. REV. 681, 683 (2008) (stating that the Protocol has been widely ratified by 110 countries as of early 2007).

The United States has presented several additional proposals to assist in bringing an end to child soldiering. The Child Soldier Prevention Act of 2007 was proposed by Congress to "end the use of child soldiers in hostilities around the world" because it was the sense of Congress that "the United States Government should support and, where practicable, lead efforts to establish and uphold international standards designed to end this abuse of human rights."[176] Another bill was proposed later in the U.S. Congress to "designate persons who recruit or use child soldiers as inadmissible aliens," and to provide for the deportation of such persons, called the Child Soldiers Accountability Act of 2007.[177] This is likely the most effective advancement the United States can make in beginning to deal with the child soldier crisis because, unlike the CRC or any child soldiering international protocols, sanctions are imposable against the adult perpetrators.[178] Despite these efforts, they are effective only if passed, and if jurisdiction can be obtained over perpetrators by their presence in the United States.[179] Their very existence even in the form of proposals, however, reveals the ineffectiveness of international laws, treaties, and protocols against child soldiering.

The treaties and protocols passed to arrest child soldiering attest to the efforts, but also the severe limits, of the CRC and the international community.[180] This grave concern for children drawn into combat persists, revealing the failure of the CRC, even buttressed by additional protocols, to halt it in any manner, and a forthright admission of the failure of international law in addressing and effecting child soldiering.

> As an agent or active force, however, international law has failed to defend persons in dire need of protection. Threats on paper have not, and will not, prevent governments or armed groups from recruiting children. Most reports on child soldiers conclude with pessimism comparable to that of a 2004 briefing prepared for the Security Council: "remarkable little progress has been made in ending the use of child soldiers, and some violators have even increased their recruitment of children."[181]

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176. *See* S. 1175, 110th Cong. (1st Sess. 2007) (detailing efforts by the United States to prevent children from being used as soldiers).

177. *See* S. 2135, 110th Cong. (1st Sess. 2007) (describing provisions of the Act which prohibited the recruitment or utilization of child soldiers).

178. See S. 2135, 110th Cong. § 2, § 2442(b) (1st Sess. 2007) (stating that the sanctions for violations of the Act include possible fines and imprisonment).

179. *See* S. 2135, 110th Cong. § 2, § 2442(c) (1st Sess. 2007) (explaining the ways that the United States attains jurisdiction over offenders of the Act); *see also United States: Bush Signs Law on Child Soldiers*, HUMAN RIGHTS WATCH, Oct. 3, 2008, http://www.hrw.org/legacy/english/docs/2008/10/03/usint19912.htm (noting that President Bush signed the Child Soldiers Accountability Act, which permitted the United States to prosecute any individual who violated any provision of the Act on American soil).

180. *See* Karen A. McSweeney, Note, *The Potential for Enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base*, 16 B.C. INT'L & COMP L. REV. 467, 488 (1993) (reaffirming the uphill climb the CRC faces in being effective); *see also* Timothy Webster, *Babes with Arms: International Law and Child Soldiers*, 39 GEO. WASH. INT'L L. REV. 227, 245 (2007) (citing Sierra Leone as an example of the ineffectiveness of the CRC).

181. *See* Webster, *supra* note 180, at 253 (discussing the many failures in ending the use of child soldiers).

This is very troubling, but not surprising, even to those who have attempted to assess blame in their advocacy against child soldiering.[182] The grim reality of the failure of international documents, treaties, conventions, and protocols is obvious.

> Until sharper teeth are sunk into enforcement—tougher sentences at international criminal courts, more assertive counter measures by the international community, or implementation of any of the United Nations Security Council's threatened sanctions—it is unlikely that children serving in armies, militia, or other rebel groups will lay down their guns.[183]

The CRC and its optional protocol on child warfare have been completely ineffective in halting this problem of abuse of children as coerced warfare participants: in fact, the problem has only grown.[184] Child soldiering is the most egregious form of forced labor, yet other forms of enslaving children are apparent in various forms of servitude.

Section V: Forced Labor and Servitude of Children

The general principles of the CRC on child labor prohibitions[185] need added support. The Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour[186] was "entered into upon the consideration of the need to adopt new instruments for the prohibition and elimination of the worst forms of child labor, as the main priority for national and international action . . . to complement" a previous document, the Recommendation concerning Minimum Age for Admission to Employment, 1973.[187] Even with these two instruments buttressing the CRC, children are nonetheless continually forced into involuntary servitude.

The nations that are offenders of these protections against child labor are all CRC signatories, from South America to Asia and in between. "Children are trafficked to Belize for labor

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182. *See id*. at 254 (discussing how the ineffectiveness of the UN's policies on child soldiering should fall on the United Kingdom, the United States, and Russia).

183. *See id.* at 227 (describing the need for the enforcement of tough laws in order to make any real progress in the fight in child warfare).

184. *See* Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education,* 40 U.C. DAVIS L. REV. 1653, 1709 (2007) (discussing the inability of individual children to make formal complaints under the CRC); *see also* Webster, *supra* note 178, at 253 (concluding that the efforts to impact child warfare have been largely ineffective); *see also* Kelly M. Whittner, Comment, *Curbing Child-Trafficking in Intercountry Adoptions: Will International Treaties and Adoption Moratoriums Accomplish the Job in Cambodia?*, 12 PAC. RIM L. & POL'Y J. 595, 613 (2003) (using the example of Cambodia to cite the failures of the CRC).

185. *See* David Smolin, *Strategic Choices in the International Campaign Against Child Labor*, 22 HUM. RTS. Q. 941 (2000) (providing a comprehensive overview of child labor issues).

186. *See* International Labor Organization, *Worst Forms of Child Labour Convention*, June 17, 1999, I.L.M. 1207, available at http://www.ilocarib.org.tt/childlabour/c182.htm (outlining steps to be taken t try to eradicate child labor).

187. *See id.* (noting that this convention was meant to build off the Convention concerning Minimum Age for Admission to Employment); *see also* RANGITA DE SILVA-DE-ALWIS, DIV. OF POLICY AND PLANNING, UNICEF, LEGISLATIVE REFORM ON CHILD DOMESTIC LABOUR: A GENDER ANALYSIS 9 (2007) (explaining that the Convention set a minimum age for joining the workforce and established a minimum age for work conditions appropriate for children).

exploitation."[188] Burmese children are trafficked to border nations for forced or bonded labor or domestic service.[189] Children are trafficked intracountry in Cuba and Iran for involuntary servitude.[190] Children are forced into labor from Venezuela throughout that country and into surrounding South American nations.[191]

A significant number of Laotian and Korean children are economic migrants who are subjected to forced labor in neighboring countries.[192]

> The illegal status of North Koreans in China and other countries increases their vulnerability to trafficking schemes and sexual and physical abuse. In the most common form of trafficking, North Korean women and children already in China are picked up by trafficking rings and sold as brides to Korean-Chinese men or placed in forced labor. [193]

In the Middle East and Africa, children are conscripted into labor against their will in a twisted exploitation of religious almsgiving, domestic work, or pure commercialism. "Saudi Arabia is a destination country for . . . Sudanese children trafficked for forced begging and involuntary servitude as street vendors."[194] Sudan is a source country for children trafficked for

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188. *See* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 257, at 71 (2006), *available at* http://www.state.gov/documents/organization/66086.pdf (discussing how Belize allows children to be trafficked into the country for labor exploitation).

189. *See id.* at 80 (enumerating the countries which Burmese children are trafficked to for forced labor and domestic service).

190. *See id.* at 100, 142 (citing both countries as sources of trafficking children for forced labor and involuntary servitude).

191. *See id.* at 257 (detailing countries in South America and beyond that children are trafficked to for forced labor).

192. *See id.* at 159 (stating that many children in Laos are trafficked to neighboring countries such as Thailand for sexual exploitation); *see also Human Rights*, 42 INT'L LAW. 755, 776 (2007) (listing North Korea as one of the countries named by the U.S. State Department which engages in human trafficking).

193. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 275, *supra* note 186, at 159 (stating that many children in Laos are trafficked to neighboring countries such as Thailand for sexual exploitation); *see also Human Rights*, *supra* note 190, at 776 (explaining that the presence of North Korean women in China extremely jeopardizes their human rights status because they are not only trafficked but sold as human brides in an illegal marriage scheme).

194. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 275,*supra* note 188, at 214 (explaining that the Middle East and Africa are ridden with exploitation of children, especially in Saudi Arabia and Sudan).

the purposes of forced labor.[195] That nation has been of particular concern regarding child camel jockeys,[196] but the most severe problem in the Sudan is child soldiering.[197]

Children are trafficked through and within Zimbabwe for forced labor, both domestic and agricultural.[198] Some are lured out of the country with false job or scholarship promises that result in domestic servitude.[199] Despite the fact that Zimbabwe demonstrated modest law enforcement efforts against trafficking, the government did not bring traffickers to justice.[200]

When children attempt to escape any one of these horrors, or others not detailed here, they may end up living on the street.[201] In Brazil, a 1990 signatory and ratifier of the CRC, there is strong evidence that some seven million street children[202] are victims of violent death at a rate of four children per day.[203]

Ineffective in all these concerns is the CRC. It has done nothing to help in halting the problem of forced labor of children. This and the four other major concerns facing children outlined in this article beg the question of the utility and/or effectiveness of the Convention on the Rights of the Child.

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195. *See id.,* at 230 (quoting "Sudan is a source country for men, women, and children trafficked for the purposes of forced labor and, at times, sexual exploitation"); *see also* Mohamed Y. Mattar, *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, 41 VAND. J. TRANSNAT'L L. 1355, 1383 (2008) (stating that Sudan is one of the countries in which children are treated as soldiers for illegal trafficking and other exploitive activities). *See generally* Benjamin J. Richardson, *Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment*, 46 OSGOODE HALL L.J. 243, 257 (2008) (stating that in general there has been an enormous number of human rights atrocities in Sudan, which includes crimes to children).

196. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 275, *supra* note 188, at 231 (describing that although Sudan is ridden with atrocities toward children, the arrest of camel jockeys is one giant step toward ending this mistreatment).

197. *See id.* at 231–32 (describing that child soldiering is a widespread problem in the Sudan); *see also* Mattar, *Human Beings*, *supra* note 193, at 1383 (stating that Sudan is one of the countries in which children are treated as soldiers for illegal trafficking and other exploitive activities).

198. *See* U.S. DEPT. of STATE, TRAFFICKING IN PERSONS REPORT, *supra* note 188, at 262–63 (examining Zimbabwe's complicity in the trafficking of children for illicit purposes within their borders).

199. *See id.* at 263 (describing the methods by which traffickers coerce children to willfully leave Zimbabwe's borders).

200. *See id.* (revealing the complicity of the Zimbabwean government in allowing trafficking to flourish under its control); *see also* Fareda Banda, *Global Standards, Local Values*, 17 INT'L J. OF LAW, POLICY & THE FAMILY 1, 4 (2003) (illuminating the difficulty in establishing human rights in countries that lack a cultural foundation in such rights).

201. *See* Paul A. Goetz, *Is Brazil Complying with the U.N. Convention on the Rights of the Child?*, 10 TEMP. INT'L & COMP. L.J. 147, 148-49, 157-58 (1996) (noting various occurrences that force children to live on the street).

202. *See* Karl Bruner, *Some in Brazil See Street Children as Victims, Others as Criminals*, CHRISTIAN SCI. MONITOR, AUG. 3, 1993, at B3 (cataloging the numbers of children who were living in the streets of Brazil).

203. *See* Paul A. Goetz, *supra* note 201, at 148 (revealing the rate of death among street children in Brazil).

Section VI: What Can Be Done in the Face of the Failure of the CRC to Remedy These Child Horrors?

The United Nation's long-standing premise for a rights framework has not worked regarding a convention designed to protect "the rights" of children. Indeed, the CRC has essentially worked to set the child as his or her own rights advocate, or at best a direct adversary to those whom he or she would normally rely on, parents and state actors, for protection and provision because of the rights framework it has adopted.

Some still insist that rights are what children need, arguing that the CRC must be incorporated into domestic law to protect children's rights.[204] "The lack of an express statement of children's rights in the[ir national] Constitution has resulted in a culture in which children's lives and opinions were not valued to the same extent as adults."[205] Blaming independent state constitutions will not cover the failure of the CRC to protect children. Rights promulgated in that landmark document have not protected children, nationally nor domestically. Children are protected only when adults have a duty to provide that protection, rather than cloaking children with the right to do so themselves.

The international framework for liberty rests in rights,[206] but often does not contain corresponding duties. Furthermore, the UN's framework for children's rights does not have any record of success. "Since the convention isn't legally binding, the onus is on governments to honour the agreement with help from a UN committee that holds nations to account every five years."[207] The UN is powerless to hold nations truly accountable, even those that are CRC signatories.

The United States has not become a ratified signatory to the CRC; even though it started out as a strong supporter of the CRC, it changed its position before making the decision

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204. *See* Jaap E. Doek, *What Does the Children's Convention Require?*, 20 EMORY INT'L L. REV. 199, 205 (2006) (emphasizing that in order to fully recognize a child's rights, states parties should fully comply with the CRC through its implementation into existing laws); *see also* Johan D. van der Vyver, *Municipal Legal Obligations of States Parties to the Convention on the Rights of the Child: The South African Model*, 20 EMORY INT'L. L. REV. 9, 9 (2006) (declaring that the Republic of South Africa effectively and without hesitation adopted the CRC into its constitution); *see also Logan Criticizes Treatment of Asylum Children*, THE IRISH TIMES, June 8, 2006, at 9 (stating that the Irish Human Rights Commission's delegation has endorsed CRC's full incorporation into existing laws).

205. *See Logan Criticizes Treatment of Asylum Children*, *supra* note 204, at 9 (paraphrasing Emily Logan's appeal to the UN committee entailing the negative impact on children stemming from omission of children's rights in a state's constitution).

206. *See* John Witt, Jr., *The Foundations and Frontiers of Religious Liberty*, 21 EMERY INT'L L. REV. 1, 4 (2007) (detailing that various UN declarations and international treaties ensuring rights of its members make up the international framework of liberty).

207. *See UK Rights Record Comes Under Fire,* CHILDREN NOW, July 25, 2007, at 11 (acknowledging that it is problematic for UK to adhere to UN's framework for children's rights when it is neither obligatory nor binding on the country to do so).

toward signatory status.[208] Although the U.S. was a strong supporter of this document and its basis in protecting the best interests of children, the country's decision against ratification has brought much ill will toward the United States.[209]

United States family law jurisprudence requires the protection of children by the legally enforceable standard of the best interests of the child.[210] This is not a rights framework, but rather it is a protective framework that requires adult obligations and duties to act in the best interests of children based on their parental rights.[211] However imperfect the best interests of the child standard may be applied, it has been immeasurably more successful at the protection, participation, and provision of children than the CRC ever could be.

Some international communities are already recognizing this fact. In discussing democratic gains based on international treaties favoring Nigerian women, particularly in light of child marriages, *Africa News* acknowledges that "[i]n all cases involving children, the best interest of the children shall be paramount."[212]

The best interest standard works better than the CRC because it balances universal moral law with the welfare of children. This is the essence of what children need from the law. Rather than a rights framework, children benefit from a family framework. The CRC has, instead, turned the best interest standard on its head, expecting legal capacity to arise out of a rights structure for a group of people that deserve protection; the result is that the CRC leaves children without advocates (by pitting them against their parents, the very people charged inalienably with the duty to protect and provide for them). The CRC signatory nations have not

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208. *See* Alison Dundes Renteln, *United States Ratification of Human Rights Treaties: Who's Afraid of the CRC: Objections to the Convention on the Rights of the Child,* 3 ILSA J. INT'L & COMP. L. 629, 629–30 (1997) (reporting that US became decidedly adverse to the CRC's ratification even though it was a key country involved in the drafting of the CRC).

209. *See* Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 185, 185 (2006) (noting that while the United States helped draft the CRC, the failure to ratify the document is at odds with the majority of nations); *see also* T. Jeremy Gunn, *The Religious Right and the Opposition to U.S. Ratification of the Convention on the Rights of the Child,* 20 EMORY INT'L. L. REV. 111, 111–12 (2006) (stating that after almost every country unreservedly ratified the convention, the U.S.'s religious right was fodder for world news). *See generally* David Smolin, *Overcoming Religious Objections to the Convention on the Rights of the Child,* 20 EMORY INT'L L. REV. 81, 81 (2006) (expressing the belief that the U.S. did not adopt the CRC because of the religious right's opposition and influence).

210. *See* Stanley v. Illinois, 405 U.S. 645, 653 n.5 (1972) (stating that the best interests of the child are the only relevant considerations in a determination of governmental intervention); *see also* Kevin B. Frankel, *The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 COLUM. J.L. & SOC. PROBS. 301, 305 (2007) (declaring that the "best interests of the child" is a standard used by courts to determine what arrangements will be best for the child); *see also* Tanya M. Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 HASTINGS RACE & POVERTY L.J. 1, 16 (2008) (describing how the right of children to be free from harm is derived from the standard of the best interests of the child).

211. *See* Pierce v. Society of the Sisters of the Holy Names, 268 U.S. 510 (1925) (explaining that those who nurture children have their own obligations); *see also* Parham v. J.R.U.S.Ga., 442 U.S. 584 (1979) (discussing parental authority in relation to the best interests of the child); *see also* J.A. v. Riti, 377 F. Supp 1046, 1050 (D.N.J. Civ. 1974) (stating the specifications for state intervention of parents in regards to the best interests of their children).

212. *See CEDAW—Completing Gains of Democracy for Nigerian Women?* AFRICA NEWS, July 9, 2007 (stating that the best interests of the child are the primary thing to consider in cases that involve children).

shown a higher standard of life for children—rather the opposite continues to grow, as evidenced in the first five sections of this article. The inherent paradox of children's rights rest on decisional autonomy, an impossibility for incapacitated persons. This paradox pervades the CRC—a paradox that requires rights to rest on decisional autonomy that requires the holder to protect his or her own autonomy—yet to require that of legally incapacitated persons, such as children,[213] is anathema.

Rights for children rather than duties on parents (and states in the absence of parents) have not led children to a safer place. A duties framework, as that provided by the best interests of the child standard, more actively and effectively obliges adults to act responsibly for children in their protection, provision, and participation. Allowing decisional autonomy, as per the CRC, takes away protections that legally incapacitated persons not only need but deserve.

In the Roman Empire girls were expected to marry and become mothers at age 12, with some marrying at even earlier ages.[214] "The obvious jeopardy in such marriages was that without effective means of birth control, the young girls got pregnant early and often, frequently dying in the process."[215] This rise of Christianity has long been seen as a social force that forever changed the Roman Empire, bringing with it a care for the treatment of women and children and a new respect for marriage and those who participated in it. "The forced marriages of young girls before they had reached puberty may well have been one of the reasons that so many Roman women embraced Christianity. While nearly half the pagan brides were under fifteen in the first century, nearly half of the Christian brides were eighteen and over."[216] This value of children is rooted in a Jewish tradition that views children as a gift from God,[217] and was passed on into Christianity by Jesus Christ in the New Testament.[218] Christianity brought a new and unfamiliar respect for children, bringing a new view of children to the law, which was manifested in the newly established United States in the best interests of the child standard.[219]

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213. *See You Have the Right: A Resource Pack About the United Nations Convention on the Rights of the Child* (February 23, 2006) (training materials provided by CommunityCare) (explaining the provisions of the CRC in a manner aimed at children in ages ranging from 7 to 11).

214. *See* RENA PEDERSON, THE LOST APOSTLE 83 (Jossey-Bass 2006) (explaining that girls in the Roman Empire were expected to be married and even become mothers at the age of twelve).

215. *See id.* at 84 (explaining that the lack of available birth control methods in Early Roman times led to frequent pregnancies and deaths during childbirth for young women).

216. *See id.* at 83 (claiming that the prevalence of abortion among unmarried women in the Roman Empire resulted in the deaths of many young mothers (citing Rodney Stark, THE RISE OF CHRISTIANITY 118–121 (1997)).

217. *See Genesis* 13:16 (showing the value of descendents to Hebrews); *see also* Psalm 127:3 (asserting that children are a reward and a gift from God); *see also Psalm* 128:3–4 (claiming that parents are blessed if they believe in God); *see also Ruth* 4:13–16 (purporting that Ruth's child would bring her great joy and would support her later in life); *see also I Samuel* 1:1 (evincing genealogical importance by including Elkanah's lineage).

218. *See Mark* 9:42 (asserting that one who harms a child who believes in Christ will suffer dire consequences); *see also Mark* 10:13–16 (acknowledging that all children are welcomed by Christ and are worthy of the kingdom of God).

219. *See* Commonwealth v. Briggs, 33 Mass. (1 Pick.) 203, 205 (1834) (declaring that a child's welfare is the chief factor in a custody dispute where a mother sought to revoke the parental rights of the child's father to whom she was still married). *See generally* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence,* 10 J. L. & FAM. STUD. 337, 348 (2008) (arguing that the development of the best interests of the child standard in American family law was largely influenced by Christianity).

This worth has become part of American jurisprudence in that the Supreme Court of the United States recognizes that the Constitution protects the fundamental rights of parents to protect and direct the upbringing of their children, as against the state, and as against third persons because it is presumed a parent will be the preeminent party to protect the best interests of a child.[220] Courts apply reasonable and commonsense understandings of the value of a child in the context of that standard. Placing a child's best interests in a purely rights framework, however, as the CRC has done, has no foundation in American jurisprudence,[221] but unveils an international disconnect between what children need—protection—versus what the Convention affords—rights. Therefore, the legitimate best interests of the child must be protected by parents, and then by the state. A rights framework loses this accountability, creating a tragic disconnect for each child. The CRC is much less powerful because of this disconnect.

Does CRC signatory status matter? Although the United States has been much maligned for its nonsignatory status, and many scholars continue to encourage the same view,[222] the CRC has not prohibited the abuse of children by signatory nations. Unless those nations act in the best interests of children, a rights framework presents a conundrum, while a nationally internal best interest of the child framework succeeds in protecting children in the United States. When adults are held accountable in an intracountry proceeding, a nation chooses to protect its future by protecting its children. This protective framework works. When children are afforded rights acquired by a national signatory to an international treaty, the intrastate accountability is lost.[223] Any rights gained for children are rhetorical only, particularly when a nation hides behind that rights treaty while all the time allowing the exploitation of its most precious future resource.

The image of God is the basis for all human rights and for children's rights in particular. God has entrusted parents to care for children, as an inalienable right that requires the utmost responsibility from parents for provision, protection, and participation. The image of God is the basis for this parental responsibility and the best interest standard. The CRC turns these

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220. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (asserting that parents have a fundamental right to determine the upbringing of their children); *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–535 (1925) (reiterating that parents have a right to control their child's upbringing and education); *see also* Troxel v. Granville, 530 U.S. 57, 72–73 (2000) (holding that a parent's fundamental right to make childbearing decisions cannot be abrogated solely by the assertion of a third party).

221. *See* In re Gault, 387 U.S. 1, 41 (1967) (asserting that a minor has Due Process right to a fair hearing in order to determine the minor's possible delinquency); *see also* Parham v. J.R., 442 U.S. 584, 602 (1979) (emphasizing that parents can determine their child's upbringing and must seek and follow medical advice if their child is ill).

222. *See* David Smolin, *Overcoming Religious Objections to the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 81, 89 (2006) (suggesting conflicts between the CRC and U.S. law are declining and urging signatory support); *see also* David Weissbrodt, *Prospects for Ratification of the Convention on the Rights of the Child*, 20 EMORY INT'L. L. REV. 209, 209–210 (2006) (encouraging U.S. ratification to demonstrate the present commitment to protect the rights of children).

223. *See* Gerison Lansdown, *The Reporting Process Under the Convention on the Rights of the Child*, *in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 113, 113 (2000) (noting that only Somalia and the United States have failed to ratify the CRC); *see also* JULIE A. MERTUS, BAIT AND SWITCH: HUMAN RIGHTS AND U.S. FOREIGN POLICY 159 (2004) (demonstrating opposition to the CRC through the fact that the U.S. Senate receives one hundred letters opposing the CRC for every letter supporting it); *see also* Kevin Mark Smith, Abstract, *The United Nations Convention on the Rights of the Child: The Sacrifice of American Children on the Altar of Third-World Activism*, 38 WASHBURN L.J. 111, 112 (1998) (examining the problems with the CRC and arguing that parents are better able to determine what is in the best interests of the child than the state).

concepts on their head, which is why the document has not eradicated injustice against children.

Conditions for children around the world are not improving, and have not improved since the CRC's inception in 1989, as evidenced clearly in this article. Indeed, life for children around the world has worsened in many ways from a growing sex tourism industry, continued FGM, (numerous) child brides to aged men, and forced child warfare training. The CRC fosters neither the legal rights of children nor what is best for any child. A rights framework has proved to be ineffective in protecting children from harmful adult interests.

Global authorities are now admitting this fact. The Council of Europe, upon review of the evidence, has acknowledged that the Convention on the Rights of Children (CRC) has been ineffective in protecting kids.[224] Citing approximately two million children subjected to abuse and violence and "used in the 'sex industry' each year."[225] The Council concludes that Article 34 of the Convention requiring states parties to protect children just from sexual exploitation and sexual abuse is completely ineffective, citing its inability to compel the passage and enforcement of national criminal legislation within the states parties, "especially as concerns trafficking of children, "sex tourism" and child pornography, the lack of a clearly defined minimum age for consenting sexual relations and lack of protection for children against abuse on the Internet."[226] The hope and help offered are recommendations regarding effective reporting systems and investigation.[227] These recommendations in reality, however, are easily ignored by states parties and signatory nations. The reasonable conclusion is that the CRC means little, if nothing, to those nations.

Physical harm, mutilation, warfare, forced labor, forced marriage and the horrors of sexual exploitation and abuse are quite shocking for adults, yet all the more when perpetrated again children. When these atrocities happen to so many children around the globe by so many nations who have agreed to uphold children's rights via the CRC, the Convention itself is not

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224. *See* Ministers' Deputies, European Committee on Crime Problems: Draft Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, 1002 meeting (Jul. 11, 2007) *available at* https://wcd.coe.intViewDoc.jsp?Ref=CM(2007)112&Language=lanEnglish&Ver=add&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75 (stating the primary objective of the Convention is to effectively contribute to the protection of children and to assist victims); see also Michael Goodhart, *Children Born of War and Human Rights: Philosophical Reflections*, in BORN OF WAR: PROTECTING CHILDREN OF SEXUAL VIOLENCE SURVIVORS IN CONFLICT ZONES 188, 202 (R. Charli Carpenter ed., 2007) (emphasizing that the CRC is ineffective because it incorrectly presumes that children live in stable families); *see also* Jennifer Banks, Note, *The U.S. Market for Guatemalan Children: Suggestions for Slowing the Rapid Growth of Illegal Practices Plaguing International Child Adoptions*, 28 SUFFOLK TRANSNAT'L L. REV. 31, 54–55 (2004) (demonstrating that the CRC and Hague Convention do not effectively manage international adoptions).

225. *See* Minister's Deputies, *Protection of Children*, *supra* note 224 (search for "1002/10.1") (describing the sexual exploitation of children as a growing problem).

226. *See id.* (search for "1002/10.1") (asserting that new technologies have increased access to children by sexual perpetrators).

227. *See id.* (suggesting that educating children about sexual abuse and how to protect themselves will increase reports of abuse incidents).

even remotely protecting the best interests of children.[228] What appeared to be a great international triumph seems to be rhetorical only, as it does not hold its signatories accountable to the horrific pain inflicted on children in those nations.[229] Indeed, the Convention seems to have had little to no bearing on making life better for children around the world. On the contrary, the argument that conditions for children have worsened since the naissance of the CRC is persuasive.

While children around the world face the horrific circumstances described in this article, many scholars would rather focus on spanking and family discipline as violative of the CRC and children's rights, blaming parents.[230] Indeed, domestic child abuse is a terrible problem, but the rights framework does not deal adequately with that matter. Rather, holding the parent to a suitable legal obligation, i.e., protecting the best interests of the child, works somewhat effectively in American state family courts when the parent is faced with the threat of termination of parental rights or losing custody of his or her child to another party or the state.[231] The best interests of the child standard works because of the integrity of an internal family court system. The CRC's human rights framework, however, has not protected children nearly as well from widespread horrors, because signatory nations and states easily wrap themselves in a cloak of cultural and political predilection to ignore or override the international law, leaving the CRC utterly powerless.

> [T]he doctrine of pacta sunt servanda in international law requires that promises must be kept. By ratifying the Convention, these countries have made a promise to their children to uphold and enforce the rights it grants; if cultural biases are allowed to exempt a state from certain obligations, the

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228. *See* Jaap E. Doek, *The Protection of Children's Rights and the United Nations Convention on the Rights of the Child: Achievements and Challenges*, 22 ST. LOUIS U. PUB. L. REV. 235, 245 (2003) (stating that even a serious and rigorous implementation of an international human rights instrument like the CRC cannot in and of itself quickly improve the world for children); see also Rebeca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. ON FIGHTING POVERTY 139, 161 (noting that the achievements of the CRC to date are minuscule in comparison to the many challenges ahead, as reports continue of horrific crimes committed against children); *see also* "Human Rights Violations," Bhutanese Refugees: The Story of a Forgotten People, *available at* http://www.bhutaneserefugees.com/index.php?id=5 (last visited Jan. 26, 2009) (noting that ever since the Royal Government of Bhutan committed itself to fulfilling the rights of all children under its jurisdiction when it ratified the CRC it has expelled an estimated 120,000 Bhutanese children from the country).

229. *See* David M. Smolin, *A Tale of Two Treaties: Furthering Social Justice Through the Redemptive Myths of Childhood*, 17 EMORY INT'L L. REV. 967, 976 (2003) (noting that while the CRC treaty is a model or goal for a nation to work toward, the CRC is an abstract treaty and almost inherently unenforceable).

230. *See* Jaap E. Doek, *What Does the Children's Convention Require?*, 20 EMORY INT'L L. REV. 199, 205 (2006) (describing how a particle implementation of the CRC to give children rights of autonomy is by promoting the relinquishment of parental control over their child, which is supported by the CRC itself); *see* also Paula C. Littlewood, *Domestic Child Abuse Under the U.N. Convention on the Rights of the Child: Implications for Children's Rights in Four Asian Countries*, 6 PAC. RIM L. & POL'Y J. 411, 448 (1997) (advocating for the CRC to be used in outlawing parental physical discipline of children while also noting that improvements in children's rights depends primarily on the strength and values of a nation and its culture)*; see* also Jaap E. Doek, *Reducing Global Violence: The Role of Protecting Children from Corporal Punishment,* Lecture at Old Dominion University (Sept. 18, 2007) (Doek is a prolific scholar on the area of the law of children's rights within the family, a firm supporter of U.S. ratification of the CRC, and argues that a child as a "rights holder" can express his or her own views).

231. Santosky v. Kramer*,* 455 U.S. 745 (1982) (stating that because of the high stakes involved for parents, the Due Process Clause requires any allegation of parental unfitness to be proved by clear and convincing evidence).

> most widely ratified Convention in the world may be left devoid of its essential quality.[232]

A legal standard that seeks to protect the best interests of every child and holds officials accountable to that standard in criminal and civil proceedings is needed in each signatory nation to change the state of affairs for children. This requires a systematic family law in each nation that does not depend on the rights of children, but on the obligations of adults to protect those children.[233] Just as uniform family court rules like the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Protection Act (PKPA) have been effective in holding sister states accountable in the 50 United States, some sort of similar global treaty, adopted internally by each nation, might prove to be more effective at nations holding themselves, and one another, accountable for the protection of children than the CRC has been.[234] Accountable adults, generally parents, are key sources for protection of children by state law.[235]

This best interest of the child as a legal standard used by some nations and by international courts has already been employed, and has been effective. A brief review of custody, parental access, and abduction cases revealed that when the CRC is used in such cases, "the best interests of the child principle is central to the courts' decision-making process."[236] This legal standard, rather than a rights framework, is what makes the CRC effective.

Conclusion

Upon review of the evidence, it is no wonder that the European Committee acknowledged that the Convention on the Rights of Children has been ineffective in protecting children.[237] That problem is not limited to Europe, but widespread globally. Despite the virtues of a landmark document like the CRC being agreed to by myriad signatory nations,[238] conditions

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232. *See* Littlewood, *supra* note 230, at 448 (noting that while Littlewood's scholarship focuses on physical domestic child abuse, her analysis of the CRC's ineffectiveness is equally applicable in the context of more severe concerns facing children).

233. *See* JAMES DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN (2006); *see* also Stephen DeBoer, *Who Is Responsible for Our Kids? A Look into the Parent/State Relationship in Raising Children.* 7 REGENT J. INT'L L., 235 (2008) (providing that there is significant conflict on the role of the family in regard to an international framework for children's rights); *see* also Kirsten M. Backstrom, *supra* note 107, at 578 (noting that UNCRC provisions emphasize the need to strengthen the family unit).

234. Though this is a significant idea, its analysis is beyond the scope of this article. It is intended here as a possible starting point for fixing the horrors and problems presented in the face of the CRC.

235. *See* Barbara B. Woodhouse, "*Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1037–42 (1992) (providing a detailed account of the history underlying parental control of children and the development of children's constitutionally protected rights).

236. See Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 199 (1998) (offering a historical analysis of the CRC as well as its limitations in ensuring the rights of children).

237. *See* Explanatory Report, *10.1 European Comm. on Crime Problems, Ministers' Deputies CM Documents 1002 Meeting*, CM/Del/Dec(2007)1002/10.1) (July 11, 2007), *available at* http://www.coe.int/t/cm/ (explaining the purpose of the Convention on the Rights of Children and its ultimate goal of preventing sexual exploitation and abuse).

238. *See* Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (outlining the measures that must be taken to prevent sexual exploitation and abuse of children worldwide).

for children around the world are *not* improving. In fact, the horrors faced by many children around the world are almost unfathomable—child sex tourism, child soldiers, child laborers, children forced into marriage, sexually molested, and sexually mutilated—and all in CRC signatory countries.[239] The CRC is not protecting children. This brief review demonstrates the near complete failure of the CRC, and reveals that it fosters neither the legal rights of children nor what is best for any child, and has in no way improved conditions for children around the world.

Though the CRC is the most adopted convention of the international community, and "celebrated as one of the most significant steps taken toward improving the lives of children throughout the world,"[240] its "limits are emerging."[241] Scholars argue those limitations arise under Article 3 and about how the CRC may limit nations in the best interest application.[242] "The concern is that courts may be developing a jurisprudence on the rights of the child that does not ensure the rights and special protections that children today so desperately need in many parts of the world."[243]

A rights framework is wholly unsuitable in protecting children. The solution is a legal response that attaches obligations to interested adults to protect those children and their best interests within the signatory nation. A response to the failure of the CRC is long overdue. That solution rests upon implementation of a legal standard of best interests of the child within signatory nations.

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239. *See* DUNCAN GREEN, HIDDEN LIVES: VOICES OF CHILDREN IN LATIN AMERICA AND THE CARIBBEAN 53–54 (Continuum Int'l Publ'g Group, 1998) (reporting that despite legislation in place and signed international accords, Latin America does not enforce the ban on child labor and exploitation); *see also* FAZILA GULREZ & SABEEN HAFEEZ, *Pakistan,* The GREENWOOD ENCYCLOPEDIA OF CHILDREN'S ISSUES WORLDWIDE 325, 327–28 (Irving Epstein ed., 2008) (noting that despite Pakistan signing onto the CRC, high poverty has caused an increase in child exploitation and trafficking and lack of enforcement of International Law; *see also* THEODORE H. MACDONALD, THE GLOBAL HUMAN RIGHT TO HEALTH: DREAM OR POSSIBILITY? 118–19 (Radcliffe Publishing, 2007) (explaining that child exploitation is caused by the increase in poverty worldwide).

240. *See* Todres, *supra* note 234, at 159 (acknowledging that given its celebrated status, children's rights advocates have been encouraging governments to adopt the provisions of the CRC).

241. *See id.* at 159–60 (asserting that judiciary interpretation of the Convention does not permit the full realization of all protective measures intended by the CRC).

242. *See* Convention on the Rights of the Child art. 3, Nov. 20, 1989, 28 I.L.M. 1448, 1577 U.N.T.S. 3, *supra* note 3 (establishing that state governments have a duty to ensure protection of all children within their borders); *see also* Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 973 (2006) (commenting that although the CRC is supposed to protect children, the Convention does not necessarily take their wishes and views under consideration); *see also* Todres, *supra* note 234, at 172 (observing that by failing to provide guidance on what "actions concerning children" means, there is a lack of uniformity in interpretation leaving judges to decide on a case-by-case basis the fate of children).

243. *See* Todres, *supra* note 234, at 200 (stressing that despite its "near universal ratification," CRC Article 3 does not provide sufficient guidance to the judiciary, resulting in an improper or insufficient implementation).

Nations that allow their children to be exploited, misused, and abused, despite the fact that the United Nations and its members do not hold signatory nations accountable, will reap the results of exploiting their most precious future asset in self-destruction.[244] "Without monitoring of, and effective action within, the judicial branches of States Parties to the CRC, we risk permitting interpretations of the Convention that limit its effectiveness."[245] The best interests of the childas a legal standard in all matters civil and criminal that affect children, even with its imperfections, would at least provide for adults to be legally obligated for the protection and provision for children within their own nation.

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244. *See* Lyric Wallwork Winic, *Can Ban Ki-moon Save the UN?*, PARADE MAGAZINE, June 24, 2007, at 7 (noting that the majority of Americans, "by more than 2 to 1," do not find the UN competent in performance of its duties); *see also* Lyric Wallwork Winic, *Does the UN Still Matter?*, PARADE MAGAZINE, Oct. 05, 2007, at 15 (finding that a vote by more than 25,000 readers revealed that only 29% believe UN matters as a peacekeeper, while 71% believe UN lacks effectiveness).

245. *See* Jonathan Todres, *supra* note 234, at 200 (expressing the belief that the author correctly points out that the CRC cannot advance unless the UN holds nations accountable for their application of the best interests of the child standard, which is equally applicable to the situations outlined in the article above).

The Cultural Genocide Debate: Should the UN Genocide Convention Include a Provision on Cultural Genocide, or Should the Phenomenon Be Encompassed in a Separate International Treaty?

Daphne Anayiotos*

I. Introduction

Though ancient in its etymology, the use of the term "genocide" has its roots in the twentieth century. The word was coined in 1943 by Ralph Lemkin,[1] a Polish law professor, to describe the Nazi genocide of Jews and Roma then taking place in Europe.[2] According to Robert Fisk, the word "genocide" was first used by Lemkin to describe the elimination of the Armenian population of Turkey during the First World War[3] (also described by Churchill as a holocaust[4]). Lemkin's book, *Axis Rule in Occupied Europe,*[5] published in November 1944, was

1. *See* LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 22 (4th ed. 1982) (describing Raphael Lemkin as a jurist who, in 1933, single-handedly initiated a campaign for international approval of a convention preventing genocide).

2. *See* MARK LEVENE, GENOCIDE IN THE AGE OF THE NATION-STATE: THE MEANING OF GENOCIDE 46 (2005) (questioning whether the Nazi Final Solution against the Jews and Roma was a result of inherent hate of those groups by German society); *see also* ERIC D. WEITZ, A CENTURY OF GENOCIDE: UTOPIAS OF RACE AND NATION 132 (2003) (establishing that World War II and the accompanying mass killings of civilians provided a convenient excuse for the Nazis to implement their genocidal policies against the Jews and Roma); *see also* Ian Hancock, *Romani Victims of the Holocaust and Swiss Complicity, in* WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 68, 68 (Roy L. Brooks ed., 1999) (establishing that a July 31, 1941 order from General Heydrich led to the events of the Holocaust where German troops were ordered to eliminate all Jews, Roma, and mental patients).

3. *See* ROBERT FISK, THE GREAT WAR FOR CIVILIZATION: THE CONQUEST OF THE MIDDLE EAST 337 (2006) (asserting that Lemkin's conception of the word "genocide" helped put in place a legal and moral basis for the protection of human rights).

4. *See* Jasper Gerard, *We Must Never Forget Turkey's "First Solution,"* THE OBSERVER (England), Jan. 21, 2007, at 13 (noting that Turkey disallows the use of the word "holocaust" regarding the slaughter of Armenians during World War I).

5. *See* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79–95 (Carnegie Endowment for Int'l Peace, Div. of Int'l Law 1944) (explaining that the objective of genocide is the destruction of the culture, language, religion, and political and social institutions of a particular national group).

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the first occasion when the term "genocide" appeared in print.[6] By "genocide," Lemkin meant the destruction of a national, religious, or ethnic group.[7] The word is a union of the Greek word *genus, "*race," and the Latin word *cide, "*killing."[8] The object of genocide is to destroy the very foundations—the existence—of a national, ethnic, or religious group, or any other identifiable group of people, so as to obliterate the group itself.[9] Genocide is directed against individuals not in their personal capacities, but as members of a group.[10]

Why, then, does the total destruction of a culture, so that the identity of a people ceases to exist, not constitute genocide? Is it simply semantics—the fact that the Latin *cide* means "killing," as in the cessation of bodily functions? Is it because the destruction of institutions that represent the very core of a nationality's culture may leave the human beings physically unscathed? Granted, killing is easier to comprehend as a crime, but that does not mean that the destruction of a nation's identity is not wrong as well. Not only is it a crime, it has also been extremely common throughout history. In the conflict in the former Yugoslavia, acts of cultural

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6. *See* FISK, *supra* note 3, at 414 (noting the use of the word "genocide" to describe liquidation of the Armenians by the Ottoman Turks in the First World War); *see also* Morel Jones, *Lemkin at Duke*, http://www.duke.edu/web/rightsatduke/raphaellemkin.html (describing Lemkin's 1944 work as having first used the term "genocide" in modern genre); *see also* An Inventory to the Raphael Lemkin Papers Manuscript Collection No. 60, *available at* http://www.americanjewisharchives.org/aja/FindingAids/Lemkin.htm (confirming that Lemkin first coined the word "genocide" in his 1944 book).

7. *See* LEMKIN, *supra* note 5, at 79–95 (declaring the meaning of "genocide" as the destruction of a national, religious, or ethnic group); s*ee also* Mai-Linh K. Hong, Note, *A Genocide by Any Other Name: Language, Law, and the Response to Darfur*, 49 VA. J. INT'L. L. 235, 256 (2008) (discussing the meaning of genocide to cover racial, ethnic, and religious groups which denoted a national meaning); *see also* David Lisson, Note, *Defining "National Group" in the Genocide Convention: A Case Study of Timor-Leste*, 60 STAN. L. REV. 1459, 1459–60 (2008) (maintaining genocide is a method by which such perpetrators target the essential foundations of life of groups of people).

8. *See* LEMKIN, *supra* note 5, at 79–95 (explaining that "genocide" is formed from the Greek *genus* (race) and the Latin *cide* (killing)); *see also* ERVIN STAUB, THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE 7 (1992) (defining the term "genocide" as derived from the Greek word meaning "race" and the Latin word meaning "killing"); *see also What Is Genocide?*, *in* HOLOCAUST ENCYCLOPEDIA (United States Holocaust Memorial Museum 2008), *available at* http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007043 (providing the origin of the word "genocide" as invented by Raphael Lemkin).

9. *See* United Nations Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter U.N. Genocide Prevention] (defining "genocide" as involving acts committed with the intent to destroy a national, ethnical, racial, or religious group); *see also* ALAIN DESTEXHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY: STUDY IN GENOCIDE 4 (Alison Marschner trans., 1995) (stating that genocide is a conspiracy intending to destroy entire groups of people); *see also* Evan P. Lestelle, Comment, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 551–52 (2008) (arguing that in genocide, the perpetrator intends to destroy a national, ethnic, racial or religious group, as opposed to slavery, which affects the individual person).

10. *See* 18 U.S.C.A. § 1091 (2007) (defining "genocide" as conduct which has the specific intent to destroy, in whole or in substantial part, a national, racial, or religious group); *see also* LEMKIN, *supra* note 5, at 79–95 (distinguishing genocide as attacking a group rather than one single individual); *see also* THOMAS W. SIMON, THE LAWS OF GENOCIDE: PRESCRIPTIONS FOR A JUST WORLD 94 (2007) (noting that genocide has the unique characteristic of targeting a particular group rather than the individual).

genocide were a regular occurrence.[11] Mosques and other Muslim religious monuments, for example, were singled out for destruction that was often widespread and systematic.[12] Still, the word "genocide" is inapt to describe cultural destruction or elimination inasmuch as it imports the physical destruction of individuals.[13] Only in a figurative or metaphorical sense can the word "genocide" be used in relation to the uprooting of a culture.

While Lemkin advocated the inclusion of cultural genocide in the definition of genocide, in this article it is suggested that the phenomenon, i.e., the destruction of the culture of a given group of people, be the subject of a distinct treaty or convention.

This article examines Lemkin's notion of genocide in Part II, cultural genocide during the Second World War in Part III, and the United Nations Genocide Convention in Part IV.[14] In Part V I discuss how far cultural genocide is covered by the existing treaties, and Part VI refers to the statutes of the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY)[15] and the International Criminal Tribunal for Rwanda (hereinafter ICTR)[16] and discusses the principles arising therefrom. Part VII examines the establishment and juridical framework of the International Criminal Court. Part VIII explains how the existing treaties fall short, and the last part of the article, Part IX, deals with problems relevant to culture and dangers posed thereto, making their confrontation through law an urgent matter. Lastly, a proposal is put forward for a new convention.

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11. *See* ANDRÁS J. RIEDLMAYER, DESTRUCTION OF CULTURAL HERITAGE IN BOSNIA-HERZEGOVINA, 1992–1996: A POST-WAR SURVEY OF SELECTED MUNICIPALITIES: EXPERT REPORT COMMISSIONED BY THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 11 (2002) (stating acts of cultural genocide occurred often during the conflicts in the former Yugoslavia in the 1990s); s*ee also* GERARD DELANTY & KRISHAN KUMAR, THE SAGE HANDBOOK OF NATIONS AND NATIONALISM 326 (2006) (describing cultural genocide occurring during the conflict in the former Yugoslavia as ethnic cleansing); s*ee also* Damir Mirkovic, *Ethnic Conflict and Genocide: Reflections on Ethnic Cleansing in the Former Yugoslavia*, 548 AM. ACAD. POL. & SOC. SCI. 191, 191 (1996) (asserting that acts of ethnic cleansing in the former Yugoslavia represent a form of cultural genocide when viewed broadly).

12. *See* RIEDLMAYER, *supra* note 11, at 11 (describing acts against mosques and other Muslim religious monuments as representing instances of cultural genocide); s*ee also Bricks and Mortars*, THE INDEPENDENT, Sept. 3, 2001, *available at* http://www.independent.co.uk/news/world/europe/bricks-and-mortars-667803.html (asserting that the destruction of cultural heritages erases memories of an entire people and results in the death of an entire group of people); *see also* Colin Kaiser, *Crimes Against Culture*, THE COURIER, http://www.unesco.org/courier/2000_09/uk/signe2.htm (noting the destruction of entire villages causing the displacement of entire cultures of people in the former Yugoslavia).

13. *See* ERIC W. HICKEY, ENCYCLOPEDIA OF MURDER AND VIOLENT CRIME 201 (2003) (stating that the UN definition of "genocide" does not include cultural genocide); *see also* ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS, AND THE RETURN OF CULTURAL OBJECTS 169 (2006) (referencing the debate that occurred over whether to include cultural genocide in the 1948 Genocide Convention); *see also* Robert Petit et al., *Exploring Critical Issues in Religious Genocide: Case Studies of Violence in Tibet, Iraq and Gujarat*, 40 CASE W. RES. J. INT'L L. 163, 191 (2007–8) (stating that early international law does not include cultural genocide in the definition of genocide).

14. *See* Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III) (Jan. 12, 1951), *available at* http://www.unhchr.ch/html/menu3/b/p_genoci.htm (regarding the General Assembly of the United Nations declaring genocide as an international crime).

15. *See About the ICTY*, International Criminal Tribunal for the Former Yugoslavia, http://www.icty.org/sections/AbouttheICTY.

16. *See* International Criminal Tribunal for Rwanda Web site, http://69.94.11.53/default.htm.

II. Lemkin on Genocide

Lemkin used the term "genocide" broadly. Under his definition, it encompasses policies designed to bring about the destruction of a group's "culture, language, national feeling or religion."[17] Lemkin claimed there were three main types of genocide: physical, biological, and cultural.[18] According to Lemkin, physical genocide is the "tangible annihilation of the group by killing and maiming its members"[19] and biological genocide consists of "imposing measures calculated to decrease the reproductive capacity of the group, such as involuntary sterilization or forced segregation of the sexes."[20] Cultural genocide occurs when a group's wider institutions are eliminated, and can involve outlawing a group's language or restricting its traditions.[21] The destruction of institutions or objects through which a group finds spiritual, artistic, or intellectual expression (houses of worship, schools, and art) can also constitute cultural genocide.[22] In destroying a group's spiritual leaders and institutions, spiritual unity within the group disintegrates. Lemkin distinguished cultural genocide because he recognized that religion or national unity could be destroyed *even if the members of the group were still alive.*[23]

The debated issue during Lemkin's time and during the drafting of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide[24] was whether the crime covered only physical and biological genocide or also encompassed a group's

17. *See* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 80 (Carnegie Endowment for Int'l Peace, Div. of Int'l Law 1944) (stating that Lemkin used the word "genocide" to describe the Nazi goals during World War II).

18. *See* WARD CHURCHILL, A LITTLE MATTER OF GENOCIDE 408 (1997) (discussing the use of Lemkin's three types of genocide in the Nuremberg Trials and the UN's use of Lemkin's definition in General Assembly Resolution 96(I)); *see also* WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW 152 (2000) (explaining that the Secretariat draft of the General Assembly Resolution 96(I) contained three types of genocide: physical, biological, and cultural); *see also* David Nersessian, *Rethinking Cultural Genocide Under International Law, Human Rights Dialogue: Cultural Rights*, CARNEGIE COUNCIL (April 22, 2005), *available at* http://www.cceia.org/resources/publications/dialogue/2_12/section_1/5139.html (describing Lemkin's three types of genocide).

19. *See* LEMKIN, *supra* note 17, at 87–89 (describing physical genocide to include the rationing of food, mass killings and endangerment of health); *see also* Nersessian, *supra* note 18 (defining physical genocide).

20. *See* LEMKIN, *supra* note 17, at 86 (explaining the different measures employed to control the birthrate); *see also* Nersessian, *supra* note 18 (defining biological genocide).

21. *See* LEMKIN, *supra* note 17, at 84 (discussing various ways the German government controlled its citizens culturally); *see also* Nersessian, *supra* note 18 (clarifying the concept of cultural genocide).

22. *See* Raphael Lemkin, *Genocide as a Crime Under International Law,* 41:1 AM. J. INT'L L. 145–51 (1947), *available at* http://www.preventgenocide.org/lemkin/ASIL1947.htm (reiterating the forms cultural genocide can take).

23. *See id.* (showing that genocide is not just the killing of a person, but can also be the controlling of them culturally).

24. *See* United Nations Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, Dec. 9, 1948, 78 U.N.T.S. 1021 (codifying that genocide is a crime under international law).

cultural destruction when it occurred without the element of killing its members.[25] Professor Vahakn N. Dadrian, whose field of specialization is genocide, in particular the Armenian genocide,[26] established a five-category typology of genocide. Among these categories are "cultural genocide, in which *assimilation* is the perpetrator's aim, and optimal genocide, in which the chief aim of the perpetrator is the total *obliteration* of the group, as in the Armenian and Jewish holocausts" (emphasis added).[27] Dadrian draws a clear distinction between assimilation and obliteration.[28] Cultural genocide is about forced assimilation—with or without obliteration, the devastation of a nation's cultural institutions that accompanies forced assimilation is an effective way to destroy a religious or ethnic group.[29]

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25. *See* Ward Churchill, *Defining the Unthinkable: Towards a Viable Understanding of Genocide*, 2 OR. REV. INT'L L. 3, 13–15 (2000) (detailing that the drafting of the Convention included a debate over whether the crime of genocide as defined by Lemkin should include cultural crimes); *see also* Matthew Lippman, *Art and Ideology in the Third Reich: The Protection of Cultural Property and the Humanitarian Law of War*, 17 DICK. J. INT'L L. 1, 60 (1998) [hereinafter Lippman, *Art and Ideology*] (explaining that there were countervailing views on the scope of the 1948 Convention on the Prevention and Punishment of Genocide); *see also* Barry Sautman, *"Cultural Genocide" and Tibet*, 38 TEX. INT'L L.J. 173, 184–85 (2003) (noting that during the drafting of the Convention, the United Nations had considered whether cultural destruction should be incorporated into the definition of genocide).

26. *See* The Zoryan Institute, *Brief Biography of Vahakn N. Dadrian*, (Jan. 2006) http://www.zoryaninstitute.org/Genocide/genocide_bio_dadrian.htm (last visited Feb. 10, 2009) (discussing how Vahakn Dadrian focused his academic career on the Armenian genocide).

27. *See* Churchill, *supra* note 25, at 21 (listing Dadrian's five-category typology of genocide, including cultural and optimal).

28. *See id*. (showing that Dadrian distinguishes between assimilation and obliteration); *see also Utilitarian Genocide: Genocide and Crimes Against Humanity,* http://www.enotes.com/genocide-encyclopedia/ (search "Utilitarian Genocide," then follow the "Utilitarian Genocide" link) (commenting that assimilation and obliteration were distinct "ideals" that formed Dadrian's five "ideal types" of genocide). *See generally* Vahakn N. Dadrian, *Patterns of Twentieth Century Genocides: The Armenian, Jewish, and Rwandan Cases*, J. OF GENOCIDE RES. 487 (2004), *available at* http://cranepsych.com/Travel/Bosnia/Genocide_patterns.pdf (asserting that assimilation and obliteration are two separate but equally destructive concepts).

29. *See* Larry May, *How Is Humanity Harmed by Genocide?*, 10 INT'L LEGAL THEORY 1, 12–13 (2004) (explaining that forced assimilation is aimed at the destruction of the target group and can cause significant harm to that group); *see also* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 282 (1997) (demonstrating that forced assimilation will eventually lead to the destruction of a cultural group by discussing the assimilation of the American Indians); *see also* William A. Schabas, *Problems of International Codification—Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENG. L. REV. 287, 291 (2001) (opining that forced assimilation is an effective way to destroy a group of people).

III. Cultural Genocide During the Second World War

The notion of genocide crossed the line from theory to practice in the doctrine of National Socialism.[30] The Nazi idea was that the nation provided the biological element for the state.[31] As a result of this ideology, the Germans waged wars not against states and their armies, but against peoples.[32] For the Nazis, war was the ultimate forum for carrying out the practice of genocide.[33] Their reasoning was that the enemy nation must be destroyed so that the German people could deal with the rest of Europe from a position of biological superiority.[34] Hitler's genocide was physical, biological, and cultural.[35] He not only killed those he considered genetically inferior to the Germans; he also obliterated their cultures and imposed upon them means

30. *See* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS (Carnegie Endowment for Int'l Peace, Div. of Int'l Law 1944), at 84 (noting that an example of genocide in practice was the school system being governed according to the doctrine of National Socialism); *see also* Mia Swart, *Name Changes as Symbolic Reparation After Transition: The Examples of Germany and South Africa*, 9 GERMAN L.J. 105, 117–18 (2008) (inferring that the genocide was a result of National Socialism and explaining how post–World War II Austria "denazified" by renaming streets after those who died in resistance against National Socialism). *See generally* Joshua M. Greene, *Hitler's Courts: Betrayal of the Rule of Law in Nazi Germany*, 196 MIL. L. REV. 155, 158–61 (2008) (indicating that Hitler's crimes of genocide flowed from the doctrine of National Socialism).

31. *See* LEMKIN, *supra* note 30, at 80 (distinguishing Hitler's organic view of a "nation" from the traditional Rousseau-Portalis conceptualization); *see also* Aristotle A. Kallis, *To Expand or Not to Expand? Territory, Generic Fascism and the Quest for an "Ideal Fatherland,"* 38 J. CONTEMP. HIST. 238, 243 (2003) (noting Hitler's "biological perception" of the German nation); *see also* Morris Edward Opler, *Cultural and Organic Conceptions in Contemporary World History*, 46 AM. ANTHROPOLOGIST 448, 457 (1944) (discussing the appeal of the Nazi philosophy as stemming from its purported biological origins).

32. *See* IRVING LOUIS HOROWITZ, TAKING LIVES: GENOCIDE AND STATE POWER 255–56 (5th ed. 2002) (discussing how the Nazi war against the Jewish people transcended national borders); *see also* LEMKIN, *supra* note 30, at 80–81 (asserting that the German strategy of war included not only foreign armies but also foreign peoples); *see also The German Army and the Racial Nature of the War Against the Soviet Union*, in HOLOCAUST ENCYCLOPEDIA (United States Holocaust Memorial Museum 2008), *available at* http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007182 (characterizing the German invasion of Russia as a crusade against the Jewish inhabitants of the country rather than against the country itself).

33. *See* LEMKIN, *supra* note 30, at 81 (explaining that war offered an ideal occasion to implement their cultural attack); *see also* Yehuda Bauer, *Was It the Nazis' Original Plan?*, 450 ANNALS AM. ACAD. POL. & SOC. SCI. 35, 38 (1980) (noting that it was the perceived spread of Judaism rather than foreign aggression that colored Hitler's plans during World War II); *see also The German Army and the Racial Nature of the War Against the Soviet Union*, *supra* note 32 (describing one motivation for the German aggression against the Soviet Union as the desire to dominate the Russian populace therein).

34. *See* LEMKIN, *supra* note 30, at 81 (explaining the Nazi philosophy of asserting "biological superiority" over conquered peoples as reason to carry out their plan of genocide); *see also* Robert N. Proctor, *Nazi Doctors, Racial Medicine, and Human Experimentation*, *in* THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION 17, 18 (George J. Annas & Michael A. Grodin eds., 1992) (discussing the racial hygiene movement imposed by German social Darwinists in order to rid the world of inferior, non-German, peoples); *see also* Theodore Abel, *The Sociology of Concentration Camps*, 30 SOC. FORCES 150, 151 (1951) (describing the German doctrine of racial elitism as being grounded in a perceived biological superiority over other races and peoples).

35. *See* LEMKIN, *supra* note 30, at 82–89 (categorizing the number of ways in which Hitler implemented the Nazi policy of extermination); *see also* Proctor, *supra* note 34, at 20 (discussing the three main biological programs implemented by the Nazi regime including the Sterilization Law, the Nuremberg Laws, and the euthanasia program); *see also* Amy L. Click, *German Pillage and Russian Revenge, Stolen Degas Fifty Years Later—Whose Art Is It Anyway?*, 5 TULSA J. COMP. & INT'L L. 185, 187 (1997) (analyzing the cultural genocide brought about by the Nazi purification goals).

of biological deterioration aimed at hindering the further production of their race.[36] One example was the Nazi policy of abortion with regard to Eastern European workers, with its basis in Himmler's decree of March 1943, which stated:

> [I]n those cases where pregnancy is caused by sexual intercourse between a member of the S.S. [Schutzstaffel, German for Protective Echelon[37]] or the police and a non-German woman residing in the occupied Eastern territories, an interruption of pregnancy is to be carried out . . . unless that woman is of good stock, which is to be ascertained in advance in every case.[38]

A. The Nuremberg Trials

At the close of the Second World War, 13 trials of accused German war criminals were held from 1945 to 1949 in Nuremberg, Germany.[39] At the first trial, conducted by the International Military Tribunal (IMT), the four Allied Powers prosecuted the top Nazi leaders.[40] The remaining trials were carried out by the United States in the Nuremberg Military Tribunals (NMT).[41] This was the first time an international tribunal had been created to try atrocities that transcended national borders, and the IMT later became the model for future

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36. *See* LEMKIN, *supra* note 30, at 86 (explaining the Nazi policy of depopulation and the methods implemented to achieve this end); *see also* Henry P. David et al., *Abortion and Eugenics in Nazi Germany,* 14 POPULATION & DEV. REV. 81, 91 (1988) (detailing the birth of the Nazi eugenics program); *see also* Marie E. Kopp, *Legal and Medical Aspects of Eugenic Sterilization in Germany,* 1 AM. SOC. REV. 761, 761 (1936) (describing the public health and social welfare services executed by Hitler's government to aid in their eugenics program).

37. *See* Chris Webb et al., *The SS: Himmler's Schutzstaffel "Loyalty Is My Honor,"* HOLOCAUST EDUCATION & ARCHIVE RESEARCH TEAM (2008).

38. *See* U.S. v. Greifelt, *in* 4-5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 88 (1950) (noting the evidence of reproductive crimes undertaken by "minor" war criminals including concentration camp doctors); *see also U.S. v. Pohl*, *in* 5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW No. 10 (1947) (citing evidence of forced abortion and concentration camp "brothels").

39. *See* Benjamin B. Ferencz, *The Holocaust and the Nuremberg Trials* 4 U.N. CHRONICLE 1 (2005), *available at* http://www.genocidewatch.org/images/Holocaust-05-The_Holocaust_and_the_Nuremberg_Trials.pdf (noting that the IMT was established in 1945 following the end of World War II); *see also* Richard Overy, From Nuremberg to The Hague: The Future of International Criminal Justice 7 (2002), *available at* http://assets.cambridge.org/97805218/29915/excerpt/9780521829915_excerpt.pdf (explaining that the prosecution team for Nuremberg was assembled in May 1945); *see also* Web site of the Harvard Law School Library, *Nuremberg Trials Project*, http://nuremberg.law.harvard.edu/php/docs_swi.php?DI=1&text=overview (establishing that IMT trials were held at the close of World War II, in addition to those held at Nuremberg).

40. *See* Jennifer Trahan, *Military Commission Trials at Guantanamo Bay, Cuba: Do They Satisfy International and Constitutional Law?* 30 FORDHAM INT'L L.J. 780, 789 n.48 (2007) (noting that the IMT was created by and staffed by the four victorious allied powers); *see also* Ferencz, *supra* note 39, at 1 (elaborating that the IMT was convened by the four top allied powers to try the German leadership); *see also* Web site of the Harvard Law School Library, *supra* note 39 (referencing that the purpose of the IMT was to prosecute top Nazi leaders).

41. *See* Telford Taylor, *Critical Perspectives on the Nuremberg Trials*, 12 N.Y.L. SCH. J. HUM. RTS. 453, 505 n.224 (1995) (noting that in addition to the trial by the International Military Tribunals, there were additional prosecutions under the NMT in Nuremberg); *see also* Greg R. Vetter, *Command Responsibility of Non-military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 89, 99 n.64 (2000) (explaining the difference in perspectives between the International Military Tribunal and the non-international trials at Nuremberg); *see also* Web site of the Harvard Law School Library, *supra* note 39 (distinguishing between the International Military Tribunal and the Nuremberg Military Tribunal).

international military tribunals.[42] The prosecutors in the Nuremberg Trial charged the defendants with "deliberate and systematic genocide, viz., the extermination of racial and national groups. . . ."[43] However, the judges convicted them of crimes against peace, war crimes, and crimes against humanity, and no mention of genocide was made.[44] As used by the IMT, war crimes and crimes against humanity may not have had such a different connotation from the later term "genocide."

> Whole populations were deported to Germany for the purposes of slave labour upon defence works, armament production and similar tasks connected with the war effort. Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes. Public and private property was *systematically* plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity. (emphasis added)[45]

Although the judgment of the IMT did not use the word "genocide," the acts it described were genocidal in nature and included numerous examples of cultural as well as physical genocide. Even without directly convicting the defendants of genocide, the judgment of the IMT was a sign of progress in that it was the first official mention of genocide in an international

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42. *See* Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 721 (1997) (recalling that plans to deal with future war crimes were considered during the negotiations to establish the Nuremberg Tribunals); *see also* Kevin M. King, Note, *A Proposal for the Effective International Regulation of Biomedical Research Involving Human Subjects*, 34 STAN. J. INT'L L. 163, 193 (1998) (recalling that the goal of the Nuremberg Tribunals was to deter similar future conduct); *see also* Mariann Meier Wang, Note, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177, 204-5 (1995) (recalling that the Genocide Convention established in 1948 was intended to pick up where the Nuremberg Tribunals left off).

43. *See* U.S. v. Ulrich Greifelt et al., *Trial of the Major War Criminals Before the International Military Tribunal Volume IV*, July 1, 1947, 599–601, *available at* http://www.trdd.org/NUREMBZE.PDF (reasoning that the goal of the defendants was to destroy other nations while strengthening Germany); *see also First Day: Tuesday, 20th November, 1945*, http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-01/tgmwc-01-01-03.html (last visited Feb. 11, 2009) (listing the charges against the defendants at the Nuremberg Trial).

44. *See* SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 50 (2002) (stating that when the Nuremberg tribunal convicted the Nazi defendants, the pronouncement did not include the charge of genocide); *see also* Gergana Halpern, Note, *Punishing Aggressors in U.S. Courts: Will the Act of State Doctrine Bar National Prosecution of the Crime of Aggression?*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 239, 248 (2008) (reasoning that the World War II military tribunals in Nuremberg held, for the first time, individuals accountable for crimes against peace because the leaders of Germany planned to wage a war in violation of international treaties); *see also* Judgment of the International Military Tribunal for the Trials of German Major War Crimes Criminals (1946), *available at* http://www.nizkor.org/hweb/imt/tgmwc/judgment/j-general-introduction-01.html [hereinafter "German War Crimes"] (holding that the defendants were guilty of initiating a war of aggression and of violating the customs of war).

45. *See* German War Crimes, *supra* note 44 (illustrating the damage German forces did to cities, civilians, and the world).

legal setting.[46] The importance of putting the word "genocide" into the public sphere cannot be underestimated. The concept was no longer hidden, and the severity of the crime was acknowledged.[47] This trial made genocide an international legal issue rather than a mere abstract idea, and demanded a normative and legal reaction to it. It was now on the agenda as an aspect of policy that needed to be addressed.[48]

The concept of genocide has a double function. It first serves as a strong normative and political term, but it is also an established legal concept with elements and teeth.[49] The key difference is that this second legal function enables prosecution.[50] The use of the term "genocide" at the Nuremberg Trial obligated the international community to switch the function from a

46. *See* POWER, *supra* note 44, at 50 (stating that the October 1945 indictment of 24 defendants was the first mention of a charge of genocide in an international legal context); *see also* Audrey Golden, *Monkey Read, Monkey Do: Why the First Amendment Should Not Protect the Printed Speech of an International Genocide Inciter*, 43 WAKE FOREST L. REV. 1149, 1152 (2008) (finding that the only known examples of newspaper prosecution for incitement to genocide did not punish actual participation in the murders, but rather punished the speech that contributed to the thought-fueling genocide); *see also* John C. Knechtle, *Holocaust Denial and the Concept of Dignity in the European Union*, 36 FLA. ST. U. L. REV. 41, 55 (2008) (explaining that the International Tribunal's Framework Decision on Germany's Act of Genocide was too broad and failed to take a proper account of the history of strife).

47. *See* Elizabeth Borgwardt, *A New Deal for the Nuremberg Trial: The Limits of Law in Generating Human Rights Norms*, 26 LAW & HIST. REV. 679, 689 (2008) (maintaining that the center of gravity at the Nuremberg trials was the aggressive war and responsibility of Hitler's members not litigating about genocide or crimes against humanity); *see also* Christopher S. Maravilla, *Hate Speech as a War Crime: Public and Direct Incitement to Genocide in International Law*, 17 TUL. J. INT'L & COMP. L. 113, 118 (2008) (indicating that genocide was a direct result of Nazi propaganda); *see also* David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT'L L. 53, 96 (2006) (stating that the International Military Tribunal found that German Forces were guilty of crimes against humanity which led to the death and starvation of millions of people that amounts to genocide).

48. *See* Knechtle, *supra* note 46, at 44 (emphasizing that the development of modern human rights law is a direct response to the atrocities of Nazi Germany and the conviction of many of the Nazi perpetrators at Nuremberg was just the beginning of the history of the Holocaust); *see also* Jordan Engelhardt, Note, *The Preeminent State: National Dominance in the Effort to Try Saddam Hussein*, 41 CORNELL INT'L L.J. 775, 784 (2008) (recognizing that the United Nations took additional steps that validated the Nuremberg proceedings and passed a resolution that declared genocide an international crime); *see also* Christopher D. Van Blarcum, Note, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 WASH. & LEE L. REV. 781, 785 (2005) (indicating that many Europeans took steps to prevent similar atrocities like the Holocaust from ever happening again).

49. *See* Kurt Jonassohn, *What Is Genocide?, in* GENOCIDE WATCH 17, 18 (Helen Fein ed., 1992) (discussing that the U.N. definition of genocide leaves out economic, political, and social groups). *See generally* David L. Nersessian, *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity,* 43 STAN. J. INT'L L. 221, 223 (2007) (articulating that Convention on the Prevention and Punishment of the Crime of Genocide is a treaty that addresses criminal behavior that destroys racial, national, religious, and ethnic groups); *see generally* Andréa Ford, *A Brief History of Genocide*, TIME, Dec. 9, 2008, *available at* http://www.time.com/time/world/article/0,8599,1865217,00.html (describing the origin of the word "genocide" and its murderous and non-murderous meaning).

50. *See* Beth Van Schaak, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and* Morals, 97 GEO. L.J. 119, 171 (2008) (discussing the first German prosecution for genocide following World War II); *see also* Melina Milazzo, Comment, *Military Commissions Act of 2006: A Regressive Step Back from the International Legal Standards of Rape and Sexual Violence,* 35 FLA. ST. U. L. REV. 527, 531 (2008) (detailing the prosecution and subsequent conviction of a Rwandan for genocide); *see also* Lauren Comiteau, *Guilty of Genocide*, TIME, Aug. 3, 2001, *available at* http://www.time.com/time/world/article/0,8599,169951,00.html (describing the 2001 prosecution and conviction of a Bosnian Serb for the 1995 slaughter of at least 7,500 people).

normative and political term to a legally established crime that could be used to prosecute war criminals.[51]

B. Law No. 10 of the Allied Control Council

The Allied Control Council was a military occupation that governed Germany after World War II.[52] Its members were the United States, Great Britain, the U.S.S.R., and France.[53] The Allied Control Council enacted Control Council Law No. 10 (C.C.10), which became effective in December 1945.[54] C.C.10 set a standard for prosecutions in the four Allied occupation zones, and defined crimes against humanity as "atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, and other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds."[55] Like the Nuremberg Judgment, C.C.10 did not mention

51. *See also* Melynda J. Price, *Balancing Lives: Individual Accountability and the Death Penalty as Punishment for Genocide (Lessons From Rwanda)*, 21 EMORY INT'L L. REV. 563, 567 (2007) (stating that genocide was first recognized as a crime at Nuremberg); *see also* James C. McKinley, *U.N. Tribunal, in First Such Trial Verdict, Convicts Rwandan Ex-Mayor of Genocide*, N.Y. TIMES, Sept. 3, 1998, at A14 (asserting that genocide was first legally defined after the Nuremberg Trials in 1948). *See generally* Maravilla, *supra* note 47, at 117 (detailing the Nuremberg trial and conviction of a Nazi whose propaganda activities resulted in genocide).

52. *See* Robert J. Delahunty & John Yoo, *Statehood and the Third Geneva Convention*, 46 VA. J. INT'L L. 131, 141 n.34 (2005) (describing the Allied Control Council's control over Germany's foreign relations); *see also* Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 290 (2005) (explaining that the Allied Control Council had authority over all matters affecting Germany); *see also Allied Occupation and the Formation of the Two Germanys, 1945–1949*, *in* ENCYCLOPEDIA BRITANNICA ONLINE, www.britannica.com/EBchecked/topic/231186/Germany/58213/The-era-of-partition (last visited Mar. 13, 2009) (declaring that the Allied Control Council jointly exercised authority over post–World War II Germany).

53. *See* Fox, *supra* note 52, at 289–90 (asserting that, pursuant to the Berlin Declaration, the United States, Great Britain, the Soviet Union, and France were the members of the Allied Control Council); *see also* Daryl A. Mundis, *Completing the Mandates of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremburg Process?*, 28 FORDHAM INT'L L.J. 591, 597 n.31 (2005) (stating that the four Allied Powers were the members of the Allied Control Council); *see also Allied Occupation and the Formation of the Two Germanys, 1945–1949*, *supra* note 52 (informing that the Unites States, Great Britain, and France occupied the western two-thirds of Germany while the Soviet Union occupied the eastern third).

54. *See* Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Crimes Against Humanity, Preamble, Dec. 20, 1945, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50–55 (1946) [hereinafter Control Council Law](stating that the law provided a basis for the prosecution of war criminals in Germany); *see also* Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT'L L. 477, 482 (2007) (informing that under Control Council Law No. 10, each allied country could criminally prosecute war criminals in its respective occupation zone); *see also* Engelhardt, *supra* note 48, at 803 (explaining that Control Council Law No. 10 served as the legal foundation for the Nuremberg Trials).

55. *See* Control Council Law, *supra* note 54 (providing for broad standards to enable postwar prosecution against a variety of crimes against humanity).

genocide. Instead, the crime was seen by the Tribunal as a general concept defining the background of a wide range of offenses that constituted crimes against humanity and war crimes.[56]

Even though C.C.10 did not specifically mention genocide, there were cases where perpetrators were convicted of genocide pursuant to its provisions.[57] The U.S. Military Tribunal applied C.C.10 in *United States of America v. Ulrich Greifelt et al.,*[58] otherwise known as the RuSHA Case. This case was one of the subsequent proceedings to the IMT.[59] RuSHA is the German abbreviation for Rasse- und Siedlungshauptamt, the Race and Settlement Main Office.[60] The defendants in this case held positions of leadership in RuSHA and other S.S. agencies.[61] Defendant Greifelt was lieutenant general in the S.S. and chief of the Staff Main Office of the Reich Commissioner for the Strengthening of Germanism.[62] RuSHA carried out racial examinations, and since negative results of these examinations led to extermination or imprisonment in concentration camps of non-Germans in Poland, RuSHA played a major role

56. *See* MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES 203–5 (2002) (elaborating upon the intent that Control Council Law reach farther than tribunal charters and national jurisdictional limitations); *see also* SCHABAS, *supra* note 18 (explaining that the Control Council's dispensation of the "nexus with war" requirement allowed for effective crimes against humanity prosecutions). *See generally* Andreas R. Wesserle, *Allied War Crime Trials*, 2 INSTITUTE FOR HISTORICAL REVIEW, No. 2 (1981), *available at* http://www.ihr.org/jhr/v02/v02p155_Wesserle.html (stating that the Control Council Law No. 10 was applied to proceedings against General Yamashita in Japan).

57. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 7 (3d ed. 2007) (stressing that although Nazi war criminals were charged with genocide, the term did not then appear in any substantive provisions governing the trials); *see also* PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 90 (1992) (stating that genocide was recognized as a prime illustration of a crime against humanity under Control Council No. 10); *see also* ALFRED DE ZAYAS, EUROPEAN ARMENIAN FEDERATION FOR JUSTICE & DEMOCRACY, MEMORANDUM ON THE GENOCIDE AGAINST THE ARMENIANS 1915–1923 AND THE APPLICATION OF THE 1948 GENOCIDE CONVENTION 9, *available at* http://www.anca.org/docs/deZayas-fullreport.pdf (asserting that genocide was charged in three of the successor trials held at Nuremburg pursuant to Control Council Law No. 10).

58. *See* U.S. v. Greifelt, *in* 4-5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (1950) at 612 (listing the charges against defendants).

59. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 409 (2d ed. 1999) (explaining that the subsequent proceedings were composed of defendants of lower rank than those indicted at the chief proceedings); *see also* PATRICIA HEBERER ET AL., ATROCITIES ON TRIAL: HISTORICAL PERSPECTIVES ON THE POLITICS OF PROSECUTING WAR CRIMES 75–77 (2008) (elaborating upon how the United States exclusively conducted the subsequent proceedings); *see also Who Else Was Brought to Trial? The Subsequent Nuremberg Proceedings*, *in* HOLOCAUST ENCYCLOPEDIA (United States Holocaust Memorial Museum 2008), *available at* http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007144 (highlighting the fact that defendants of the subsequent proceedings represented broader segments of German state and society such as physicians, army officers, and businessmen).

60. *See Case #8, The RuSHA Case*, *in* HOLOCAUST ENCYCLOPEDIA (United States Holocaust Memorial Museum 2008), *available at* http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007137 (stating that RuSHA is the German acronym for the Race and Settlement Office). *See generally* U.S. v. Greifelt, *supra* note 38, at 609 (identifying the RuSHA organization).

61. *See* U.S. v. Greifelt, *in* TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (1950) at 608 (listing defendants' names, rank, and organizations they were involved in).

62. *See id*. (detailing Greifelt's involvement in RuSHA).

in the genocide.[63] It was alleged that the defendants committed crimes that were "connected with a systematic programme of genocide."[64] Count one of the indictment charged all defendants with crimes against humanity, and stated the following:

> Between September, 1939, and April, 1945, all the defendants herein committed Crimes against Humanity as defined by Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with: atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, persecutions on political, racial and religious grounds. . . . The acts, conduct, plans and enterprises charged in this Count were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of national characteristics.[65]

The Tribunal convicted the defendants of genocide, not as a distinct crime, but as a crime against humanity under C.C.10.[66] As can be seen from count one, the prosecution seemed to reason that genocide included all forms of destruction of a human group. The defendants were charged with implementing a program of genocide that was about not only murder, but the destruction of all elements that characterize a group's identity.[67]

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63. *See id*. at 612 (noting that a person who did not pass the examination was either exterminated or incarcerated in a concentration camp); *see also* Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 415, 438 (1998) [hereinafter Lippman, *Fifty Years Later*] (identifying the RuSHA defendants as high echelon officials engaged in resettlement of occupied territories); *see also* Matthew Lippman, *The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany*, 3 IND. INT'L & COMP. L. REV. 1, 37 (1992) [hereinafter Lippman, *The Other Nuremberg*] (forcing individuals classified as "undesirable racial stock" to perform slave labor and undergo abortions and expulsions).

64. *See* U.S. v. Greifelt, *supra* note 61, at 599 (explaining that these groups were designed to implement the ideology and program of Hitler, to wit, the destruction of other nations); *see also* Henry T. King, Jr., *The Judgments and Legacy of Nuremburg*, 22 YALE J. INT'L L. 213, 217 (1944) (enumerating the defendants' transgressions, including acts such as kidnapping "racially valuable" children, forced Germanization of foreign nationals, and persecution of Jews); *see also* David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT'L L.J. 231, 252 (2002) (stating that defendants' programs were aimed at the destruction of foreign nations and ethnic groups).

65. *See* U.S. v. Greifelt, *supra* note 61, at 88–89 (summarizing count one of the indictment, which charged the defendants with crimes against humanity).

66. See *Trial of Ulrich Greifelt and Others*, *in* VI LAW REPORTS OF CRIMES OF WAR CRIMINALS 1, 68–69 (UN War Crimes Commission ed., 1949), *available at* http://www.ess.uwe.ac.uk/WCC/greifelt6.htm (proclaiming that following superior orders does not free a defendant from responsibility of a crime).

67. *See* U.S. v. Greifelt, *supra* note 61, at 608–16 (indicting the defendants on three counts collectively referred to as "crimes against humanity": war crimes, involvement in a criminal organization, and atrocities committed against human beings).

1. The Specific Acts Committed by the Nazis That Constituted "Elimination and Suppression of National Characteristics"

The *Greifelt* case points to a treatise drafted by the Nationalsozialistische Deutsche Arbeiterpartei[68] (National Socialist German Workers' Party, or NSDAP) called "The Problem of the Manner of Dealing with the Population of the Former Polish Territories on the Basis of Racial-Political Aspects."[69] In essence, this treatise obliterated every trace of national character in the incorporated areas (western Poland and Luxembourg, among others).[70] The treatise created a German Peoples' List to determine who was a German, with the aim of Germanizing anyone who was not.[71] It stated that the official language of all authorities, including courts, was to be exclusively German.[72] Polish cultural life was not allowed to continue, and Polish cultural autonomy was to exist no more.[73] Polish schools were outlawed and replaced with German schools that taught National Socialist racial policies.[74] All religious services in Poland were discontinued, German priests were installed, services were held in only the German language.[75] The treatise declared that "in order to prevent any cultural or economic life, Polish corpora-

68. *See id*. at 624 (summarizing "Germanization" as a three-step method by which the Nazis would systematically categorize and then integrate or "deport" the peoples of occupied territories).

69. *See id*. at 91 (calling for the "ruthless decimation of the Polish population" and "expulsion of all Jews" from the invaded Polish territories).

70. *See id*. at 91–96 (mandating that Poles and Jews be stripped of their rights, properties and affiliations, and then deported to make way for German resettlement); *see also* Lippman, *Art and Ideology*, *supra* note 25, at 56–57 (adding that the RuSHA was also charged with the confiscation of art, literature, cultural items, and other valuables for the purpose of "denuding" the east of non-German influences); *see also* Lippman, *Fifty Years Later*, *supra* note 63, at 448 (describing the Nazis' systematic use of kidnapping, forced pregnancy, and abortion to strengthen the German population while simultaneously suppressing Polish and Jewish procreation).

71. *See* U.S. v. Greifelt, *in* TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (1950) at 120–21 (clarifying that the list was actually a classification system used to differentiate between ethnic Germans, desirable non-Germans, and people who were not worthy of becoming Germanized); *see also* Lippman, *The Other Nuremberg*, *supra* note 63, at 38 (explaining that being labeled as "undesirable racial stock" resulted in a denial of citizenship and marriage rights, and almost certain subjection to expulsion, internment, or slave labor).

72. *See* U.S. v. Greifelt, *supra* note 71, at 91–94 (declaring that the Polish language be banned and that all Polish names, religious services, and forms of education be replaced with German counterparts); *see also* UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS: UNITED NATIONS WAR CRIMES COMMISSION 6 (1997) (mandating that German be the official language of all Polish authorities, courts included).

73. *See* U.S. v. Greifelt, *supra* note 71, at 92 (stressing that the Polish culture must be eradicated); see also Józef Garlinski, *The Polish Underground State (1939–45)*, 10 J. CONTEMP. HIST. 219, 220–21 (1975) (itemizing the destruction of the Polish culture). *See generally* Bradley E. Fels, *"Whatever Your Heart Dictates and Your Pocket Permits": Polish-American Aid to Polish Refugees During World War II*, 22 J. AM. ETHNIC HIST. 3, 7 (2003) (mentioning the Germans' goal of destroying Polish cultural life).

74. *See* U.S. v. Greifelt, *supra* note 71, at 92 (declaring that the only schools in Poland would be German schools); see also WLODZIMIERZ BORODZIEJ, THE WARSAW UPRISING OF 1944, 17 (Barbara Harshav trans., 2001) (explaining how the Germans closed high schools and middle schools to eliminate the idea of a Polish nationality); *see also* RICHARD C. LUKAS, THE FORGOTTEN HOLOCAUST: THE POLES UNDER GERMAN OCCUPATION, 1939–1944 10 (1986) (noting how the Germans attacked the Polish school system in order to destroy Polish culture).

75. *See* U.S. v. Greifelt, *supra* note 71, at 92 (reporting the restriction on religion and German requirements for the clergy); *see also* BORODZIEJ, *supra* note 74, at 15 (commenting on the arrests of clergy, shutting down of churches, and the overall "Germanization" process); *see also* LUKAS, *supra* note 74, at 13 (addressing the German plan to undermine nationalism by attacking the hierarchy of the Catholic Church).

tions, associations, and clubs cease to exist; Polish church unions are to be dissolved."[76] Polish restaurants, theaters, cinemas, and other places of cultural life were closed down.[77] It concluded by setting out the following goal: "The final aim must be the complete elimination of the Polish national spirit."[78]

The policies of the NSDAP shocked the conscience of the international community and created a motive to formalize a new term in order to describe what had taken place.[79] What had happened during the Nuremberg Trials was coming to a head. The second function of genocide, that of a legally established crime, was about to become a reality.

IV. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide

A. Resolution 96(1)

At the close of World War II, the international community was so astounded that something so inhuman had occurred in Europe that it needed a name and a legal definition to even begin to understand it.[80] In response to the atrocities committed by the Nazis, in 1946 the United Nations General Assembly passed Resolution 96(1),[81] which proclaimed that genocide had resulted in "great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the

76. *See* U.S. v. Greifelt, *supra* note 71, at 93 (quoting the ban on organizations that foster cultural or economic life in Poland).

77. *See id.* (listing restaurants and cafés as additional places that should be closed due to their connection to Polish nationalism); *see also* Garlinski, *supra* note 73, at 220–21 (highlighting the demise of Polish cultural life through the closing of theaters and museums*). See generally* Israel Gutman, *The Victimization of the Poles*, *in* A MOSAIC OF VICTIMS: NON-JEWS PERSECUTED AND MURDERED BY THE NAZIS 96, 97–98 (Michael Berenbaum ed., 1990) (detailing how the Germans restricted the market, exploited property, and attempted to destroy the Polish culture).

78. *See* U.S. v. Greifelt, *supra* note 71, at 94 (designating the destruction of the Polish national spirit as the end goal).

79. S*ee* Elizabeth Borgwardt, *A Tribute to Professor Richard M. Buxbaum: Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT'L L. 401, 455–56 (2005) (explaining that part of the reason for creating new vocabulary was to describe the atrocities that had taken place); *see also* Barbara M. Yarnold, *Doctrinal Basis for the International Criminalization Process*, 8 TEMP. INT'L & COMP. L.J. 85, 94 (1994) (implying that genocide is a crime that "shocks the conscience" and thus is not aligned with the terms of the United Nations).

80. *See* Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials,* 7 HARV. HUM. RTS. J. 281, 288 (1994) (describing the motivation behind searching for a word that could encompass the mass murder phenomenon that had occurred); *see also* David Luban, *Legal Implications of a Rising China: Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 CHI. J. INT'L L. 303, 307–8 (2006) (asserting that people would not be able to fathom the extent of the crime without a memorable word to describe the inhuman events); *see also* Hannibal Travis, *Genocide in Sudan: The Role of Oil Exploration and the Entitlement of the Victims to Reparations*, 25 ARIZ. J. INT'L & COMP. LAW 1, 7 (2008) (confirming that Raphael Lemkin coined the term "genocide" to refer to the unfortunate events).

81. *See* G.A. Res. 96 (I), at 188, U.N. Doc. A/64 (Dec. 11, 1946) (establishing that genocide is a crime under international law).

United Nations."[82] In pointing out that genocide results in losses to a group's cultural contributions, this resolution hinted that culture may be deserving of international protection, or that physical death also kills culture.[83]

B. The Initial Draft of the Genocide Convention

Resolution 96(1) eventually led to the current definition of the crime of genocide in the UN Genocide Convention.[84] The initial draft of the Genocide Convention was written in 1947.[85] Article I (II) enumerated certain acts that constituted genocide, and described three types of genocide: physical, biological, *and cultural* (emphasis added).[86] It defined cultural genocide as:

> destroying the specific characteristics of the group by:
>
> (a) forcible transfer of children to another human group; or
>
> (b) forced and systematic exile of individuals representing the culture of a group; or
>
> (c) prohibition of the use of the national language even in private intercourse; or
>
> (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or

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82. *See id*. (stating that the crime of genocide is not only immoral but unaligned with the goals of the United Nations).

83. *See id*. at 175 (stating that since genocide results in losses to a group's cultural contributions, it is a matter of international concern); *see also* Lippman, *Art and Ideology*, *supra* note 25, at 60 (purporting that a group's cultural contribution is deserving of international protection).

84. *See* Farid Samir Benavides-Vanegas, *The Elimination of Political Groups Under International Law and the Constitution of Political Claims*, 15 FLA. J. INT'L L. 575, 581 (2003) (demonstrating that Resolution 96(I) directed the subsequent definition of genocide); *see also* Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States Is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425, 438 (1999) (noting that Resolution 96(I) led to the current definition of genocide in the Genocide Convention); *see also* Alexander K.A. Greenawalt, Note, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2272 (1999) (establishing that Resolution 96(I) declared genocide to be an international crime).

85. *See* The Secretary-General, *Commentary of the U.N. Secretary General*, 6–7, *delivered to* Genocide Draft Convention on the Crime of Genocide, art. I (II)(3), U.N. Doc. E/447 (1947) [hereinafter The Secretary-General, *Comments on Genocide*] (categorizing cultural genocide, along with biological and physical, as the three types of genocides qualified under the Convention in 1947); *see also* LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 25 (1991) (explaining how the UN Secretariat consulted experts in international and criminal law in preparing the initial draft in 1947); *see also* Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization,* 8 HARV. HUM. RTS. J. 229, 255 (1995) (detailing the implied duty of the Secretary-General in providing information on genocide to the UN during the first draft of the Convention in 1947).

86. *See* The Secretary-General, *Comments on Genocide*, at 6–7 (listing specific acts within each of the three categories of genocide); *see also* Kurt Mundorff, *Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARV. INT'L L.J. 61, 76 (2009) (discussing how the "destroy" language used in defining the original three types of genocides was not limited to just killing); *see also* David M. Smolin, *Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture, and Gender*, 12 J.L. & RELIGION 143, 149–50 (1996) (explaining that cultural genocide was excluded in subsequent drafts which put more emphasis on physical and biological genocide).

> (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.[87]

C. The Genocide Convention in Its Current Form

Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[88] defines genocide to mean "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:

> (a) killing members of the group;
>
> (b) causing serious bodily or mental harm to members of the group;
>
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) imposing measures intended to prevent births within the group;
>
> (e) forcibly transferring children of the group to another group."[89]

Despite Lemkin's advocacy and the initial draft of the Genocide Convention, the General Assembly decided against including a provision on cultural genocide.[90] The view was that the concept of genocide was meant to protect people's lives.[91] While cultural protection may be important, it was viewed as less severe than mass physical extermination.[92] Mr. Khan, a delegate from Pakistan, voiced his view that cultural genocide was the end, and physical genocide

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87. *See* The Secretary-General, *Comments on Genocide*, at 6–7 (enumerating five distinct acts of cultural destruction that would be considered cultural genocide under the Convention).

88. *See* United Nations Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277 (stating the definition of "genocide" under the current official Convention).

89. *See id.* (reemphasizing the original draft's focus on physical and biological genocide).

90. *See* The Secretary-General, *Comments on Genocide*, at (3)(e) (stating that the original draft of the convention contained an article prohibiting cultural genocide); *see also* United States Congress, Senate Committee on Foreign Relations, The Genocide Convention 90 (1982) [hereinafter Senate Genocide Convention] (discussing the definitions of genocide and what the law should really protect); *see also* Matthew Lippman, *Art and Ideology in the Third Reich: The Protection of Cultural Property and the Humanitarian Law of War*, 17 DICK. J. INT'L L. 1, 60 (1998) (noting that ultimately the convention decided to remove the article on cultural genocide from the agreement).

91. *See* Senate Genocide Convention, *supra* note 90, at 112 (announcing how genocide is against the ideals of our country and how we must do our part to protect against it); *see also* Lippman, *Art and Ideology*, *supra* note 25, at 60 (defining the convention and law as a process to stop genocide and save lives); *see also* Juan E. Méndez, *Remarks On Intervention*, 40 CASE W. RES. J. INT'L L. 87, 88 (2007) (addressing that the convention and the laws' purpose is to save lives).

92. *See* LEBLANC, *supra* note 85, at 91 (attributing the deletion of cultural genocide from the convention to fear of the effect it would have on governmental assimilation policies); *see also* JOHN B. QUIGLY, THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS 103 (2006) (remarking that cultural genocide was deleted from the convention and is only included under the topic of ethnic cleansing); *see also* Lippman, *Art and Ideology*, *supra* note 25, at 60 (explaining that the convention did not believe cultural genocide was as important because it did not involve physical harm).

was merely the means to that end.[93] He claimed that the main purpose of genocide was to destroy the "values and the very soul of a national, racial or religious group, rather than its physical existence."[94] In Mr. Khan's view, if physical genocide were to be treated as a crime, the only logical conclusion was for cultural genocide to be treated as such as well.[95] He argued that the failure to include a provision on cultural genocide might lead to crimes occurring with impunity against the culture, religion, or language of a group.[96] Notwithstanding these arguments, in 1948 the United Nations concluded that a provision on cultural genocide would be better suited for a separate international convention.[97]

V. How Far Do Existing Treaties Cover Cultural Genocide?

Since the Genocide Convention, there have been numerous attempts through international conventions to adequately deal with the phenomenon of cultural genocide, but thus far they have all fallen short.

A. The 1954 Hague Cultural Property Convention

The Hague Cultural Property Convention, which was drafted on May 14, 1954 and entered into force on August 7, 1956, was the first international agreement that focused exclu-

93. *See* Lippman, *Art and Ideology*, *supra* note 90, at 60 (quoting Mr. Kahn's view that cultural genocide is the desired end result of those committing genocide); *see also* Johannes Morsink, *Cultural Genocide, the Universal Declaration, and Minority Rights*, 21 HUM. RTS. Q. 1009, 1033 (1999) (indicating that Pakistani delegate Khan addressed cultural and physical genocide as being indivisible); *see also* David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention*, 36 CORNELL INT'L L.J. 293, 311 (2003) (analyzing that cultural genocide should be held to the same standard as physical genocide because both achieve the same desired result).

94. *See* Lippman, *Art and Ideology*, *supra* note 25, at 60 (acknowledging that Mr. Kahn believes the purpose of genocide is to destroy every person's soul in a particular group); *see also* Morsink, *supra* note 93, at 1033 (announcing that during the Sixth Committee Mr. Kahn stated his opinion that the main purpose of genocide is to destroy people culturally and religiously); *see also* Van Schaack, *supra* note 50, at 171 (recognizing that the intent to destroy a group includes the annihilation of a group as a social unit, including any of its unique qualities).

95. *See* U.N. GAOR, 3d Sess., 83d mtg. at 195, U.N. Doc. A/C.6/SR.83 (Oct. 25, 1948) (quoting the Venezuelan delegation who supported the inclusion of cultural genocide provisions in the Genocide Convention); *see also* CAROLINE FOURNET, THE CRIME OF DESTRUCTION AND THE LAW OF GENOCIDE: THEIR IMPACT ON COLLECTIVE MEMORY 43 (2007) (criticizing the Genocide Convention for not recognizing that cultural genocide is the dehumanization and annihilation of peoples, and as such is intrinsically tied to physical genocide); *see also* Lippman, *Art and Ideology*, *supra* note 25, at 61 (referencing the view of Mr. Khan, a Pakistani delegate to the U.N., who held that cultural genocide was the goal of the physically genocidal acts).

96. *See* Lippman, *Art and Ideology*, *supra* note 25, at 61–62 (predicting negative ramifications of omitting provisions on cultural genocide from the Genocide Convention); *see also* Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1, 37 (1994) (discussing the comments of Professor Lemkin whose consultative remarks to the U.N. Secretary-General warned of the international destruction that would result from the annihilation of culture). *See generally* SCHABAS, *supra* note 18 (analyzing the drafting process of the Genocide Convention and the discussion over whether or not to include a cultural genocide provision).

97. *See* Lippman, *Art and Ideology*, *supra* note 25, at 60–62 (chronicling the United Nations' decision to exclude a prohibition against cultural genocide from the Convention on the Prevention and Punishment of Genocide).

sively on the protection of cultural heritage.[98] However, it protects only tangible objects like monuments, archaeological sites, works of art, manuscripts and books.[99] It states that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."[100] This convention does not protect a culture from extinction. It focuses on the protection of property and the cultural heritage of mankind as a whole, and does not protect the specific identities of national groups. Lemkin argued that the property that constitutes a group's national identity must also be considered and be protected by law.[101] He wrote,

> [T]he confiscation of property of nationals of an occupied area on the ground that they have left the country may be considered simply as a deprivation of their individual property rights. However, if the confiscations are ordered against individuals solely because they are Poles, Jews, or Czechs, then the same confiscations tend in effect to weaken the national entities of which those persons are members.[102]

B. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR), which entered into force on March 23, 1976, includes provisions that distinctly recognize the protection of culture.[103] Article 27 of the ICCPR states that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[104] However, this deals with protection *of* cultural freedoms and practices and is not the same as protection *from* cultural eradication.[105]

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98. *See* Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 36 Stat. 2279, 249 U.N.T.S. 215 (recognizing the need to protect cultural property and implementing an international instrument to ensure such protection).

99. *See id*. at art. 1 (defining cultural property as tangible items of importance to collective heritage).

100. *See id.* (listing the first international agreement focusing exclusively on the protection of culture).

101. *See* Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law*, AM. SOC. INT'L L. PROCEEDINGS 423, 427, (2005) (revealing case law to protect cultural property based on the 1954 Hague Convention); *see also* M. Catherine Vernon, Note, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L. 435, 459 (1994) (describing the purpose of the 1954 Hague Convention to protect important property of all mankind).

102. *See* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79–95 (Carnegie Endowment for Int'l Peace, Div. of Int'l Law 1944) (explaining the effects of confiscating property based on individual culture as a deprivation of their individual property rights).

103. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (Mar. 23, 1976), *available at* http://www1.umn.edu/humanrts/instree/b3ccpr.htm (containing provisions recognizing cultural property rights).

104. *See id.* at 71 (stating religious and linguistic minorities still retain cultural property rights in such countries).

105. *See* 120 INTERNATIONAL LAW REPORTS 409 (Sir Elihu Lauterpact, C.J. Greenwood & A.G. Oppenheimer eds., 2002) (discussing how some international agreements address issues pertaining to cultural protection and others examine cultural genocide); *see also* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167–169 (5th Cir. 1999) (holding that Beanal erroneously relied on documents that defined aspects of cultural protection, like the ICCPR, to support his claim of cultural genocide).

C. The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 15(1)(a), states that "the States Parties to the present Covenant recognize the right of everyone to take part in cultural life."[106] Again, while recognizing the right of all people to exercise their cultural freedom, this convention does not contain provisions that deal with encroachment on those freedoms.

D. The Convention on the Rights of the Child, 1989 (CRC)

1. CRC Article 29.1(c)

CRC Article 29.1(c) states that

> States Parties agree that the education of the child shall be directed to the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.[107]

2. CRC Article 30

CRC Article 30 states that

> in those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language."[108] Although this convention states that State Parties shall ensure that the child is "protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents,"[109] it does not deal with the idea of eradication of a culture as a whole, but rather with the protection of cultural freedom for the individual.

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106. *See* International Covenant on Economic, Social, and Cultural Rights, art. 15(1)(a), open for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), *available at* http://www.unhchr.ch/html/menu3/b/a_cescr,htm (declaring the ICESCR's belief that everyone has the right to enjoy and participate in one's own culture).

107. *See* Convention on the Rights of the Child, G.A. Res. 44/25, art. 29(1)(c), U.N. GAOR, 4th Sess., Supp. No. 49, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm (proclaiming a parent's right to raise and educate his or her child based on his or her unique cultural beliefs).

108. *See id.* at art. 30 (establishing that children belonging to a nation's minority culture shall not be denied the right to practice their customs).

109. *See id.* at art. 2 (indicating the obligation to protect children from cultural discrimination).

E. The Convention on Migrant Workers, 2003 (CMW)

1. CMW Article 17.1

CMW Article 17.1 provides that "migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity."[110]

2. CMW Article 31.1

Article 31.1 goes on to state that "States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin."[111] Both Articles 17.1 and 31.1 refer to only migrant workers, and not to the protection of people as a whole.[112]

F. The UNESCO Convention on Cultural Diversity, 2005

The United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on Cultural Diversity[113] is consistent with the UNESCO Universal Declaration on Cultural Diversity,[114] which states that

> all persons have the right to express themselves and to create and disseminate their work in the language of their choice. . . . [A]ll persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.[115]

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110. *See* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 17, ¶ 1, Dec. 18, 1990, 30 I.L.M. 1517 (entered into force July 1, 2003), *available at* http://www2.ohchr.org/english/law/pdf/cmw.pdf (stating that migrant workers and their families who are deprived of liberty should be treated "with humanity and with respect for the inherent dignity" of man).

111. *See id.* at art. 31 (asserting that governments should ensure "respect for the cultural identity of migrant workers and members of their families" to allow them to keep their cultural identities).

112. *See id*. at arts. 17, 31, ¶¶ 1, 1 (listing migrant workers without mention to people as a whole).

113. *See* The United Nations Educational, Scientific, and Cultural Organization [hereinafter UNESCO], Convention on Cultural Diversity, Dec. 18, 2006, *available at* http://ec.europa.eu/culture/portal/action/diversity/unesco_en.htm (affirming the rights of states to elaborate cultural policies with a view "to protect and promote the diversity of cultural expressions").

114. *See id.* (asserting that intercultural dialogue and respect for cultural diversity and tolerance are among the surest guarantees of peace).

115. *See id.* at art. 5 (identifying that that people of different cultures have an equal right to education in the language of their choice).

The Convention on Cultural Diversity was ratified on December 18, 2006, and entered into force in March 2007.[116] The goal of this convention is to protect cultural products (a nation's film and music industries) from international trade regulations.[117] The idea behind the convention is that a nation's cultural activities, goods and services have more than mere commercial value and should therefore be protected.[118] Once again, this convention protects tangible items from impositions of trade regulations, and does not deal with protection from cultural destruction.

VI. The ICTY and the ICTR

The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by Security Council Resolution 827 on May 25, 1993.[119] It was a response to violations of international humanitarian law committed in the former Yugoslavia since 1991, and its mandate was to prosecute those responsible for the violations.[120]

The Security Council created the International Criminal Tribunal for Rwanda (ICTR) by Resolution 955 of November 8, 1994.[121] The ICTR was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and in the territory of neighboring states between Janu-

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116. *See id*. (stating the dates that the convention on culture and diversity was ratified and adopted); see also Universal Declaration on Cultural Diversity, http://www2.ohchr.org/english/law/diversity.htm (last visited Feb. 12, 2009) (asserting the day the UNESCO convention on culture and diversity was ratified); *see also* Convention on the Protection and Promotion of the Diversity of Cultural Expression, *available at* http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO_TOPIC&URL SECTION=201.html (last visited Feb. 12, 2009) (stating the UNSECO convention was entered into force in March 2007).

117. *See* Andre Lewin, Commentary, *Convergences and Divergences: The United States and France in Multilateral Diplomacy*, 58 ME. L. REV. 395, 399 (2006) (acknowledging that the goal of UNSECO was to advance the arts); *see also* Eireann Brooks, Note, *Cultural Imperialism vs. Cultural Protectionism: Hollywood's Response to UNESCO Efforts to Promote Cultural Diversity*, 5 J. INT'L BUS. & L. 112, 116 (2006) (indicating that the goal of the convention is to protect the film and television industries); *see also* UNESCO Passes Cultural Diversity Pact, CBC/Radio Canada, Oct. 20, 2005, *available at* http://www.cbc.ca/story/arts/national/2005/ 10/20/Arts/UNESCO_culture_051020.html (describing that the goals of the UNESCO convention are aimed at protecting cultural diversity).

118. *See id.* (concluding that because the arts have more than a commercial value, they should be protected).

119. *See* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.S.-Fr., May 25, 1993, 32 I.L.M. 1203 (listing the day the Security Council resolution was adopted).

120. *See* Gerry Azzata, *Keeping Up with the War Crimes Tribunal: Human Rights Research into the Twenty-first Century*, 9 HARV. HUM. RTS. J. 323–24 (1996) (discussing the establishment of the ICTY in 1993 as the first international criminal court to prosecute war crimes since World War II); *see also* Mikas Kalinauskas, *The Use of International Military Force in Arresting War Criminals: The Lessons of the International Criminal Tribunal for the Former Yugoslavia*, 50 U. KAN. L. REV. 383, 384 (2002) (describing the establishment of the ICTY to prosecute genocide, crimes against humanity, and war crimes committed in the former Yugoslavia); *see also* Ivana Nizich, *International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA K. INT'L & COMP. L. 353, 353 (2001) (explaining how the formation of the ICTY was an attempt to make up for the European and Americans lack of help during the crisis in Yugoslavia).

121. *See* International Criminal Tribunal for Rwanda: Statute of the International Criminal Tribunal For Rwanda, adopted by Security Council Resolution 955, 8 November 1994, *available at* http://www.un.org/ictr/statute.html (providing the statute that created the International Criminal Tribunal for Rwanda (ICTR)).

ary 1, 1994 and December 31, 1994.[122] The ICTR is governed by the Statute of the Tribunal.[123]

Article II of the Statute of the ICTY lays down the power to prosecute persons who have committed grave breaches of the Geneva Conventions of 1949.[124] Article III gives the Tribunal power to prosecute persons who have violated the laws or customs of war. Adopting the wording of the UN Genocide Convention, Article IV of the ICTY defines genocide as:

> Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) killing members of the group;
>
> (b) causing serious bodily or mental harm to members of the group;
>
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) imposing measures intended to prevent births within the group;
>
> (e) forcibly transferring children of the group to another group.[125]

Article IV further states that "the International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article."[126] By spelling out the fact that paragraph 2 includes acts that constitute genocide, and that paragraph 3 includes "other acts," the Statute of the ICTY makes it clear that the acts in paragraph 3 are not considered genocide. These acts include:

> • Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> • Seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments, and works of art and science;
>
> • Plunder of public or private property.[127]

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122. *See* International Criminal Tribunal for Rwanda: General Information, http://69.94.11.53/ENGLISH/geninfo/index.htm (last visited Feb. 10, 2009) (recognizing that serious violations of humanitarian law were committed in Rwanda).

123. *See* International Criminal Tribunal for Rwanda: Statute of the International Criminal Tribunal For Rwanda, adopted by Security Council Resolution, *supra* note 121, at 955 (discussing the contents of the International Criminal Tribunal for Rwanda (ICTR)).

124. *See* Geneva Conventions of August 12 , 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) (discussing how those who have breached the Geneva Convention of 1949 can be punished).

125. *See* Statute of the International Tribunal art. 4, May 25, 1993, 32 I.L.M. 1193, *available at* http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf (defining "genocide" as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group and giving examples).

126. *See id.* (outlining situations where the International Tribunal would have power to prosecute).

127. *See id.* (indicating acts that would not be considered genocide but rather violations of the laws or customs of war).

Article 2 of the Statute of the ICTR[128] defines genocide in the same way as does the Statute of the ICTY, also excluding cultural genocide from its definition.

In the ICTY's landmark case, *The Prosecutor v. Radislav Krstic*, defendant Krstic was an army corps commander involved in the Srebrenica massacre of at least 7,500 Muslim men and boys from 14 to 19 July 1995.[129] Charges of genocide were based on Article IV of the ICTY Statute.[130] Despite many clear instances of cultural genocide, the ICTY in *Krstic* found that the destruction referred to under the Genocide Convention covered only a physical or biological destruction and did not include cultural destruction.[131] The Tribunal set forth the various ways a group may be destroyed in order to constitute genocide. Aside from physical destruction, a group can also be destroyed through "purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community."[132] The ICTY pointed out that Lemkin's notion of genocide covered all forms of destruction of a group as a distinct social entity.[133] In discussing the *Greifelt* case, the Tribunal stated that there, "the indictment interpreted destruction to mean not only the extermination of the members of those groups but also the eradication of their national characteristics."[134]

Although the ICTY does not include cultural genocide in the definition of the crime of genocide, it reasons that because physical destruction is often accompanied by attacks on a group's culture, these attacks will be considered evidence of the intent to physically destroy the

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128. *See* S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994), *available at* http://www.un.org/ictr/statute.html (specifying acts that are considered genocide under the Rwandan statute).

129. *See* Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Initial Indictment, ¶ 6-11 (Nov. 2, 1998) (enumerating actions that led to the crimes with which Krstic was charged).

130. *See* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Art. IV, UN doc. S/25704 (1993) (stating that Article IV provides that the International Tribunal shall have the power to prosecute charges of genocide).

131. *See* The Prosecutor v. Radislav Krstic, *supra* note 129, at ¶ 580 (explaining that the Trial Chamber recognizes that customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of a group).

132. *See id*. at ¶ 201 (acknowledging that witnesses came across a mass grave near Cerska which they believed contained the bodies of victims of the July 1995 executions, which indicates that there was indeed a purposeful eradication if the group's culture).

133. *See id.* at ¶ 202 (stating that all of the victims of the mass execution were of similar age, gender and social status, thus indicating that it was a form of genocide).

134. *See id.* at ¶ 203 (describing that the mass execution of the members of the group were planned in advance and well organized); *see also* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *supra* note 130, at art. IV (defining genocide as either killing members of a group or causing serious bodily or mental harm to members of the group, which indicates that the mental harm may be the eradication of the group's national characteristics). *See generally* Genocidal Intent Before the ICTY, *available at* http://journals.cambridge.org/download.php?file=%2FILQ%2FILQ52_02%2FS0020589300066823a.pdf&code=0c54235076762938a239898b3, last accessed February 12, 2009 (grappling with the issue of whether or not ethnic cleansing can be characterized as genocide).

group.[135] The key issue, however, is what happens when there is no attempt to physically destroy a group. What if a situation involves only the destruction of cultural or national symbols or practices?

VII. The International Criminal Court

The first thought given to the establishment of an international criminal court was in the Treaty of Versailles (June 28, 1919),[136] which envisaged the establishment of an international tribunal to try the Nazis for atrocities committed during World War I. Unfortunately nothing came of this attempt to create a tribunal. Just a short while later, the Treaty of Sèvres (August 10, 1920)[137] recognized a free Armenian State[138] and envisaged a similar international tribunal to try the Turks for atrocities committed during World War I,[139] namely, the Armenian genocide. This treaty was never ratified, and the criminal tribunal and arbitral commissions envisaged by the treaty were never set up.[140] On July 24, 1923, the Treaty of Lausanne[141] replaced the Treaty of Sèvres.[142] In so doing, it abandoned the plan for an international tribunal to try

135. *See* The Prosecutor v. Radislav Krstic, *supra* note 129, at ¶ 203 (signaling that the preplanning and organization of executions suggest an attempt at total extermination of a people); *see also* Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 84 n. 99 (2005) (affirming that physical destruction of a people is an attempt to destroy that people's culture); *see also* William Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the former Yugoslavia*, 25 FORDHAM INT'L L.J. 23, 41 (2001) (emphasizing that the regional extent of genocidal actions is irrelevant when determining intent).

136. *See* Treaty of Versailles art. 227–229, June 28, 1919, *available at* http://history.sandiego.edu/ gen/text/versailles treaty/all440.html (originating the concept of an international tribunal to punish violations of international treaties).

137. *See* The Treaty of Peace Between the Allied and Associated Powers and Turkey Signed at Sèvres art. 144, 230, Aug. 10, 1920, *available at* http://www.hri.org/docs/sevres/part3.html (noting this treaty as subsequent and similar to the Treaty of Versailles).

138. *See id.* (detailing the rights now conferred upon the recognition of Armenia).

139. *See id.* (conceding the right of autonomy in recognizing the power of an international tribunal to try Turks for war crimes).

140. *See* VAHAKN N. DADRIAN, THE HISTORY OF THE ARMENIAN GENOCIDE: ETHNIC CONFLICT FROM THE BALKANS TO ANATOLIA TO THE CAUCASUS 305 (6th ed. 2003) (commenting that the adjudicatory provisions of the Treaty never came to fruition because of international political tensions); see also M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 FORDHAM INT'L. L.J. 1191, 1194–95 (1995) (stating that the Treaty of Sèvres was never ratified and its replacement, the Treaty of Lausanne, omitted entirely any prosecution for the genocide); *see also* Vincent M. Creta, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 20 HOUS. J. INT'L L. 381, 386–87 (1998) (stressing that the Treaty of Lausanne failed to provide any means of prosecuting the Armenian genocide criminals).

141. Treaty of Peace with Turkey Signed at Lausanne, July 24, 1923, *available at* http://net.lib.byu.edu/~rdh7/wwi/1918p/lausanne.html (showing that the Treaty of Lausanne was signed on July 24, 1923).

142. *See Treaty of Sèvres*, THE COLUMBIA ENCYCLOPEDIA (8th ed. 2008), *available at* http://www.encyclopedia.com/doc/1E1-Sevres-T.html (explaining that the Treaty of Sèvres was ultimately abandoned for the Treaty of Lausanne).

the Ottoman Turks for the Armenian genocide, as well as the recognition of a free Armenian State.[143]

A successful attempt to establish an international criminal tribunal was made on July 17, 1998 with the adoption of the Rome Statute of the International Criminal Court (ICC)[144] by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Rome Statute is an international treaty and is binding on the states that have ratified it.[145] It entered into force on July 1, 2002, and on March 11, 2003 the ICC was inaugurated and the judges sworn in.[146] The United States is not a member of the ICC. The ICC has jurisdiction over genocide, crimes against humanity and war crimes, and may exercise this jurisdiction over nationals of State Parties when the crime took place on the territory of a State Party, or when the UN Security Council refers a situation to the Prosecutor of the Court.[147]

Article 6 of the Rome Statute adopts the Genocide Convention's definition of genocide as the *physical* destruction of a group, thereby excluding the possibility of prosecuting cultural genocide on its own.[148]

It could be argued that cultural genocide falls under the umbrella of "crimes against humanity." However, Article 7 of the Rome Statute lists certain acts that, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack," constitute crimes against humanity.[149] These acts include "murder, extermination, enslavement," and other physical acts, thereby excluding cultural genocide when

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143. *See* ROBERT FISK, THE GREAT WAR FOR CIVILIZATION: THE CONQUEST OF THE MIDDLE EAST 337 (2006), at 331–32 (remarking that the failed clauses of the Treaty of Sèvres granting independence to Armenia was a betrayal to the Armenians); *see also* Leo Kuper, *The Turkish Genocide of Armenians, 1915–1917*, in THE ARMENIAN GENOCIDE IN PERSPECTIVE 43, 51–52 (Richard G. Havannisian ed., 1986) (asserting that the provisions of the Treaty of Sèvres that provided for recognition of the genocide and establishment of an independent state were never materialized).

144. Rome Statute of the International Criminal Court, July 17 1998, U.N. Doc. A/CONF.183/9* [hereinafter "Rome Statute"] (establishing that the International Criminal Court was created upon its signing on July 17, 1998).

145. *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15–17, 1998, Rome Statute of the International Criminal Court, A/CONF.183/9 entered into force July 1, 2002) (establishing an international criminal tribunal).

146. *See* Chronology of the International Criminal Court, http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm (last visited Feb. 8, 2009) (showing chronologically when the Rome Statute was created and entered into force and giving a listing subsequent important dates in the development of the International Criminal Court).

147. *See* International Criminal Court Jurisdiction and Admissibility, http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm (last visited Feb. 8, 2009) (explaining the jurisdictional limitations of the International Criminal Court); *see also* Peter Sharp, *Prospects for Environmental Liability in the International Criminal Court*, 18 VA. ENVTL. L.J. 217, 220 (1999) (listing the crimes for which the International Criminal Court has authority to prosecute).

148. S*ee* United Nations Diplomatic Conference, *supra* note 145, at ¶ 6 (defining genocide for the purposes of International Criminal Court to mean the physical destruction of a group. This was the same way the Genocide Convention had defined it).

149. *See id.* at ¶ 7 (enumerating those acts that qualify as crimes against humanity).

unaccompanied by a physical attack.[150] The definition of war crimes in Article 8 of the Statute does include "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments. . . ."[151] However, in order to prosecute what might be called cultural genocide, these acts must be committed in the context of an international armed conflict,[152] which presumably means accompanied by killing.

VIII. The Existing Framework Falls Short

As we have seen, all attempts thus far to prosecute cultural genocide when it occurs on its own have failed. The statutes of the ICTR, the ICTY, and the ICC do not cover it, and although multiple conventions have dealt with the idea of protecting cultural expression, none deals with the complete destruction of a group's unique cultural, linguistic, and religious characteristics.[153] The result is that as it stands, when cultural genocide occurs as a component of physical or biological genocide, it is prosecuted, but standing alone it may not be. Because the Genocide Convention does not include a provision on cultural genocide, "a claim of conduct committed with the intent to destroy, in whole or in part, the *culture* of a national, ethnical, racial or religious group would not, without more, fall within Article II of the Genocide Convention."[154] Some may say that cultural genocide will always be punished because physical genocide is punished and the two go hand in hand. However, as Lemkin himself argued, "[M]ass murder does not convey the specific losses to civilization in the form of the cultural contributions which can be made only by groups of people united through national, racial or

150. *See* Rome Statute, *supra* note 144, at art. 7 (enumerating acts constituting "crimes against humanity").

151. *See id.* at art. 8(2)(b)(ix) (listing types of buildings whose destruction would constitute a war crime); *see also* Jefferson Reynonds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 69 (2005) (noting that the broad nature of the definition of "war crimes" may permit prosecution of any act resulting in collateral damage); *see also* Mominah Usmani, Note, *Restrictions on Humanitarian Aid in Darfur: The Role of the International Criminal Court*, 36 GA. J. INT'L & COMP. L. 257, 269 (2007) (asserting that intent and knowledge are required with respect to material elements of a war crime).

152. *See* Rome Statute, *supra* note 144, at art. 8(2)(b) (delineating acts that would be war crimes because they would violate laws and customs applicable in international armed conflict).

153. *See* Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights*, 15 EMORY INT'L L. REV. 391, 405–6 (2001) (asserting a common-ground approach with regard to human rights rather than preserving each group's distinct cultural or religious characteristics); *see also* Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Laws' Relevance to the Crime Against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT'L L. 49, 57 (2006) (claiming that there was no clear definition of persecution prior to the Rome Statute). But see Deborah Weissman, *The Human Rights Dilemma*, 35 COLUM. HUM. RTS. L. REV. 259, 311–12 (2004) (indicating the United States did not sign the Rome Statute because it believed its human rights guarantees trumped those guaranteed by the Rome Statute).

154. *See* Nulyarimma v. Thompson (1999) 96 F.C.R. 153, 202, reprinted in 120 INT'L L. REP. 354, 409 (2002) (noting the absence of a cultural genocide provision in the Genocide Convention).

cultural characteristics."[155] The living may suffer cultural genocide without death, in which case they are not vindicated by the prosecution of physical genocide.

IX. Suggestions

"Cultural genocide" may not be the most fitting term for the phenomenon I have described. The very essence of the term "genocide" implies killing. Using the term to refer to the bombing of empty churches or even the elimination of all cultural aspects of a national group undermines the word "genocide." The expression "hate crime" does not capture the idea either. Hate crimes can be isolated acts; the destruction of culture occurs when hate crimes have happened so many times and with such thoroughness that the group's identity is virtually obliterated and its soul is no more.

The author of an article in *Peace Magazine* entitled "Ecocidal Wars" posed the following question: "Why is it impossible to use the correct phrase, 'cultural genocide,' in reference to a socialist republic in the East Bloc? Why do you belittle the suffering endured by my people?"[156] It is time to come up with a way to prosecute the crime that can destroy a group's cultural identity without actually killing its people.

The aim of the United Nations has always been to eliminate discrimination in any form, and to offer protection to those in need.[157] If this is to be achieved, and if the international community is to remain true to this aim, then the elimination of a nation's culture deserves more attention.

"The world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well-developed national psychology. The destruction of a nation, therefore, results in the loss of its future

155. *See* Raphael Lemkin, *Genocide as a Crime Under International Law,* 41:1 AM. J. INT'L L. 145–51 (1947), *available at* http://www.preventgenocide.org/lemkin/ASIL1947.htm, at 147 (defining the crime of genocide as including the deprivation of life and health); see also Lippman, *Art and Ideology*, at 61–62 (reporting that the omission of a provision on cultural genocide at The 1948 Convention on the Prevention and Punishment of Genocide was a result of the Committee's belief that cultural genocide should be protected in a separate human rights instrument); *see also* Barry Sautman, *"Cultural Genocide" and Tibet*, 38 TEX. INT'L L.J. 173, 184–85 (2003) (outlining various arguments and rationales for why the Committee declined to include a provision prohibiting cultural genocide).

156. *See* Brigitta Bali, Letters, *Cultural Genocide*, PEACE MAGAZINE, Aug.–Sept. 1989, at 5, *available at* http://archive.peacemagazine.org/v05n4p05.htm (criticizing the use of the term "forced cultural assimilation" as misleading).

157. *See* COUNCIL OF EUROPE, ACCESS TO SOCIAL RIGHTS FOR PEOPLE WITH DISABILITIES IN EUROPE 21 (Marc Maudinet et al. eds., 2003) (recognizing the adoption of the International Convention on the Elimination of all Forms of Racial Discrimination has resulted in the formation of numerous other conventions, declarations and covenants); *see also* Jane H. Byes & Rita Mae Kelly, *Political Spaces, Gender, and NAFTA*, *in* GENDER, GLOBALIZATION, & DEMOCRATIZATION 149, 155 (Rita Mae Kelly et al. eds., 2001) (discussing the United Nations' various reasons for enacting The Convention to Eliminate Discrimination Against Woman); *see also* William B. Moffitt, *Racial Discrimination in America*, 24 CHAMPION MAGAZINE, May 2000, at 9 (noting that despite ratifying various international conventions, discrimination and bias are a continuing problem in the United States criminal justice system).

contributions to the world."[158] A convention is needed to protect cultural identity when it is attacked on its own, independent of murder—one that goes further than protecting cultural identity and protects groups *from* attacks on their culture that would otherwise result in its total destruction.

An important question is what to call this phenomenon. The word "denationalization" was used in the past,[159] but Lemkin believed that this word was inadequate because it did not connote the destruction of a group's biological structure.[160] Furthermore, the term "denationalization" conveys only the destruction of a nation, and not the step that follows, i.e., the imposition of an oppressor's national structure. Another problem with the term "denationalization" is that it is often used to mean only the deprivation of citizenship.[161] The phrase "forced cultural assimilation" also does not fully reflect the idea. Assimilation is the state of being incorporated into a culture; people of different backgrounds come to see themselves as part of a larger national family. It is also the social process of bringing one cultural group into harmony with another.[162] Assimilation does not require people to deny their original cultural heritage, and it certainly does not involve being forced to give up one's own culture.[163]

In the words of former UN Secretary General Kofi Annan,

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158. *See* Raphael Lemkin, *Axis Rule in Occupied Europe: Law of Occupation, Analysis of Government, Proposal for Redress* 91 (1944), *available at* http://www.preventgenocide.org/lemkin/AxisRule1944-3.htm (illustrating the benefits and contributions that various cultures can provide to the world).

159. *See* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS (Carnegie Endowment for Int'l Peace, Div. of Int'l Law 1944), at 80 (defining the historical meaning of the word "denationalization" as the destruction of a national pattern); *see also* KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 195 (recognizing that while no state in the United States has completely adopted denationalization, that many states offer limited protection through other laws).

160. *See id.* (providing that the word "denationalization" is inadequate because the word does not connote the destruction of a group's biological structure).

161. *See id.* at 82 (stating that the word "denationalization" has been used to mean the deprivation of citizenship, and this conveys only the destruction of a nation, and not the step that follows, i.e., the imposition of an oppressor's national structure); *see also* Leo Zaibert, *Uprootedness as Cruel and Unusual Punishment*, 11 NEW CRIM. L. REV. 384 (2008) (stating that to be denationalized is to be forcibly uprooted and removed from a place that forms an integral part of what a person is, severing a person's sense of identity and very sanity).

162. *See* United States v. Castillo, 386 F.3d 632, 634 (5th Cir. 2004) (citing WEBSTER'S NEW COLLEGE DICTIONARY II at 274 (2001) (stating that assimilation is defined as the process whereby a minority group gradually adopts the cultural characteristics of the majority).

163. *See* MILTON GORDON, ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGIN, 60–76 (Oxford University Press 1964) (observing rigorous critiques of the existing assimilation/acculturation models, Milton Gordon describes an assimilation/acculturation model as having dimensions of time, as well as "depth." There are eight stages or aspects of the assimilation/acculturation process: (1) the entry group changes its cultural patterns to those of the host group (acculturation); (2) the entry group gains access into social institutions and forms of social organization of the dominant culture (structural assimilation); (3) the entry group conforms with cultural conduct patterns of dominant culture (behavioral assimilation); (4) intermarriage (marital assimilation); (5) the entry group self-identifies with the values and norms of the dominant community (identification assimilation); (6) absence of prejudice by the host group (attitude-receptional assimilation); (7) absence of discrimination by the host group (behavior receptional assimilation); (8) the entry group participates in the civic life of the dominant group as equals (civic assimilation)).

> We cannot simply shrug off discrimination as an aspect of human nature. We know that people are taught to hate—and they can also learn to overcome it, through better understanding. Nor must we accept intolerance as a predictable by-product of poverty, injustice or poor governance. Yes, these are among the conditions that pit man against man. But it is within our power—and it is surely our duty—to change them.[164]

Culture defines identity—it gives meaning to life and defines the values of man. Destruction of a people kills its culture. What is objectionable is not just destroying the being of somebody, but destroying the being of somebody *with an identity.* The habits, attitudes, history and beliefs of a group of people, specific to a particular time and place, are what make up its culture. Culture is not something that can be replaced, or even transplanted, without major losses. Traditions are often tied to a place, and people who are moved from one place to another forfeit many of their customs. Respect for different cultures not only promotes peace and understanding but strengthens civil society by promoting debate. Culture represents different experiences, different methods for addressing problems, and different ways of upholding the dignity of man. Through the various ways and devices of people, we multiply knowledge to the benefit of humanity. In this way, the elimination of culture is a loss for the whole world.

I propose that an international treaty be created called *The Convention on Protection from Cultural Destruction.* A key issue to be considered relates to the specific acts that should be punishable under such a convention. For example, how many people need to be culturally oppressed before it can be called cultural destruction? If five people are prevented from speaking their native language, that may not be enough, but what is? A hate crime is "an offense committed against another person, with the specific intent to cause harm to that person due to his or her race, gender, sexual orientation, religion, or culture, etc."[165] If enough people are the victims of hate crimes, does that constitute cultural destruction? The answer to this question may turn on specific intent. In cultural destruction, the intent must be to destroy the entire culture, as opposed to hate crimes, where the intent is to harm a specific person or persons. In my view, responsibility should be personal, rendering every individual who takes part in acts of cultural destruction, in any capacity, guilty of the commission of the offense. Such an approach is consistent with the modern tendency to hold individuals, and not persons in their official

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164. *See* Kofi Annan, Secretary-General, United Nations, Speech at the Reception of his Honorary Doctorate at Freie Universität Berlin (July 2001), *available at* http://www.fu-berlin.de/en/aktuell/annan/annan.html (stating that people cannot simply shrug off discrimination as an aspect of human nature nor accept intolerance as a predictable by-product of poverty, injustice or poor governance).

165. *See* BLACK'S LAW DICTIONARY 166 (8th ed. 2004) (defining hate crimes).

capacity, responsible for grave acts against humanity,[166] as is the case with the Rome Statute, which renders individuals responsible for heinous crimes against humanity.

History provides us with a multitude of violations of cultural heritage.[167] By way of example, we can point to cultural violations committed on a mass scale by Romanian authorities in communist times.[168] After Austria-Hungary lost World War I, the 1920 Treaty of Trianon awarded Transylvania to Romania, placing approximately 3 million ethnic Hungarians under Romanian rule.[169] In 1967, Nicolae Ceausescu became the Communist leader and president of the country and remained in power until 1989.[170] During his rule, his government committed what amounted to cultural genocide against Romania's Hungarian, German, and other minori-

166. *See* DOUGLAS HODGSON, INDIVIDUAL DUTY WITHIN A HUMAN RIGHTS DISCOURSE 80, 81 (2003) (discussing the International Tribunal of Yugoslavia's ruling to hold a superior officer criminally responsible for the actions of their subordinates in executing crimes against humanity); *see also* YITIHA SIMBEYE, IMMUNITY AND INTERNATIONAL CRIMINAL LAW 92 (2004) (explaining that the International Criminal Court holds individuals personally responsible for international crimes, giving the example of the prosecution of the former Prime Minister of Rwanda's charge of genocide); *see also* Michael P. Hatchell, Note & Comment, *Closing the Gaps in United States Law and Implementing the Rome Statute: A Comparative Approach*, 12 ILSA J INT'L & COMP L 183, 194 (2005) (noting that Canada has adopted legislation making generals personally liable for crimes committed during times of war).

167. *See* Simon Eagle, *Trading Human Rights*, *in* GLOBAL TRADE AND GLOBAL SOCIAL ISSUES 27, 40–42 (Annie Taylor & Caroline Thomas eds., 1999) (concluding that many of history's cultural violations have been caused by the pursuit of wealth, using Mexico's current *maquiladora* human rights violations as an example); *see also* Marianne Geula, Note, *South Africa's Truth and Reconciliation Commission as an Alternate Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. INT'L L.J. 57, (2000) (comparing South Africa's historical apartheid government and the creation of the Truth Reconciliation Commission to rectify the past governmental segregation and oppression. *See generally* U.N. Econ. & Soc. Council [ECOSOC], Committee on Economic, Social, and Cultural Rights, April 23–May 11, 2001, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ¶ 1–14, U.N. Doc. E/C.12/2001/10 (May 10, 2001) (acknowledging that widespread poverty is a result of cultural rights violations and inequality with current international norms freezing change).

168. *See* Carrie A. Rankin, *Romania's New Child Protection Legislation: Change in Inter-country Adoption Law Results in A Human Rights Violation*, 34 SYRACUSE J. INT'L. L. & COM. 259, 261 (2006) (critiquing Romania's policy of banning birth control and mandating that women have multiple children and encouraging poor families to abandon their children at state-run facilities); *see also* Victor Williams, *Extremist Threats to Fragile Democracies: A Proposal for an East European Marshall Plan*, 15 MICH. J. INT'L L. 863, n.98 (1994) (book review) (commenting that even the German S.S. officer were taken aback by the communists' persecution of the Jews in their programs). *See generally* Tom Gallagher, *Romanian History*, in REGIONAL SURVEY OF THE WORLD: CENTRAL AND SOUTH EASTERN EUROPE 2004, 609 (Imogen Bell ed., 2003) (discussing the history of Romania and the widespread persecution endured of minorities during the communist era).

169. *See* Frank Koszorus Jr., *Trianon: Tragedy, Dissolution, and Remedy* (June 4, 2007), http://www.americanhungarianfederation.org/news_trianon.htm. (explaining the separation of the Kingdom of Hungary post–World War I).

170. *See* BBC News Profiles, *Pushing Back the Curtain: Nicolae Ceausescu: Romanian Communist Leader and President, 1967–89*, http://news.bbc.co.uk/hi/English/static/special_report/1999/09/99/iron_curtain/profiles/profiles.stm (last visited Feb. 10, 2009) (stating that Nicolae Ceausescu remained the communist leader and president of Romania until his execution on Christmas Day, 1989).

ties.[171] Such genocide was perpetrated by the implementation of the following government decisions: (1) elimination of minority educational institutions, (2) suppression of minority languages, (3) falsification of historical data and population statistics, (4) confiscation of cultural archives, (5) obstruction of contact with relatives abroad, and (6) dissolution of ethnic communities.[172] These acts were in direct violation of Article 27 of the International Covenant on Civil and Political Rights,[173] which Romania (then Roumania) had ratified at the time. Hungarian cultural centers were gutted, grave markers removed from cemeteries, birth and baptism records wiped out, and the Hungarian language forbidden in public.[174] Just as the 1948 Genocide Convention lists acts constituting genocide, the acts enumerated here provide examples of cultural destruction. They configure a list of acts that should be criminalized as acts offensive to human civilization and grave enough to merit punishment similar to that befitting crimes against humanity.

The tragic reality is that cultural destruction has occurred throughout the ages, and is a phenomenon likely to be repeated on a grander scale, given the means presently available. Humanity cannot remain inactive before this threat. It is the duty of man to protect the cultural roots that provide a guide to the future. It is high time that nations and people unite in evolving a treaty or convention that would address the problem. The initiative may be taken by the United Nations or any group of countries, such as the European Union, committed by their basic documents to the ascent of man and the relief of humankind from a scourge that tarnishes human civilization.

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171. *See* Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT'L L. 183, 217, 219, 221 (2003) (indicating that Ceausescu's systematization, based on Marxist ideology, was a method of suppressing cultural identity); *see also* Jackson Diehl, *Trouble in Transylvania: Romania Assailed for Treatment of Minorities*, WASHINGTON POST, Nov. 9, 1986, Part 1, at 20 (emphasizing that under the guise of "national homogenization," Ceausescu practiced cultural extinction or "cultural genocide"); *see also* Alan Ferguson, *Extremists Make Grab for Romania's Revolution*, TORONTO STAR, Apr. 1, 1990, at H1 (explaining that Ceausescu practiced deliberate cultural genocide by bulldozing Hungarian villages and suppressing their language); *see also Will United States Endorse Cultural Genocide in Romania*, NEW YORK TIMES, May 7, 1976, Section 1, at 15 (alleging that Ceausescu by means of language suppression and data falsification perpetrated cultural genocide of Romania's minorities).

172. *See Will United States Endorse Cultural Genocide in Romania?*, *supra* note 171, at 15 (exemplifying Ceausescu's methods of suppressing Romania's minority populations).

173. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (Mar. 23, 1976), *available at* http://www1.umn.edu/humanrts/instree/b3ccpr.htm, at art. 27 (declaring that ethnic minorities within a state cannot be denied the right to their culture, religion or language).

174. *See* Brigitta Bali, Letters, *Cultural Genocide*, PEACE MAGAZINE, Aug.–Sept. 1989, at 5, *available at* http://archive.peacemagazine.org/v05n4p05.htm (criticizing the use of the term "forced cultural assimilation" as misleading), at 5 (revealing the consequences of Ceausescu's assimilation program, which resulted in destruction of the Hungarian way of life in Romania).

International Antitrust Agreement: Premature Proposal and Practical Solutions

Olga Petrovsky*

> The derivation of a common antitrust standard among nations—a truly international antitrust law—does not arise simply through legislative act. It must be the logical culmination of the economic, political, and social development of a nation or groups of nations.
>
> —E.W. Kitner, *Primer on the Law of Mergers*

Introduction

The arena of international antitrust regulation is in need of change. The current enforcement mechanisms, characterized by myriad bilateral agreements between nation-states, are proving to be both inefficient and ineffective.[1] Domestic interests will continue to overpower international concerns until the community of nations can develop universally accepted antitrust standards.[2] Yet, the goal of a uniform system for antitrust regulation has proven elusive.[3] This article will outline the present network of antitrust regulation and cooperation agreements with respect to merger regulation and, with practical insight from leading scholars, will argue

1. *See* TONY ALLAN FREYER, ANTITRUST AND GLOBAL CAPITALISM, 1930–2004 129 (2006) (positing that substantial differences in antitrust between nations makes enforcement of restrictive trade practices ineffective); *see also* Sarah Holloway, *International Merger Control: Globalization or Global Failure?*, 34 DENV. J. INT'L L. & POL'Y 353, 370 (2006) (arguing that bilateral agreements, which prevail in antitrust regulation, do not address variation and inconsistencies in national antitrust laws). *See generally* Lucio Lanucara, *The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses*, 9 IND. J. GLOBAL LEGAL STUD. 433, 450–51 (2002) (noting that bilateral agreements in antitrust enforcement can be increasingly obsolete without being complemented by multilateral agreements).

2. *See* MARTYN D. TAYLOR, INTERNATIONAL COMPETITION LAW: A NEW DIMENSION FOR THE WTO? 304–5 (2006) (explaining that the proposed International Antitrust Panel of the WTO would have the power to enforce international standards for the regulation of anticompetitive conduct overriding domestic courts, which would be more effective); *see also* JOSEPH WILSON, GLOBALIZATION AND THE LIMITS OF NATIONAL MERGER CONTROL LAWS 253 (2003) (discussing that in 1993 a group of antitrust scholars proposed an antitrust code for WTO states to enact into their domestic law, which included standards for horizontal arrangements, vertical restrictions and mergers); *see also* Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L L. 355, 356 (2004) (asserting that nations are biased in the application of their own antitrust policies, which includes being more aggressive in enforcing anticompetitive laws against foreign corporations than against domestic corporations).

3. *See* M. J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 599 (3d ed. 2005) (maintaining that few concrete steps have been taken by the international community to standardize antitrust law despite a draft of international rules for antitrust, known as the Munich Code, developed by a group of German competition scholars); *see also* Gerhard Schricker, *International Aspects of the Law of Unfair Competition, in* INTERNATIONAL HARMONIZATION OF COMPETITION LAWS 129, 134 (Chia-Jui Cheng et al. eds. 1995) (noting that the lack of international laws with respect to unfair competition means that its prevention is left up to national laws and governments); *see also* Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207, 207 (2003) (arguing that the lack of a uniform system of antitrust regulation is a result of disagreement over the optimal balance between national and international enforcement).

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for the enhancement of current agreements in an effort to streamline the regulatory process of merger enforcement. Part I will detail the current network of competition agreements, focusing primarily on the common bilateral agreement structure and briefly expounding on the less-prevalent multilateral and plurilateral agreements. Part II will highlight the primary issues facing international cooperation within regulation of anticompetitive behavior through a factual summary of the mergers of General Electric-Honeywell, Boeing-McDonnell Douglas, and AOL-Time Warner. Part III will describe and analyze previous attempts at the harmonization of competition policy through various international agreements, and Part IV will conclude the discussion with general remarks and suggestions.

Analysis

Part I: Current Network of Antitrust Cooperation Agreements

The research of the foremost scholars in the arena of international antitrust suggests an emerging consensus that enhancement of the current cooperation framework is preferred to the development of a uniform regulatory scheme.[4] Bilateral agreements among nation-states, as they currently stand, are clearly lacking in their ability to provide an effective cooperation framework.[5] However, coalescing individual competition enforcement structures into a joint agreement is premature and unlikely to result in an efficiency-maximizing framework.[6]

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4. *See* BRUNO ZANETTIN, COOPERATION BETWEEN ANTITRUST AGENCIES AT THE INTERNATIONAL LEVEL 66 (2002) (explaining that for the European Commission, bilateral agreement with the United States on antitrust enforcement was necessary for better cooperation and coordination at the international level); *see also* Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT'L L. 931, 951 (2002) (positing that cooperation across national borders in antitrust enforcement has been successful at overcoming certain sovereignty issues, such as receiving documents and testimony from abroad); *see also* Piilola, *supra* note 3, at 224 (arguing that greater cooperation between national antitrust agencies has led to better enforcement and more standardization of antitrust laws).

5. *See* ANDREAS MITSCHKE, THE INFLUENCE OF NATIONAL COMPETITION POLICY ON THE INTERNATIONAL COMPETITIVENESS OF NATIONS 86 (2008) (discussing the limitations of bilateral agreements regarding international antitrust enforcement); *see also* Carlos Di Ponio, *Competition, Cooperation, and Conflict: An Assessment of the Extraterritorial Application and Enforcement of Competition Laws in Canada in the United States*, 13 MICH. ST. J. INT'L L. 283, 303 (2005) (advising that an international antitrust regime is a long-term solution for the problem of antitrust enforcement among national states); *see also* Ariel Ezrachi, *Globalization of Merger Control: A Look at Bilateral Cooperation Through the GE/Honeywell Case*, 14 FLA. J. INT'L L. 397, 416 (2002) (explaining that the European Union realized that bilateral agreements are not effective for conflict resolution, and that instead, the European Union recommended a multilateral or international framework for such issues).

6. *See* Simon J. Evenett et al., *Antitrust Policy in an Evolving Global Marketplace, in* ANTITRUST GOES GLOBAL 1, 1 (2000) (arguing that the globalization of antitrust has the potential to raise questions regarding national sovereignty and foster disagreements among intergovernmental institutions that could lead to trade wars); *see also* Kevin J. O'Connor, *Federalist Lessons for International Antitrust Convergence*, 70 ANTITRUST L.J. 413, 430 (2002) (asserting that the convergence toward an international antitrust system could inhibit compromise between nations and may not be accountable and transparent); *see also* Kathleen Luz, Note, *The Boeing-McDonnell Douglas Merger: Competition Law, Parochialism and the Need for a Globalized Antitrust*, 32 GEO. WASH. J. INT'L L. & ECON. 155, 171 (1999) (stating that a uniform international antitrust system would have several flaws which would lead to its ineffectiveness, such as finding a code that would be acceptable to all nations and the inevitable disputes over interpretation).

The most common form of cooperation among the world's antitrust agencies is the network of bilateral competition agreements.[7] Such agreements are, generally speaking, arrangements made between two nations with similar competition laws and converging views on the requisite substantive and procedural enforcement strategies.[8] In relation to merger review, in particular, such bilateral agreements have proven to be an expedient and mutually beneficial structure where the two nations agree to share pertinent information, engage in consultation, notification, and co-operation.[9] Such agreements grew in prominence during the late 1970s and have since evolved from these "first-generation" bilateral agreements to "third-" and "fourth-generation" agreements, with the primary difference being the current, increased degree of trust and cooperation between bilaterally engaged nations.[10]

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7. *See* MARK A. POLLACK & GREGORY C. SHAFFER, TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY, 132 (2001) (claiming that direct bilateral cooperation agreements have been the most preferred method of both the United States and the European Union to increase antitrust enforcement initiatives); *see also* MICHAEL UTTON, INTERNATIONAL COMPETITION POLICY: MAINTAINING OPEN MARKETS IN THE GLOBAL ECONOMY 114 (2006) (noting that the United States favors bilateral competition agreements containing provisions for cooperation on competition policy matters); *see also* Alberto Alvarez-Jimenez, *Emerging WTO Competition Jurisprudence and Its Possibilities for Future Development*, 24 NW. J. INT'L L. & BUS. 441, 447 (2004) (remarking that in recent years, nations have opted in growing numbers to implement bilateral competition agreements that address antitrust and trans-border competition issues).

8. *See* Conference on Trade & Development, Commission on Investment, Technology and Related Financial Issues Intergovernmental Group of Experts on Competition Law and Policy, Geneva, Switz., Mar. 31, 1999, *Experiences Gained so Far on International Cooperation on Competition Policy Issues and the Mechanisms Used* ¶ 7 (Jun. 7, 1999), *available at* http://www.unctad.org/en/docs/c2clp99d11.pdf (discussing bilateral competition agreements having provisions in which parties with similar enforcement strategies will defer to each other in certain cases); *see also* Leigh Davidson & Debra Johnson, *Multilateralism, Bilateralism and Unilateralism: A Critical Commentary on the EU's Triple-Track Approach to the International Dimension*, EUR. BUS. REV 6 (Dec. 6, 2007) (stating that bilateral agreements containing assurances that preserve the rights of parties to initiate enforcement action at a later date establish trust in each other's strategies and procedures); *see also* Allison J. Himelfarb, Comment, *The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union with a Uniform Understanding of "Extraterritoriality,"* 17 U. PA J. INT'L ECON. L. 909, 914 (1996) (maintaining that such agreements serve to balance the interests of both member nations by extending one nation's laws to the other and balancing the interests of both parties).

9. *See* Joseph P. Griffin, *Extraterritoriality in U.S. and E.U. Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 185–86 (1999) (emphasizing that successful bilateral agreements contain promises that the nations will cooperate using agreed-upon economic principles based upon clear rules); *see also* Mervyn Martin, *The Creation of a Global Competiton Regime: Where Exactly Do the Obstacles Lie—Practical Co-operation or Ideological Differences?*, 7 RICH. J. GLOBAL L. & BUS. 297, 312 (2008) (commenting that voluntary cooperation between the parties is essential to having a successful bilateral agreement); *see also* Harve A. Truskett, *"This Does Not Matter in Mexico": Mexico-U.S. Competition Law—Conflicts and Resolutions*, 30 HOUS. J. INT'L L. 779, 809 (2008) (suggesting bilateral agreements taking advantage of the will of nations to put common competition law principles and best practices can work together to achieve common goals in competition areas).

10. *See* TAYLOR, *supra* note 2, at 108 (illustrating the transformation of bilateral agreements that have increased trust and cooperation provisions between nations).

As Andrew Guzman aptly stated, "These bilateral agreements provide for the sharing of information between the enforcement authorities where the actions of one country's regulators may affect the other country's interests."[11] The United States, for example, has entered into such agreements with Mexico, Brazil, Japan, Australia, Israel, Canada, the European Union, and Germany.[12] When reviewing a merger on an international scale, where the affected parties are two nations and the reach of the merger has the potential to impact the economic stability of their respective domestic markets, such bilateral agreements provide for consultation and information—sharing in an effort to discern the potential market impact.[13] Although bilateral agreements are not without drawbacks, it is generally true that "the greater the degree of confidence and similarity between the nations in relation to [the countries] . . . respective competition laws and enforcement policies, the more likely it is that these nations will favor . . . bilateral agreements, and the greater the degree of corresponding bilateral co-operation."[14]

Most of the "modern-day" bilateral agreements enacted and enhanced since the early 1990s (third-generation agreements) have six principal components in common: notification, information exchange, co-operation, consultation, negative comity, and positive comity.[15] Notification provisions require each nation to notify the other of any potentially significant

11. *See* ZANETTIN, *supra* note 4, at 183 (stating such bilateral agreements encourage the exchange and sharing of information involving each other's legal proceedings); *see also* Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142, 1144 (2001) [hereinafter Andrew Guzman, *Federalism*] (asserting bilateral agreements are a vehicle by which one nation shares enforcement information with another nation); *see also* Gesner Oliveira & Bruno Werneck, International Symposium, *Bilateral Cooperation Agreements: The U.S.-Brazil Experience*, COMP. P. & CONSUMER INTEREST IN THE GLOBAL ECON., 12–13 (2001), *available at* http://www.goassociados.com.br/2006/Paper_Cuts.pdf (affirming the bilateral agreement between the U.S. and Brazil assures that each country will engage in mutual cooperation in the application of antitrust laws).

12. *See* Guzman, *Federalism*, *supra* note 11, at 144 n.5 (identifying other nations that have entered into bilateral agreements with the U.S.).

13. *See* MARGARET R. KELLY, ISSUES AND DEVELOPMENTS IN INTERNATIONAL TRADE POLICY 12 (International Monetary Fund 1988) (referencing the bilateral agreement between the United States and Mexico and the consultation mechanisms for governing trade); *see also* Guzman, *Federalism*, *supra* note 11, at 1144–45 (discussing bilateral agreements and the sharing of information because the actions of the nations overlap); *see also* Sabrina Haake, Comment, *Antitrust in the United States and European Community: Toward a Bilateral Agreement*, 2 IND. INT'L & COMP. L. REV. 473, 510 (1992) (noting that an important feature of bilateral agreements is the information sharing requirement).

14. *See* MARTYN D. TAYLOR, INTERNATIONAL COMPETITION LAW: A NEW DIMENSION FOR THE WTO? 108 (2006) (mentioning that the similarity between nations and the confidence between them will increase the occurrence of bilateral agreements).

15. *See id*. at 116 (referencing the six important elements of a bilateral agreement); *see also* Mitsuo Matsushita, *International Cooperation in the Enforcement of Competition Policy*, 1 WASH. U. GLOBAL STUD. L. REV. 463, 468 (2002) (outlining the six factors that are important to most international bilateral agreements); *see also* Brian K. Peck, Comment, *Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution*, 35 SAN DIEGO L. REV. 1163, 1187 (1998) (enumerating the main objectives of bilateral agreements and the six factors important to these agreements).

information that could warrant enforcement activity by the other.[16] If an investigation commences, information exchange provisions mandate the sharing of confidential and commercially sensitive information relating to the entities under investigation.[17] Co-operation obligations and consultation provide for mutual investigative assistance to the fullest extent of the nations' laws, interests, and available resources.[18] Negative comity provisions seek to mitigate overregulation during a merger investigation by requiring an enforcing nation to consider any adverse affects of its regulatory actions on the other affected nation, and "include[s] an implied commitment for the affected nation not to act unilaterally, via extra-territorial application of its competition laws" without prior consultation and consideration of the other nation.[19] Finally, bilateral agreements provide for positive comity provisions that seek to mitigate underregulation by requiring an enforcing nation to consider any requests for enforcement

16. *See* Symposium, *A Taxonomy of International Competition Cooperation Provisions*, Centre for Economic Policy Research, 29 (Dec 9–10, 2005) (stressing the notification provision in the bilateral agreement between the European Union and Chile regarding information exchange and competition matters.); *see also* Carlos Di Ponio, *Competition, Cooperation, and Conflict: An Assessment of the Extraterritorial Application and Enforcement of Competition Laws in Canada in the United States*, 13 MICH. ST. J. INT'L L. 283, 298 (2005) (stating that the bilateral agreement between the United States and Canada required that the antitrust authorities notify the other side if their actions could affect the other nation's interest); *see also* Spencer W. Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 365 (1997) (informing that the 1995 agreement between the United States and Canada contains notification provisions when the action of one party affects the other party).

17. *See* Spencer W. Waller, *Antitrust and American Business Abroad*, *in* ANTITRUST & AMERICAN BUS. ABROAD § 1:10 (3d ed.) (illustrating the importance of the language of the antitrust agreements and the means for dealing with confidentiality will determine the effectiveness of the Antitrust Division of the FTC); *see also* Organization for Economic Co-operation and Development [OECD], *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, C(98)35/FINAL, at 2, March 25, 1998, *available at* http://strategis.ic.gc.ca/pics/ct/1998oecd_hccrec.pdf (asserting that there are great benefits to parties sharing confidential investigatory information); *see also* Nodirbek Ormonov, *Exchange of Information in the Enforcement of Antitrust Laws*, 6 ASPER REV. INT'L BUS. & TRADE L. 343, 357 (2006) (mentioning the importance of member countries sharing information but also being aware of the importance of confidentiality).

18. *See* Conference on Competition Policy in the Global Trading System: Perspectives from Japan, the United States, and the European Union, *Improving Bilateral Antitrust Cooperation*, June 23, 2000 (mentioning that the antitrust cooperation agreements between the United States and Canada allow for mutual investigative practices across the borders); *see also* Philippe Brusick et al., *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, UNCTAD/DITC/CLP/2005/1 (2005), *available at* http://www.unctad.org/en/docs/ditcclp20051_en.pdf (explaining that examples of what cooperation can provide is investigative assistance between nations); *see also* Simon J. Evenett et al., *International Cartel Enforcement: Lessons from the 1990's* 20 (World Bank Policy Research, Working Paper No. 2680 2001) (emphasizing that in the 1999 agreement between the United States and Australia, either country can ask for investigative assistance from the other).

19. *See* TAYLOR, *supra* note 14, at 116 (explaining the notion of negative, or traditional, comity is a valuation method that seeks to analyze the benefits and drawbacks of applying either domestic or foreign laws to a given antitrust regulatory scheme, the idea being respect for the effects of domestic jurisdictional enforcement of antitrust law on foreign nations and markets. Ideally, nations will not assert their jurisdiction over certain cases in an effort to mitigate potential international effects on a given market).

by an affected nation.[20] As a result of these provisions, "bilateral agreements have proved valuable in lessening the differences between the nations in the application of their competition laws while creating an environment conducive to cross-border competition law co-operation."[21]

Aside from bilateral agreements, the last few decades have seen a rise in multilateral and regional agreements as well.[22] Although not as prevalent as bilateral agreements, such agreements bring together a few nations under a unitary competition agreement.[23] More commonly referred to as either multilateral or plurilateral agreements, such agreements have been initiated within the context of the European Union (EU), in relation to the nations of Western Europe, and the Asia-Pacific Economic Cooperation (APEC), in relation to the nations of the Asia-Pacific region, among others.[24] These agreements have, thus far, proven to be relatively success-

20. *See* Agreement Between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws art. VI (3)(f), Sept. 23, 1991, State Dept. No. 91-216, KAV No. 3050 (codifying the consideration of enforcement activities between contracting parties); *see also* TAYLOR, *supra* note 14, at 116 (stating that positive comity, although similarly based on the idea of reciprocity and respect for foreign markets and nations, requires nations to actively seek the investigatory assistance of other nations when anticompetitive behavior extends into foreign territory); *see also* A. Neil Campbell & J. William Rowley, *The Internationalization of Unilateral Conduct Law—Conflict, Comity, Cooperation and/or Convergence?*, 75 ANTITRUST L.J. 267, 332 (2008) (suggesting that positive comity provisions are more relevant since competition laws are more prevalent).

21. *See* TAYLOR, *supra* note 14, at 122 (asserting that bilateral agreements create more uniform competition laws).

22. *See* Garrick L.H. Goo, *Deregulation and Liberalization of Air Transport in the Pacific Rim: Are They Ready for America's "Open Skies?"* 18 U. HAW. L. REV. 541, 558 (1996) (providing that multilateral agreements have grown gradually and are becoming increasingly successful); *see also* Inaamul Haque, *Doha Development Agenda: Recapturing the Momentum of Multilateralism and Developing Countries*, 17 AM. REV. INT'L L. REV. 1097, 1104 (2002) (illustrating that the GATT introduced the multilateral system); *see also* John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the Two*, 44 VA. J. INT'L L. 229, 233 (2003) (commenting that multilateral agreements are preferred over international law).

23. *See* Haque, *supra* note 22, at 1104 (defines multilateralism as being based on cooperation, equal rights, non-discrimination and participation as equals between countries); *see also* Elisabeth T. Jozwiak, *Worms, Mice, Cows and Pigs: The Importance of Animal Patents in Developing Countries*, 14 NW. J. INT'L L. & BUS. 620, 638 (1994) (emphasizing that multilateral agreements create more uniformity than bilateral agreements); *see also* McGinnis, *supra* note 22, at 384 (positing that multilateral agreements are appropriate when there will be gains to all parties involved that could not be achieved if each acted individually).

24. *See* TAYLOR, *supra* note 14, at 122 (reiterating the different types of plurilateral initiatives). Examples of multilateral agreement initiatives include the United Nations Conference on Trade and Development (UNCTAD), Inter-governmental Group of Experts on Competition Law and Policy, the Organization for Economic Co-operation and Development (OECD), Committee on Competition Law and Policy, and the World Trade Organization (WTO) Working Group on the Interaction Between Trade and Competition Policy; *see also* Thomas C. Fischer, *A Commentary on Regional Institutions in the Pacific Rim: Do APEC and ASEAN Still Matter?*, 13 DUKE J. COMP. & INT'L. L. 337, 365 (2003) (showing APEC provides for multilateral agreements); *see also* Sharon E. Foster, *Untangling the Web of International Competition Law*, 107 DICK. J. INT'L. L. 775, 782 (2003) (illustrating how multilateral agreements are influenced by European Union laws).

ful given the similar competition goals and policy motives of the respective regions.[25] The APEC agreement seeks to "promote four overriding core principles of non-discrimination, comprehensiveness, transparency and accountability."[26] The basis of the agreement is to strengthen the bilateral network of agreements among the nations of the Asia-Pacific region, and

> (1) address anti-competitive behaviour by implementing "competition policy to protect the competitive process"; [(2)] foster confidence and build capability in the application of competition policy by building expertise in its competition authorities and adequately resourcing these authorities; [(3) and] develop effective means of co-operation between APEC competition authorities. . . .[27]

Generally, the success of such agreements is due, in part, to the diversity of the region coupled with a low to moderate degree of economic integration.[28] Although complete harmonization of competition policies is premature,[29] cooperation in enforcement activity and a moderate convergence of the nations' relative competition policies has proven rather effective

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25. *See* M. Ulric Killion, *Chinese Regionalism and the 2004 Asean-China Accord: The WTO and Legalized Trade Distortion*, 31 N.C. J. INT'L L. & COM. REG. 1, 40 (2005) (commenting that regionalism is a beneficial type of agreement second to multilateralism); *see also* Eric M. Pedersen, *APEC: What Future Course of Action Should It Pursue?* 16-SUM CURRENTS: INT'L TRADE L.J. 31, 32 (2008) (explaining that a regional agreement was necessary and a proper fit for APEC due to the countries' policies); *see also* Byung-Woon Lyou, Note, *Building the Northeast Asian Community*, 11 IND. J. GLOBAL LEGAL STUD. 257, 259 (2004) (asserting that APEC has both multilateral and regional characteristics and inferring that its success is derived from the economic benefits provided by the agreement).

26. *See* MARTYN D. TAYLOR, INTERNATIONAL COMPETITION LAW: A NEW DIMENSION FOR THE WTO? 124 (2006), (quoting Taylor's view on the core principles promoted by the APEC Competition Principles).

27. *See id*. (quoting the three major objectives APEC nations must accomplish to implement certain core principles); *see also* ASIA-PACIFIC ECONOMIC COOPERATION [APEC], THE AUCKLAND CHALLENGE: APEC LEADERS' DECLARATION (1999), *available at* http://www.apec.org/apec/leaders__declarations/1999.html [hereinafter APEC, AUCKLAND] (detailing several key factors to a successful agreement, including developing means of cooperation between APEC authorities); *see also* APEC, APEC PRINCIPLES TO ENHANCE COMPETITION AND REGULATORY REFORM: OPEN AND COMPETITIVE MARKETS ARE THE KEY DRIVERS OF ECONOMIC EFFICIENCY AND CONSUMER WELFARE (1999), *available at* http://www.apec.org/apec/leaders__declarations/1999/attachment_-_apec.html (noting that APEC endorses several principles, including addressing anti competitive behavior, fostering confidence and building capability in the application of competition policy, and developing effective means of cooperation between competition authorities in APEC).

28. *See* TAYLOR, *supra* note 26, at 124 (stating that diversity and economic integration are partly responsible for the success of this type of agreement); *see also* William A. Kerr et al., *Regional Trade Blocs in the Global Economy: The EU and ASEAN*, 32 N.Y.U. J. INT'L L. & POL. 1200, 1200–1 (2000) (commenting generally that regional trade agreements are "more or less successful" because of their economic qualities); *see also* Pedersen, *supra* note 25, at 36–37 (asserting that APEC's success is related to its member's economies working together towards achieving their goal).

29. *See* TAYLOR, *supra* note 26, at 72 (The APEC region is highly diverse and "exhibit[s] a diversity of cultures, institutions, social and economic policies, and stages of economic development.").

in the region.[30] Since the early 1990s, APEC committees have presented and subsequently adopted a number of regional cooperation initiatives with respect to competition policies.[31] The APEC Eminent Person Group outlined an initial vision and plan and has since promulgated the acceptance of a variety of "action agendas" in Osaka (1995), Manila (1996), and Auckland (1999).[32] Detailing the proposals and recommendations for the improvement of competition policy at APEC conventions has allowed the issue to rise to the forefront of regional debate, "culminating with the adoption of and implementation of the APEC Competition Principles."[33] Additionally, as opposed to alternative attempts at the harmonization of competition law in other regions, the APEC Principles focused, in large part, on assisting member nations with effective and efficient institution building so as to ease the cooperation and integration process.[34]

The success of the EU agreement, on the other hand, is a factor of the region's cohesiveness and willingness to succumb to a supranational authority with respect to antitrust policy.[35]

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30. *See id*. (inferring that the adoption of effective competition policies and competition policy cooperation has led to the positive effect of the region's agreement); *see also* Alden F. Abbott, *Competition Policy and Its Convergence as Key Drivers of Economic Development*, 28 MISS. C. L. REV. 37, 49–50 (2008) (acknowledging the need for member countries of regional agreements to further the practical adoption of competition principles while embracing the already effective competition policy convergences of such agreements); *see also* Greg J. Bamber, *How Is the Asia-Pacific Economic Cooperation (APEC) Forum Developing? Comparative Comments on APEC and Employment Relations*, 26 COMP. LAB. L. & POL'Y J. 423, 444 (2005) (commenting that while APEC's focus on economic cooperation has been effective, it is necessary to focus on social cooperation).

31. *See* TAYLOR, *supra* note 26, at 123 (discussing the historic development and implementation of APEC regional competition initiatives); *see also* C. Fred Bergsten, *APEC and World Trade: A Force for Worldwide Liberalization*, 73 FOREIGN AFF. 20, 20–22 (1994) (noting the substantive results of APEC's efforts to develop and implement regional competition agreements); *see also* Fisher, *supra* note 24, at 342–52 (providing extensive detail on the history of APEC's development and initiatives throughout the 1990s).

32. *See* TAYLOR, *supra* note 26, at 123 (detailing the strategic plan adopted for APEC to establish a regional cooperation framework with regard to competition law); *see also* APEC, APEC ECONOMIC LEADERS' DECLARATION FOR ACTION, ¶¶ 5–6 (1995), *available at* http://www.apec.org/apec/leaders__declarations/1995.html (setting forth the action agenda adopted during the meeting in Osaka, Japan); *see also* APEC, APEC ECONOMIC LEADERS' DECLARATION: FROM VISION TO ACTION, ¶¶ 5–10 (1996), *available at* http://www.apec.org/apec/leaders__declarations/1996.html (discussing the implementation of the Osaka action plan and additional regional initiatives adopted at the Manila conference).

33. *See* TAYLOR, *supra* note 26, at 123 (explaining the genesis of the competition principles); *see also* APEC, Auckland, *supra* note 27, at ¶¶ 4–6 (establishing the non-binding competition principles to be followed by APEC nations); *see also* Arthur Grimes, *APEC Competition Principles: Application to Financial Services*, 13 JAPAN & WORLD ECON. 95, 95–96 (2000) (noting the adoption of the APEC competition principles and applying them to the financial services industry).

34. *See* TAYLOR, *supra* note 26, at 123 (suggesting that rather than pursue harmonization as a goal of competition laws among heterogeneous nations, APEC has encouraged policies of convergence and enforcement with a by-product of that being greater institution and capacity building); *see also* Fisher, *supra* note 24, at 342–52 (discussing the derivative focus on capital investment into technology, improved labor standards, and environmental issues among APEC countries); *see also* Shujiro Urata, *Competition Policy and Economic Development in East Asia*, 1 WASH. U. GLOBAL STUD. L. REV. 15, 33 (2002) (asserting that the APEC principles of competition encourage capacity building in member nations).

35. *See* TAYLOR, *supra* note 26, at 123 (attributing the success of competition laws of the European Union to their supranational standing); *see also* MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 192 (2d ed. 2001) (using the European Union as a prime example of the effectiveness of supranational competition laws); *see also* H. Thomas Hefti, *European Union Competition Law*, 18 SETON HALL LEGIS. J. 613, 614–17 (1994) (discussing the historical development of the European Union and the major treaties that contributed to its political integration).

Rather than foster an APEC-style network of enhanced bilateral agreements, "the most significant feature of EU competition law is that it has a supranational status in the form of a 'higher law' that overrides national competition laws."[36] After the ratification of the Treaty of Rome in 1957,[37] the states of the European Economic Community implemented into their respective national laws a common set of competition provisions, commonly known as Article 81 and Article 82 of the Treaty.[38] Although these articles were supplemented by the EC Merger Regulation in 1989,[39] the main goals of the EU competition agreement remain the same:

> Article 81 prohibits as incompatible with the common market any agreements, decisions by associations and concerted practices which affect trade between the EC member states and which have as their common object or effect the prevention, restriction or distortion of competition within the common market [and] Article 82 prohibits any abuse of a dominant position within the common market in so far as it affects trade between member states.[40]

The success of this agreement is based, in large part, on "the high degree of legal and economic integration, [thereby making a] . . . supra-national competition law . . . possible."[41] Generally speaking, however, "plurilateral instruments need not be regional in application, and could be based . . . on common interests between like nations . . . [and] multilateral instrument[s] need not be comprehensive and could selectively regulate particular sectors or markets within the international economy."[42]

Part II: Case Analysis: GE-Honeywell, Boeing-McDonnell Douglas, and AOL-Time Warner

A clear illustration of the successes and drawbacks inherent in the harmonization of competition laws at an international level requires a case analysis in an effort to provide practical

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36. *See* TAYLOR, *supra* note 26, at 123 (asserting that the European Union's ability to transmit supranational authority to its antitrust laws is the most important feature of those laws).

37. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (establishing that the treaty for the European Economic Community was signed in Rome).

38. *See id*. at art. 81-82 (mandating that member parties shall implement national efforts to reduce tariff and trade costs).

39. The 1989 addendum to the Articles, known as the EC Merger Regulation, had, as its goal, the implementation of a common regulatory framework to grapple with large merger transactions affecting any single EU market that required the approval of the European Commission before the merger could be deemed valid. *See* Council Regulation 4064/89, Preamble, On the Control of Concentrations Between Undertakings, 1985 O.J. (L257) 90 (EEC) (stating that the objective underlying the Merger Regulation is the establishment of a intra-European regulatory scheme).

40. *See* Treaty of Amsterdam Amending the Treaty on European Union, and Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 (amending and modifying Articles 81 and 82 of the EEC Treaty).

41. *See* MARTYN D. TAYLOR, INTERNATIONAL COMPETITION LAW: A NEW DIMENSION FOR THE WTO? 128 (2006) (noting that supranational competition law is more likely where there is a high level of legal and economic integration such as in the European Union).

42. *See id*. at 141 (observing that plurilateral instruments may be national interest based in addition to being region based).

insight into the effectiveness of current methods.[43] In turn, qualification of the aforementioned proposals to enhance the current bilateral agreement structure with the foregoing case analysis will illustrate the inadequacies prevalent in a unitary regulatory mechanism, as suggested by advocates for WTO involvement.

A. GE-Honeywell

The 2000 merger review of the $42 billion transaction of the General Electric-Honeywell merger that transpired between the EU and U.S. antitrust authorities, where General Electric (GE) agreed to acquire the total share capital of Honeywell International, Inc., was a quintessential example of the ramifications of jurisdictional conflict.[44] The Department of Justice approved the merger, whereas the European Commission proceeded to a Phase II investigation in an effort to halt the transaction.[45]

The merger was preceded by GE's intention to acquire Honeywell's production of avionic products, home, building, and industrial controls, automotive products, general power systems, and electronic and advanced materials in an effort to expand its $130 billion business in aircraft engines, household appliances, lighting, power generation, industrial controls, medical

43. *See* Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383, 428 (2007) (finding that business tends to favor harmonization of international competition laws because it would enhance procedural coherence and reduce transaction costs and uncertainty); *see also* A. Neil Campbell & J. William Rowley, *The Internationalization of Unilateral Conduct Law—Conflict, Comity, Cooperation and/or Convergence?*, 75 ANTITRUST L.J. 267, 267 (2008) (reasoning that the lack of understanding of different nations is the source of failure for harmonization of international competition laws); *see also* Harve A. Truskett, *"This Does Not Matter in Mexico": Mexico-U.S. Competition Law—Conflicts and Resolutions*, 30 HOUS. J. INT'L L. 779, 810 (2008) (suggesting that a solution to the failure of international competition's law is not to mandate uniform legal principles between two countries but to promote a certain level of cooperation).

44. *See* David J. Gerber, *Two Forms of Modernization in European Competition Law*, 31 FORDHAM INT'L L.J. 1235, 1254 (2008) (asserting that the highly publicized conflict over the proposed merger between General Electric and Honeywell led to pressure on the European Commission to move toward a convergence of Antitrust law); *see also* Daniel J. Gifford, *Trade and Tensions*, 15 MINN. J. INT'L L. 297, 312 (2006) (outlining the conflict between the European Commission and U.S. antitrust authorities which led to the demise of the proposed merger between General Electric and Honeywell was largely on the ground that the merged company could bundle products at a package price that none of its European competitors could meet); *see also* Kyle Robertson, *One Law to Control Them All: International Merger Analysis in the Wake of GE/Honeywell*, 31 B.C. INT'L & COMP. L. REV. 153, 153 (2008) (noting that the European Commission blocked a proposed merger between GE and Honeywell despite having similar antitrust laws because the merger was viewed as monopolistic).

45. *See* Matthew C. Franker, *Restoration: International Merger Review in the Wake of General Electric/Honeywell and the Triumphant Return of Negative Comity*, 26 GEO. WASH. INT'L L. REV. 822, 885–86 (2004) (reiterating that the European Commission initiated an investigation due to the horizontal overlaps that would reduce competition in the market, which will likely foreclose competition in those markets); *see also* Stefan Schmitz, *How Dare They? European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger*, 23 U. PA. J. INT'L ECON. L. 325, 351–52 (2002) (providing that the European Commission merger control provides for pre merger notification followed by Phase II investigation that finds serious doubts that the merger is compatible with the common market); *see also* Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust*, 29 SYRACUSE J. INT'L L. & COM. 263, 274 (2002) (providing that after the Department of Justice approved the merger, the European Commission initiated phase II of the investigation, which prompted the concerns of dominance in the market that would result in an entity exercising a dominant position over multiple markets).

imaging, and engineering plastics.[46] While U.S. authorities hailed the merger, aside from some minor concerns with respect to its relative effect on U.S. military helicopter engines and provision of maintenance of certain Honeywell engines, the European Union had general skepticism, fearing that the resulting conglomerate would severely restrict competition in the markets for jet engines, avionics, and non-avionic products:

> Concessions offered by GE were considered insufficient to address fears that GE's dominance in the market for jet engines, coupled with Honeywell's strength in the markets for avionic and non-avionic products would result in an entity exercising a dominant position in all three markets with considerable vertical integration and the ability to foreclose markets to competitors.[47]

Specifically, the Commission's 155-page statement of objections reflecting its concerns of the merger indicated its strong views as to the net conglomerate effects from the "bundling of jet engines with avionics and other airplane parts."[48] This "conglomerate" issue was the main fissure in its relations with the Department of Justice.[49] Whereas U.S. authorities mainly looked for fluctuation in the price of aviation technology as a result of the merger, the European Union was concerned with the competitive structure of the market, fearing that the

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46. *See* Eleanor M. Fox, *The European Court's Judgment in GE/Honeywell—Not a Poster Child for Comity or Convergence*, 2 SPG ANTITRUST 77, 78 (2006) (reasoning that GE, the largest manufacturer of engines for commercial jet aircrafts, wanted to merge with Honeywell because they were the leading supplier of certain avionic and non-avionic equipment used in jet aircrafts); *see also* Robertson, *supra* note 44, at 155–56 (analyzing that GE was the primary manufacturer of engines for commercial aircrafts and wished to acquire Honeywell because they were the leading supplier of certain equipment used in those aircrafts).

47. *See* Stevens, *supra* note 45, at 274 (asserting that the European Commission was prompted with concerns about the reduction of competition in the markets for jet engines); *see also* Paul Meller, *Europe Plans Full Inquiry On G.E–Honeywell Deal*, N.Y. TIMES, MAY 9, 2001 (commenting that the commissioner of the European antitrust regulators had concerns with bundling that could allow the conglomerate of GE and Honeywell to have a dominant position in the avionic market).

48. *See* Keith R. Fisher, *Transparency in Global Merger Review: A Limited Role for the WTO?*, 11 STAN. J.L. BUS. & FIN. 327, 262 (2006) (concluding that the proposed merger between GE and Honeywell resulted in a possible bundling of jet engines with avionics and other airplane parts); *see also* Franker, *supra* note 45, at 885–86 (proclaiming that the European Commission rejected the merger between GE and Honeywell because of the horizontal and vertical overlaps in business production of Commercial jet engines would likely result in the foreclosure of competition in those markets); *see also* Paul Jin, *Turning Competition on Its Head: Economic Analysis of the EC's decision to Bar the GE–Honeywell Merger*, 23 NW. J. INT'L L. & BUS. 187, 190 (2002) (rationalizing that the conglomerate effects of bundling engines with airplane parts would result in a dominant position in both markets).

49. *See* Jeremy Grant & Damien J. Neven, *The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict*, 1 J. COMPETITION L. & ECON. 595, 597 (2005) (establishing the "conglomerate" issue as the Commission's largest concern with the merger); *see also* Bob Davis & Anita Raghavan, *Competing Views: GE-Honeywell Deal Gets Caught Up in Diverging Histories*, WALL ST. J., July 3, 2001, at A.1 (distinguishing the European Union's stance on competitive markets from the United States' stance). *See generally* John R. Wilke, *U.S. Antitrust Chief Criticizes EU Decision to Reject Merger of GE and Honeywell*, WALL ST. J., July 5, 2001, at A.3 (reporting the United States' reaction to the European Union's rejection of the merger).

merger would lead to the marginalization of smaller firms in the aviation industry.[50] EU competition policy is centered on "consumer welfare with price being the important measure" and the assumption that "[i]f one firm gets larger while competitors, consequently, earn smaller shares of the market, the default assumption is the smaller firms . . . will stop trying to compete." On the other hand, the U.S. approach is based on the policy that "increased market power is not bad because fewer larger firms can create more efficient markets resulting in lower prices for consumers."[51]

In July 2001, the Commission declared the merger incompatible with its competition goals.[52] In blocking one of the largest industrial mergers in history, the EC based its findings on the following factors:

> 1) the nature of the jet engine market is characterized by high barriers to entry and expansion; 2) GE's incumbent position with many airlines; 3) its incentive to use GE Capital's financial power with customers; 4) its ability to leverage its vertical integration through GECAS; 5) the limited countervailing power of customers, and; 6) the weak position of its competitors.[53]

The U.S. Department of Justice, on the other hand, cleared the acquisition after determining that consumers were adequately protected.[54]

Although the merger block was significant, it came as no surprise:

> [t]he truth of the matter is that it was only a matter of time before the different merger control regimes in Europe and the United States would arrive at

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50. *See* Barbara C. George et al., *Increasing Extraterritorial Intrusion of European Union Authority into U.S. Business Mergers and Competition Practices: U.S. Multinational Businesses Underestimate the Strength of the European Commission from G.E.-Honeywell to Microsoft*, 19 CONN. J. INT'L L. 571, 591 (2004) (quoting the Commission's concern that the merger would lead to a General Electric-Honeywell domination over the industry).

51. *See id*. at 588–89 (contrasting the European Union's and United States' views on competition policies).

52. *See* William Drozdiak, *European Union Kills GE Deal*, WASH. POST, July 4, 2001, at A.1 (announcing the European Union rejected the merger between General Electric and Honeywell); *see also Competing Competition Policies*, ECONOMIST, Dec. 11, 2001, at 1 (recalling how the merger between General Electric and Honeywell was not approved). *See generally* Davis & Raghavan, *supra* note 49 (outlining the history that led to the European Union's stance on competition and rejection of the merger).

53. *See* George et al., *supra* note 50, at 593 (listing the Commission's reasons for rejecting the merger). *See generally* Evelyn Iritani, *U.S. Companies Taking Heed of EU*, L.A. TIMES, Mar. 2, 2002, at C1 (labeling the European Union's rejection of the merger as an example of the European Union's growing power in business competition and trade); *see generally* Chris Marsden, *U.S. and Europe Split on GE Takeover of Honeywell*, WORLD SOCIALIST WEB SITE, June 21, 2001, http:www.wsws.org/articles/2001/jun2001/gec-j21.shtml (summarizing the events leading up to the European Union rejecting the merger).

54. *See* STEPHEN D. COHEN ET AL., FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY 207 (2003) (explaining that since the products of GE and Honeywell were complementary and the companies financially healthy, the merger would benefit consumers by way of lower prices); ; *see also* Eric S. Hochstadt, *The Brown Shoe of European Union Competition Law*, 24 CARDOZO L. REV. 287, 295–97 (2002) (asserting that the goal of U.S. antitrust law is the maximization of consumer welfare and that this principle was dominant with respect to the GE-Honeywell merger approval); *see also* Thomas L. Ruffner, *The Failed GE/Honeywell Merger: The Return of Portfolio-Effects Theory?*, 52 DEPAUL L. REV. 1285, 1315–16 (2003) (stating that the Department of Justice regards access to cheaper capital as efficiency which would translate into innovation and cheaper prices).

> different results for the same merger. The problem of having different merger control regimes in two of the world's largest economies has simply been dormant for a long time.[55]

The policy divergence is a factor of the European Union, generally, favoring competition, and the United States favoring consumers. Although the European Union and United States both consider competition and consumer protection in merger evaluation, the priority scheme differs: "European law acknowledges the importance of consumer protection, but by far does not award it the position it has in the United States today."[56] Specifically, following the Chicago–Supreme Court debate during the 1980s, "U.S. law finally moved away from the protection of small competitors and toward a focus on consumer welfare."[57] The European Union, however, has maintained its focus on what is known as the "market dominance" theory, "ask[ing] whether or not a merger will lead to the creation of a dominant position" and, thereby, significantly impact smaller businesses.[58]

B. Boeing-McDonnell Douglas

A similarly striking clash between U.S. and EU authorities arose during the proposed acquisition of McDonnell Douglas by Boeing on December 15, 1996.[59] As noted in the merger analysis of GE-Honeywell in the previous section, the United States focused on the aggregate effect on prices, while the European Union focused on a broader array of potential side effects, including its detrimental affect on other, albeit smaller, manufacturers of commercial and mili-

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55. *See* Schmitz, *supra* note 45, at 540 (asserting that the merger block in the European Union reflected a broader doctrinal difference between the European Union and the United States with respect to merger control regimes); *see also* Mario Monti, *Antitrust in the US and Europe: A History of Convergence*, Speech presented at the General Counsel Roundtable of the American Bar Association (Nov. 14, 2001), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/540&format=HTML&aged=0&language=EN&guiLanguage=en (elaborating upon the merger control regimes of the United States and the European Union).

56. *See* Stefan Schmitz, *How Dare They? European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger*, 23 U. PA. J. INT'L ECON. L. 325, 550 (2002) (stressing that European law places less of an emphasis on consumer protection than the United States in the context of merger analysis).

57. *See id*. at 548 (emphasizing the shift in merger emphasis in the United States from small competitors to consumers); *see also* Hochstadt, *supra* note 54, at 295 (asserting that the goal of U.S. antitrust law is the maximization of consumer welfare); *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 1992 (Apr. 2, 1992) (revised Apr. 8, 1997), *available at* http://www.usdoj.gov/atr/public/ guidelines/hmg.htm (elaborating upon the criteria and considerations under which horizontal mergers are to be assessed).

58. *See* Schmitz, *supra* note 56, at 544 (explaining the European Union's "market dominance" theory with respect to mergers).

59. *See* DONALD DEPAMPHILIS, MERGERS, ACQUISITIONS, AND OTHER RESTRUCTURING ACTIVITIES 106 (Academic Press 2008) (referring to the confusion felt by GE and Honeywell when the U.S. and EC antitrust authorities took different approaches when reviewing the merger); *see also* Amy A. Karpel, *The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S.-EU Cooperation in the Merger Field*, 47 AM. U.L. REV. 1029, 1062 (1998) (asserting that the Agreement limits its own effectiveness when there is fundamental disagreement between the antitrust authorities); *see also* Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust*, 29 SYRACUSE J. INT'L L. & COM. 263, 265–66 (2002) (explaining that the history of the Boeing/McDonnell Douglas "fiasco" began when the commission initiated a Phase II investigation into the acquisition).

tary aircraft equipment.[60] Because both U.S. corporations had publicly traded shares, the review involved the EU Commission along with the Federal Trade Commission, given the potential of the new conglomerate enterprise of Boeing-McDonnell Douglas to adversely impact the third largest aircraft manufacturer, Airbus, operated almost exclusively under the auspices of the European Union.[61] From the perspective of Boeing executives, "the merger was seen as creating a better balance between defense and commercial aircrafts [and] . . . was also viewed as a means of increasing Boeing's ability to use McDonnell Douglas's capacity to help meet its . . . new demand for commercial aircraft."[62] The president of McDonnell Douglas concurred, noting that "the transaction [would] combine . . . a focused, broad-based aerospace company with extraordinary capabilities in commercial and military aircraft, defense and space systems."[63]

Boeing "operates in the commercial aircraft, defense and space market [and includes in its operations base] . . . 'the development, production and marketing of commercial jet aircraft' and '[d]efense and space operations includ[ing] research, development, production, modification and support of military aircraft and helicopter and related systems.'"[64] McDonnell Douglas, on the other hand, is mainly renowned for its defense equipment, being the "world's leading manufacturer of military aircraft."[65] Although the company maintains a steady output

60. *See* BRUNO ZANETTIN, COOPERATION BETWEEN ANTITRUST AGENCIES AT THE INTERNATIONAL LEVEL 93 (2002) (commenting on the difference between the U.S. and EC's vastly different conclusions despite considerations to similar factors); *see also* Hochstadt, *supra* note 54, at 384 (2002) (describing the EC's decision-making process as looking at the merger in an "offensive" manner); *see also* Pinar Karacan, *Differences in Merger Analysis Between the United States and the European Union, Highlighted in the Context of the Boeing/McDonnell Douglas and GE/Honeywell Mergers*, 17 TRANSNAT'L LAW 209, 211 (2004) (introducing the different approaches of the U.S. and the EC when reviewing the merger).

61. *See* Thomas L. Boeder, *The Boeing-McDonnell Douglas Merger*, *in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 139, 140 (Brookings Institution Press 2000) (suggesting that the EC's political issues were due to Airbus being the most successful example of postwar European economic cooperation); *see also* Crystal Jones-Starr, *Community-Wide v. Worldwide Competition: Why European Enforcement Agencies Are Able to Force American Companies to Modify Their Merger Proposals and Limit Their Innovations*, 17 WISC. INT'L L.J. 145, 168 (1999) (commenting that despite the merging parties' assertion that the Commission catered to the interests of Europe's Airbus, the EC claimed throughout its decision that it sought to ensure an even playing field); *see also*. Ruffner, at 1298 n. 87 (2003) (observing that a merger between the top two companies, Boeing and McDonnell Douglas, would have made it difficult for the third company, Airbus, to compete).

62. *See* Karacan, supra note 60, at 213 (discussing the U.S.'s more positive conclusion to the Boeing-McDonnell merger); see also Eric J. Stock, *Explaining the Differing US and EU Positions on the Boeing/McDonnell Douglas Merger: Avoiding Another Near-Miss*, 20 U. PA J. INT'L ECON. L. 825, 839 (1999) (asserting that Boeing could use its commercial offsets to bolster its international sales of military hardware).

63. *See* Karacan, *supra* note 60, at 213 (giving the statements of Harry Stonecipher, president of McDonnell Douglas, and Phil Condit, president of the Boeing Company).

64. *See* Commission of the European Communities, *Case IV/M.877, Boeing/McDonnell Douglas*, 1997 O.J. (C97) 2598 final, at ¶ 3(describing Boeing's role as one of the three largest manufacturers of commercial and military aircraft worldwide); *see also* Karacan, *supra* note 63, at 211 (reiterating the information expressed in the commission decision, but adding that Boeing had recently acquired Rockwell International's defense and space division prior to its merger with MDC).

65. *See id*. (setting forth the EU Commission's position that MDC was still the largest manufacturer of military aircraft worldwide). *But see* Jeffrey A. Miller, Comment, *The Boeing/McDonnell Douglas Merger: The European Commission's Costly Failure to Properly Enforce the Merger Regulation*, 22 MD. J. INT'L L. & TRADE 359, 361–62 (1999) (recalling that MDC began to suffer financially after losing its bid for a $200 billion contract with the U.S. Department of Defense and the United Kingdom for their new lines of military fighter aircraft). *But see* Stock, *supra* note 62, at 838 (explaining further MDC's losses were the result of a more global problem, caused by a significant reduction in the United States' budget for defense procurement).

of commercial jet aircraft, "[i]ts operations in military aircraft and missiles involved the design, development, production and support of the following products: military transport aircraft; combat aircraft and training systems; commercial and military helicopters and ordnance; missiles; satellites . . . communications, and intelligence systems."[66] In sum, Boeing was primarily interested in McDonnell Douglas's military aircraft sector, because its commercial aircraft market share was no longer a significant factor in its composite manufacturing scale.

In their respective analyses of the effects of the proposed merger, the United States and the European Union diverged on one primary point of comparison: the United States, taking note of Douglas's seemingly insignificant commercial aircraft manufacturing line compared to Boeing's, focused on the resulting price of commercial and military aircraft production post-merger along with Douglas's inability to compete in commercial large aircraft, whereas the European Union's analysis was centered around the resulting conglomerate effects of the commercial aircraft market share.[67] Prior to the European Union's analysis of the merger, the U.S. Department of Defense and Department of Justice indicated to the European Union that

> prohibiting the merger would harm U.S. defense interests . . . [and] a divestiture to a third party would likely be unsuccessful in preserving Douglas as a stand-alone manufacturer of new aircraft [resulting in an] . . . anticompetitive [situation] . . . because it would create a firm with the incentive and means to raise prices and diminish services with respect to the provisions of spare parts and Douglas' fleet.[68]

However, the Commission insisted on a competitor-effect analysis rather than the merger's effect on overall industry prices (U.S. analysis),[69] highlighting, as with the GE-Honeywell merger, that "the combination of the world's leading manufacturer of commercial aircraft with the world's leading manufacturer of military aircraft would result in a combination of two extremely large portfolios of intellectual property . . . [thereby] strengthen[ing] a dominant

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66. *See* Karacan, *supra* note 63, at 211 (listing some of the military enterprises for which MDC was most well known: including aircrafts, weapons, communications equipment and training programs); *see also* U.S. Centennial of Flight Commission, *McDonnell Douglas Corporation*, http://www.centennialofflight.gov/essay/Aerospace/McDac/Aero32.htm (last visited Mar. 9, 2009) (highlighting the most notable products and developments throughout MDC's history as a stand-alone enterprise).

67. *See Boeing/McDonnell Douglas*, *supra* note 64 at ¶¶ 54, 56–57, 71 (presenting the diverging views of the United States and E.U. on the issue of anticompetitive mergers within the context of the Boeing-McDonnell case); *see also* Karacan, *supra* note 60, at 212 (summarizing the European Union's position on the Boeing-McDonnell merger, calling it an anticompetitive transaction that would leave only two major competitors in the global aircraft-manufacturing industry); *see also* Karpel, *supra* note 59, at 1043–44 (discussing the boon which Boeing experienced as the result of its merger with MDC, including an increase in its global market share and its ability to induce former MDC customers to buy Boeing products).

68. *See Boeing/McDonnell Douglas*, *supra* note 64, at ¶ 12 (fronting the United States' core arguments for why the merger would not constitute an anticompetitive transaction, such as McDonnell's lack of market share in the commercial aircraft industry and its general inability to maintain itself as a stand-alone entity).

69. *See* Eleanor M. Fox, *Remedies and the Courage of Convictions in a Globalized World: How Globalization Corrupts Relief*, 80 TUL. L. REV. 571, 585 (2005) (illustrating that the focus of the European Commission was on the anticompetition effects the merger would have); *see also* Karacan, *supra* note 60, at 215 (stating that the focus of the United States in the merger was on future price effects); *see also* Karpel, *supra* note 59, at 1040 (acknowledging that the primary concern of the commission was the effect that the merger would have on competition).

position through which effective competition would be significantly impeded in the common market."[70] Although the European Union ultimately approved the merger, Boeing was forced to make significant concessions.[71]

The United States decided not to challenge the proposal.[72] Although the Federal Trade Commission voiced concerns, in agreement with the EU Commission, that the merger created concerns based on high market shares and extremely high barriers to entry (where, with respect to commercial aircraft, Boeing maintained a 60 percent market share and McDonnell Douglas less than 5 percent), the United States analyzed the merger from a price-effect perspective.[73] The FTC noted that since Boeing's and Douglas's exclusive dealing agreements accounted for only 11 percent of the market, there was little reason for concern about the merger's impact on

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70. *See Boeing/ McDonnell Douglas*, *supra* note 64, at ¶ 3; *see also* Karacan, *supra* note 60, at 215 (indicating that a merger between Boeing and McDonnell Douglas would hinder competition in the common market); *see also* Erin E. Holland, Comment, *Using Merger Review to Cure Prior Conduct: The European Commission's GE/Honeywell Decision*, 103 COLUM. L. REV. 74, 74–75 (2003) (asserting that the Commission's primary concern with the Boeing-McDonnell merger was its effect on competition).

71. *See* Stock, *supra* note 62, at 888–90 (listing the concessions that Boeing had to make in order for the European Commission to approve the merger); *see also* Kathleen Luz, Note, *The Boeing-McDonnell Douglas Merger: Competition Law, Parochialism and the Need for a Globalized Antitrust*, 32 GEO. WASH. J. INT'L L. & ECON. 155, 167 (1999) (demonstrating that in order for the EC to approve the merger, Boeing had to make several important concessions); *see also* Jeffrey A. Miller, *supra* note 65, at 401–2 (listing some of the concessions that Boeing had to make in order for the European Commission to approve the merger).

72. *See* Sarah Holloway, *International Merger Control: Globalization or Global Failure?*, 34 DENV. J. INT'L L. & POL'Y 353, 362 (2006) (noting that the United States announced on July 1, 1997 that it would not challenge the merger); *see also* Thomas P. O'Toole, Comment, *"The Long Arm of the Law"—European Merger Regulation and Its Application to the Merger of Boeing & McDonnell Douglas*, 11 TRANSNAT'L LAW. 203, 234 (1998) (stating the day that without attaching any conditions to it the United States approved the merger); *see also* Brian K. Peck, Comment, *Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution*, 35 SAN DIEGO L. REV. 1163, 1163–64 (1998) (describing how the United States quickly approved the Boeing-McDonnell merger and stating the opposition that came from the European Commission).

73. *See* Boeing/ McDonnell Douglas, *supra* note 64, at ¶ 3; *see also* Pinar Karacan, *Differences in Merger Analysis Between the United States and the European Union, Highlighted in the Context of the Boeing/McDonnell Douglas and GE/Honeywell Mergers*, 17 TRANSNAT'L LAW 209, 211 (2004) 214 (showing that the focus of the United States in approving and analyzing the merger was its effects on price); *see also* Thomas E. Kauper, *Merger Control in the United States and the European Union: Some Observations*, 74 ST. JOHN'S L. REV. 305, 339–40 (2000) (describing what the expected effects of the merger would be).

competitors such as Airbus.[74] In turn, U.S. authorities approved the merger as it was, without making any significant changes to the terms of the proposal.

In its concession agreement, Boeing agreed to a number of EU mandates prior to receiving the green light for the merger. First, Boeing agreed to maintain the commercial sector of McDonnell Douglas as a separate legal entity for 10 years, catering to Douglas's customer base needs without any detrimental impact to the quality or price.[75] Boeing also agreed to "license patents obtained under U.S. government-funded contracts to commercial aircraft manufacturers on a non-exclusive, reasonable royalty basis . . . and to supply know-how related to such patents."[76] Finally, Boeing conceded and agreed not to enter into any exclusive dealing agreements for 10 years, and "not to enforce the existing agreements with American, Delta and Continental Airlines."[77] Specifically, "[i]n Europe, the concern was that the merger would increase the leverage that can be exercised by a dominant firm . . . [whereas] [i]n the United

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74. *See* Karacan, *supra* note 73, at 215 (purporting that the United States had little reason for concern as to the merger's impact on competitors such as Airbus); *see also* Chairman Pitofsky and Commissioner Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney, 5 TRADE REG. REP. (CCH) P 24, at 295 (July 1, 1997) (providing insight to how Airbus affected the level of concern in conjunction to the merger); *see also* Stephen H. Dunphy, *Boeing Finds Itself in Dogfight with Europe over Market Share—FTC, EC Have Opposing Views of Outcome*, THE SEATTLE TIMES, July 15, 1997, at D1 (explaining how the contracts represented only about 11 percent of the market and therefore Airbus raises little concern); *see also* Michele Kayal, *The Boeing-McDonnell Merger Looks Very Different Through European Eyes*, JOURNAL OF COMMERCE, July 21, 1997, at 1A (demonstrating that the contracts accounted for only 11 percent of the global market and thus implying that Airbus was not a worthy competitor); *see also* Press Release, Statement of Commissioner Mary L. Azcuenega in the Boeing Co., File No. 971-0051, *available at* http://www.ftc.gov/opa/1997/07/ma.shtm (asserting that 11 percent of the global market was below any level for there to be concern). *See generally* Eric J. Stock, *Explaining the Differing U.S. and EU Positions on the Boeing/McDonnell Douglas Merger: Avoiding Another Near-Miss*, 20 U. PA J. INT'L ECON. L. 825 (1999) (discussing how the merger's impact on Airbus raised little concern due to the minimal percentage of the market that the Boeing and Douglas agreements held).

75. *See* Karacan, *supra* note 73, at 220 (enumerating the important concessions that Boeing agreed to prior to European Union's approval of the merger); *see also* Stacy L. Eberhart, Note, *Extraterritorial Merger Regulation: Policies, Problems and a Proposal Explored Through the Planned Dow Chemical and Union Carbide Merger*, 9 CARDOZO J. INT'L & COMP. L. 341, 357–58 (2001) (providing that the European Union approved the merger after Boeing agreed to numerous concessions); *see also* Amy A. Karpel, *The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S.-EU Cooperation in the Merger Field*, 47 AM. U.L. REV. 1029, 1062 (1998) 1034 (asserting that Boeing agreed to certain concessions prior to European Union's approval of the merger).

76. *See* David J. Feeney, *The European Commissions' Extraterritorial Jurisdiction over Corporate Mergers*, 19 GA. ST. U. L. REV. 425, 492 (2002) (proclaiming that Boeing agreed to license patents on a non-exclusive, reasonable royalty basis upon request by a commercial aircraft manufacturer); *see also* Karacan, *supra* note 73, at 220 (declaring that Boeing agreed to license patents procured under U.S. government-funded contracts on a non-exclusive, reasonable royalty basis and to supply know-how related to such patents); *see also* Stock, *supra* note 74, at 889–90 (explaining the agreement Boeing had to license patents or "know-how" via government funding).

77. *See* S.G. Corones, *The Treatment of Global Mergers: An Australian Perspective*, 20 NW J. INT'L L. & BUS. 255, 283 (2000) (addressing the agreement by Boeing to refrain from enforcing existing contracts it had with other airlines); *see also* Karacan, *supra* note 73, at 221 (stating that Boeing agreed not to enforce existing agreements with American, Delta, and Continental Airlines); *see also* Brian K. Peck, Comment, *Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution*, 35 SAN DIEGO L. REV. 1163, 1193 (1998) (establishing that Boeing agreed not to enforce existing agreements with American, Delta, and Continental Airlines).

States, the focus was on the effect of the merger on future prices and consumers."[78] In short, the review process between the United States and the European Union resulted in a clash of differing interests, thus causing the business in question to incur potential economic losses in the long run as a result of the various concessions mandated by E.U. authorities.

C. AOL-Time Warner

In early 2000, the America Online (AOL) and Time Warner agreed on a merger and announced an all-stock deal on January 10 of the same year.[79] Initially, there was little concern for the effects of the merger, at least from U.S. authorities, considering there was little overlap between the business models and sectors of the two companies.[80] The deal would align AOL's online services with Time Warner's "print publications, cable television lines and services."[81] Final approval for the merger required the ratification of several U.S. and EU regulatory bod-

78. *See* Karacan, *supra* note 73, at 221 (stating that Europe's concern was the impact of the merger on competitors whereas the United States' focus was the effect of the merger on future prices and consumers); *see also* Debra A. Valentine, *Jurisdiction and Enforcement: Building a Cooperative Framework for Oversight in Mergers—The Answer to Extraterritorial Issues in Merger Review*, 6 GEO. MASON L. REV. 525, 531 (1998) (positing that the United States was particularly concerned with the effect of the merger on future prices and consumers); *see also* David Snyder, Note, *Mergers and Acquisitions in the European Community and the United States: A Movement Toward A Uniform Enforcement Body*, 29 LAW & POL'Y INT'L BUS. 115, 138–39 (1997) (demonstrating the weight of importance the United States put on future prices in considering the merger).

79. *See* Aaron M. Wigod, *The AOL–Time Warner Merger: An Analysis of the Broadband Internet Access Market,* 6 J. SMALL & EMERGING BUS. L. 349, 351 (2002) (noting that AOL's stock-for-stock takeover of Time Warner created the largest ISP and entertainment company in the world); *see also* Hiawatha Bray, *New Technology Takes over the Driver's Seat,* BOSTON GLOBE, Jan. 11, 2000, at A1 (describing the merger as the first instance of an Internet media company taking over a traditional media company); *see also* Saul Hansell, *America Online Agrees to Buy Time Warner for $165 Billion; Media Deal Is Richest Merger*, N.Y. TIMES, Jan. 11, 2000, at A1 (reporting that the merger was the biggest in history).

80. *See* Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust*, 29 SYRACUSE J. INT'L L. & COM. 263, 270 (2002) (illustrating how the AOL/Time Warner merger, despite not raising traditional merger concerns, still has vertical and horizontal business dominance issues); *see also* Kathy Chen, *Few Major Firms File Objections to AOL Merger*, WALL ST. J., Apr. 27, 2000, at 1 (noting how the lack of comments submitted by rivals to federal regulators concerning the merger indicates a strong expectation of regulatory approval); *see also* Ianthe J. Dugan & Ariana E. Cha, *AOL to Acquire Time Warner in Record $183 Billion Merger; Few Obstacles Foreseen for All-Stock Deal*, WASHINGTON POST, Jan. 11, 2000, at A1 (reporting that the lack of overlap in terms of business should indicate an easy approval by regulators).

81. *See* James M. Turner, Note, *Mega Merger, Mega Problems: A Critique of the European Community's Commission on Competition's Review of the AOL/Time Warner Merger*, 17 AM. U. INT'L L. REV. 131, 133 (2001) (describing the merger as a combination of new and old media to create a next-generation media company); *see also* David Lieberman, *Merger Fulfills Needs of Each "Opportunity" Now AOL Time Warner Byword*, USA TODAY, Jan. 11, 2000, at B1 (stating how under the merger Time Warner would provide content while AOL provides the means of distribution); *see also* Martin Peers et al., *Media Blitz: AOL, Time Warner Leap Borders to Plan a Mammoth Merger*, WALL ST. J., Jan. 11, 2000, at A1 (describing the many potential synergies of the merger that would offer consumers a wealth of content through an unparalleled range of distribution channels).

ies, mainly the Department of Justice, the Federal Trade Commission, the Federal Communications Commission, and the European Union's Directorate-General for Competition.[82]

However little concern the merger stirred at first glance, the potential for anticompetitive waves were difficult to avoid: "AOL, with more than twenty-seven million customers, is the largest ISP in the world. Time Warner, with nearly thirteen million cable customers, is one of the largest fiber optic, broadband cable providers in the world."[83] Further, at that time, AOL had the largest ISP presence throughout Europe.[84] Similarly, Time Warner's European presence coupled with this merger raised concerns as to its increased integration with Bertelsmann, a German music company, thereby potentially providing Time Warner with preferential access to Europe's music catalogue.[85]

The resulting disjointed review process conducted by American and European authorities illustrated, yet again, "the fact that a merger will affect different territorial markets in different ways . . . necessitat[ing] differing (although not necessarily inconsistent) remedies when one jurisdiction elects to enforce extraterritorially its merger control regime."[86] As expected, the European Commission initiated its Phase II full investigation, approaching the merger from a much broader perspective than that of the United States. Primarily, the EU Commission

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82. *See* ALEC KLEIN, STEALING TIME: STEVE CASE, JERRY LEVIN, AND THE COLLAPSE OF AOL TIME WARNER 108 (2003) (illustrating how the required approval of the merger by numerous federal and international regulatory agencies was akin to obtaining a marriage license); *see also* Turner, *supra* note 81, at 133–34 (stating how the process of obtaining approval from the FCC, FTC, DOJ, and the European Union took over a year from the announcement of the merger); *see also* Julia Malone, *Regulatory Approval: Process Will Take Time, but Few Hurdles Seen for AOL–Time Warner Merger*, ATLANTA J. CONST., Jan. 11, 2000, at F4 (listing the numerous regulatory hurdles as time-consuming but not difficult).

83. *See* Turner, *supra* note 81, at 162–63 (reporting how the massive size of both merging companies immediately raises obvious concerns of potential anti-competitive behavior); *see also* AOL Fact Sheet, http://www.timewarner.com/corp/businesses/detail/aol/index.html (last visited Mar. 10, 2009) (proclaiming that AOL is still one of the largest Internet access companies in the United States); *see also* Time Warner Cable Fact Sheet, http://www.timewarner.com/corp/businesses/detail/time_warner_cable/index.html (last visited Mar. 10, 2009) (detailing Time Warner Cable's current position as the second-largest cable operator in the United States in terms of subscribers).

84. *See* Turner, *supra* note 81, at 162–63 (stating that the merger of AOL and Time Warner gave the company dominant control over the media industry); *see also* Derek E. Bambauer, *Solving the Inbox Paradox: An Information-Based Policy Approach to Unsolicited E-Mail Advertising*, 10 VA. J.L. & TECH. 5, 37–38 (2005) (announcing that AOL is one of the world's largest ISPs); see also Europa, *Commission Opens Full Investigation into AOL/Time Warner* (June 19, 2000), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/634 (discussing the investigation into the company to determine if they were using their leverage improperly).

85. *See* Stevens, *supra* note 80, at 271 (citing concerns of the EC Commission that Time Warner's relationship with Bertelsmann would allow it to dominate music sales over the Internet); *see also* Christa Corrine McClintock, Comment, *The Destruction of Media Diversity, or: How The FCC Learned to Stop Regulating And Love Corporate Dominated Media*, 22 MARSHALL J. COMPUTER & INFO. L. 569, 580 (2004) (noting how large corporations such as Time Warner and AOL have conglomerated and are squeezing out alternative media outlets); *see also* Douglas K. Schnell, Note, *All Bundled Up: Bringing the Failed GE/Honeywell Merger in from the Cold*, 37 CORNELL INT'L L.J. 217, 236 (2004) (discussing the concern over the Time Warner merger that would give them control over a third of Europe's market).

86. *See* Stevens, *supra* note 80, at 271–72 (critiquing that Time Warner's relationship with other music industries might give them an unfair advantage and leverage against other European corporations).

"focused on three major issues, the broadband Internet Service Provider (ISP) market, the online music catalogue, and the online music player industry."[87] Although the merger was eventually approved by the Commission because it ultimately "decided that a merged AOL/Time Warner threatened neither competition within the broadband ISP market . . . nor the online music industry,"[88] it nevertheless required the two companies to make significant concessions (far outweighing those imposed by U.S. authorities) with respect to the conglomerate's online music industry catalogue business ("requiring structural changes and procedural guarantees").[89]

The Federal Trade Commission and the Federal Communications Commission were primarily concerned with "concentration and loss of competition in the markets for residual broadband Internet access, transport services and television,"[90] thereby requiring, via a final consent order, the merged entity to "open its cable system to competing Internet Service Providers and refrain from interfering with the content of any material transmitted along its bandwidth by the independent ISPs."[91] The Commission concluded that the broadband market fears were unfounded and instead forced Time Warner to sever links with Bertelsmann.[92]

Part III: Proponents of Change

Arguments both in favor of a unitary and binding regulatory framework and against a supranational enforcement scheme run volumes. The difference between the two schools of

87. *See* Turner, *supra* note 81, at 162–63 (analyzing the EU Commission's investigation of the Time Warner merger, addressing its effect on the world's market as a whole); *see also* Eric S. Hochstadt, *The Brown Shoe of European Union Competition Law*, 24 CARDOZO L. REV. 287, 368 (2002) (examining the EU Commission's focus of their investigations into large mergers); see also, *Business, EU Hurdle to AOL, Time Warner Merger*, BBC NEWS, June 19, 2000, http://news.bbc.co.uk/2/hi/business/797558.stm (remarking on the European Union's investigation of the Time Warner merger and the areas that needed to be addressed).

88. *See* Turner, *supra* note 81, at 162–63 (determining that ultimately the commission approved the merger because it did not threaten fair competition or market shares).

89. *See* David S. Evans & Michael Salinger, *Competition Thinking at the European Commission: Lessons from the Aborted GE/Honeywell Merger*, 10 GEO. MASON L. REV. 489, 491 (2002) (explaining the different concessions on the merger sought by the FTC and the European Commission based on their differing competitive concerns); *see also* Turner, *supra* note 81, at 162 (quoting the Competition Commission's belief that without substantive changes in the merger, AOL-Time Warner would monopolize the online music catalog industry); see also Wigod, *supra* note 79, at 384 (detailing the strict concessions imposed on the merger that would prevent a monopoly of AOL-Time Warner in the Internet service market); *see also* David Schwab, *Rewriting the Media Universe—Proposed Merger of AOL and Time Warner Heralds New Order for the New Century*, STAR LEDGER, Jan. 11, 2000, at 3–4 (noting that the merger was subject to certain conditions and regulatory approvals).

90. *See* Stevens, *supra* note 80, at 272 (summarizing the FTC's complaint against the AOL-Time Warner merger).

91. *See* Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust*, 29 SYRACUSE J. INT'L L. & COM. 263, 274 (2002) (detailing the concerns of the consent order which the FTC obtained from AOL-Time Warner to refrain from interfering with independent internet service providers).

92. *See* Massimo Motta et al., *Merger Remedies in the European Union: An Overview*, 52 THE ANTITRUST BULL. 603, 621 n.51 (2007) (proclaiming the European Commission's goal of breaking the links between AOL and Bertelsmann in the AOL-Time Warner merger); *see also* Stevens, *supra* note 91, at 271 (explaining the European Commission's willingness to approve the merger conditioned on AOL-Time Warner's severance from Bertelsmann); *see also* Press Release, European Commission, *Commission Gives Conditional Approval to AOL/Time Warner Merger* (Oct. 11, 2000) (reporting the European Commission's approval of the AOL-Time Warner merger and discussing the concern about the possible monopoly on Internet music distribution).

thought is in the level of practicality of such proposals. It is easy to hypothesize a framework of a single multinational regulatory body that would monitor international antitrust enforcement based on a mutually agreed upon international antitrust agreement. The difficulty is in implementing the theory. Until we reach a level of international consensus on what constitutes optimal competition standards, such hypothetical proposals will remain premature. For that reason, proponents of maintaining the status quo converge on a practical regulatory framework that would enhance current cooperation agreements rather than do away with them.

Currently, more than 90 countries have antitrust laws and agencies, and about 20 more such agreements are in the drafting process.[93] Cooperation between these agencies in matters of multinational antitrust enforcement runs from informal communications to complex plurilateral antitrust agreements.[94] However, convergence on a common set of principles with regard to competition law and enforcement has yet to be realized.[95] Over the past few decades, a number of international organizations have attempted to draft a uniform agreement in an effort to streamline the antitrust review process and avoid overregulation, underregulation, and transactional costs, among other regulatory drawbacks.[96] These efforts have yet to produce a coherent and uniform agreement that would appease the political, social, and jurisdictional differences of interested nations, and align the seemingly inconsistent interests of the respective nations, as

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93. *See* Charles A. James, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address at the OECD Global Forum on Competition, *International Antitrust in the 21st Century: Cooperation and Convergence* (Oct. 17, 2001) *available at* http://www.usdoj.gov/atr/public/speeches/9330.pdf (discussing the widespread international creation of antitrust laws as an expression of the increasingly accepted respect for deregulation and competitive market forces).

94. *See* Edward T. Swaine, *International Coordination of Competition Policy: Does Global Antitrust Law Have a Future?*, 43 VA. J. INT'L L. 959, 972 (2003) (noting how the countries like the United States participate in bilateral agreements with foreign antitrust authorities); *see also* Dane Holbrook, Comment, *International Merger Control Convergence: Resolving Multijurisdictional Review Problems*, 7 UCLA J. INT'L L. & FOREIGN AFF. 345, 360 (2002) (explaining the three different types of agreements available to effectuate cooperation between agencies in matters of multinational antitrust enforcement).

95. *See* Wesley A. Cann, Jr., *Internationalizing Our Views Toward Recoupment and Market Power: Attacking the Anti-dumping/Antitrust Dichotomy Through WTO-Consistent Global Welfare Theory,* 17 U. PA. J. INT'L ECON. L. 69, 70 (1996) (commenting that the limited existence of antitrust policies inhibits the growth of global wealth and distribution); *see also* David P. Cluchey, *Competition in Global Markets: Who Will Police the Giants?*, 21 TEMP. INT'L & COMP. L.J. 59, 65 (2007) (revealing that a response to the differences in procedural requirements of competition laws has been to encourage harmonization of procedure and standards in the national law); *see also* D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 44 (2007) (highlighting the lack of analytical convergence on enforcement approaches in international antitrust efforts).

96. *See* Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383, 438 (2007) (concluding that the purpose of the article was to develop an accurate description of the failure of negotiating binding international antitrust agreements); *see also* Lucio Lanucara, *The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses*, 9 IND. J. GLOBAL LEGAL STUD. 433, 439 (2002) (critiquing the purely unilateral approach toward international antitrust issues); *see also* Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 649 (2001) (acknowledging the impact of cooperation agreements that improve the coordination of enforcement activities).

illustrated by the GE-Honeywell, Boeing-McDonnell Douglas, and AOL-Time Warner merger reviews.[97]

Despite the presence of myriad inconsistent antitrust agreements, many believe it is still a wise choice to place trust in the creation of a uniform international agreement in a multinational authoritative agency such as the World Trade Organization.[98] Others go even further and argue in favor of creating a new agency, similar in structure to the WTO, that would impart on all member nations a mandatory agreement.[99] Both proposals are premised on the basic notion that a formally imposed mandatory agreement is more likely to gain acceptance and result in antitrust uniformity as opposed to informal, "soft," agreements negotiated voluntarily among nations. Although both proposals are certainly not without their respective merits, the latter seems to be the rational choice for the next step toward international antitrust standards.[100]

First and foremost, competition policies around the world are predominantly offspring of their respective national interests. Although any given nation's competition law may transcend national borders during a multinational antitrust investigation, the substantive and procedural tenets of any national antitrust laws will invariably favor national over international interests:

> Under the aegis of competition policy, governments regulate producer choices, including decisions to cooperat[e] with other producers. Regulation of prices, marketing practices, and the array of products offered comes under competition policy. Notwithstanding the label, states do not necessarily invoke competition policy either to enhance competition or to maximize global welfare, much less consumer welfare. Competition policy, in practice as much as in theory, involves decisions about competition but does not

97. *See* Commission Regulation (EEC) 4064/89, Merger Procedure AOL/Time Warner, 2000, 24 (portraying the merger agreement between AOL and Time Warner Cable); *see also* Commission Decision 97/816, Boeing/ McDonnel Douglas, 1997 O.J. (L 336) 16–47 (EC) (declaring a concentration compatible with the common market and function of the EEA Agreement); *see also* Commission Regulation (EEC) 4064/89, Merger Procedure General Electric/ Honeywell, 2001, 13 (outlining the merger agreement between General Electric and Honeywell).

98. *See* MARTYN D. TAYLOR, INTERNATIONAL COMPETITION LAW: A NEW DIMENSION FOR THE WTO? 108 (2006) (explaining the need for the creation of a uniform international agreement with the WTO). *See generally* KEVIN KENNEDY, COMPETITION LAW AND THE WORLD TRADE ORGANIZATION: THE LIMITS OF MULTILATERALISM (Sweet and Maxwell 2001) (asserting that the inconsistency of international trade agreements would be cleared with a uniformed international agreement through multinational authoritative agencies).

99. *See* KENNEDY, *supra* note 99, at 258 (proposing a harmonized international competition law that includes minimum obligations all WTO members would be required to enact); *see also* Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142, 1144 (2001) (stating that the most effective way to achieve cooperation in international antitrust agreements is to utilize a form of bilateral agreements). *See generally* MAX PLANCK INST. FOR INTELL. PROP., COMPETITION AND TAX LAW (Josef Drexel ed., 2003) (discussing potential plans for a uniform, harmonized international code for antitrust and competition laws).

100. *See* TAYLOR, *supra* note 98, at 311–12 (reporting that many countries responded negatively to the mandatory, hard agreement proposed in the Munich Code aimed at creating a harmonious, international competition law); *see also* Paul Crampton & Milos Barutciski, *Post Privatization in the Americas: Competition Law Policy and the Alternatives: Trade Distorting Private Restraints: A Practical Agenda for Future Action*, 6 SW J. L. & TRADE AM. 3, 40 (1999) (positing that soft agreements are a necessary step for those countries with developing competition laws because they help create a familiarity and understanding of international cooperation).

> imply a preference for competitive markets. Support for a national champion, suppression of large-scale and efficient producers that threaten politically influential small producers . . . all represent competition. . . . [But] [e]ven if states could agree that efficiency-optimization of welfare-is the only legitimate objective of competition policy, agreement as to whether a particular regime advances or detracts from efficiency would remain elusive [because] [s]pecifying the optimal mix of competition and cooperation in a particular economic sector is inevitably controversial.[101]

As a result, and in the context of international merger review, we see an increasing number of conflicting and inconsistent merger review mechanisms: "Among the costs generated by the current noncooperative system are the effects of multiple regulators reviewing a single transaction (including redundant filing and reporting obligations), the risk of biased prosecutions based on the nationalities of the parties, and the impact of international activity on the substantive rules chosen by states."[102] That being said, it is certain that the current framework of cooperation agreements between nations is lacking in its ability to produce consistent results.[103] The viable approach, however, is a gradual transition toward strengthening current bilateral and multilateral agreements, rather than an overhaul of the current system.

A. Previous Attempts at Achieving International Competition Cooperation

The Havana Charter of 1948 attempted to create the International Trade Organization (ITO).[104] Although regulation of competition policies and merger reviews was not the primary objective of the drafters of the Charter, Article 46.1 provided a general framework of common principles by which each member nation would abide. Although the Charter was never

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101. *See* Paul B. Stephan, *Against International Cooperation, in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 67–69 (Richard A. Esptein & Michael S. Greve eds., 2004) (reviewing several different factors that often shape a nation's competition law); *see also* Daniel J. Gifford & Robert T. Kudrle, *Alternative National Merger Standards and the Prospects for International Cooperation, in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 210 (Daniel M. Kennedy & James D. Southwick eds., 2002) (suggesting that there are several factors and objectives that define and distinguish states' competition law policies).

102. *See* Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L L. 355, 99–100 (2004) (arguing that the application of numerous diverging trade policies to a single transaction has an overall negative effect on international trading activities).

103. *See* Joseph P. Griffin, *What Business People Want from a World Antitrust Code*, 34 NEW ENG. L. REV. 39, 39 (2000) (opining that as the number of different competition law schemes increases, the more likely inconsistent results become); *see also* Henriette Tielemans, Charles Lister & James R. Atwood, *One Step Forward, Another Step Back: Proposed Reforms of EC Competition Law*, 15 ANTITRUST 65, 68 (2000) (claiming that a decentralized international competition law scheme yields inconsistent results because of each nation's variation in resources and expertise). *See generally* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 226–62 (2001) (analyzing how disparate approaches to competition law create different results in judicial litigation).

104. *See* Havana Charter for an International Trade Organization, Mar. 24, 1948, U.N. CONFERENCE ON TRADE & EMPLOYMENT, FINAL ACT AND RELATED DOCUMENTS, U.N. Doc. E/Conf. 2/78, U.N. Sales No. 1948.II.D.4 (1948) (creating the International Trade Organization); *see also* JOSEPH WILSON, GLOBALIZATION AND THE LIMITS OF NATIONAL MERGER CONTROL LAWS 212 (2003) (stating that The Havana Charter was intended to create the International Trade Organization).

adopted, the attempt was a significant step toward harmonization of competition goals.[105] If established, the ITO would have mandated that

> [each] Member . . . take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade.[106]

The ITO was to have the positive duty to monitor and prevent anticompetitive conduct, requiring compliance from member nations in an effort to unify competition principles.[107]

Following the failed attempt at ratifying the Havana Charter, the United Nations made another attempt at the harmonization of international antitrust regimes in 1973 during the United Nations Conference on Trade and Development (UNCTAD).[108] Although the member states reached an agreement the following year, the proposed Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set) was not binding on member states and thus settled into history as yet another unsuccessful attempt at antitrust harmonization.[109] Despite this, the Set did "encourage . . . member nations to improve and enforce their national competition laws [and] . . . require[d] multinational enterprises to conform to the competition laws of the nations in which they operate [along with] . . . recommend[ing] cooperation among competition law enforcing agencies of Member states."[110]

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105. *See* Ioannis Lianos, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, 15 TUL. J. INT'L & COMP. L. 415, 419–20 (2007) (asserting that the Havana Charter of 1948 included provisions concerning restrictive business practices); *see also* Spencer W. Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 350 (1997) (indicating that although the competition rules of the Havana Charter were never adopted, the rules did address the substance and enforcement of competition law); *see also* Friedl Weiss, *From World Trade Law to World Competition Law*, 23 FORDHAM INT'L L.J. 250, 261 (2000) (providing that Article 46.1 of the Havana Charter required that each member nation prevent any business practice that restrains competition).

106. *See* Havana Charter for an International Trade Organization *supra* note 104, at art. 46 (asserting that all members shall take measures to prevent business practices that inhibit competition and the expansion of production or trade).

107. *See* Tony A. Freyer, *Restrictive Trade Practices and Extra Territorial Application of Antitrust Legislation in Japanese-American Trade*, 16 ARIZ. J. INT'L & COMP. L. 159, 166 (1999) (commenting that the formation of the International Trade Organization was an attempt to establish an international dispute resolution process for trade and antitrust issues); *see also* Shanker A. Singham, Symposium, *Shaping Competition Policy in the Americas: Scope for Transatlantic Cooperation?*, 24 BROOK. J. INT'L 363, 376 (1998) (maintaining that the International Trade Organization was authorized to take remedial actions if member nations failed to meet their obligations of preventing anticompetitive conduct).

108. *See* United Nations Conference on Trade and Development, U.N. Doc. TD/RBP/CONF/10 (1980), *reprinted in* 19 I.L.M. 813 (1980) (addressing the need to promote anti-competitive business practices among the international community).

109. *See* Lianos, *supra* note 105, at 416–17 (asserting that the Set did not have a binding effect); *see also* Joel Brandon Moore, Note, *The Natural Law Basis of Legal Obligation: International Antitrust and OPEC in Context*, 36 VAND. J. TRANSNAT'L L. 243, 265 (2003) (explaining that while the U.N. Review Conference declared the Set to be valid, it is still not legally binding).

110. *See* WILSON, *supra* note 104, at 213 (describing the requirements of the 1980 Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices).

In November 1997, the United States proposed the establishment of the International Competition Policy Advisory Committee (ICPAC).[111] Headed by the then-U.S. Attorney General Janet Reno and Assistant Attorney General for the Antitrust Division Joel Klein, the ICPAC issued a Final Report in February 2000 detailing recommendations for reforming transnational merger review.[112] The Committee suggested that an effective harmonization of merger review among the world's antitrust agencies requires three primary steps: "[i]ncreased transparency; [d]evelopment of disciplines to guide review of mergers with significant transnational and spill over effects; and [c]ontinued enhancement of cross-border cooperation."[113] Further, the Committee proposed additional merger review reforms to mitigate the transaction costs of inefficient review processes.[114] Specifically, the ICPAC suggested the provision of notification thresholds to screen out mergers "that are unlikely to generate appreciable anticompetitive effects in the reviewing jurisdiction."[115] Further, a two-stage review process was proposed to prevent unnecessary reviews of transactions that, although triggering the minimum threshold, would not be reviewed further if there is no harm to competition: "The two-stage review process would enable competition agencies to identify and focus on transactions that raise competition issues while allowing those that present no anticompetitive concerns to proceed expeditiously."[116] Additionally, ICPAC recommended specific review periods to mitigate lengthy review processes as well as setting forth guidelines for information requests: "Recognizing that there is a trade-off between the amount of information initially supplied and the time frame in which clearance is to be granted, the Advisory Committee recommended the option of a 'short-form long-form' for the notifying parties" where the short form would be used for mergers that do not raise anticompetitive concerns in the reviewing jurisdictions, and the long-form information requests would be applied to mergers that raise anticompetitive concerns.[117] Despite the viable and commendable recommendations and efforts of the Advisory Committee, how-

111. *See* INT'L COMPETITION POLICY ADVISORY COMM. TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, Final Report, ch. 1 (2000), *available at* www.usdoj.gov:80/atr/icpac/finalreport.htm (stating that Reno and Klein formed the Committee to examine the emerging global economic competition issues); *see also* Mark A. A. Warner, *After Seattle: Is There a Future for Trade and Competition Policy Rule-Making?*, 26 BROOK. J. INT'L L. 307, 319 (2000) (declaring that the Committee members included trade and competition policy scholars as well as people from both the legal and business communities).

112. *See* Int'l Competition Policy Advisory Comm. to the Attorney General and Assistant Attorney General for Antitrust, *supra* note 111 (describing the topics the Advisory Committee addressed from 1997 through 2000).

113. *See id.* (asserting that nations can keep transaction costs and conflicts to a minimum by focusing on these three areas in effectuating merger reviews).

114. *See id.* (discussing a way to increase the efficiency of the review process).

115. *See* JOSEPH WILSON, GLOBALIZATION AND THE LIMITS OF NATIONAL MERGER CONTROL LAWS 248 (2003) (describing the International Competition Policy Advisory Committee's plan to review and not allow mergers that result in anticompetitive effects).

116. *See id.* (describing the two-stage process for reviewing mergers that may result in anticompetitive effects).

117. *See* INT'L COMPETITION POLICY ADVISORY COMM. TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, *supra* note 111, at 157–58, (discussing the two different types of review processes); *see also* WILSON, *supra* note 115, at 248 (describing the "short-form long-form" methods to be used in reviewing mergers).

ever, the ICPAC did not take the extra step to appoint a regulatory body that would take on the task of implementing and overseeing the guidelines of the Final ICPAC Report.[118]

Yet another proposal to address the coordination and harmonization of antitrust laws came as a result of the work of several antitrust scholars at the Munich conference of the GATT-Multilateral Trade Organization.[119] The scholars published what became known as the Draft International Antitrust Code (DIAC), detailing "standards that addressed horizontal arrangements, vertical restrictions, mergers, and abuse of dominant position."[120] Although the DIAC was "more of an agreement than a code," it required member states to enact minimum antitrust review standards that would supplement domestic competition laws.[121] Going farther than the aforementioned ICPAC proposal, the Munich group suggested the establishment of an International Antitrust Agency (IAA) that would oversee and regulate the implementation of the agreement.[122] The IAA would have the

> [r]ight to ask for action by a national antitrust authority (NAA); [r]ight to bring action against NAA, and private parties before the national law courts; [r]ight to appeal even though it was not a party to the case in the first instance; and [r]ight to sue member country before the International Antitrust Panel where the member country breaches its obligations under the Code.[123]

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118. *See* WILSON, *supra* note 115, at 248 (discussing how there was no regulatory body appointed to oversee the final ICPAC Report); *see also* William S. Dodge, *International Litigation: A Symposium Honoring the Distinguished Career of Professor Russell J. Weintraub: An Economic Defense of Concurrent Antitrust Jurisdiction*, 38 TEX. INT'L L.J. 27, 39 (2003) (providing further commentary about the lack of impact the ICPAC Final Report will have on future mergers); *see also* Eleanor M. Fox, *Symposium—Competition Law in the New Millennium: Foreword: Mergers, Market Access and the Millennium*, 20 NW. J. INT'L L. & BUS. 203, 205 (Winter 2000) (describing the ICPAC Report's addressing of merger issues and a number of proposals to alleviate problems).

119. *See* WILSON, *supra* note 115, at 253 (listing group members who participated in drafting the code).

120. *See Special Report: International Antitrust Code Will Be Studied by GATT Members*, 65 ANTITRUST & TRADE REG. REP. (BNA) S-1 (1993) (enumerating general provisions and basic principles of the Draft International Antitrust Code); *see also* WILSON, *supra* note 115, at 253 (defining the basic structure of the Draft International Antitrust Code).

121. *See* HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 40.3d1 (2004) (discussing the background of the DIAC); *see also* Wilson, *supra* note 115, at 253 (2003) (noting that the format of the DIAC was more of an agreement than a code); *see also* Daniel J. Gifford, *The Draft International Antitrust Code Drafted at Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1, 4 (1997) (acknowledging that the DIAC sets out minimum standards with which member nations must comply).

122. *See Special Report: International Antitrust Code Will Be Studied by GATT Members*, *supra* note 120, at S-1 (providing the scope of the IAA's powers); *see also* WILSON, *supra* note 115, at 255 (stating that the IAA was founded based upon the Munich group's recommendation); *see also* Brian K. Peck, Comment, *Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution*, 35 SAN DIEGO L. REV. 1163, 1205–6 (1998) (outlining the broad powers the IAA would have).

123. *See Special Report: International Antitrust Code Will Be Studied by GATT Members*, *supra* note 120, at S-1 (1993) (detailing the scope of the IAA's authority); *see also* WILSON, *supra* note 115, at 256 (examining the powers that the IAA would be able to exercise).

Aside from procedural recommendations, the Munich group proposed several substantive rules as well, among them minimum thresholds in order to discount proposed mergers deemed not to have an "international dimension."[124] Specifically, mergers that either had "an aggregate worldwide turnover of all the undertakings concerned . . . [of] less than 0.1 per cent of the total GNP of the member country affected by the merger; or more than 90 per cent of the aggregate worldwide turnover of all the undertakings concerned made outside the territory of the member country affected by the merger," would not qualify for review based on anticompetitive ramifications.[125] Additionally, the Munich group "advocated enhancing global welfare instead of national welfare . . . recommend[ing] . . . that the national authorities . . . take into consideration relevant markets even beyond their territorial boundaries," thereby proposing that "where a merger is found by a national antitrust authority to be anti-competitive, the national authority may nevertheless clear the merger if justified by the overwhelming public interest of the member countries affected."[126] However, as noble as the intentions of the group may have been in drafting the DIAC, the proposed agreement and the requirement that member states cede their authority to the supranational IAA was a premature suggestion.[127]

The Organization for Economic Cooperation and Development (OECD), formed in 1961 as an economic enhancement structure among the member states, presents yet another forum that, over time, has made numerous attempts at coordinating international competition

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124. *See* WILSON, *supra* note 115, at 253 (explaining that the Antitrust Code an agreement to propose rules between the member states to enact minimum antitrust standards); *see also* Gifford, *supra* note 121, at 42 (stating that the Agreement provides for a special set of rules dealing with mergers and restructuring that seeks not to have anticompetitive effects but to provide for other economies and actually increase competition in new markets).

125. *See* WILSON, *supra* note 115, at 253 (quoting that the aggregate worldwide turnover of all the undertakings concerned is less than .1 percent of the GNP of the member country affected by the merger); *see also* Gifford, *supra* note 121, at 42 (arguing that the member states of the DIAC must abstain from specifying any minimum thresholds such as a specific percentage of shares or voting capital necessary to establish control which will in turn curb anticompetitive behavior).

126. *See* JOSEPH WILSON, GLOBALIZATION AND THE LIMITS OF NATIONAL MERGER CONTROL LAWS 253 (2003) (clarifying that because the Code would be applicable only to mergers with an international dimension, the Code accounted for the public interest of the member countries affected); *see also* Gifford, *supra* note 121, at 50 (enunciating that any of the requirements may be circumnavigated in the event that there is national public interest and does not unreasonably harm the parties).

127. *See* A. Neil Campbell & J. William Rowley, *The Internationalization of Unilateral Conduct Law—Conflict, Comity, Cooperation and/or Convergence?*, 75 ANTITRUST L.J. 267, 334 (2008) (reinstating the premise that the intentions of the drafters were indeed noble as it was an early attempt by a group of academics to propose a harmonized regime and set some "minimum standards"); *see also* Ryan Marth, Note, *The Canadian Middle Road: Balancing Efficiency and Sovereignty in the Age of Multijurisdictional Merger Review*, 12 MINN. J. GLOBAL TRADE 221, 224 (2003) (focusing on the theory that the DIAC was drafted by a group of academics whose intentions were altruistic in creating a plurilateral trade agreement).

policy.[128] The OECD's motto is that it seeks to "improve efficiency, hone market systems, expand free trade and contribute to development in industrialized as well as developing countries."[129] The OECD has, since its establishment, made numerous attempts at "promulgat[ing] . . . a number of nonbinding recommendations to improve antitrust coordination and foster harmonization" including recommendations proposed in 1967, 1973, 1979, 1986, 1995, 1998, and 2005.[130]

In 1995, the OECD issued a proposal on practical considerations for anticompetitive practices, with its goal as "strengthen[ing] co-operation and minimiz[ing] conflicts in the enforcement of competition laws."[131] This proposal followed a 1994 report, entitled "Merger Cases in Real World—A Study of Control Procedures," published by the OECD's Competition Law and Policy Committee and prepared by Richard Whish and Diane Wood, which "reviewed the motivations, advantages and disadvantages of greater cooperation and convergence in merger review for competition agencies and merging parties."[132] Some recommendations included "[c]reating a model merger notification filing form, which requires common information in a single format, and country-specific information as annexes where appropriate . . . [h]armonizing of time periods for completion of merger review . . . [d]rawing up guidelines for the joint treatment of the confidential information of merging parties by multiple competition agencies . . . [and] [e]stablishing a waiver system in which merging parties would allow

128. *See* Organization for Economic Co-operation and Development [OECD], *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, C(98)35/FINAL, at 2, March 25, 1998, *available at* http://strategis.ic.gc.ca/pics/ct/1998oecd_hccrec.pdfat 427 (stating that the OECD's basic rules on the flow of personal data and communication will be instrumental towards increasing competition between countries); *see also* Benjamin J. Keele, *Privacy by Deletion: The Need for a Global Data Deletion Principle*, 16 IND. J. GLOBAL LEGAL STUD. 363, 369 (2009) (asserting that the OECD is committed through its means to advocate data protection to use the free flow of information to increase competition throughout countries). *See generally* Alexandra G. Watson, Note, *International Intellectual Property Rights: Do Trips' Flexibilities Permit Sufficient Access to Affordable HIV/AIDS Medicines in Developing Countries?*, 32 B.C. INT'L & COMP. L. REV. 143, 157 (2009) (defining the OECD as a chain of wealthy member states that transacts 80 to 90 percent of global pharmaceutical sales and thus suggesting that the OECD can increase the economic enrichment structure of its member states).

129. See OECD Member Countries, OECD.org, http://www.oecd.org/document/58/0,3343,en_2649_201185_1889402_1_1_1_1,00.html (last visited Mar. 3, 2009) (itemizing the 30 members that comprise the OECD).

130. *See* D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 47 (2007) (proving the commitment of the OECD to coordinate antitrust acts); *see also* OECD, Recommendation of the Council of 5 October 1967 [C (567) 53 (Final)]; OECD, Recommendation of the Council of 3 July 1973 [C (73) 99 (Final)]; OECD, Recommendation of the Council of 25 September 1979 [C (79) 154 (Final)]; Recommendation of the Council of 21 May 1986 [C (86) 44 (Final)]; OECD, Recommendation of the Council of 27 and 28 July 1995 [C (95) 130 (Final); OECD, Recommendation of the Council Concerning Effective Action Against Hard Cartels, 25 March 1998 [C (98) 35/FINAL]; OECD, Recommendation of the Council on Merger Review, 23 March 2005—C(2005)34; OECD, Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations (2005).

131. *See* Organization for Economic Co-operation and Development, Revised Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, July 27-28, 1995, *available at* http://www.oecd.org/dataoecd/60/42/21570317.pdf (last visited Mar. 9, 2009) (asserting that the purpose of the proposal is to minimize conflicts in laws).

132. *See* RICHARD P. WHISH & DIANE P. WOOD, MERGER CASES IN REAL WORLD: A STUDY OF CONTROL PROCEDURES (1994); *see also* JOSEPH WILSON, *supra* note 126, at 259 (presenting support for the assertion that transnational mergers are fraught with conflict).

exchange of confidential information among competition agencies in exchange for expedited consideration."[133]

In the interim, several World Trade Organization initiatives, including the Singapore Ministerial Declaration, the Doha Declaration, and the Cancun Ministerial, have, within the framework of the Working Group on the Interaction Between Trade and Competition Policy, proposed several "core principles includ[ing] transparency, nondiscrimination, procedural fairness, voluntary cooperation, capacity building, and discipline of hard-core cartels."[134] Among the proposed initiatives were three "pillars" of antitrust cooperation and coordination:

> First, WTO members would agree to adopt domestic competition rules and structures, which would include basic substantive rules on restrictive business practices, as well as adequate enforcement provisions. Secondly, the agreement would lay down rules concerning cooperation between agencies, based on experience to date. Finally, it was suggested to apply the WTO dispute settlement system to the agreement, subject to the specifics of competition law.[135]

Although the initiatives resulted in several model proposals as to adequate antitrust regulation and cooperation among the WTO member nations, "the Working Group agreed that any binding standards for antitrust law were not feasible or desirable [and in 2003] . . . the WTO ended the Working Group on the Interaction Between Trade and Competition Policy [thereby] . . . dropping antitrust from the trade agenda."[136] Some scholars have purported that a binding agreement proposed within the confines of the WTO would not only be a time-consuming endeavor, but would not be a feasible allocation of WTO resources: "An antitrust

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133. *See* WILSON, *supra* note 126, at 259 (presenting ideas that would reduce conflicts in international laws).

134. *See* Sokol, *supra* note 130, at 50–51 (stating that the Doha Declaration established several significant principles regarding international antitrust regulation); *see also* World Trade Organization, Ministerial Declaration of 13 December 1996, ¶ 20, WT/MIN(96)/DEC, 36 I.L.M. 218 (1997) (announcing that a study group will be convened to investigate various international trade issues, such as international antitrust regulations, between WTO members); *see also* World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 22, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) (proclaiming that the Working Group on Relationship Between Trade and Investment will further articulate principles and developments in areas such as nondiscrimination, safeguards, and settlement of disputes between Member nations).

135. *See* BRUNO ZANETTIN, COOPERATION BETWEEN ANTITRUST AGENCIES AT THE INTERNATIONAL LEVEL 236 (2002) (outlining three principle proposals for WTO Member nations in achieving international antitrust regulation).

136. *See* D. Daniel Sokol, *supra* note 95, at 51 (commenting that the Working Group on Interaction Between Trade and Competition Policy no longer continued to research international antitrust regulations because Member nations had too many differing views).

agreement within the WTO framework . . . would require reaching a consensus among 149 heterogeneous states, as well as seeking domestic ratification by their respective legislatures."[137]

B. Current Proposals

In 2000, following the recommendations of the International Competition Policy Advisory Committee,[138] Joel Klein, the then-Assistant Attorney General of the United States, suggested creating a negotiation forum unlike that of the WTO that would bring together developed nations in an effort to "exchange . . . information, views and experiences on such topics as multinational merger control and notification, global cartels, or market blocking private restraints . . . [and include] a comprehensive program for providing technical assistance to new antitrust agencies."[139] The proposal launched as the Global Competition Initiative (GCI) and later realized under the name of the International Competition Network (ICN).[140] The overriding purpose of the GCI, and later the ICN, was "not envisioned as a forum for the negotiation and implementation of binding international rules or dispute settlement mechanisms, but was seen instead as a tool to help and build trust among antitrust agencies, and contribute to the development of competition policies in developing countries."[141]

As of December 2003, "more than 80 agencies from over 70 jurisdictions joined the ICN, among them the competition authorities of almost all industrial countries and many transition and developing countries as well as the multinational agencies of the E.U., the European Free Trade Association, and the Andean Community."[142] Often characterized as a "virtual organiza-

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137. *See* DEBRA JOHNSON & COLIN TURNER, INTERNATIONAL BUSINESS: THEMES AND ISSUES IN THE MODERN GLOBAL ECONOMY 193 (2003) (surmising that an antitrust agreement within the WTO framework would be impracticable because of the enormous effort required by all Member nations); *see also* Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383, 405 (2007) (concluding that requiring an agreement on antitrust issues between such a large number of countries contributed to the impossibility of the undertaking); *see also* Ariel Ezrachi, *The Role of Voluntary Frameworks in Multinational Cooperation over Merger Control*, 36 GEO. WASH. INT'L L. REV. 433, 439 (2004) (claiming that arranging an international agreement would not only be costly but also complex).

138. *See* Joel I. Klein, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Address at the EC Merger Control 10th Anniversary Conference, *Time for a Global Competition Initiative?* (Sept. 14, 2000), *available at* http://www.usdoj.gov/atr/public/speeches/6486.htm (informing that the United States has begun to follow the recommendations made by the International Competition Policy Advisory Committee regarding mergers).

139. *See* ZANETTIN, *supra* note 135, at 237 (stating that Joel Klein suggested the formation of the Global Competition Initiative).

140. *See id.* at 238 (stating that the GCI was officially launched as the International Competition Network in October, 2001).

141. *See id.* at 237 (explaining the purpose for which the Global Competition Initiative was formed); *see also* A. Douglas Melamed, Acting Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Address Before the Fordham Corporate Law Institute 27th Annual Conference on International Antitrust Law and Policy Promoting Sound Antitrust Enforcement in the Global Economy, (Oct. 19, 2000), *available at* http://www.usdoj.gov/atr/public/speeches/6785.htm (describing that the GCI was formed more to build trust among antitrust agencies than to serve as a dispute resolution forum).

142. *See* Oliver Budzinski, *Toward an International Governance of Transborder Mergers? Competition Networks and Institutions Between Centralism and Decentralism*, 36 N.Y.U. J. INT'L L. & POL. 1, 20 (2004) (announcing the vast number of agencies and jurisdictions that have joined the ICN); see also ICN Membership Contact List (Oct. 12, 2006), available at http://www.internationalcompetitionnetwork.org/media/archive0611/icn_membership_list.pdf (listing contact information for the members of the International Competition Network).

tion," since it has no legal status and is not based on an international treaty, thereby making any proposals of the ICN nonbinding, "both participation in its work and compliance with its outcomes are completely voluntary."[143] The ICN functions via working groups headed by volunteers from various international competition commissions, and provides for a consensus-based forum where the ICN members can voice concerns and common goals in an effort to change policy objectives.[144]

As of December 2002, the ICN had launched three working groups: "(i) the merger control process in the multi-jurisdictional context, (ii) the competition advocacy role of antitrust agencies, and (iii) capacity building and competition policy implementation."[145] As noted by Wolfgang Kerber and Oliver Budzinski, such an arrangement allows the ICN to "promote . . . mutual learning through two channels: the creations of transparency concerning different solutions to competition policy problems, which enhances the possibilities for interjurisdictional comparisons, and the public identification of superior solutions (best practices), which facilitates their diffusion by putting 'peer pressure' on the member jurisdictions to imitate best practices."[146]

C. "Hard Law" Approaches to Effective Cooperation Among Antitrust Agencies

Still, many believe that the nonbinding nature of organizations such as the ICN will not adequately address the myriad competing objectives and solve the antitrust Prisoner's

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143. *See* Budzinski, *supra* note 142, at 20 (explaining that none of the ICN's propositions are binding, and that participation is voluntary because the ICN is based upon an international treaty); *see also* Konrad von Finckenstein, Comm'r of Competition and Chair of Interim Steering Group, International Competition Network, Address at the 6th Annual International Bar Association Competition Conference on the ICN's Latest Developments and Deliverables (Sept. 20, 2002), *available at* http://www.internationalcompetitionnetwork.org/index.php/en/newsroom/?&news_id=18 (describing the voluntary nature of participation in the network).

144. *See* Budzinski, *supra* note 142, at 21 (stating that the ICN makes consensus decisions regarding its projects); *see also* D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 44 (2007) 79 (noting that the ICN is a transnational group, composed of both state and nonstate actors, that seeks to change a government's policy views); *see also* Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173, 195 (2005) (asserting that the ICN is an organization of government regulators whose purpose is to promote the harmonization of competition policy rules among nations).

145. *See* Budzinski, *supra* note 142, at 21 (listing the three substantial ICN Working Groups that perform the actual work of the ICN working programs); *see also* Konrad von Finckenstein, Recent Developments in the International Competition Network (Feb. 6, 2003), *available at* http://www.internationalcompetitionnetwork.org/index.php/en/newsroom/2003/02/6/12 (discussing the ICN Working Groups and the work product of each group, as presented at the Naples Conference in 2002); *see also* Chul-kyu Kang, Chairman, Korea Fair Trade Commission, ICN Future Workplan Session—Introductory Remarks (June 25, 2003), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_2nd_merida_2003/merida_speech9.pdf (commenting on the progress made by the ICN Working Groups).

146. *See* Wolfgang Kerber and Oliver Budzinksi, *Competition of Competition Laws: Mission Impossible?*, *in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 55 (Richard A. Epstein & Michael S. Greve eds., 2004) (explaining how transparency encourages nations to imitate best practices); *see also* D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. COLLOQUY 242, 246 (2008) (noting that the ICN seeks to promote the adoption of best practices by antitrust agencies and increase cooperation among them).

Dilemma.[147] Instead, proponents of a supranational enforcement mechanism insist that a "hard law" approach is the only effective method. Such an organizational approach to international antitrust coordination is premised on the notion of "legalization—the institutionalization of legal governance."[148] In turn, "increased centralization of authority under hard law may increase compliance through the threat of enforcement via dispute settlement. Trade agreements may lead to increased compliance because they tie the hands of domestic-level participants (courts, legislators, and executives)."[149]

Advocates of a WTO-like approach to antitrust regulation articulate that non-binding approaches will achieve minimal results, at best:

> Although these information-sharing agreements play an important role in international antitrust enforcement, they are not and cannot be a solution to the problem of international cooperation. There is, for example, no coordination of substantive laws, no compromise of domestic control, and no minimum standards. Furthermore, compliance is voluntary. Each state is free to refuse cooperation when it wishes and remains guided by its own interests in deciding when to do so.[150]

If implemented, a binding "hard law" agreement "would be compulsory in nature as far as the signatories are concerned. A party to such an agreement would be obligated to implement the contents of the agreement domestically . . . [and if a] member does not implement such laws, it is in violation of the agreement."[151] Specifically applying this to whether the WTO is the correct forum, it is generally agreed upon by proponents of the "hard law" solution that "[b]ecause WTO tribunals are already familiar with applying a nondiscrimination jurisprudence, an extension of that regime would not require construction of a new and untested insti-

147. *See generally* Anu Bradford, *supra* note 137, at 385 (commenting that binding international cooperation is obstructed when a state assumes it will be unfairly affected by an international antitrust agreement and explaining how to deal with such a situation if it occurs).

148. *See* Sokol, *supra* note 144, at 81 (stating that legalization has been used in the World Trade Organization to create legalized commitments among nations that cannot be unilaterally altered).

149. *See* Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251, 251–52 (2006) (discussing the United States' preference for rule-based dispute resolution as opposed to negotiation); *see also* Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385, 386 (2000) (outlining the increasing trend of legalizing international institutions); *see also* Gregory Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides?*, 7 J. INT'L ECON. L. 459, 459 (2004) (noting that developing countries are not able to effectively participate in the WTO judicial process); *see also* Sokol, *supra* note 144, at 77 (analyzing the use of hard law institutions).

150. *See* Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L L. 355, 369 (2004) (stressing the need for information sharing between nations and international organizations).

151. *See* Mitsui Matsushita, *Globalizing the World Economy and Competition Law and Policy: The Need for International Cooperation*, *in* INTERNATIONAL AND COMPARATIVE COMPETITION LAW AND POLICIES 249, 253 (Yang-Ching Chao et al. eds., 2001) (outlining the advantage and disadvantages of both the hard and soft law approaches); *see also* MARTYN D. TAYLOR, INTERNATIONAL COMPETITION LAW: A NEW DIMENSION FOR THE WTO? 362 (2006) (suggesting that the implementation of soft law can help to facilitate the introduction of hard law); *see also* D. Daniel Sokol, *What Do We Really Know About Export Cartels and What Is the Appropriate Solution*?, 4 J. COMPETITION L. & ECON. 967, 978 (2008) (noting that although soft-law solutions create norms and standards, they do not formally bind the parties).

tution."[152] Also, as for noncompliance with WTO mandates, the organization's history of gaining compliance and imposing reciprocal sanctions for noncompliance in the form of redress or tariff fines "will energize the exporters adversely affected by the sanctions to lobby their governments to comply with the WTO ruling."[153]

Proponents such as Andrew Guzman articulate that one of the soundest arguments in favor of a supranational antitrust enforcement agency such as the WTO, aside from the reduction in various transaction costs in not having to implement and organize an organization from the ground up, is "the presence of a dispute settlement system . . . [since] [i]n the absence of procedures to compel such compliance, these countries would have little incentive to honor their commitments."[154] Inversely, without a structured enforcement agency and with the current informal competition structure, "we must rely on reputational constraints and the potential for sanctions by other states—an unreliable and often unpredictable alternative."[155]

In sum, a "hard law" WTO competition agreement "could best promote effective compliance with its substantive obligations via a supra-national, quasi-judicial institution, coupled with inter-governmental peer enforcement,"[156] where certain provisions of a WTO agreement could work to solve for jurisdictional incohesiveness, under- and overregulation with a "pure cross-border application, such as international co-operation arrangements . . . standards for domestic competition laws . . . [and] rules and procedures that should be incorporated."[157]

D. "Soft-Law" Approaches to Effective Cooperation Among Antitrust Agencies

The premise of the ICN in building consensus through voluntary negotiations is more broadly identified as "soft-law" institutional cooperation. As opposed to a WTO framework for negotiations, where the resulting agreement is binding via a supranational authority that can impose sanctions and legal ramifications on nonabiding nations ("hard-law" institution), a "soft-law" institution "use[s] consensus to reach positions . . . [and] requires that countries share information about their preferences with one another, [thereby] . . . allow[ing them] to

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152. *See* John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, *in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 126, 142 (Richard A. Epstein & Michael S. Greve eds., 2004) (explaining that the WTO would be well suited to apply a hard-law solution to antitrust issues).

153. *See id.* at 143 (discussing the use of sanctions, such as tariffs, to compel compliance with WTO rules).

154. *See* Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142, 1158 (2001) (stating that the WTO's greatest advantage is its dispute resolution settlement system because it promotes equitable settlements between members of the WTO).

155. *See id.* (stating that the world needs a new regulatory enforcement agency within the WTO because our current system of sanctioning nations is unreliable); *see also* Andrew T. Guzman, *Global Governance and the WTO,* 45 HARV. INT'L L.J. 303, 320 (2004) (arguing that the current dispute settlement procedures of the WTO are the best means to resolve global trade disputes).

156. *See* TAYLOR, *supra* note 151, at 357 (postulating that the most effective means to enforce compliance with WTO competition agreements is to codify them in the textual bylaws of the WTO).

157. *See id.* (postulating that the most effective means to enforce compliance with WTO competition agreements is to codify the agreements into the textual bylaws of the WTO).

determine a common position that they all can accept."[158] Thereby, voluntary acceptance rather than force can, arguably, achieve lasting results.[159] In turn, such voluntary negotiations produce trust and an increased likelihood of convergence of competition policies:

> Governance of cross-border mergers through informal and undersigned institutions can produce a functional institutional framework if it constitutes a network of voluntary cooperative arrangements that preserves diversity and achieves coherence. . . . The coordinated and systematic interaction of the relevant competition policy agents offers opportunities for cognitive convergence . . . [which] could lead to the emergence of substantial trust among the agencies and their agents, thereby contributing to the reduction of interjurisdictional conflicts on merger control issues.[160]

It can certainly be argued that such "soft-law" institutions provide little incentive for countries to "fear" nonacceptance of specific protocols with respect to merger review.[161] However, "[i]f best practices for notification and review procedures . . . substantive standards for prohibiting anticompetitive mergers . . . and investigative techniques . . . are—reliably and consistently-determined and published, then a competition agency and the corresponding legislative and judicial authorities will probably have difficulties in explaining a refusal to adopt these benchmarks."[162] Refusal to adopt mutually agreed upon and seemingly mutually benefi-

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158. *See* D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 44 (2007)79 (stating that an effective means for achieving a common platform for global antirust regulations is a consensus approach whereby members of the WTO can voice their thoughts and concerns about various regulatory schemes at scheduled WTO meetings).

159. *See* Kerstin Jacobsson, *Between the Deliberation and Discipline: Soft Governance in EU Employment Policy, in* SOFT LAW IN GOVERNANCE AND REGULATION 81, 99–101 (Ulrika Morth ed., 2004) (postulating that the European Union's use of soft-law tactics and the voluntary acceptance of the system has contributed to a sound economic system); *see also* WILLIAM K. TABB, ECONOMIC GOVERNANCE IN THE AGE OF GLOBALIZATION 176–77 (2004) (theorizing that the soft law approach is more powerful and conducive to a stable system in the international economic market).

160. *See* Louis Baeck, *The Saga of Development and Globalization, in* BUILDING TOWERS: PERSPECTIVES ON GLOBALISATION 55, 81–2 (Luc Anckaert et al. eds., 2002) (explaining that an increase in globalization has led to a larger number of transborder mergers which requires greater international cooperation to stabilize the economic system); *see also* Oliver Budzinski, *Toward an International Governance of Transborder Mergers? Competition Networks and Institutions Between Centralism and Decentralism*, 36 N.Y.U. J. INT'L L. & POL. 1, 20, 32 (2004) (discussing the importance of transborder mergers in the promotion of trust and cooperation among economic institutions); *see also* Imelda Maher, *Competition Law in the International Domain: Networks as a New Form of Governance*, 29 J. L. & SOC'Y 111, 117–18 (2002) (extrapolating that continued discussion and cooperation among different networks will lead to a beneficial evolution of policy); *see also* Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 500–1 (2000) (reasoning that continued cooperation between states will foster an effective international economic situation).

161. *See* Kal Raustiala, *Form and Substance in International Agreements,* 99 A.J.I.L. 581, 586–88 (2005) (stating that one of the fundamental problems with "soft-law" is that its provisions are weak and non-binding, making contracts more like pledges rather then binding contractual obligations); *see also* TAMARA K. HERVEY & JEAN V. MCHALE, HEALTH LAW AND THE EUROPEAN UNION 61–62 (2004) (noting that one of the only effective methods of enforcing "soft-law" policies within the E.U. is to use monetary incentives to comply, although members can still opt out of compliance).

162. *See* Budzinski, *supra* note 160, at 36 (claiming that failure to use such established benchmarks and practices would reduce the credibility of an institution).

cial benchmarks in their respective jurisdictions may lead to that nation losing considerable credibility and willingness of others to cooperate with it in future merger reviews.[163]

In contrast, a "hard law" approach implemented through the WTO in order to achieve harmonization on competition law is "a formula for disaster":[164] "A consensus exists among economists and some government officials that the GATT-WTO rules and agreements on trade liberalization generate mutually beneficial welfare effects for importing and exporting nations. No similar consensus exists among economists or government officials regarding the effects of proposed international competition rules."[165] Further, "[f]rom an international perspective, we do not have a common vocabulary or sense of the subject, much less a common commitment to substantive ends. Once one appreciates how undefined the concept of competition policy is, the difficulties of coordinating national regulatory regimes becomes clearer."[166]

Part IV: Conclusion

Coupled with "soft law" proposals, enhanced comity structures among the world's antitrust authorities is perhaps the only feasible approach until greater uniformity and harmonization of common competition principles is achieved.[167] In turn, viable solutions include amending current bilateral agreements to account for "divergent government competition policies and inconsistent antitrust remedies," learning from comity applications in other regulatory and administrative settings, implementing a deference policy where one nation will defer to its counterpart "when a competition authority in a jurisdiction with a more substantial nexus to the transaction or conduct at issue orders a remedy," and succumb to a policy of consultation prior to seeking final review orders.[168]

The current system of minimally cooperative bilateral agreements among nations involved in competition enforcement is inadequate and suboptimal. The polar opposite approach of a

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163. *See id.* (opining that the benefit of using the established techniques will help with future mergers).

164. *See* KEVIN KENNEDY, COMPETITION LAW AND THE WORLD TRADE ORGANIZATION: THE LIMITS OF MULTILATERALISM 331 (Sweet and Maxwell 2001) (rationalizing that it would be a futile endeavor to force international regulation of competition upon unwilling and unprepared governments).

165. *See id.* (explaining that, unlike the consensus pertaining to positive effects of GATT–WTO trade liberalization rules, no such belief exists regarding international trade competition rules).

166. *See* Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173, 178 (2005) (maintaining that the lack of common understanding on the topic of international competition laws creates a substantial problem for the establishment of national regulatory regimes).

167. *See* Calvin S. Goldman et al., Comments to the Antitrust Modernization Commission on the Need to Enhance Comity Arrangements with Foreign Antitrust Authorities (Topic VI(2)), 1 (Aug. 12, 2005), *available at* http://govinfo.library.unt.edu/amc/public_studies_fr28902/international_pdf/050812_Bertelsmann_AG_et_al.pdf (suggesting that antitrust enforcement authorities should implement "enhanced comity mechanisms" to overcome conflicts due to divergent national approaches to regulation).

168. *See id.* (asserting that comity principles should be applied to facilitate various business deals and operations involving international parties). *See generally* Charles A. James, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address at the OECD Global Forum on Competition, *International Antitrust in the 21st Century: Cooperation and Convergence* (Oct. 17, 2001) *available at* http://www.usdoj.gov/atr/public/speeches/9330.pdf (expressing the belief that a great need exists for cooperation among various antitrust agencies in order to establish uniform antitrust enforcement, and to combat anticompetitive tendencies).

WTO style of antitrust regulation is similarly inefficient. The practical median is to focus on improving the current system of jurisdictional access of bilaterally enjoined nation-states in an effort to solve for the incongruence and inefficiencies exposed by recent antitrust cases. Although it is too soon to contemplate a uniform agreement, it is the right time to enhance the current system, and redefine the notion of bilateral interaction among nation states.

Morgenthau v. Avion Resources Ltd.

11 N.Y.3d 383, 898 N.E.2d 929, 869 N.Y.S.2d 886 (2008)

The New York Court of Appeals held that service of process on defendants in a foreign country pursuant to CPLR 313 is proper and sufficient to confer personal jurisdiction if no treaties or international agreements supplant New York's service requirements.

I. Holding

In *Morgenthau v. Avion Resources Ltd.*,[1] the Court of Appeals held that compliance with CPLR 313 when serving foreign defendants constitutes proper service and complies with due process requirements. In addition, there is no violation of the standards of international comity if there is no relevant treaty superseding the requirements of § 313.[2] The Court held that the service on individual defendants through their lawyers under CPLR 308(5); the service on corporate defendants to an authorized representative in the foreign country, in this case Brazil, under CPLR 311(a)(1); or, in the alternative, service pursuant to CPLR 311(b) to defendants' lawyers are all sufficient and comply with CPLR 313.

II. Facts and Procedural History

This case originated as a result of a federal investigation of the defendants, who engaged in an illegal international money transfer scheme.[3] The defendants were accused of transferring money from Brazil to a Manhattan bank in violation of Brazilian monetary regulations and New York banking laws.[4] Federal authorities obtained ex parte warrants from the United States District Court for the District of New Jersey authorizing the seizure of the funds that the defendants deposited into a Manhattan Bank.[5] The defendants moved in district court for an order to vacate, arguing that the government failed to demonstrate a rightful claim to the money and that the government should be compelled to release the funds.[6] The district court granted the order, which in turn led federal authorities to request that the petitioner, District Attorney Morgenthau, bring charges against the defendants in New York state court.[7] The defendants were charged with violating New York Banking Law § 650(2)(b)(1).[8] On June 20, 2006, petitioner commenced a civil forfeiture action pursuant to CPLR art. 13-A in Supreme Court, seeking $635,924,865 in alleged proceeds from defendants' alleged criminal money

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1. 11 N.Y.3d 383, 898 N.E.2d 929, 869 N.Y.S.2d 886 (2008) (hereinafter *Avion Resources*).
2. *Id.* at 385.
3. *Id.*
4. *Id.* at 386.
5. *Id.*
6. *Id.*
7. *Id.*
8. Making it a Class E felony to "knowingly receive[] or agree[] to receive for transmission from one or more individuals a total of ten thousand dollars or more in a single transaction, a total of twenty-five thousand dollars or more during a period of thirty days or less, or a total of two hundred fifty thousand dollars or more during a period of one year or less." *Avion Resources,* 11 N.Y.3d at 385.

transfer scheme and the Supreme Court signed an ex parte temporary order freezing defendants' assets and an order of attachment.[9]

On August 8, 2006, the Supreme Court vacated the June 20 attachment order upon defendants' motion, holding that the attachment order was improper because the petitioner failed to confirm the order within five days, as required by the statute.[10] The petitioner then obtained a second order of attachment and served the defendants, who could not be reached by personal service through their attorneys pursuant to an August 10 order of the Supreme Court, which allowed the alternative method of service.[11] The Supreme Court vacated the second attachment order on two grounds: (1) at the time of the order, the funds were located in New Jersey, beyond the court's jurisdiction, and (2) the plaintiff's service process did not comply with the Inter-American Convention on Letters Rogatory[12] and the service requirements of Brazil.[13] The Appellate Division affirmed, holding that the trial court did not abuse its discretion in its decision to vacate the attachment order and that the service of process did not comply with Brazilian law and the standards of international comity.[14] The Appellate Division certified the following question to the Court of Appeals: "Was the order of this Court to the extent that it affirmed the order of the Supreme Court . . . properly made?"[15]

III. Discussion

A. CPLR 313 Allows Service on a Foreign Defendant Outside of New York

The Court held that service pursuant to CPLR 313 was sufficient to confer personal jurisdiction on a defendant.[16] The Court looked to the specific language of the statute: "A person domiciled in the state or subject to the jurisdiction of the courts of the state under § 301 or § 302 . . . may be served with summons without the state, in the same manner as service is made within the state. . . ."[17] Since the language of the statute does not require that New York follow the service requirements of a foreign locale, the Court held that conformity with Brazil's requirements was unnecessary.[18] "[T]he words of CPLR 313 are 'clear and unqualified; service may be made without the State . . . in the same manner as service is made within the state.'"[19] The purpose of "removing state lines" for the purpose of conferring personal jurisdiction was, as the Court explained, to increase the possibility of acquiring personal jurisdiction over nonresidents who are

9. *Id.* at 386.

10. *Avion Resources*, 11 N.Y.3d at 386–87.

11. Morganthau v. Avion Resources Ltd., 11 N.Y.3d 383, 387, 898 N.E.2d 929, 869 N.Y.S.2d 886 (2008) (hereinafter *Avion Resources*).

12. Jan. 30, 1975, O.A.S.T.S. No. 43, *reprinted following* 28 U.S.C.A. § 1781.

13. *Avion Resources* at 387.

14. Morgenthau v. Avion Resources Ltd., 49 A.D.3d 50 (1st Dep't 2007).

15. *Avion Resources*, 11 N.Y.3d at 388.

16. *Id.*

17. CPLR 313.

18. *Avion Resources*, 11 N.Y.3d at 389.

19. *Id.* (quoting Dobkin v. Chapman, 21 N.Y.2d 490, 501, 236 N.E.2d 451, 457 (1968)).

rightly subject to the jurisdiction of New York courts.[20] Thus, the Court held CPLR 313 is appropriate for serving a foreign defendant outside of New York.[21]

B. Standards of International Comity Do Not Apply in This Case

The Court held that the recognized standards of international comity do not require a different result in this case.[22] The Court described the doctrine of international comity as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."[23] The Court also held, citing *Byblos Bank Europe, S.A. v. Sekerbank Turk Anonym Syrketi*,[24] that whether to apply the doctrine of comity is up to the discretion of the individual trial court and is not required.[25] In addition, the Court held that the doctrine has never been applied in a New York court to enforce the laws of a foreign country in a New York lawsuit.[26] Thus the Court held that applying comity principles would be inappropriate in a case where the CPLR's service requirements upon foreign defendants are correctly executed.[27] The defendants in this case were asking the Court to apply Brazil's service requirements, which require that service of process by a foreign party upon a party domiciled in Brazil be made by letters rogatory.[28] The Court found this request to be without merit and that service made pursuant to CPLR is appropriate; thus the doctrine of comity does not apply.[29]

C. The Inter-American Convention on Letters Rogatory

The Court acknowledged that if there were an applicable treaty requiring a specific service of process, such as the Hague Service Convention,[30] that treaty would be, pursuant to the Constitution, the supreme law of the land and its requirements would be mandatory nationwide.[31] However, Brazil is not a signatory of such a treaty and the Inter-American Convention on Letters Rogatory, to which both the United States and Brazil are signatories, does not require letters rogatory as the exclusive means of service on a party in Brazil.[32] "Nothing in the language

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20. *Id.* at 389.
21. Morganthau v. Avion Resources Ltd., 11 N.Y.3d 383, 387, 898 N.E.2d 929, 869 N.Y.S.2d 886 (2008) (hereinafter *Avion Resources*).
22. *Id.*
23. *Id.* (quoting Byblos Bank Europe, S.A. v. Sekerbank Turk Anonym Syrketi, 10 N.Y.3d 243, 247 (2008)).
24. 10 N.Y.3d 243, 247, 885 N.E.2d 191, 193, 855 N.Y.S.2d 427, 429 (2008).
25. *Id.* at 390.
26. *Id.*
27. *Id.*
28. Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 640 (5th Cir. 1994) (defining letters rogatory as a "procedural mechanism by which a court in one country may request authorities in another country to assist the initiating court in its administration of justice"). *Avion Resources*, 11 N.Y.3d at 388.
29. *Id.*
30. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 15 Nov. 1965, 658 U.N.T.S. 163, 20 U.S.T. 1361, TIAS No. 6638.
31. Morganthau v. Avion Resources Ltd., 11 N.Y.3d 383, 391, 898 N.E.2d 929, 869 N.Y.S.2d 886 (2008) (hereinafter *Avion Resources*).
32. *Id.* at 390–91.

of the [Inter-American] Convention expressly reflects an intention to supplement all alternative methods of service."[33] The Court interpreted the Inter-American Convention as governing only the delivery of letters rogatory between the signatories, if the parties choose to use that method of service.[34] Thus, the Court held that the Inter-American Convention allowed service of process pursuant to a signatory's own statute and that in this case the applicable statute is CPLR 313.[35]

IV. Conclusion

The Court held that the use of CPLR 313 to serve the defendants was appropriate in this case.[36] The Court next inquired as to whether the defendants were actually served properly under CPLR 313. The Court held that the service on individual defendants through their lawyers, under § 308(5), the service of corporate defendants to an authorized representative in the foreign country, in this case Brazil, under 311(a)(1) or, in the alternative, service pursuant to 311(b) to defendants' lawyers were all sufficient and complied with CPLR 313.[37] The result is that CPLR allows several alternative methods of serving a defendant in order to maximize the chances that a defendant who is domiciled but not actually present in the state will still be subject to the authority of New York courts.[38] The long-term effect of the Court's interpretation that the Convention does not to require that New York follow a signatory's rules regarding service of process is that it will be cited by other states in order to give precedence to their long-arm statutes over the treaty. Another long-term effect is the possibility that Brazil and other countries that are parties to the Inter-American Convention on Letters Rogatory will be less cooperative with U.S. courts regarding issues of serving defendants and the prosecution of claims against native defendants.

Gavin Fields

33. *Id.* at 391 (quoting Kreimerman v. Casa Veerkamp. S.A. de C.V., 22 F.3d 634, 640 (5th Cir. 1994)).
34. *Id.*
35. *Id.*
36. *Id.* at 385.
37. *Id.* at 391
38. *Id.* at 390.

Glencore Denrees Paris v. Department of National Store Branch 1

No. 99 Civ. 8607(RJS), 2008 WL 4298609, 2008 U.S. Dist. LEXIS 71351 (S.D.N.Y. Sept. 19, 2008)

The U.S. District Court for the Southern District of New York granted Glencore's motion to compel production of witnesses for deposition, but denied Rule 37 sanctions for Vietnam's failure to comply with discovery mandates. Before deciding Vietnam's claim of sovereign immunity, the court sought to be sure that both parties had the opportunity for full disclosure.

I. Holdings

In *Glencore Denrees Paris v. Department of National Store Branch 1*,[1] the United States District Court for the Southern District of New York granted the plaintiffs' motion to compel production of the defendant's affiants for deposition, but denied the portion of the motion demanding Rule 37(b) sanctions.[2] The court held that Rule 37(b) sanctions on Vietnam were inappropriate in the present case because Vietnam had neither failed to comply with a court order compelling discovery nor acted in bad faith.[3] Rule 37(b) permits sanctions when a party fails to comply with a discovery order or, at the discretion of the court, when a party completely fails to respond to a discovery request.[4]

The court simultaneously dismissed without prejudice the defendant's motion for summary judgment.[5] The court held that the plaintiffs had to have a full opportunity for discovery,

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1. No. 99 Civ. 8607(RJS), 2008 WL 4298609, 2008 U.S. Dist. LEXIS 71351 (S.D.N.Y. Sept. 19, 2008) (hereinafter *Glencore*).

2. FED. R. CIV. P. 37(b) (establishing sanctions for failure to obey a discovery order:

> If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination

and for failure to produce a witness for deposition. "If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person").

3. *Id*. at *3.

4. *Id*.

5. *Id*. at *1.

including depositions of the two affiants named in the defendant's motion, before the court could decide the defendant's motion for summary judgment.[6]

II. Facts and Procedural History

The plaintiffs, Glencore Denrees Paris and Glencore Grain Rotterdam B.V. (collectively, Glencore), are incorporated in France and the Netherlands, respectively.[7] Glencore contracted with National Store of Vietnam in July 1994 for the purchase of 50,000 metric tons of Vietnamese long-grain white rice.[8] In that same month, they contracted with Tigimex, another Vietnamese company, for the purchase of an additional 40,000 tons of Vietnamese long-grain white rice.[9]

In late 1994, heavy flooding in the Mekong Delta of Vietnam led the Vietnamese government to temporarily suspend all rice exports, in what the defendant claimed was an effort to prevent the onset of famine among the Vietnamese people.[10] The plaintiffs argued that the primary purpose of suspending rice exports, and the reason Tigimex and National Store canceled their contracts with Glencore, was a commercially based initiative to achieve more favorable prices.[11]

The original action was commenced in arbitration proceedings against National Store and Tigimex on December 22, 1994 before the International Chamber of Commerce. Vietnam was not named as a party to the action.[12] Arbitration awards were granted to the plaintiffs in November 1996.[13]

In August 1999, the plaintiffs filed a petition in the Southern District of New York to confirm the ICC arbitration awards and added the Republic of Vietnam as a joint and several judgment debtor; the plaintiffs moved for default judgment two months later.[14] This motion was granted and default judgments were entered against National Store, Tigimex, and Vietnam.[15]

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6. *Id*. at *3.
7. *Id.* at *1.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.
12. FED. R. CIV. P. 37(b) at *2.
13. *Id*.
14. *See Glencore Denrees Paris v. Dep't of Nat'l Store Branch 1*, No 99 Civ. 8607(NRB), 2000 WL 913843 at *1 (S.D.N.Y. July 7, 2000).
15. *Id*.

In December 2000, Judge Buchwald, who had previously granted the plaintiff's motion, entered an amended order removing Vietnam as a judgment debtor because "the presumption of separateness between the corporate entities . . . and the sovereign . . . had not been overcome."[16] The plaintiffs filed for reconsideration, which was denied.[17]

On January 8, 2002, the Second Circuit vacated the December orders and remanded the case with instructions to allow attempts to effectuate service of process on Vietnam.[18] Vietnam was served on May 2, 2002 and responded on August 5.[19] On September 4, 2003, the plaintiffs moved to compel discovery using Rule 37; Vietnam cross-moved for summary judgment on November 3.[20] The case was reassigned to Judge Holwell, who denied the discovery motion as overbroad, ordering "rifle-shot discovery,"[21] which would focus requests on Vietnam for narrowly tailored, determinative evidence.[22] The case was then reassigned on September 3, 2004, to Judge Karas, who granted, in part, the plaintiffs' additional motions to compel discovery.[23]

Vietnam filed the present motion for summary judgment on August 1, 2006, alleging immunity under the Foreign Sovereign Immunities Act (FSIA).[24] The case was reassigned on October 2, 2007, to Judge Sullivan, who delivered the opinion of the court.

III. The Court's Analysis

A. Motion to Compel Production of Affiants and Jurisdiction Under the Foreign Sovereign Immunities Act

The plaintiffs sought the right to depose Vietnam's two key affiants, Le Hoang Thu and Nguyen Quoc Tien, the former directors of National Store and Tigimex, respectively, whose affidavits Vietnam relied upon in support of its motion for summary judgment.[25] The court granted the plaintiffs' request.[26]

In order to compel production of Vietnam's key affiants, the court had to establish subject matter jurisdiction over Vietnam under the FSIA.[27] Quoting *Phoenix Consulting, Inc. v. Republic of Angola*, the court noted that it had to give the plaintiffs "ample opportunity to secure and

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16. Glencore Denrees Paris v. Department of National Store Branch 1, No. 99 Civ. 8607(RJS), 2008 WL 4298609, 2008 U.S. Dist. LEXIS 71351 (S.D.N.Y. Sept. 19, 2008) (hereinafter *Glencore*) at *2.
17. *Id*.
18. *Id.* at *3.
19. *Id*.
20. *Id*.
21. *Id.* (quoting Harwood Aff. Ex. 56 at 27).
22. *Id.* (citing Prescott Aff. Ex. L.).
23. *Id.* at *3.
24. *Id*; *see also* Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. §1602-11 (2009).
25. *Id.* at *5.
26. Glencore Denrees Paris v. Department of National Store Branch 1, No. 99 Civ. 8607(RJS), 2008 WL 4298609, 2008 U.S. Dist. LEXIS 71351 (S.D.N.Y. Sept. 19, 2008) (hereinafter *Glencore*) at *5.
27. *Id*.

present evidence relevant to the existence of jurisdiction," particularly with respect to discovery motions.[28]

In granting the plaintiffs' motion to compel production, the court acknowledged Judge Holwell's previous denial of the request, but emphasized his reliance on the overbreadth of the initial request, which had since been tailored to fit Judge Holwell's "rifle shot" discovery.[29] The depositions of Thu and Tien are relevant to establishing evidence of jurisdiction over Vietnam, in that both affiants have knowledge relating to the structure and activities of Tigimex and National Store.[30] The court also found that the affidavits introduced by Vietnam offered possibly contradictory evidence into the record and that the plaintiffs had a right to explore this new information.[31]

The court found that the question of subject matter jurisdiction under the FSIA would be illuminated by further discovery efforts of the plaintiffs in examining the inconsistencies in the defendant's testimony as they directly relate to the issue.[32] The positions of Thu and Tien as directors of the two defendant companies would provide insight into whether Vietnam had sufficient influence over either company to be subject to the jurisdiction of the court.[33]

B. Sanctions Under Rule 37(b)

While the court partially granted the plaintiffs' motion for discovery, the sanctions sought on the basis of Vietnam's refusal to produce discovery materials were denied as inappropriate.[34]

Federal Rules of Civil Procedure Rule 37(b) permits a party to seek an order to compel discovery where the responding party fails to respond to the request or provides evasive or incomplete responses.[35] While courts have great discretion in imposing sanctions for failing to comply with discovery orders,[36] the court usually cannot impose sanctions where no order has been violated.[37]

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28. 216 F.3d 36, 40 (D.C. Cir. 2000).

29. *Glencore* at *5.

30. *Id*.

31. *Id*.

32. *Id.* at *6; *see also* Reiss v. Société Centrale du Groupe des Assurances Rationales, 235 F.3d 738, 747–48 (2d Cir. 2000) (holding that the deposition of two French nationals would help in undertaking FSIA jurisdiction analysis).

33. *Id.* at *5.

34. *Id*.

35. *See supra* note 2.

36. FED. R. CIV. P. 37(a); *see also* Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 135 (2d Cir. 2007).

37. *See* CHARLES ALAN WRIGHT, ARTHER R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2829 (2d ed. 1994).

Here, Vietnam did not violate a discovery order, but complied by submitting responses and documents to the plaintiffs.[38] Although the plaintiffs contended that Vietnam's responses were deliberately incomplete, that claim was unsupported, making any 37(b) sanctions inappropriate in this instance.[39]

The court noted that it had discretion to grant relief "even where no discovery order has been violated," but stipulated that such relief is granted only when a party fails to respond entirely to a discovery request.[40] Hence, even evasive responses such as Vietnam's are not subject to discretionary sanctions.[41]

C. Denial of Summary Judgment

The court dismissed Vietnam's motion for summary judgment without prejudice, with the possibility of a renewed motion pending the plaintiffs' completed discovery efforts.[42]

For a motion for summary judgment to be granted, there can be no genuine issue of material fact.[43] Here, the court found that Vietnam's FSIA argument was, in actuality, a claim of lack of subject matter jurisdiction; such a claim can be determined only after the resolution of any underlying factual disputes.[44] Adjudicating the FSIA claim requires the court to make findings of fact; under such circumstances, the court found it premature to grant a motion for summary judgment.[45]

IV. Conclusion

In granting the plaintiffs' motion to compel production of the defendant's affiants, the court made it clear that it would not consider Vietnam's motion for summary judgment until the plaintiffs had had an opportunity to complete their discovery efforts. In a global market where sovereigns may be subject to the jurisdiction of foreign courts, the court's decision here ensures that both parties have ample opportunity to explore all issues relevant to the question of subject matter jurisdiction before a decision as to sovereign immunity is made.

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38. Glencore Denrees Paris v. Department of National Store Branch 1, No. 99 Civ. 8607(RJS), 2008 WL 4298609, 2008 U.S. Dist. LEXIS 71351 (S.D.N.Y. Sept. 19, 2008) (hereinafter *Glencore*) at *4.

39. *Id*.

40. *Id.*; *see also* Salahuddin v. Harris, 782 F.2d 1127, 1130 (2d Cir. 1986).

41. *Glencore* at *4.

42. *Id.* at *3 n.4 (quoting Globecon Group, LLC v. Hartford Fire Ins. Co., 434 F.3d 165, 170 (2d Cir. 2006)).

43. *Id*.

44. *Id*.

45. *Glencore* at *3.

The court dismissed Vietnam's motion for summary judgment because the plaintiffs were unable to complete the discovery process and analyze the inconsistencies in testimony created by Vietnam's new affidavits. Although the court granted the plaintiffs' motion to compel the production of those affiants for deposition, it declined to impose sanctions on Vietnam under Rule 37(b) because it could not find that Vietnam had failed to respond or had acted in bad faith. The directed discovery authorized by the court will allow future adjudication on the issue of the court's subject matter jurisdiction over Vietnam as a sovereign state.

Nicole Rosich

Reino de España v. American Bureau of Shipping, Inc.

2008 WL 3851957, 2008 U.S. Dist. LEXIS 62865 (S.D.N.Y. Aug. 18, 2008)

Pursuant to F.R.C.P. 72(a), the U.S. District Court for the Southern District of New York, after assessing the plaintiff's objections to the granting of the Defendant's motions, overruled such objections and imposed discovery sanctions on the Spanish government for not disclosing electronic documents.

I. Holding

In *Reino de España v. American Bureau of Shipping, Inc.*,[1] the district court affirmed Judge Ellis's ruling that (1) granted the defendant's motion to compel plaintiff to disclose electronic documents; (2) denied plaintiff's motion for reconsideration of the November 2, 2006, order; and (3) granted, in part, defendant's motion for sanctions.[2] Judge Ellis held that the plaintiff (Spain) had failed to meet its obligations under the Federal Rules of Civil Procedure in preserving and producing electronic documents and e-mails.[3]

II. Facts and Procedural History

The plaintiff Kingdom of Spain brought this suit against the defendant American Bureau of Shipping, Inc. (ABS) after the oil tanker *Prestige* sank off the northwest coast of Spain on November 19, 2002.[4] Spain was seeking damages as a result of the oil spill. ABS was seeking sanctions for Spain's alleged spoliation of material evidence in the form of dismissal of Spain's claims; alternatively, dismissal of Spain's claims for damages, because Spain ordered that the tanker's engines be started on November 14, 2002; or, alternatively, that the court order an appropriate adverse inference to be drawn against Spain and that ABS be awarded attorney's fees and costs.[5]

After the spill, ABS served several Spanish governmental agencies with a document request seeking the production of specified e-mails and electronic documents created around the time of the casualty.[6] Spain produced some documents, but ABS complained that the production was deficient. Spain then agreed to produce all nonprivileged electronic records.[7] A few months later, ABS narrowed its discovery request by asking Spain to disclose responsive e-mails and electronic records to approximately 98 names and 15 governmental e-mail addresses.[8] Spain rejected this request, claiming that the computers of Spanish governmental officials are

1. 2008 WL 3851957, 2008 U.S. Dist. LEXIS 62865 (S.D.N.Y. 2008) (hereinafter *Reino de España*).
2. *Id*. at 1.
3. Reino de España v. American Bureau of Shipping, Inc., 2007 U.S. Dist. LEXIS 41498 (2007).
4. *Id*. at 3.
5. *Id*. at 2.
6. *Id*.
7. *Id*. at 1.
8. *Id*. at 4.

subject to Spain's privacy laws and cannot be searched without the user's consent.[9] After a two-day evidentiary hearing, Judge Ellis issued the November 2, 2006, Opinion and Order, which granted ABS's motion to compel and directed ABS to apply for any relief, remedy, or sanction it deemed appropriate.[10] Spain then moved for reconsideration of this Order, which was denied.[11] In a June 1, 2007, Opinion and Order, ABS's requests for sanctions were granted in part. Spain filed objections under Federal Rule of Civil Procedure 72(a) to the rulings of all three Opinions and Orders in the U.S. District Court for the Southern District of New York.[12]

III. The Court's Discussion

A. Standard of Review

Under Rule 72(a), if a party objects to a magistrate judge's order regarding nondispositive matters, the district judge to whom the case is assigned can modify or set aside any portion of the magistrate judge's order that is found to be clearly erroneous or contrary to law.[13] A finding may be considered clearly erroneous where the district court is "left with the definite and firm conviction that a mistake has been committed."[14] Reversal is appropriate only if a magistrate judge abuses his broad discretion in resolving nondispositive disputes.[15]

B. Objections to Judge Ellis's November 2 and January 25 Orders

Spain argued that the magistrate judge incorrectly found that Spain had been given adequate notice of his intent to hear evidence on the preservation of evidence and spoliation.[16] This claim was inconsistent with the record of this case. Judge Ellis, in his November 2 Order, directed the parties "to be prepared to address all issues surrounding the pending motion."[17] Furthermore, in the January 24 Order, Judge Ellis stated that preservation evidence would not be precluded at the hearing.[18] The court then determined that Spain had been on notice of ABS's spoliation and preservation concerns since at least December 2004, because ABS had been requesting production of electronic records since that time.[19] The court also pointed out that Spain's argument at the hearings that its witnesses were not prepared to testify on these issues served as evidence that Spain had knowledge these issues would arise. Thus, Spain's

9. *Id*.

10. *Id*. at 4.

11. Reino de España v. American Bureau of Shipping, Inc., 2008 WL 3851957, 2008 U.S. Dist. LEXIS 62865 (S.D.N.Y. 2008) (hereinafter *Reino de España*) at 4.

12. *Id.* at 1.

13. FED. R. CIV. P. 72(A).

14. *Id*.

15. *Id*.

16. *Reino de España* at 2.

17. *Id*. at 2.

18. *Id*.

19. *Id*.

objection that it was not properly put on notice of the preservation and spoliation issues was overruled.[20]

Spain then argued that Judge Ellis's procedural approach was defective.[21] In his November 2 Opinion and Order, Judge Ellis found that electronic records related to the sinking of the *Prestige* were likely lost by Spain. It was concluded that this failure to preserve evidence, in accordance with the Federal Rules and the district court's rules, was sanctionable.[22] Spain argued that "the law regarding email production calls for a systematic, staged inquiry into the relevant issues"[23] and that the inquiry in this case was analogous to that performed in *Zubulake v. UBS Warburg LLC*.[24] That case provided a three-step analysis that Judge Ellis found to be inapplicable in the present case.[25] However, the court determined that Spain was posing this argument only in an attempt to gain more time to find e-mails, which it had already claimed to be nonexistent.[26] Because Spain violated its discovery obligations under Federal Rule of Civil Procedure 34, the court had the authority to provide sanctions without having to follow the procedure established for the facts of *Zubulake*.[27] In its argument, Spain could not present a basis in the law that required the court to follow the *Zubulake* analysis. The district court concluded that Judge Ellis's findings were consistent with the Federal Rules and not defective. Thus, Spain's objections on this matter were overruled.[28]

Spain then argued that the limitation of electronic discovery to 98 individuals and 15 governmental e-mail addresses was unreasonable, and also that the judge failed to identify a "trigger date" as of which Spain should have commenced litigation.[29] The district court held that Judge Ellis, in each instance, weighed the evidence properly and that his decisions were well within his discretion in resolving nondispositive discovery issues.[30]

C. Objections to Judge Ellis's June 1 Order

Spain objected to the awarding of attorney's fees to ABS in connection with its motion to compel discovery. Spain argued that the award was not appropriate because Spain was "substantially justified" in opposing this motion.[31] Under Federal Rule of Civil Procedure 37, a

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20. *Id*.
21. Reino de España v. American Bureau of Shipping, Inc., 2008 WL 3851957, 2008 U.S. Dist. LEXIS 62865 (S.D.N.Y. 2008) (hereinafter *Reino de España*).
22. *Id*.
23. *Id*.
24. 220 F.R.D. 212, 2003 U.S. Dist. LEXIS 18771 (S.D.N.Y. 2003).
25. *Reino de España* at 3.
26. *Id*.
27. *Id*.
28. *Id*.
29. *Id*. at 4.
30. *Id*.
31. Reino de España v. American Bureau of Shipping, Inc., 2008 WL 3851957, 2008 U.S. Dist. LEXIS 62865 (S.D.N.Y. 2008)

court may impose broad sanctions for discovery-related abuses.[32] An award of reasonable expenses can be issued if a motion to compel discovery is made and the opposing party's non-disclosure was substantially justified.[33] Spain negligently failed to preserve electronic information; thus, it was not substantially justified in opposing the defendant's motion to compel.[34] Therefore, the defendants were entitled to all reimbursements of the reasonable expenses incurred in making their motion to compel.[35] However, all of the other sanction requests by ABS were denied, including a dismissal of the action and adverse inference instructions.[36] Ultimately, the district court overruled Spain's objection to the June 1 Order.[37]

IV. Conclusion

The district court, after considering all of Spain's objections to Judge Ellis's rulings, overruled these objections.[38] The court concluded that Judge Ellis properly put Spain on notice of the preservation of electronic evidence and spoliation issues.[39] Spain had time to prepare for these issues, but failed to do so. The court also concluded that Judge Ellis's procedural approach was not defective.[40] This ruling shows the importance of electronic discovery in federal litigation and indicates that parties in such litigation should be prepared to face electronic discovery, e-mail production, and spoliation issues both during discovery and possibly before litigation even commences.

Joseph DiPalma

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32. *Id.*
33. FED. R. CIV. P. 37
34. *Reino de España* at 4.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 5.
39. *Id.* at 2.
40. *Id.* at 3

Katz Park Avenue Corp. v. Jagger

11 N.Y.3d 314 (2008)

The New York Court of Appeals held that the holder of a B-2 visa precluded, as a matter of law, from maintaining a "primary residence" in a rent-stabilized apartment as required under New York City Rent Stabilization Code § 2524.

I. Holding

In *Katz Park Avenue Corp. v. Jagger*,[1] the New York Court of Appeals affirmed the Supreme Court of New York, Appellate Division, First Department's order granting summary judgment in favor of the plaintiff landlord.[2] Accepting the Appellate Division's reasoning, the Court ruled that the holder of a B-2 ("tourist") visa, as a matter of law, could not maintain a primary residence in a rent-stabilized apartment in New York City,[3] as required by Rent Stabilization Code § 2524 to prevent a landlord from seeking an action in ejectment prior to the expiration of the tenant's lease agreement.[4]

II. Facts and Procedural History

Bianca Jagger ("defendant" or "tenant") was a British subject who entered the United States on a B-2 tourist visa.[5] She was a tenant in Katz Park Avenue Corporation's ("plaintiff" or "landlord") apartment pursuant to a written lease agreement, which was to expire on February 29, 2004.[6] In November 2003, the landlord served the tenant with a notice of nonrenewal of the lease, on the grounds that the apartment was not the tenant's primary residence.[7] In June 2004, the landlord commenced an action for ejectment in the Supreme Court on these grounds.[8] The tenant moved for summary judgment, claiming that in November 2003 the landlord served her with a notice of renewal of the lease for a period of one year, which was before the landlord served the notice of nonrenewal.[9] The landlord cross-moved for summary judgment on the grounds that the tenant, a British subject who entered the country on a B-2 visa, was statutorily barred from claiming a primary residence in the United States.[10]

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1. 11 N.Y.3d 314 (2008) (hereinafter *Jagger*).
2. Katz Park Ave. Corp. v. Jagger, 843 N.Y.S.2d 329 (App. Div., 1st Dep't 2007), *aff'd*, 11 N.Y.3d 314 (2008).
3. *Jagger*, 11 N.Y.3d at 317.
4. N.Y. COMP. CODES R. & REGS., tit. 9, § 2524.4(c) (2000) (N.Y.C.R.R.).
5. Katz Park Ave. Corp. v. Jagger, No. 0104524, 2005 WL 5885421, at *1 (N.Y. Sup. Oct. 4, 2005).
6. Katz Park Ave. Corp. v. Jagger, 843 N.Y.S.2d at 330.
7. *See* N.Y.C.R.R., tit. 9, § 2524.4(c) (2000) (requiring a tenant of a rent-stabilized apartment to use the apartment as her primary residence).
8. Katz Park Ave. Corp. v. Jagger, 843 N.Y.S.2d at 330.
9. *Id.*
10. *Id.*

In November 2004, the landlord again served a notice of nonrenewal upon the tenant, referencing the lease that the tenant claimed would expire in February 2005.[11] While the first action was still under review, the landlord commenced a second action for ejectment and moved for summary judgment, again claiming that the tenant was statutorily barred from claiming the apartment as her primary residence because she was in the country on a B-2 visa.[12] Subsequently, the Supreme Court dismissed the first ejectment action, holding that the notice of renewal superseded the notice of nonrenewal, thereby creating a binding lease agreement.[13] With regard to the second action, the court again denied the landlord's motion for summary judgment on the same grounds as the denial in the first action.[14]

The landlord appealed and the Appellate Division reversed the lower court's grant of summary judgment to the tenant on the grounds that the tenant, as the holder of a B-2 visa, was required to return to the United Kingdom at the end of her stay[15] and that the landlord met its burden of showing that the tenant was not using the apartment as her primary residence.[16] The tenant subsequently appealed.[17]

III. Discussion

On appeal, the Court of Appeals had to determine whether the tenant met the primary residence requirement under Rent Stabilization Code § 2524.[18] In affirming the Appellate Division's holding, the Court of Appeals analyzed first the meaning of the "primary residence" requirement of the Rent Stabilization Code[19] and second whether the tenant's status as holder of a B-2 visa precluded her from having the apartment as her primary residence.[20] While the Court found that the tenant did not meet the primary residence requirement, Judge Ciparick, in a concurring opinion, disagreed with the majority's reasoning[21] but nevertheless concurred in the judgment, because the tenant presented no evidence indicating she used the apartment as a primary residence.[22]

A. The "Primary Residence" Requirement

Under Rent Stabilization Code § 2524, a landlord may regain possession of a rent-stabilized apartment from a tenant if he can show that the tenant is not using the apartment as her

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 331.
15. *Id.* at 332.
16. *Id.* at 332–33.
17. Katz Park Avenue Corp. v. Jagger, 11 N.Y.3d 314 (2008) (hereinafter *Jagger*).
18. *Id.* at 317.
19. *See* N.Y.C.R.R., tit. 9, § 2524.4(c) (2000) (requiring a tenant of a rent-stabilized apartment to use the apartment as her primary residence).
20. *See Jagger*, 11 N.Y.3d at 317.
21. *Id.* at 318.
22. *Id.*

primary residence.[23] The Code lists a number of factors to determine whether a tenant is using an apartment as her "primary residence," including the address listed on the tenant's tax return, driver's license, or other document filed with a public agency; the tenant's voter registration address; the length of time the tenant occupies the apartment; and whether the apartment is sublet.[24] However, the Code asserts that "no single factor shall be solely determinative."[25] The Court pointed to an appellate court definition of "primary residence," which defined primary residence as "an ongoing, substantial, physical nexus with . . . premises for actual living purposes."[26]

B. The Effect of the Tenant's Status as the Holder of a B-2 Visa

The Court then considered the tenant's status as holder of a B-2 visa as applied to the "primary residence" requirement.[27] Federal law requires foreign individuals seeking to enter the United States for tourism purposes to obtain a B-2 visa, which is available to individuals who are "visitors for pleasure,"[28] and applies to individuals who have "a residence in a foreign country which [they have] no intention of abandoning."[29] A "residence" is a "principal, actual dwelling place in fact, without regard to intent."[30] The Court compared the federal residency requirement for a B-2 visa holder[31] to the "primary residence" requirement of the Rent Stabilization Code[32] and held that "at least absent some unusual circumstance, a primary residence in New York and a B-2 visa are logically incompatible."[33] The Court noted the possibility of "some unusual circumstance" in which a tenant could maintain a rent-regulated primary residence in New York despite having a principal dwelling place in another country, but offered no concrete examples.[34] Therefore, the Court found that the tenant did not maintain the rent-stabilized apartment as her primary residence.[35]

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23. *See* N.Y.C.R.R., tit. 9, § 2524.4(c) (2000) (stating that a landlord may recover possession if the apartment "is not occupied by the tenant, not including subtenants or occupants, as his or her primary residence . . .").
24. *See* N.Y.C.R.R., tit. 9, § 2520.6(u) (2000) (listing possible factors that may be used to determine whether the apartment is a primary residence).
25. N.Y.C.R.R., tit. 9, § 2524.4(c) (2000).
26. *Jagger*, 11 N.Y.3d at 317 (citing Emay Props. Corp. v. Norton, 136 Misc. 2d 127, 129 (App. Term, 1st Dept. 1987)).
27. Katz Park Avenue Corp. v. Jagger, 11 N.Y.3d 314, 317 (2008) (hereinafter *Jagger*).
28. 8 U.S.C. § 1101(a)15)(B).
29. *Id.*
30. 8 U.S.C. § 1101(a)(33).
31. *Id.*
32. N.Y.C.R.R., tit. 9, § 2524.4(c) (2000).
33. *Jagger*, 11 N.Y.3d at 317.
34. *Id.*
35. *Id.* at 318.

C. The Concurring Opinion's Opposing Rationale

In a concurring opinion, Judge Ciparick agreed with the majority's holding but disagreed with its rationale.[36] Specifically, she rejected the majority's assertion that the primary residence requirement of the Rent Stabilization Code and the residency requirement for a B-2 visa are "logically incompatible."[37] Furthermore, she believed that the majority overemphasized the significance of a B-2 visa in determining the primary residence requirement.[38]

With regard to the primary residence requirement,[39] Judge Ciparick, like the majority, cited the Appellate Division's definition of "primary residence."[40] She also emphasized the Code's assertion that "no single factor shall be solely determinative" in considering whether an apartment is a tenant's primary residence.[41] However, she criticized the majority for failing to consider the additional factors cited in the Rent Stabilization Code,[42] and criticized the majority's determination that a tenant's B-2 visa status is "logically incompatible"[43] with the Rent Stabilization Code's residence requirement.[44] "Thus," she concluded, "an analysis of a tenant's immigration status should not be dispositive or, in certain cases, even relevant to a resident's ability to maintain rent-stabilized housing."[45]

Concerning the majority's emphasis on the tenant's B-2 visa status, Judge Ciparick focused on the purposes of the Rent Stabilization Code and the federal government's immigration law. She stated that the purpose of the Rent Stabilization Code was to increase the availability of affordable housing, and juxtaposed it to the purpose of the B-2 visa residency requirement, which was to enforce the federal government's "authority over immigration matters."[46] She then asserted that it was improper to focus solely on the tenant's B-2 visa status, because an individual's B-2 visa status may change.[47] She stated that immigration law is unclear on whether a B-2 visa holder can stay in the United States for more than one year,[48] which could enable a tenant to satisfy one of the factors enumerated under the Rent Stabilization Code.[49] Furthermore, Judge Ciparick noted that a B-2 visa holder may have his or her status

36. *Id.* (Ciparick, J., concurring).

37. Katz Park Avenue Corp. v. Jagger, 11 N.Y.3d 314, 317 (2008) (hereinafter *Jagger*).

38. *Id.*

39. *See* N.Y.C.R.R., tit. 9, § 2524.4(c) (2000) (requiring a tenant in a rent-stabilized apartment to maintain the apartment as his primary residence).

40. *Jagger*, 11 N.Y.3d at 319 (Ciparick, J., concurring) (citing Emay Props. Corp. v. Norton, 136 Misc. 2d 127, 129 (App. Term, 1st Dep't 1987)).

41. N.Y.C.R.R., tit. 9, § 2524.4(c) (2000).

42. *Jagger*, 11 N.Y.3d at 319 (Ciparick, J., concurring).

43. *Id.* at 317.

44. *Id.* at 318 (Ciparick, J., concurring).

45. *Id.*

46. *Id.* at 319.

47. Katz Park Avenue Corp. v. Jagger, 11 N.Y.3d 314, 319–20 (2008) (hereinafter *Jagger*).

48. *Id.* at 320.

49. *See* N.Y.C.R.R., tit. 9, § 2520.6(u) (2000) (stating that one factor to consider is whether the tenant occupies the apartment for more than 183 days during the year).

adjusted by being granted political asylum, a student (F-1) visa, or temporary work privileges.[50] In conclusion, she said that an individual's B-1 or B-2 visa status "may not adequately define the duration of residency as adjustments in immigration status can often result in a protracted stay and in some cases be coterminous with the duration of the rent-stabilized lease."[51]

IV. Conclusion

This case leaves open the question of how the primary residence requirement would apply to undocumented aliens, many of whom may be "in dire need of affordable housing."[52] While the majority noted that the question was not at issue in this case,[53] Judge Ciparick's concurring opinion points to a view that immigration status as a whole should not be dispositive in determining primary residence under the Rent Stabilization Code.[54] In particular, Judge Ciparick's emphasis on considering all factors noted under the Rent Stabilization Code[55] may be of particular significance. For example, one such factor is "the address listed by the tenant on any . . . driver's license.[56] Prior to his resignation, former Governor Eliot Spitzer had proposed allowing undocumented aliens to acquire driver's licenses.[57] While the plan was ultimately withdrawn,[58] other proposals have been made, including legislation on the federal level,[59] to issue driver's licenses or other identification documents to undocumented aliens.[60] The status of undocumented aliens in the United States will remain a divisive political issue for the foreseeable future and it may not be long before the Court of Appeals will have to determine "whether someone who is in the United States illegally may have a primary residence in New York for rent regulation purposes."[61]

Brendan Mulvey

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50. *Jagger* 11 N.Y.3d at 320 (Ciparick, J., concurring).
51. *Id*.
52. *Id*. at 318.
53. *Id.*
54. *See id.* at 319 (asserting that a tenant's status may not even be relevant in certain cases).
55. N.Y.C.R.R., tit. 9, § 2520.6(u) (2000).
56. *Id.*
57. *See* Katherine Liebner, *Driving Too Fast: Spitzer's Failed Experiment at Immigration Reform*, 26 BUFF. PUB. INT. L.J. 73, 97 (2007) (noting that Gov. Spitzer sought to allow undocumented aliens to obtain New York State driver's licenses).
58. *See* Erika Hayasaki, *Driver's License Plan Dropped*, L.A. TIMES, Nov. 15, 2007, at A16 (stating that Gov. Spitzer withdrew his plan as a result of the public's disapproval of the plan).
59. *See* Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 61 (2007) (noting that the REAL ID Act of 2005 prohibits states from issuing driver's licenses or identification cards to most undocumented workers).
60. *See* Liebner, *supra* note 57, at 90 (noting the development of a three-tiered plan which was intended to satisfy the security concerns raised by state and federal officials).
61. *See* Katz Park Avenue Corp. v. Jagger, 11 N.Y.3d 314, 318 (2008).

Sony Music Entertainment (Germany) GmbH v. Falcon Neue Medien Vertrieb GmbH

Case C-240/07, 2008 E.C.R. 0000 (Jan. 20, 2009)

The European Union Court of Justice extended copyright protection to Plaintiff pursuant to a finding that a Directive of the European Parliament and Council permits such protection to a creative work that is protected by the laws of a Member State.

I. Holding

In *Sony Music Entertainment (Germany) GmbH v. Falcon Neue Medien Vertrieb GmbH*,[1] the Bundesgerichtshof (the German High Court) asked the European Union Court of Justice (the Court) to make a preliminary ruling on international and European Union laws pertaining to copyright protections.[2] The Court reasoned that an interpretation of Article 10(2) of Directive 2006/116/EC of the European Parliament and Council of December 12, 2006 (the Directive)[3] must focus on the use of the language of the law in "at least one Member State."[4] Based on this reasoning, Sony Music Entertainment (Germany) GmbH (Sony) was allowed to claim copyright protection over phonograms in Germany under a United Kingdom law[5] already in force at the time copyrights in certain Bob Dylan songs fixated.[6]

II. Facts and Procedure

A. Facts and Key Issues

Falcon Neue Medien Vertrieb GmbH (Falcon), a German music company, distributed two CDs that contained songs by Bob Dylan.[7] Sony, a German subsidiary of the Japanese multinational corporation known by the same name, claimed copyrights over all of the Bob Dylan

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1. Case C-240/07, Sony Music Entm't (Germany) GmbH v. Falcon Neue Medien Vertrieb GmbH, 2008 E.C.R. 0000 (Jan. 20, 2009) (hereinafter *Sony Music*).

2. *Id*. at ¶ 1.

3. Council Directive 2006/116/EC, art. 10(2), 2006 O.J. (L 372) 12, which states in its entirety:

> The terms of protection laid down in Article 3 shall also apply in the case of right holders who are not Community nationals, provided Member States grant them protection. However, without prejudice to the international obligations of the member States, the term of protection granted by Member States shall expire no later than the date of expiry of the protection granted in the country of which the rightholder is a national and may not exceed the term laid down in Article 3.

4. *Id.*

5. *Sony Music* at ¶ 19.

6. A work fixates when it manifests in a "material object from which it can be perceived or communicated directly or with the aid of a machine." *See* Matthew Bender & Co., Inc. v. West Publ'g Co., 158 F.3d 693, 702 (2d Cir. 1998).

7. *Sony Music* at ¶ 10. The CDs are distributed under the names "Bob Dylan—Blowin' in the Wind" and "Bob Dylan—Gates of Eden." The CDs contain songs that were released in the United States before January 1, 1966. *Id.* at ¶ 11.

songs included on the CDs.[8] Sony applied to the Landgericht, the German court, for an injunction to stop the distribution of the CDs and filed a motion for discovery against Falcon to initiate damage calculations.[9] The Landgericht dismissed Sony's appeal and denied its motion, agreeing with Falcon's assertion that no music producer held copyrights in Germany over any Bob Dylan songs released prior to January 1, 1966.[10] On appeal, the German Appellate Court affirmed the dismissal of Sony's claims, holding that German law did not extend copyright protection over phonograms, or CDs, until after January 1, 1966.[11]

Sony then applied to the German High Court for a "Revision" of this judgment.[12] Prior to passing down a decision, the German High Court asked the Court for a preliminary ruling or clarification on the law and an interpretation of Article 10(2) of the Directive.[13] The request for clarification specified that the German High Court was uncertain about the interplay between interpretations of Article 10(2) and Article 7(2) of the Directive.[14]

The German High Court posed three questions: (1) whether Sony could seek Article 10(2) protection in Germany, an EU Member that had not previously protected copyrights; (2) whether allowing one EU member's copyright protections to apply to a non-Community national would violate Article 7(2) of the Directive;[15] and (3) whether the term of protection granted in Article 10(2) could be applied to Sony if the relevant protective law is from another Member community to which Sony does not belong.

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8. *Id*. at ¶ 12–13.

9. *Id*. at ¶ 13.

10. *Id.* at ¶ 14.

11. Case C-240/07, Sony Music Entm't (Germany) GmbH v. Falcon Neue Medien Vertrieb GmbH, 2008 E.C.R. 0000 (Jan. 20, 2009) (hereinafter *Sony Music*). at ¶ 15 (interpreting the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, T.I.A.S. 7808, 888 U.N.T.S. 67, to mean that the German Copyright Law (Urheberrechtsgesetz), which applies only to activities that took place after January 1, 1966, is applicable to this case).

12. *Id*. at ¶ 16. A "revision" to the Bundesgerichtshof is similar to a limited appeal, available to the German Appellate Court. Generally, it is allowed only for questions of law and when either the appeal is sanctioned by statute or authorized by the Appellate Court.

13. *Id*. (stating that the High Court would base its determinations on the EU preliminary ruling).

14. *Id.* at ¶ 30. *See* Council Directive 2006/116/EC, arts. 7(1)–(2), 2006 O.J. (L 372) 12, which state in their entirety:

> 1.Where the country of origin of work, within the meaning of the Berne Convection, is a third country, and the author of the work is not a Community national, the term of protection granted by the Member States shall expire on the date of expiry of the protection granted in the country of origin of the work, but may not exceed the term laid down in Article 1.
>
> 2.The terms of protection laid down in Article 3 shall also apply in the case of right holders who are not Community nationals, provided Member States grant them protection. However, without prejudice to the international obligations of the Member States, the term of protection granted by Member States shall expire no later than the date of expiry of the protection granted in the country of which the rightholder is a national and may not exceed the term laid out in Article 3.

15. Council Directive 2006/116/EC, art. 7(2), 2006 O.J. (L 372) 12.

B. Framework of Multinational and State Law

There are three main sources of multinational and state law that govern this dispute: Article 10 of the Directive;[16] the 1971 Convention of for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (1971 Convention);[17] and the United Kingdom's copyright laws.[18]

Of important note is that, here, the 1971 Convention applies the domestic law of Germany. However, the relevant German copyright protections did not exist until January 1, 1966, several years after copyrights in the Bob Dylan songs fixated.[19]

III. Discussion

A. Interpretation of Article 10(2) of Directive 2006/116

In determining an answer to the first question posed above, the Court focused its analysis on the Directive's use of the language of the law in "at least one Member State."[20] The Court ruled that the Directive allows the extension of copyright protection to Sony, as long as some form of copyright protection existed in any one of the EU Member States at the time copyrights in the Bob Dylan songs fixated.[21]

Here, the issue is more complex because Germany, the state in which protection is being sought, did not recognize copyright protection of activities that took place prior to January 1, 1966.[22] Because no German law is applicable, other EU Members' laws must be analyzed.

The United Kingdom had copyright protection laws that extended protection to phonograms in which copyrights fixated before 1966.[23] This protection applied to American produced phonograms fixated in the United States prior to 1966—clearly covering the Bob Dylan songs in question.[24] Therefore, because of the protection offered under the UK copyright law, Sony had a claim for protection under Article 10(2).

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16. Council Directive 2006/116/EC, art. 10, 2006 O.J. (L 372) 12.

17. Convention for the Protection of Producers of Phonograms against the Unauthorized Duplication of their Phonograms, *supra* note 11. The German Appellate Court interpreted the German and U.S. ratification of this treaty to mean that German law applied to this case. This provided producers of phonograms copyright protections under Paragraph 85 of the German Copyright law, the Urheberrechtsgesetz. Pursuant to this provision of the German Copyright Law, protections extend only to activity that fixated after January 1, 1966. *See Sony Music* at ¶ 15.

18. *Song Music* at ¶ 19. Sony asserted, and the Bundesgerichtshof accepted, that UK copyright legislation extends protection to phonograms fixated before January 1, 1966 and to phonograms of American producers, which includes Bob Dylan. *Id.*

19. *Id.* at ¶ 15.

20. Council Directive 2006/116/EC, art. 10(2), 2006 O.J. (L 372) 12.

21. Case C-240/07, Sony Music Entm't (Germany) GmbH v. Falcon Neue Medien Vertrieb GmbH, 2008 E.C.R. 0000 (Jan. 20, 2009) (hereinafter "*Sony Music*") at ¶ 21–22.

22. *Id.* at ¶ 15.

23. *Id.* at ¶ 19.

24. *Id.*

B. The Application of United Kingdom Copyright Laws

The second question the Court discussed was whether, relying on this UK copyright law, Sony had a claim against Falcon under the Directive. The Court answered this question in the affirmative.[25] Article 10(2) extends protection to phonograms, provided that one Member State's law implemented such protection as of July 1, 1995.[26] Because the Dylan recordings were offered copyright protection in the UK at the relevant time, Sony's claim to protection under Article 10(2) was appropriate.

The Court then stated that Sony's claim to copyright protection under the Directive must be analyzed under the national law of the Member State that had the relevant protective law at the time of fixation.[27] Here, that requires the application of UK law, not German law, which was applied by the German court system.[28] Because the UK copyright law "granted"[29] protection to phonograms released in the United States, there is no violation of Article 7(2) of the Directive.[30] Therefore, Sony's protected status under the law of a Member State that it does not belong to is irrelevant for the application of Article 10(2).[31] The Court justified its decision to protect Sony under the UK law by pointing to the Directive's overall objective to harmonize different national copyright laws.[32]

The third question posed to the Court was whether there could be copyright protection under Article 10(2) if the law that protects Sony is from a Member State to which Sony does not belong. The Court did not address this issue separately because it was thoroughly answered in the affirmative in its response to the German High Court's second question.[33]

IV. Conclusion

The Court ruled that Sony was entitled to copyright protection regarding the songs of one of its American artists, Bob Dylan. This protection, awarded in Germany, was granted despite the fact that German law did not recognize copyright protections at the time the Bob Dylan songs were released. Article 10(2) of the Directive was interpreted to extend copyright protec-

25. *Id.* at ¶ 37.

26. *Id.* at ¶ 28. Article 10(2) states that protection will be extended to works as long as they were protected by law of any one EU Member on the date referred to in paragraph 1. *See* Council Directive 2006/116/EC, art. 10(2), 2006 O.J. (L 372) 12. The relevant date in article 10(1) is July 1, 1995. *See* Council Directive 2006/116/EC, art. 10(1), 2006 O.J. (L 372) 12.

27. *Sony Music* at ¶ 34.

28. *Id.* at ¶ 15.

29. *Id.* at ¶ 33.

30. *Id.* at ¶ 36. Article 7(2) regulates copyright protections to those right holders who are not Community nationals of the Member with the protective laws; such rights are allowed as long as the Member State grants the non-Community national protection. *Id.* at ¶ 33. This provision is not violated because the UK law grants the extension of its copyright laws to those phonograms produced in the United States. *Id.* at ¶ 19.

31. Case C-240/07, Sony Music Entm't (Germany) GmbH v. Falcon Neue Medien Vertrieb GmbH, 2008 E.C.R. 0000 (Jan. 20, 2009) at ¶ 35.

32. *Id.* at ¶ 23.

33. *Id.* at ¶ 38.

tion as long as any European Union member had already promulgated relevant law at the time the rights in the works in question were fixated.

The holding in this case demonstrates the wide breadth of protection that is afforded under Directive 2006/116. This decision's scope is not limited to producers of phonograms. Article 10(2) extends protection to any subject matter and all creative works that are protected by any Member State's law.[34] In this case, the Court of Justice not only outlines a uniform procedure for future copyright disputes, ensuring more consistent adjudication in national judicial systems, but it also eliminates an incentive to produce and distribute records containing creative works protected in other Member States.

Abigail Beaudoin

34. Council Directive 2006/116/EC, art. 10(2), 2006 O.J. (L 372) 12.

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